

Investigating corruption in South Africa

Cooperation or conflict?

David Bruce



The Hawks are supposed to be the principal body for investigating corruption in South Africa. But their performance has been lacking. In March 2019, President Ramaphosa announced the creation of a new Investigating Directorate in the National Prosecuting Authority to investigate serious corruption. This report examines key problems with the investigation of corruption by the Hawks and the implications of the new investigating directorate for its future.

Key findings

- ▶ Developments indicate the government is open to taking firmer steps against corruption. This raises questions about how to strengthen South Africa's anti-corruption system.
- ▶ The creation of the new Investigating Directorate in the National Prosecuting Authority is highly significant. However, the Hawks are the body that is supposed to be South Africa's main anti-corruption agency.
- ▶ The legislation governing the Hawks goes quite far to protect their independence.
- ▶ The Hawks are not a dedicated anti-corruption agency – their mandate focuses on 'priority crime'. For them to investigate corruption effectively, attention needs to be dedicated to developing their capacity specifically for this function.
- ▶ The creation of the Investigating Directorate risks contributing to further neglect of the specialised corruption investigation capacity of the Hawks.
- ▶ Given that their mandates overlap, there is a risk of rivalry and conflict between the Hawks and investigating directorate.

Recommendations

- ▶ The obligation to ensure the Hawks establish an effective specialist capacity to investigate corruption should not be neglected as a result of the creation of the investigative directorate. Corruption investigation capacities of both bodies should be strengthened.
- ▶ The Hawks should establish clear internal structures for coordinating and managing their work on corruption. They should be more transparent about their work on corruption, including providing clear information on how the investigation of corruption is being resourced and on progress made.
- ▶ All promotions and appointments that have been made within the Hawks over the past decade should be evaluated.
- ▶ The use of selection panels to publicly interview the Head and other top appointments, as happened with the appointment of the national director of public prosecutions in 2018, should be institutionalised and enacted in law.
- ▶ Mechanisms should be put in place to manage the relationship between the Hawks and the investigating directorate.
- ▶ Measures to prevent unnecessary duplication of effort between the Special Investigating Unit, the Hawks and the investigating directorate should be implemented.
- ▶ To manage pressure for quick results, there should be clear public communication from the Hawks on progress of investigations and cases handed to the NPA.
- ▶ The online SAPS Act that is published by government should reflect the changes resulting from the judgment in the case of *Helen Suzman Foundation v President of the Republic of South Africa and Others*.

Introduction

Since late 2016, when former public protector Thuli Madonsela's 'State of Capture' report¹ was released, corruption in South Africa has come to be equated with 'state capture'. Prominent in the public mind are allegations relating to former president Jacob Zuma, the Gupta family and their companies, such as Trillian Capital, and Bosasa and its late CEO Gavin Watson. Much public attention has been given to testimony implicating these people in corruption at hearings before the Judicial Commission of Inquiry into Allegations of State Capture, headed by Deputy Chief Justice Raymond Zondo (the Zondo Commission).

But corruption is clearly a far broader problem.² Every week there are reports pointing to corruption of one kind or another. These may concern members of the executive and national government, but also frequently concern provincial or local government politicians and officials. According to a 2016 report, as much as 40% of South Africa's procurement budget of R600bn for goods and services is lost as a result of corruption.³ Another estimate is that more than 60% of tenders are linked to corruption.⁴ And while procurement corruption has been the main concern, soliciting of bribes and extortion by lower-level officials also occur, including by, border officials, police, prosecutors, and many others.

Corruption profoundly undermines the government's ability to respond to the country's many challenges

Corruption is evidently not South Africa's only social problem. Other types of crime, including serious corporate crime and chronic violent crime, and a range of other problems, including mass unemployment, poverty, a crisis-ridden public health system and poorly performing education system, are also part of South Africa's current reality. Along with the rest of the world, South Africa is experiencing, and is vulnerable to, the impacts of climate change.

Nevertheless, it is clear that corruption as a social problem deserves focused attention. This is above all

because it profoundly undermines the ability of the government to respond in a purposeful way to the host of challenges South Africa faces. It obstructs public officials within government who aspire to strengthen the role of the state in improving South Africans' quality of life.

As a result of corruption, state resources are consistently misused, rather than being put to productive use. The costs of procurement are inflated and services or goods that are procured are of poor quality or simply not delivered at all. The resulting waste of public resources discourages willing compliance with tax laws. Ultimately, corruption contaminates the fabric of social relationships between all South Africans by undermining mutual respect and trust, as well as dignity linked to pride about South Africa as a nation.

Focus of the report

Recent key developments indicate a shift in government policy towards a committed focus on addressing corruption. The willingness of government to strengthen anti-corruption measures raises the need for greater clarity about how this should be done. This report focuses on the primary agencies involved in criminal investigation of corruption in South Africa and seeks to recommend how these agencies should be strengthened in order to ensure that corruption is investigated more effectively. On the one hand the Directorate for Priority Crime Investigation – commonly referred to as 'the Hawks' – are identified by the Constitutional Court as South Africa's principal anti-corruption agency. However, it is questionable whether they are indeed functioning as an effective anti-corruption agency.

On the other hand the creation in 2019 of a new directorate for investigating corruption, within the National Prosecuting Authority, is significant because it adds a new investigative mechanisms for addressing corruption. The implications of the new directorate for the Hawks therefore need to be clearly understood. The question of how to strengthen the corruption investigation capacity of the Hawks, and the implications of the creation of the Investigating Directorate for the Hawks, are the major focus of this report.

The Hawks and the investigation of corruption

The Hawks' mandate

The full name of the Hawks is the Directorate for Priority Crime Investigation. This reflects the fact that they are an agency for investigating 'priority crime'. They are not a dedicated anti-corruption agency.⁵ The term 'priority crime' is itself articulated in confusing terms in the SAPS Act.⁶ One provision that confirms that corruption is an important part of their mandate is Section 17B(a) of the act. This states that the creation of the Hawks is based on the 'need to establish a directorate in the [SAPS] to prevent, combat and investigate national priority offences, in particular serious organised crime, serious commercial crime and serious corruption'.⁷

Status of the Hawks as South Africa's principal anti-corruption agency

Nevertheless, in litigation about the independence of the Hawks, and in Constitutional Court judgments on the matter, the Hawks have come to be identified as the agency through which South Africa fulfils its obligations in terms of the Constitution – and international law – to establish 'effective bodies for fighting corruption'.⁸ In March 2011, the Constitutional Court in the case of *Glenister v President of the Republic of South Africa and Others*⁹ held that various conventions¹⁰ 'impose on the Republic the duty in international law to create an anti-corruption unit that has the necessary independence'.¹¹ The court held that the legislation creating the Hawks was inconsistent with the Constitution and invalid 'to the extent that it fails to secure an adequate degree of independence for the Directorate for Priority Crime Investigation'.¹²

The judgment highlighted aspects of the legislative framework that presented a high risk of compromising the Hawks' independence. The declaration of constitutional invalidity was suspended for 18 months to allow Parliament to remedy the legislation's defects. Accordingly, a further amendment to the SAPS Act was drafted and passed by Parliament, and assented to by Zuma on 14 September 2012.¹³

This amendment was subject to further litigation over whether it provided the Hawks with the necessary degree of independence. In November 2014, the Constitutional

Court judgment in the case of *Helen Suzman Foundation v President of the Republic of South Africa and Others*¹⁴ held that various provisions of the amended law were inconsistent with the Constitution and therefore invalid, and that they were to be deleted ('struck down') from the Act.¹⁵

These Constitutional Court judgments therefore focus on whether the Hawks enjoy 'sufficient independence' for an anti-corruption entity. Quoting a report by the Organisation for Economic Cooperation and Development (OECD) the 2011 judgment refers to independence as one of the requirements for the effectiveness of the agency.¹⁶ The OECD report also identifies specialisation as one of the requirements for effectiveness.¹⁷ The two judgments may however be seen to send out mixed messages on the latter issue.

The Hawks investigate 'priority crime' – they are not a dedicated anti-corruption agency

In the 2011 judgement the court explicitly acknowledged that the Hawks were not 'a dedicated anti-corruption entity', but rather 'a directorate for the investigation of priority offences'.¹⁸ In the 2014 judgment, the court stated that 'South Africa needs an agency dedicated to the containment and eventual eradication of the scourge of corruption'. It referred to this as the agency's 'core mandate'. This might be seen to imply that if the Hawks are the main anti-corruption agency in South Africa, then anti-corruption work should be their central focus.

However, though it struck down various provisions of the SAPS Act which undermined the independence of the Hawks, the 2014 judgment does not indicate that the Hawks' focus on 'priority offences' is problematic. It does not explicitly state that its mandate needs to be purified to focus exclusively or primarily on corruption.

How the Hawks investigate corruption

In line with the manner in which Section 17B(a) defines the Hawks' functions, according to the SAPS the work of the Hawks is organised into three components: Serious Organised Crime, Serious Commercial Crime and Serious Corruption.¹⁹ However, not all Hawks' corruption

investigations are carried out by the Serious Corruption component. They are also carried out by the component dealing with Serious Commercial Crime.²⁰

For instance, in a 2014 presentation to the Portfolio Committee the Hawks indicated that the Serious Commercial Crime component deals with ‘serious procurement and related corruption at local government level’; while the Serious Corruption component investigates serious fraud and corruption within the criminal justice system (‘the Justice, Crime Prevention and Security Cluster’), other government departments and the private sector.²¹ At a number of meetings of Parliament’s Standing Committee on Public Accounts, the head of the Hawks’ Commercial Crime Unit has provided briefings on the investigation and prosecution of corruption.²² The Serious Corruption component has been largely invisible at these briefing.

Data on Hawks corruption investigations

Although they are supposed to operate independently from it, the Hawks are part of the SAPS. Related to their location within the SAPS, reporting on the performance of the Hawks is provided in the SAPS annual report under a section on the Specialised Investigations sub-programme. It is noteworthy that in the 2017/18 annual report reporting on the performance of the Serious Corruption component is confined to a single brief paragraph at the end of the narrative report on the Hawks’ performance.²³

A body that is dedicated to fighting corruption should provide clear information on the progress it has made. The data reflected in Table 1, for instance, suggest there has been investment in investigating cases of fraud and corruption by individuals within the criminal justice system (the JCPS – Justice, Crime Prevention and Security – Cluster). A smaller number of cases of ‘serious corruption where officials are involved including procurement fraud and corruption’ have also been investigated.

A question remains about the standards that have been applied in determining that dockets are ‘trial-ready’ and whether this indeed indicates that the cases have been investigated properly. Assuming the basic merits of the case, the possibility of a conviction depends on the quality of work by both investigators and prosecutors. It is also not uncommon for investigators and prosecutors to blame each other when cases are not prosecuted or are unsuccessful.

Although they are meant to operate independently from it, the Hawks are part of the SAPS

In July 2019, the Hawks reported they had handed over 1 800 ‘trial-ready’ dockets to the NPA.²⁴ This might have been seen to imply that the main obstacles to prosecution resulted from shortcomings on the part of the NPA rather than the Hawks. The current situation, however, is that both the Hawks and the NPA have been profoundly weakened, and problems with cases they are dealing with reflect inadequacies on both sides.

In so far as corruption is broadly understood – as in this report – it is not only prosecuted under the Prevention and Combating of Corrupt Activities Act (PRECCA)²⁵ but may include cases of fraud, theft and other offence categories. Data on cases of commercial crime the Hawks have investigated include fraud cases as well as cases under PRECCA and numerous other categories (Table 2). No indication is given as to which cases can be regarded as cases of corruption. It is therefore unclear to what degree this information may be used as an indicator of performance in addressing corruption.

Table 1: Performance by the Hawks in relation to corruption-related key performance indicators

Key performance indicator	2014/15	2015/16	2016/17	2017/18
Trial-ready case dockets for fraud and corruption by individuals within the JCPS Cluster	1 215	444	511	436
Trial-ready case dockets for serious corruption where officials are involved, including procurement fraud and corruption	30	18	30	29

Table 2: Hawks' performance in cases of commercial crime (2017/18)

Offence category	No. of cases received	No. of convictions			Cases on which convictions achieved as % of cases received
		Cases	Counts	Accused	
Fraud	2 158	543	15 077	558	25
Theft	337	137	7 082	152	41
PRECCA	100	21	4 651	18	21
POCA	12	4	23	9	33
Counterfeit Goods Act	138	60	1 538	65	43
Income Tax Act	31	11	77	14	35
National Credit Act	38	10	445	10	26
Value Added Tax Act	160	11	533	12	7
Other categories not included above	330	116	745	119	35
Total	3 304	913	30 171	0	28
PRECCA as % of total	3	2	15	2	–

Source: Authors analysis of data provided in SAPS Annual Report, 2017–18

The information provided by the SAPS does little to clarify how the Hawks are dealing with corruption. If they are to function as a dedicated anti-corruption agency, the Hawks should:

- Clearly indicate how they interpret the term 'corruption'.
- Indicate what resources they have committed to investigating corruption – in particular, they should clarify what portion of their overall investigative capacity is committed to investigating corruption.
- Provide an indication of the number of cases of corruption they have received, including data on the types of institutions that have been affected and types of corruption involved.²⁶
- Provide clear information on case outcomes.
- Provide detailed information about more complex cases, particularly those involving large sums of money.

In particular, in so far as there is evidence of the involvement of prominent politicians or public figure in acts of corruption, the agency should provide information about progress made in investigating these cases. It is widely recognised that the credibility of anti-corruption

agencies is linked to evidence that they are willing to pursue high-level officials who are allegedly involved in corruption.

Key performance indicators used by the Hawks

One sign that the Hawks have set a very low bar for themselves in relation to the investigation of corruption is in their key performance indicators (KPIs). The 2017/18 SAPS annual report indicates that they did not underperform on any KPIs and achieved all their targets.²⁷ This shows their performance targets have not been carefully crafted with a view to encouraging improvements in performance in investigating corruption.²⁸

Information from the SAPS does little to clarify how the Hawks are dealing with corruption

One of the targets listed as having been achieved is for 'trial-ready case dockets for fraud and corruption by individuals within the JCPS Cluster.' The target is said to have been achieved, notwithstanding that the number of

trial-ready case dockets in this category is the lowest it has been for the past four years (see Table 1).

Cases cited as ‘major achievements’ of the Serious Corruption component

In the annual report, two cases are cited as ‘major achievements’ of the Serious Corruption component. In one case, it is reported that the component arrested two suspects ‘for bribing an immigration officer with R500 000.00’ to allow a consignment to leave King Shaka International Airport, in Durban, without inspection. ‘Upon further investigation, a large amount of money was found in the boot of the suspect’s BMW vehicle. The container was filled with counterfeit goods, valued at R12 million. The goods included kids and adult shoes, as well as soccer shirts.’²⁹

According to the description of the second case, a company called Moneymine 310CC and/or its director,³⁰ submitted fictitious information to the Construction Industry Development Board. This resulted in it obtaining a grading as a service provider, to which it was not entitled. Thereafter, the company applied for a contract with the Department of Public Works, using fictitious documents and the illegitimately obtained grading. It appears that Moneymine secured the contract which was valued at R22 million. On 28 November 2017, the accused pleaded guilty on counts of fraud and was fined R50 000 or five years’ imprisonment.³¹

A sign that the Hawks have set a very low bar for themselves regarding the investigation of corruption is in their key performance indicators

One of these cases therefore involves an attempt by members of the public to bribe an immigration officer. The other involves an attempt to obtain a government contract using fictitious information. It is noteworthy that neither of these cases implicated public officials. They appear to have been relatively simple cases that would have required a modest level of investigative work. This information suggests that, at best, the Hawks’ Serious Corruption component is making very modest inroads in addressing corruption.

These cases also support the conclusion that the component’s focus is on ‘going after small fry’.³² Similar conclusions may be drawn from media reports on corruption cases the Hawks have successfully investigated; for instance, against a municipal ward councillor arrested in 2016 for defrauding the municipality of R20 000, who received a five-year prison term.³³

Post-Zuma era steps to strengthen the Hawks

In May 2018, Godfrey Lebeya was appointed as head of the Hawks.³⁴ His appointment came more than a year after the removal of Berning Ntlemenza, whose appointment in September 2015³⁵ the courts found to have been unlawful.³⁶



CORRUPTION HAS BEEN LOW ON THE HAWKS’ LIST OF PRIORITIES IN RECENT YEARS

Lebeya's appointment inspired hope that the Hawks would improve their performance in addressing corruption. In July 2019, it was reported that Minister of Police Bheki Cele had asked Lebeya to undertake an assessment of the Hawks. Lebeya concluded that the agency had an 'incoherent organisational structure' and needed re-engineering.³⁷

One consequence of the institutional autonomy of the Hawks is that its head determines what share of the agency's resources are dedicated to fighting corruption. Reports during this period, however, do not indicate that the need to invest in improving the anti-corruption investigation capacity of the agency has been identified as a priority. More generally, evidence indicates that in recent years corruption has been low on the Hawks' list of priorities. In so far as they have a dedicated anti-corruption capacity, the information they have provided indicates that this component is relatively weak – though it does not perform all the Hawks' corruption investigations – and that there is no coherent approach to investigating corruption. Overall, the agency does not provide clear information on its responses to corruption; and much of the information it does provide inspires little confidence.

Implications of the creation of the NPA investigating directorate

Establishment and mandate of the directorate

The NPA Act authorises the president to establish investigating directorates in respect of specified 'offences or criminal or unlawful activities'.³⁸ In line with this provision President Ramaphosa issued a proclamation establishing a new investigating directorate within the NPA on 20 March 2019.³⁹ The proclamation authorises the directorate to 'investigate any unlawful activities relating to serious, high profile or complex corruption'. Cases it is to investigate are to include those arising from the Zondo Commission, the Nugent Commission of Inquiry into the South African Revenue Service (SARS) and the Mpati Commission of Inquiry into the Public Investment Corporation, as well as 'any other serious, high profile or complex corruption case referred to the new directorate by the National Director.'⁴⁰

The new directorate therefore provides a dedicated anti-corruption investigating and prosecuting capacity.

The NPA Act provides that investigating directorates may include personnel from other state agencies who are seconded to the directorate, as well as 'any other person whose services are obtained'.⁴¹ This means police investigators and other state personnel may be seconded to the directorate. In addition, personnel from outside government, such as auditors and accountants whose expertise is relevant to investigating complex financial crime, may also be contracted. One advantage of this type of approach is that it allows prosecution-led investigation teams to be established. These are widely regarded as necessary if such investigations are to lead to successful prosecutions in complex corruption cases.

Implications for the Hawks

The creation of the investigating directorate may be seen to have been necessitated by the dysfunctional state of the Hawks.⁴² As discussed, the Hawks are supposed to be the main investigative body by means of which the South Africa government fulfils its obligation to establish 'effective bodies for fighting corruption.'⁴³

The new investigating directorate within the NPA has significant implications for the Hawks

But as indicated, the available evidence is that the investigative capacity of the Hawks is relatively weak, particularly with regard to its capacity to investigate cases of complex corruption and other financial crimes. During the Zuma era, particularly under the leadership of Ntsemeza, the Hawks were badly compromised.⁴⁴ Notably questions have been raised about appointments that have been made in the organisation, including at senior level, particularly during the term of office of Berning Ntsemeza. (There is also evidence of inappropriate promotions in the period subsequent to this.⁴⁵)

As already highlighted the development of specialised corruption investigation capacities within the Hawks has not received the required attention. The creation of the new NPA investigating directorate clearly has significant implications for the Hawks. The Constitutional Court has identified the Hawks as South Africa's primary anti-corruption investigation mechanism. But the mandate

of the directorate authorises it to investigate some of the major cases in which there is apparent evidence of corruption.

A fundamental element of the Constitutional Court's judgments dealing with the Hawks is that South Africa's main anti-corruption agency should be 'sufficiently independent'.⁴⁶ As a result of amendments to the SAPS Act, including the Constitutional Court striking down provisions of the act, the Hawks – in Constitutional terms – may now be seen as 'sufficiently independent'. They may still be seen as vulnerable to political interference partly as a result of the influence of the Minister of Police over the appointments and removal of senior leaders.⁴⁷ Nevertheless the legal framework governing the Hawks is now quite robust in protecting their independence.

Government needs to take seriously the possibility that the creation of the investigating directorate will have negative consequences for the Hawks

The investigating directorate is situated in the NPA and accountable to the National Director of Public Prosecutions (NDPP). It is therefore located in an organisation, and accountable to a senior leader, that, in terms of the Constitution, are regarded as independent.⁴⁸ NDPP Shamila Batohi has also indicated that she will not allow for political meddling in the operation of the NPA. The fact that the directorate falls under her authority may provide reassurance that it will not be politically influenced in its work.

Some have noted that the directorate can be shut down abruptly if the President rescinds the proclamation that established it. But the NPA Act provides that this can only be done on the recommendation of the NDPP, along with other officials. If the NDPP remains independent, this provides some protection against it being shut down for inappropriate reasons.

The directorate therefore enjoys a certain level of protection against inappropriate interference. Nevertheless, given that they enjoy legislative protection, the Hawks independence may be better protected, and their existence may be more secure.

However, the current focus of attention, in respect of the investigation of corruption, has shifted to the investigating directorate. Hopefully this does not mean that the need for development of corruption investigation capacity within the Hawks is further neglected. If so, it may lead some people to conclude that the Hawks are largely superfluous, at least in terms of investigating high-level corruption. Government needs to take seriously the possibility that the creation of the investigating directorate will have negative consequences for the Hawks, as key investigators from the Hawks with expertise in the investigation of complex financial crime and corruption are seconded to the directorate.

20 March
2019

PRESIDENT RAMAPHOSA
ISSUES A PROCLAMATION
ESTABLISHING A NEW
INVESTIGATING DIRECTORATE
WITHIN THE NPA

There is a major overlap between the Hawks' corruption investigation mandate and that of the investigating directorate. The Hawks' mandate is to 'prevent, combat and investigate national priority offences' including offences under PRECCA. This overlaps with the directorate's responsibility to investigate 'serious, high profile or complex corruption'. As a result there is the potential for issues of jurisdiction to cause tension and conflict between the two bodies.

One of the consequences of the creation of the Scorpions, within the NPA in 2001,⁴⁹ was intense inter-organisational rivalry with the SAPS. This was exacerbated because the Scorpions received considerable recognition and acclaim, given that many of their investigations targeted high-profile individuals. The alliance that formed to support Zuma's election as president took advantage of these differences to undermine and dismantle the Scorpions.

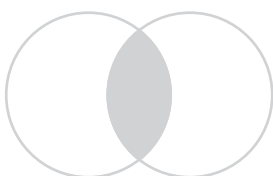
It is worth taking note of this experience. Measures to create cooperation and trust between the Hawks and directorate are likely to be useful in pre-empting and reducing the potential for similar conflict driven by inter-agency rivalry.

The investigating directorate's creation appears to intrude on the authority of the head of the Hawks to determine what matters are investigated by it

The creation of the investigating directorate also has implications for the authority of the head of the Hawks to determine which matters the agency investigates. In 2014, the Constitutional Court ordered that certain provisions should be excised from the SAPS Act⁵⁰ because they created 'a plain risk of executive and political influence on investigations and on the entity's functioning.'⁵¹

Since 2014 the head of the Hawks has had the authority to determine 'whether criminal conduct or endeavour thereto falls within the mandate of the Directorate'.⁵² The only qualification is that these must reasonably be regarded as 'national priority offences' (as defined in Section 17A of the SAPS Act)⁵³ and/or matters falling under Chapter 2 and Section 34 of PRECCA. The proclamation that established the investigating directorate authorises the directorate to investigate certain matters. In line with Section 28(1)(b) of the NPA Act, it also authorises the NDPP to refer other cases of 'serious, high profile or complex corruption' to the directorate.⁵⁴

The investigating directorate's creation therefore appears to intrude on the authority of the head of the Hawks to determine what matters are investigated by it. This therefore also motivates for inter-agency mechanisms to be established so that the allocation of cases between the two organisations can be managed. Such mechanisms may also play a valuable role more broadly in building more effective relationships between the Hawks and the NPA itself,



THERE IS A MAJOR OVERLAP BETWEEN THE HAWKS' CORRUPTION INVESTIGATION MANDATE AND THAT OF THE INVESTIGATING DIRECTORATE

contributing to a climate of shared responsibility for the eventual outcome of corruption, and other, investigations.

Conclusion

There is a need for clarity on how to strengthen the anti-corruption system and dedicated action, which includes committing adequate resources to it. This applies, in particular, to criminal justice mechanisms responsible for the criminal investigation and prosecution of corruption. Internationally there is ongoing debate about what are the best types of anti-corruption systems.⁵⁵ It is an important debate but it is of uncertain relevance to SA's situation at the current time as there are unlikely to be major structural changes in the anti-corruption system in the next 3–5 years.

There is a need for clarity on how to strengthen South Africa's anti-corruption system

It is important that the current period is not characterised only by 'quick fixes', but also by steps to ensure that the overall anti-corruption system is strengthened. While it is important, the investigating directorate is only part of the anti-corruption machinery. It is not intended as an agency that will continue to exist in the long term. Its primary mandate is to deal with investigations and prosecutions emerging from various recent or current commissions of inquiry. It is therefore not intended as a replacement for the Hawks' anti-corruption function. This means that the Hawks need to continue to be recognised as South Africa's principle anti-corruption agency. Sustained investment in building up the Hawks' anti-corruption investigating capacity is needed.

Recommendations

1. The creation of the investigating directorate appears to be a positive and necessary development in strengthening the government's capacity to address corruption. However, it should not lead to neglect of the obligation to ensure the Hawks' capacity and performance in investigating corruption are considerably strengthened. The corruption investigation capacities of both bodies therefore need to be improved; for example, through dedicating financial resources, improving training and recruiting personnel with appropriate specialist expertise.
2. To comply with the obligation to ensure that they serve as a specialist corruption investigation agency, the Hawks need to clarify their work on corruption:
 - a. There should be clear internal structures for coordination and overall management of corruption matters within the Hawks.
 - b. The Hawks should ensure, and demonstrate to the public, that the investigation of corruption is adequately resourced. They should be clear about what portion of their overall investigative capacity, and what financial resources, are committed to dealing with corruption.
 - c. Other information they should provide on their response to corruption includes:
 - i. How they define the term corruption.
 - ii. Data on the number of cases of corruption that they have received, including data on the types of institutions that have been affected and the types of corruption involved.
 - iii. Clear information on case outcomes.
 - iv. Detailed information about more complex cases, particularly those involving large sums of money.
3. Measures should be put in place to evaluate the appropriateness of many of the promotions that have been made within the Hawks over the past decade. Efforts to strengthen the Hawks should include a human resource approach that ensures further appointments and promotions are in line with clear competency-based criteria.
4. Use of a selection panel, as happened with the appointment of the NDPP in 2018, should be institutionalised and enacted in law. Rigorous and transparent selection procedures should be used on a consistent basis to ensure the quality of senior leadership appointments to key criminal justice and anti-corruption agencies. Requirements for the use of such procedures in respect of senior leadership appointments in the Hawks and NPA should be formalised in legislation.⁵⁶ If final authority to make appointments resides with the president or a

minister, these procedures should still be required, and should serve an advisory function in the appointment process.

5. An inter-agency mechanism should be put in place to manage the relationship between the Hawks and the investigating directorate. This should address the allocation of cases between the two bodies and ensure effective cooperation. The potential for rivalry between the two organisations that could undermine the potential for full cooperation should be recognised.
6. The SIU is a state agency that is also involved in investigating corruption. Measures should be put in place to prevent unnecessary duplication of effort between the SIU, the Hawks and the investigating directorate, and improve cooperation between them in investigating specific cases. (The Anti-Corruption Task Team may not have been the appropriate type of mechanism to achieve this.)⁵⁷
7. There should be an emphasis on strengthening anti-corruption investigation capacities in a sustained manner. Rather than focusing on quick results, the emphasis should be on establishing a robust

anti-corruption investigation system. To manage the pressure for quick results, public communication should be clear about steps to strengthen investigative systems, as well as reports on progress.⁵⁸

8. In the case of *Helen Suzman Foundation v President of the Republic of South Africa and Others*, the Constitutional Court struck down certain provisions of the SAPS Act pertaining to the Hawks.⁵⁹ However, the versions of the SAPS Act that are published on police⁶⁰ and other government⁶¹ websites has not been updated to reflect these changes and do not acknowledge the Constitutional Court judgement. The government should ensure that versions of the act that are published online reflects the changes resulting from the judgment or at least provide access to and draw attention to the judgement.

Acknowledgment

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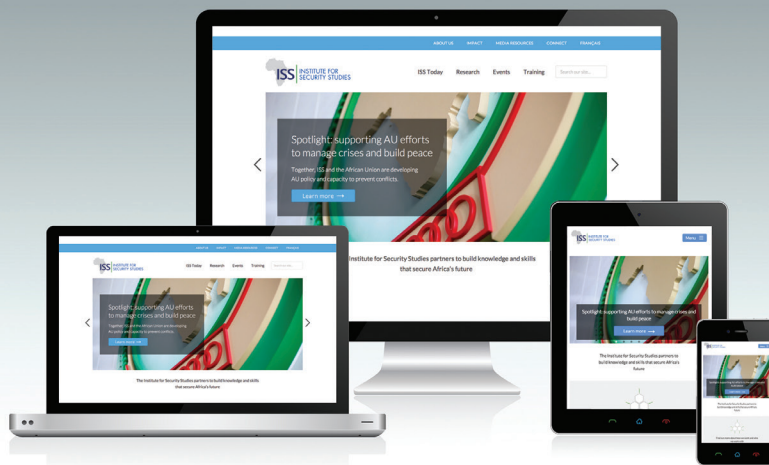
Notes

- 1 Public Protector South Africa, State of Capture, 2016, <http://saflii.org/images/329756472-State-of-Capture.pdf>.
- 2 In this report, the term 'corruption' is understood broadly to refer to the abuse of public power for private gain.
- 3 S Mkokeli, Treasury hunts fraud worth R233bn in spending, *Fin24*, 6 October 2016, www.fin24.com/Economy/treasury-hunts-fraud-worth-r233bn-in-spending-20161006.
- 4 A Khoza, I'm immune to bribes because I get paid well – deputy public protector, *News24*, 11 March 2016, www.news24.com/SouthAfrica/News/im-immune-to-bribes-because-i-get-paid-well-deputy-public-protector-20160311.
- 5 *Glenister v President of the Republic of South Africa and Others (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC), 17 March 2011*, para 233; P Hoffman SC, Re: Non-compliance with the findings of the Constitutional Court in respect of the requirements for anti-corruption machinery of state, 18 September 2018, para. 11.
- 6 See, for example: Section 17B, Section 17D(1) the definition of 'national priority offences' in Section 17A, and Sections 16(1) and (2). Aspects of Section 17(D) were amended by the Constitutional Court in *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others [2014] ZACC 32*. See, for example, parts of para. 112(5) of the court order dealing with Section 17D.
- 7 Similar priorities are outlined in Section 17D.
- 8 *Glenister v President of the Republic of South Africa and Others*, 39, para. 83 [Note 5].
- 9 *Ibid.*
- 10 The conventions referred to are outlined in: *Glenister v President of the Republic of South Africa and Others*, paras 183–186 [Note 5].
- 11 *Ibid.*, 189 [Note 5]. See also the conclusions of the minority that the relevant international instruments do not require 'absolute or complete independence'. The ultimate question is instead 'whether the anti-corruption agency enjoys sufficient structural and operational autonomy so as to shield it from undue political influence' (para 121).
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- 14 *Helen Suzman Foundation v President of the Republic of South Africa and Others* [Note 6].
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