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FOREWORD

Together with the people of South Africa, the National Prosecuting Authority will this year be celebrating ten years of freedom and democracy.

Apart from celebrating, we will also critically review and reflect upon the role the NPA currently plays in upholding the rule of law, protecting our constitution and enhancing the depth and quality of our democracy. We will be examining how far we have come in fulfilling our vision of a just society where our people can live in safety and security, free from the fear of crime.

In particular we will be examining the functioning of one of our newest and most important constituent parts, namely the Directorate of Special Operations, or the Scorpions, as they are more commonly known.

The phenomenon of serious and organized crime, particularly in its transnational manifestation, is one that poses a real and imminent threat to our democracy and economy. The ever increasing interconnectedness and dynamism of the world we occupy, means that organized crime is more sophisticated than ever in the manner it goes about its business.

I am proud of the role the DSO is starting to play in countering this threat. It has already shown its sophistication, professionalism and organizational mettle by taking on some of the market leaders in crime, the big players who believe they can defraud, smuggle, murder, deceive, threaten and corrupt with impunity.

The NPA welcomes this timely monograph by the Institute of Security Studies. It contains the outcome of an objective and arms-length examination to which we have willingly subjected ourselves.

The reason we adhere to this level of transparency is that it is good for our organisation. It leaves us with a more acute and informed sense of our strengths and our weaknesses. Transparent scrutiny of this kind minimizes the risks of self-delusion. It ultimately makes us do our work better.

For that we are grateful.

Bulelani Ngcuka

National Director of Public Prosecutions

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GLOSSARY

AFU	Asset Forfeiture Unit, an entity within the NPA
CIO	chief investigating officer
DSO	Directorate of Special Operations, an entity within the NPA, also called the Scorpions
DSO legislation	NPA Amendment Act 61 of 2000
FBI	Federal Bureau of Investigation (United States)
IDOC	Investigating Directorate: Organised Crime and Public Safety
IDSEO	Investigating Directorate: Serious Economic Offences
ISS	Institute for Security Studies
national director	national director of public prosecutions, NPA head
NIA	National Intelligence Agency
NPA	National Prosecuting Authority
NPA Act	National Prosecuting Authority Act 32 of 1998
NPS	National Prosecuting Service, an entity within the NPA
POC Act	Prevention of Organised Crime Act 121 of 1998
SAPS	South African Police Service
SI	special investigator
SSI	senior special investigator
Scorpions	nickname of the DSO

EXECUTIVE SUMMARY

The launch of the “Scorpions” was announced in September 1999, in the context of a world extremely concerned about the phenomenon of organised crime. The Scorpions became formally known as the Directorate of Special Operations (DSO), when the DSO officially came into existence 16 months later, in January 2001. The DSO is the investigative arm of South Africa’s National Prosecuting Authority. South Africa is quite distinctive in having this investigative component to a national prosecuting authority, as well as a national police force.

Although international attention has shifted away from organised crime somewhat since September 2001, onto the threat of terrorism, organised crime remains the focus of the DSO. High-profile since its inception four years ago, the organisation and its staff are generally viewed by the South African public as the ultimate crime fighters. The DSO investigation into the “arms deal” concluded by the South African government in 1999, and its investigation of the role of the deputy president in this deal, upped this public profile considerably.

In the course of these investigations, the powerful position of the national director has come into the spotlight, and questions originally raised at inception of the DSO have re-emerged. How does the DSO take on cases? Is it constitutional that the DSO is part of the National Prosecuting Authority and not part of the South African Police? Are there sufficient safeguards?

Despite a high public profile, these uncertainties, along with limited public information about the DSO, have resulted in some confusion and misconception. For one, the national director of public prosecutions has been conflated in the public mind with the DSO. The aim of this monograph is to correct misconceptions about the DSO, and to provide information about an organisation which has rapidly become extremely important in South Africa.

While the DSO is often likened to the US Federal Bureau of Investigation, South Africa is quite unlike the US in terms of its political and law enforcement structure. International comparison and overview suggests some ways in which

oversight and accountability over the DSO could be better achieved. The information presented here was gathered through interviews with DSO staff and external stakeholders, and through research into internationally comparable institutions.

INTRODUCTION

The “Scorpions”, when referred to by this nickname, are probably, outside of the police, the most recognised law enforcement body in South Africa. The impact of the Scorpions on the South African public’s psyche after four years of operation cannot be underestimated. Yet very little is really known about the Scorpions – even their official name, “Directorate of Special Operations”, draws blank looks.

This lack of understanding, along with the oft-mentioned problem of overlap with the work of the South African police force, and concerns that the DSO might use case-selection as a tool for political manipulation, make it important that information about the DSO be made more broadly accessible.

Debates surrounding the Scorpion’s establishment, mandate, and operation are discussed in this monograph. It is hoped that through recording and explaining the agency’s functioning, the questions of the ordinary reader will be answered and misconceptions about the Scorpion’s role and operation will be dispelled.

CHAPTER 1

METHODOLOGY

This monograph made use of interviews conducted with DSO personnel as well as external DSO stakeholders. The results of these interviews were combined with other materials obtained from the DSO, such as their Annual Reports, and other data specifically requested from the DSO, such as information on personnel and training. Other sources, such as newspaper reports, government documents, and the work of other researchers, were also consulted. The author drew on her own experience in 1999–2000 of a brief secondment to the Cape Town DSO office, as well as discussion with research colleagues.

An ISS research team selected the interviewees.¹ In all, 78 interviews were held from December 2002 to late March 2003.² The majority of the interviews (45) were held with internal DSO personnel, in all four DSO regions, and at head office, including prosecutors, investigators and analysts, both managers and non-managers. This constitutes 8% of the DSO staff complement in 2003.

Of all internal interviews, 15% were at the DSO Head Office, 36% were with investigators, 29% with prosecutors (excluding head office and regional heads) and 9% with analysts. This means that of the internal interviews, investigators were somewhat under-represented, as they comprised 63% of the staff at the time the interviews were done, while analysts and prosecutors were slightly over-represented in terms of the staff composition of the DSO.

With respect to the method of selection of internal DSO interviewees, this varied from region to region. In Gauteng and the Western Cape, the regional head provided a list of interviewees, covering a range of personnel from trainee to deputy director. In the Eastern Cape, the DSO employee's committee appointed persons to speak on their behalf. In KwaZulu-Natal, secretarial staff asked personnel who were available on the days the researcher was there, to attend interviews. The duration of interviews varied from 30 minutes to 2.5 hours.

A further 33 interviews were held with key people among various stakeholders, ranging from other entities within the NPA, such as the National Prosecuting

Service (NPS); to national and provincial police officials; selected members of Parliament; key people among relevant government bodies; and informed opinions outside of government. Interview notes were written up and distributed amongst the team. The ISS research team assisted with analysis.

The monograph was intended to answer the ordinary reader's questions about the DSO. A relatively informal writing style was therefore adopted. Most of the technical detail, particularly with respect to legislation, can be found in the endnotes rather than in the body of the work, in order to ensure easier reading.

CHAPTER 2 HISTORY

President Thabo Mbeki launched the “Scorpions”³ in Guguletu in the Western Cape on 1 September 1999, soon after assuming the reigns of the presidency in June that year. Journalists at the event shifted between questioning the appropriateness of the name, given that it matched that of a notorious Cape gang, and wondering “But *who* are the Scorpions?” They need only have turned around and looked at the people sitting at the back of the hall; for the staff of the then Western Cape office of the Investigating Directorate on Organised Crime and Public Safety (IDOC) were all there, and it was the staff of these directorates that formed the core of the Scorpions soon after its launch. This tendency to “hide in plain sight” has continued to be a theme of the Scorpions’ operation.

Because the launch of the Scorpions had not been preceded by widespread public debate or debate in Parliament and followed so closely on Mbeki’s assumption of leadership, political opposition parties expressed some doubts on the day of the launch. They pointed to problems and issues which needed to be resolved, some of which seem remarkably prescient when reviewed four years later.

The Inkatha Freedom Party (IFP) welcomed the formation of the Scorpions, but warned there should be no political interference in the functioning of the new unit. IFP safety and security spokesperson, Velapi Ndlovu, said it would be vital that the director of the unit remain free of political interference and not be used as a tool for political harassment: “Our democracy is very new and fragile; if we are to cherish and nurture it, we must be on our guard at all times against the misuse of organs of the state for political purposes,” Ndlovu said.⁴

Graham McIntosh of the then Democratic Party (DP) welcomed the establishment of the “Directorate of Special Investigations”⁵, but said the DP was concerned that the Scorpions would apparently report to Mbeki, and there was no indication whether this meant that Mbeki and his office would essentially be afforded powers to gather information, investigate and prosecute.

Further, there did not appear to be any measures in place which ensured that the Scorpions would be held accountable for the work they undertook. It was also not clear whether the powers and functions of the Scorpions would be set out in legislation, which Parliamentary committee the Scorpions would report to, nor whether functions of the Scorpions would be clearly differentiated from existing law enforcement agencies, such as the National Intelligence Agency. "This differentiation is imperative if rivalry between the various agencies is to be avoided," McIntosh said.⁶

The Pan Africanist Congress (PAC) said it was uneasy as to how the activities of the unit would be monitored. Then-PAC spokesperson Patricia de Lille said she was concerned that the names of the members of the unit would not be public knowledge. She said the PAC believed it was not possible to strengthen democracy when "nameless people" were operating with extensive monetary and technological resources.⁷

From the beginning, one of the motivating factors behind the creation of the Scorpions appeared to be to raise public confidence in the ability of government to fight crime. No matter what efforts had been made since 1994 to transform the South African Police force (SAP) into the South African Police Service (SAPS), the public appeared unconvinced that the police could be trusted and were winning the fight against crime. Hence despite the fact that many of the details around the operation of the Scorpions had not been ironed out – and indeed the legislation creating the "DSO" was not finalised until months later – the Scorpions were launched with all the paraphernalia of a well-managed media campaign, including T-shirts and baseball caps emblazoned with their catchy name and logo. In the public imagination, the Scorpions existed as of 1 September 1999, and close media attention has been a hallmark of their operation ever since.

Even the head-designate of the Scorpions, Frank Dutton, was not yet in the country at the Scorpions' launch, and only arrived in October 1999 from the Hague where he had been on secondment to the United Nations War Crimes Tribunal probing Bosnian war crimes. Dutton was a respected senior policeman hailing from KwaZulu-Natal who had headed investigations into the Trust Feed and KwaMakutha massacres. Percy Sonn,⁸ as head of IDOC (a unit of the NPA which was one of the entities operating as "the Scorpions") became "head of prosecutions", with Dutton acting as "head of investigations", although Dutton was termed the "CEO" of the Scorpions. The immediate work of the Scorpions was in effect to carry on the work which the various investigating directorates within the NPA, established under the provisions of

the NPA Act, had already been doing. Dutton arrived to join the Scorpions in November 1999, but took early retirement in November 2000 for health reasons, after which Sonn effectively lead the Scorpions.

The Scorpions only officially came into legal existence as of 12 January 2001 (16 months after being launched) when the amendments to the NPA Act came into operation.⁹ Those within the Scorpions worked under a great cloud of uncertainty during this initial period before the legislation was passed, as most were seconded to the unit and did not know if they would finally be appointed to the DSO, and nobody knew exactly where the new unit would fall and what its powers and obligations would be.

Exacerbating this uncertainty, Sonn and Dutton became embroiled in controversy in July 2000 when allegations of “unauthorised spending” were levelled against them both in the media. While the press focused on “luxury homes” that were too large and bought without proper approval, the allegations also involved rental of office space and office equipment – sorely needed by the Scorpions in order to do their work. This was an early taste of clashes with government rules around procurement that still have an impact on DSO operation today.

The legislation creating the DSO took months to finalise. Opposition parties continued to express their fears that the DSO would be the “president’s private police force”, and that there would be problems with the police around turf. Fears were also raised about whether such a body would be constitutional, given that the constitution provides for a single national police service.

At first, a draft Directorate of Special Operations Bill was drawn up. This Bill envisaged that the national director would be a member of the DSO, and that a chief investigating officer be the effective head of the organisation. This person need not be a deputy director or be otherwise legally qualified. The Bill also provided that the national director *must* (not may) *in* consultation (not *after* consultation – “in” implies consensus) with the national commissioner of the SAPS determine procedures for the referral of investigations to the DSO. A deputy director of the NPA would also have to be assigned to the DSO by the national director to assist with investigations. The rest of the Bill talked about permanent, seconded and contract members, reflecting a desire to confirm what was already happening in practise.

Members of Parliament complained that the Bill that was eventually passed was confusing and difficult to follow. The final Bill, an amendment to the NPA

Act, placed a deputy national director of the NPA as head of the DSO. The bill makes no provision regarding referral of matters to the DSO, save that the Ministerial Committee provided for in s31, should determine such procedures.¹⁰ At the time of writing, more than four years after the launch of the DSO, the Ministerial Committee has not yet met for that purpose.

Addressing the constitutional question, the Bill takes the unusual measure of noting in the preamble, what is *not* provided for in the constitution:

“AND WHEREAS the Constitution does not provide that the prevention, combating or investigating of crime is the exclusive function of any single institution...”

The Bill was finally passed in December 2000, traditionally the time of year when difficult legislation is passed, and came into effect in January 2001. Meanwhile, the “Scorpions” had already been operating for some 16 months, first under Dutton and Sonn, and then under Sonn only.

Percy Sonn’s management style has been described as “can do” and “shoot from the hip”. He found the bureaucratic procedures required to be followed for just about everything to be done within the NPA very burdensome, and tried to circumvent them whenever he could, he claimed, in order to get the job done. He professed to follow an “open-door” policy and had an “informal” relationship with the people who worked for him: “Pick up the phone and ask me!” he would say.

However, his concurrent responsibility as chairman of the United Cricket Board (UCB) raised eyebrows as to his ability to do justice to either position. The Hansie Cronje cricket match-fixing scandal which broke in April 2000 saw his positions bizarrely seem almost to coincide, given the role of his colleague, then NPA deputy director Shamila Batohi (subsequently regional head of the DSO in KwaZulu-Natal for some time) in the King Commission.¹¹

Sonn resigned from the DSO in July 2002, citing personal reasons. Sonn was subsequently forced to resign from the UCB following a drunken incident at a World Cup cricket match in Paarl in February 2003.

A successor to Sonn was not quickly appointed. Sonn’s “head of operations”, Leonard McCarthy, was appointed investigating director in an acting capacity, resulting in a climate of uncertainty within the DSO over that period, and rumblings within the DSO about the need for a black African, to be made

head of the DSO. The difficulty in being both the head of operations and acting investigating director was only relieved when Geoph Ledwaba was appointed head of operations, and McCarthy himself was permanently appointed in April 2003.

McCarthy's management style is almost completely opposite to that of Sonn's. Methodical and careful, he keeps to the letter of the law and procedure on all matters, and has maintained a very low profile despite the newsworthy nature of his position. His carefulness has also manifested itself in his surrounding himself with advisors and another layer of command at head office between himself and the people who work under him, termed "desk-heads", and his preference for written communication.

It was during McCarthy's quieter and more careful leadership of the DSO that the NPA head, national director Bulelani Ngcuka, began to become conflated in the public mind with the DSO. Although the DSO is a division within the NPA, and as such is ultimately accountable to the national director, it does have its own head, just as the Asset Forfeiture Unit (AFU), Witness Protection Unit (WPU) and Sexual Offences and Community Affairs (SOCA) unit have their own heads. Although the national director appoints the investigating director of the DSO, and has the ultimate say on whether a matter is to be *prosecuted* or not (on all matters, whether they are DSO matters or simply National Prosecuting Service matters) it is the investigating director who authorises preparatory investigations and has the power to declare an investigation in terms of s28 of the NPA Act: in other words, to decide what matters are to be *investigated* by the DSO, including those referred to the DSO by the national director himself. However, in practice, on controversial matters, McCarthy confers closely with the national director and indeed defers to his opinion; both their offices are in the NPA's well-appointed Victoria and Griffiths Mxenge building in Silverton, Pretoria, making this kind of conferring easy to achieve.

It was soon after the DSO's coming into legal operation that the DSO first confirmed, in April 2001, that it was investigating the arms deal¹² matter with a view to carrying out prosecutions for any criminal wrongdoing it might uncover. This investigation by the DSO continued until July 2003, when it transpired that the DSO was also investigating the role of the deputy president, Jacob Zuma, in the arms deal. It was in the furore over this revelation that the original questions about the DSO were again raised: is it constitutional that the DSO falls under the NPA and not the SAPS? To whom is the DSO accountable?

For some time in August 2003 there was speculation in the media over whether either or both of the DSO and the national director would survive the political fallout: his decision not to prosecute Zuma but to allege publicly that there was prima facie evidence against the deputy president attracted much discussion and speculation.

There appeared to be strong public resistance to the idea that there should be any changes to the nature or position of the DSO, despite suggestions from the highest level that the DSO should perhaps fall under the SAPS.¹³ Allegations then emerged linking the national director to spying activities on behalf of the apartheid government prior to 1994. It was at first announced that the DSO Ministerial Committee (see *Mandate*) provided for in s31 of the NPA Act would sit, for the first time, to investigate these allegations against the national director. It is difficult to see exactly how an “investigation” of this nature falls under the competency of this Ministerial Committee which is supposed largely to determine procedures for referral of investigations.¹⁴

However, it was subsequently announced that cabinet had taken a decision to launch a judicial inquiry, to be headed by a retired judge, Judge Joos Hefer, former president of the Supreme Court of Appeal, to uncover whether the national director had been a spy and whether he had consequently abused his position.¹⁵

Many commentators felt that the Hefer Commission was a distraction from the real twin issues of the alleged role of the deputy president in arms deal corruption, as well as the national director’s decision not to prosecute him. Hefer found that the evidence did not support a finding that the national director had been a spy. Hefer felt that consequently, the second leg of the inquiry – whether the national director had abused his position as a result of being a spy – fell away. The debate around the positioning of the DSO died down after the conclusion of the Hefer Commission, possibly also a consequence of the imminent election in April 2004.

CHAPTER 3

CONTEXT

It is difficult to remember that when the Scorpions were launched in 1999, the international security focus and “buzz-word” was organised crime and the “war on drugs”¹⁶, rather than terrorism and the “war on terror”. Despite South Africa’s brush in 1998–1999¹⁷ with a home-grown form of the kind of terrorism that was to occupy international centre-stage after September 2001¹⁸, the Scorpions were launched as an organisation focused firmly on organised crime, in a world and country primarily concerned about organised crime.

Indeed, international concern about the role of corrupt “transitional states”¹⁹, in the burgeoning illegitimate economy created by “transnational organised crime”²⁰ put some pressure on the “new” South Africa to be seen to be addressing the threat, and launching South Africa’s own “FBI” was one way of doing that. Another way was to pass powerful and not uncontroversial legislation – drawing on international precedent – designed to combat organised crime, prior to the launch of the Scorpions, and which the Scorpions were intended to use.

Organised crime

Organised crime is difficult to define. Indeed, in drafting the *United Nations Convention against Transnational Organised Crime* delegates spent many months trying to come to agreement on a definition for organised crime. The definition finally agreed upon in November 2000 and signed in Palermo, in typically dry convention style, seems to lose some of the glamour with which the concept is usually imbued:

*“A structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this convention, in order to obtain, directly or indirectly, a financial or other material benefit.”*²¹

However, what the definition does capture is the broadness of the concept, and how it does not exclude the actions of those attached to the legitimate

economy or to governments. Even terrorists could fall under this definition, as long as their actions are in some way aimed at a material benefit. Indeed, the Scorpions in the early days, together with the National Intelligence Agency (NIA), investigated the bombings in the Western Cape of 1998-1999.

More interesting is the question of why organised crime was and is of such particular concern to governments. The arguments in favour of extraordinary measures being taken by governments against organised crime focus unsurprisingly on the threat to the state. Organised crime creates an economy outside of official markets. Unchecked, these unofficial markets can channel monetary flow outside of the mainstream economy and outside of the reach of tax collection, destabilising the economy.

Some organised crime groupings may also become closely intertwined with the legitimate economy; furthermore, the illegal activities or illicit enterprises themselves may involve ordinary business persons, civil society, and government officials, thus destabilising society as a whole. For example, the illegal drug trade in many countries has resulted in the corruption of police and other government officials.

Organised crime can also create authority figures outside of the state, which can effectively control communities. For example, the communities who rely on abalone poaching in the Western Cape are reliant on organised crime for their livelihood and do not respect the authority of the police or any other government agency. Effectively, organised crime in such communities usurps the authority of the state.

Pressure from abroad to deal with organised crime, and the requirements of international conventions, had an impact on the measures taken by states.²² International concern about the “growth in organised crime” from the 1980s onward lead to pressure on “problem” states, including South Africa, to be seen to be taking a stand against organised crime.

South Africa has since the early 1990s been perceived to be a transit nation for illicit goods, particularly drugs.²³ After 1994, as a “society in transition”, South Africa along with other transitional countries such as those arising out of the former Soviet Union, was perceived to be a country “spawning” organised crime²⁴ and to be “transit states” for the smuggling of illicit goods generally.²⁵ The impact of the problem of organised crime in South Africa was not felt by South Africa alone but also by other countries; hence these countries placed pressure on South Africa to combat the problem.²⁶

During the 1990s therefore, South Africa began to orient itself to combating organised crime, and as part of that positioning requested and received assistance from the US to do so, not only in the creation of the DSO, but for other entities involved in combating organised crime.²⁷ South Africa's Prevention of Organised Crime (POC) Act²⁸ is part of that trend, and appears to be largely based on concepts pioneered in US anti-racketeering legislation.²⁹ Similar provisions have been adopted in many countries, and will be described in the next section.

Organised crime legislation³⁰

Laws aimed at organised crime often reflect the desperation of law enforcers when faced with sophisticated criminals who thwart efforts to police them, and this is also true of South Africa's Prevention of Organised Crime (POC) Act. Implicit in the Act is the idea: "We know you did something really bad, but we can't prove it."

Two basic strategies aimed at the essential characteristics of organised crime are adopted in laws targeting organised crime. The first type of law aims at the fact that organised crime implies groups of people organised in some way who repeatedly engage in criminal activities. The second type of law aims at the fact that these groups make a profit.

The first type of law usually defines a gang or a syndicate in terms of numbers of members, and types of crimes committed. Some countries make membership of a group, and actions in association with an actual perpetrator, a crime. The idea is that those who direct or otherwise assist criminal activities, but who do not carry them out themselves, can also be brought to justice in this manner.

With this type of law, a new crime (racketeering) is often also created, based on a series of other crimes (predicate offences). This new crime of racketeering attracts harsher penalties than the predicate offences on their own would normally warrant. Similarly, the commission of certain crimes as a member of a proscribed group may also be subject to harsher penalties than would otherwise be the case. In some countries, these laws come very close to limiting freedom of association.

The second type of law focuses on removing the profits of criminal activities, and then on following the money trails. The idea is that confiscating the profits of crime reduces the incentive to commit the crime. This procedure is

called forfeiture and is generally done in two ways. The first is known as “post-conviction” or “criminal” forfeiture. This type of forfeiture occurs after conviction of an accused.

The second is known variously as “non-conviction”, “*in rem*”, or “civil asset” forfeiture. This type of forfeiture can occur without conviction of an accused. Assets can be forfeited if it is proved, usually on a standard of proof lower than that required for a criminal conviction, that they are either the proceeds of crime, or that the assets were used to commit an offence.

Criticisms of civil asset forfeiture law include that it is a punishment and punishments should not be meted out without a criminal conviction. This criticism sees civil asset forfeiture as a means of “fining” a person where law enforcement is unable to prove a criminal conviction.

So-called “money laundering” legislation looks at a profit-related problem for organised crime: how can they use their profits without getting noticed? Money laundering laws provide for all sorts of persons to be on the lookout for dirty money. Those who unknowingly or knowingly assist in the “cleaning” of money so that it seems to originate from a legitimate source, can also be convicted. This is a means of forcing the public to become law-enforcement’s eyes and ears. It also makes it highly unattractive for anyone to assist organised crime in “cleaning” its money.

South Africa’s POC Act contains provisions providing for all of these types of laws described above. It is clear from the way the POC Act and the DSO’s legislation was drafted, that the DSO was intended to be the primary agency to enforce the racketeering and criminal gang provisions contained in the POC Act, while the Asset Forfeiture Unit would make use of the criminal and civil asset forfeiture provisions, in conjunction with the DSO and SAPS.

The DSO was therefore, to some extent, created in order to use the legislation and to meet the need to be seen to be combating organised crime in the international arena. Its legislative mandate revolves almost exclusively around the concept of organised crime as provided for in the POC Act. The DSO routinely sets monetary asset forfeiture targets, and sees the procedure as integral to its strategy.

Although international attention has shifted away from organised crime somewhat since September 2001, onto the threat of terrorism, organised crime remains the focus of the DSO.³¹

CHAPTER 4

PEOPLE

To return to that question asked by journalists back in 1999 at the launch of the Scorpions: but who are the Scorpions? Obviously, the composition of the DSO has changed since the launch of the organisation, but some characteristics have remained the same.

The first unchanged characteristic is that of youth. Much was made of the recruitment of university graduates straight out of university in late 1999 into the Scorpions, and their dispatch for highly specialised training, some at the FBI's Quantico, some at Scotland Yard, and, later, some in the DSO's own programme in Mpumalanga. The idea was that the "cream of the crop", brimming with youthful enthusiasm and energy, would be armed with the tools of the trade with which to combat crime, and would do so without fear or favour, and with proper regard for human rights.

But youth is a double-edged sword. While on the one hand, the young people recruited into the DSO were meant to have been trained "properly" on how to conduct an investigation and would not therefore hold onto bad habits that some may have developed in the old SAP, their relative initial lack of experience – not necessarily as investigators, but of experience of life, and of any kind of work at all – potentially places a burden on those more experienced constantly to check and guide the work of those less experienced.

How young are members of the DSO? At the time of writing in late 2003, just more than a quarter of DSO members were under the age of 30.³² Only 3% were older than 50 years of age. More than a quarter of the DSO's entire staff complement had no prior work experience before being employed by the DSO, although most were university graduates. Most were employed as investigators, so that for every experienced investigator, there is another who had no work experience prior to being taken on by the DSO.

The idea behind this recruitment of youth was that the new and inexperienced would be well trained, and, with the passage of time, become experienced. This problem of lack of experience would therefore be short-lived and

was the inevitable short-term cost of creating a new kind of organisation. Indeed, some of the new recruits from the first batch employed have already been promoted from “special investigator” to “senior special investigator”.

Furthermore, many of the experienced investigators taken on were indeed extremely experienced and brought with them a wealth of skills, which are more likely to be quickly passed on to new investigators in the DSO than elsewhere, as investigators in the DSO work in teams rather than alone (see *Operation*).

However, some say that the “passage of time” on its own is not enough to make investigators experienced, even in the DSO’s team environment, as young investigators need the freedom to “learn from their mistakes” – the room to apply in real life what has been learnt in training. The DSO policy of only taking on large important matters (see *Mandate*) means there are few smaller cases which the less experienced can lead on their own, and indeed, no room to allow mistakes. Young investigators have to be content with small roles in larger team investigations.

Furthermore, the overseas training that the first new recruits received also created some problems. A decision was taken at the time that no experienced investigators would be sent to the US and the UK for the basic training, although some experienced members were sent for senior training on specific topics. The UK government provided training on South African request to 100 members of the DSO; 50 new recruits followed a tailored seven-week training programme; 50 others undertook Senior Investigation Officers (SIO) training.³³ Training was carried out at the Police Training College at Hendon.³⁴ Both UK training programmes included a significant human rights element. On the US side, about 80 members of the DSO were trained at Quantico, Virginia, at the FBI Academy³⁵.

This decision to send only the new recruits on foreign basic training was ostensibly taken for reasons of cost. Those investigators who were sent abroad for neither the basic nor the senior training, many of them ex-SAPS members, felt at the time that the underlying reason for the decision was that they were being sidelined, and would be retained in the DSO only until the new recruits were ready to take over from them.

Whatever the true motivation, the decision had consequences. The first was that those new recruits were trained in a vacuum, without any knowledge of how things are done in South Africa and of the South African law enforce-

ment environment, with which to challenge the overseas trainers. The second was that many of the older investigators were not trained in the new methods taught. In sum, the decision to send the new but not the old on the overseas training may have exacerbated any inevitable tensions existing between the “old guard” and the “new guard”, and may also have resulted in some of the training not being taken on board. Again, this is a problem that is likely to dissipate with time, especially since recent DSO training has been locally-based.

One of the advantages of youth, is related to the second characteristic of the DSO: it is one of the most representative organisations in South Africa; a new organisation of younger people, created post-1994, supposedly without any of the “historical baggage” sometimes bedeviling state organisations.

As far as the employment equity figures go, the DSO has indeed managed to be a representative organisation. At the time of writing, African, Asian or Coloured members made up 70% of DSO members.³⁶ Just over half of all members are African, the majority of whom are special investigators (64%). On the gender front, just less than 30% of the staff consists of women, a not insignificant proportion given that law enforcement is not often a career of choice for women. However, most of the women (55%) are prosecutors or occupy administrative positions. By comparison, 68% of male DSO members are senior special or special investigators.

Overall, the representative nature of the DSO, making it in some senses a microcosm of broader South African society, means that while all sections of the public can feel a sense of ownership of the DSO, some of the challenges of South African society are also reflected within the organisation. For example, one of the inevitable consequences of the gender-occupation split alluded to above is that women are often the group-head prosecutors directing an investigation by a team of mostly male investigators (see *Operation*), and there is sometimes noted a tendency to want to “go over their heads” to a male authority figure.

Apart from youth and diversity, the DSO is also composed of persons of a higher than average educational standard: almost all, including the investigators, are university graduates. Indeed, it was apparent from the interviews conducted that the DSO consists of many talented individuals keen to make a difference and not afraid to speak their minds; any complaints of those interviewed had tended to revolve around frustration at not being able to do more in their positions in the DSO.

The future success of the DSO will depend on retaining and capitalising on the investment in these individuals. This can only be achieved by limiting DSO employees' frustrations, since such talented individuals are far more likely to move if frustrated, and far more marketable in the private sector, than the less talented.

In sum, therefore, the DSO is a young, diverse organisation of talented individuals, and these qualities have implications for how the DSO should be managed.

CHAPTER 5 OPERATION

What do people do in the DSO and how does this translate into how the DSO operates? There are a plethora of job designations in the DSO (approximately 33) but generally speaking the job-descriptions fall into the following categories: investigators, prosecutors, analysts, administrative support, and specialist support. This section describes what various people in the DSO do, and how these various people work together to carry out DSO operations.

Investigators

All investigators have the powers assigned to them by the DSO founding legislation. The Act provides³⁷ that a special investigator has the powers as provided for in the Criminal Procedure Act which are bestowed upon police officials, relating to:

- (a) the investigation of offences;
- (b) the ascertainment of bodily features of an accused person³⁸;
- (c) the entry and search of premises³⁹;
- (d) the seizure and disposal of articles⁴⁰;
- (e) arrests⁴¹;
- (f) the execution of warrants⁴²; and
- (g) the attendance of an accused person in court.⁴³

Hence, prior to the promulgation of this legislation, special investigators of the “Scorpions” did not have these powers unless they were police officials seconded from the South African Police Service (SAPS). As a result, during that time (September 1999–January 2001) Scorpions operations had to make extensive use of SAPS members when carrying out operations, unless the operation was making use of powers under the old IDSEO legislation (see *History*).

This also implies by omission that special investigators do not in the ordinary course have the power to conduct road blocks under authorisation of the national commissioner of police,⁴⁴ or to cordon off the scene of an offence

and prevent people from entering or leaving the area,⁴⁵ as these police powers are contained in the SAPS Act and not in the Criminal Procedure Act.

However, any DSO member, including a special investigator, has powers beyond those of ordinary police once he or she is designated to investigate a matter by the investigating director, which can only happen once the investigating director has decided to conduct an investigation (the terminology used is “to declare an investigation in terms of s28”). These include somewhat expanded powers of search and seizure.⁴⁶ The investigating director therefore has to designate the appropriate number of members that might be needed to conduct an operation. He can only designate such members once an investigation has been declared.

No-one can be appointed as a special investigator unless they have undergone a security screening by the NIA and have been issued with a security clearance certificate by the national director, after he has considered the information contained in that screening.⁴⁷ Each investigator is supposed to be issued with an identity document signed by the national director, which serves as proof that the person is a special investigator.⁴⁸ The initial security screening is not a once-off affair, however; any special investigator may at any stage be subject to further security screening, and denied clearance and discharged if found to pose a threat to the DSO’s work.⁴⁹

Investigators comprise most of the DSO (64%). There are only three types of investigators, called special investigators (SI), senior special investigators (SSI), and chief investigating officers (CIO) (or chief special investigators (CSI), as they are referred to in the *Government Gazette*). As a result, many investigators feel limited by the “flat” career trajectory available to investigators. Once a special investigator has jumped from there to become a senior special investigator, the only remaining “investigator” positions are the very few CIO positions, which would also take an investigator away from real investigating work. For the young and ambitious, as well as for those used to the many rungs of authority in the SAPS, this lack of career path is a real problem. Some investigators feel many positions at head office are only open to those with prosecuting as opposed to investigating backgrounds.

However, there were other investigators who were puzzled by these concerns and said the label of a more senior position or “rank” was less important than the reputation and esteem one could build up in the DSO by doing good work, and thereby being involved to a greater degree in more and more challenging work. They also pointed to the advantages of working in an organisa-

tion where most people are on a similar level and there are not rungs of authority to be bridged on a daily basis. Furthermore, a broad salary scale has been developed in the DSO for special investigators, so that it is possible for an ambitious SI to move up the salary notches, even while retaining the same “rank”. While the first notch of the SI salary scale was initially high in comparison to detective salaries in the SAPS, a somewhat lower notch was introduced as of July 2003.⁵⁰

Special investigators

Special investigators do the bulk of the DSO’s work. Although investigators work within a group, very often the group will designate a different task within the broader project to each investigator, who might sometimes work alone in achieving that task, or more often with another investigator, and sometimes with a prosecutor. Some investigators who come from a SAPS-background initially found it difficult to work as a team, as they were used to “owning” a docket and having the freedom to pursue the investigation as they saw fit.

In the DSO, much of that freedom is lost, as the team-based formula means the group decides under leadership of the group-heads or the lead investigator (see *Prosecutors*), who does what, and each person must stick to their tasks, and share the information with the team. Some investigators also felt quite limited by the directing role of the prosecutor, and a few were not convinced that prosecutors were best placed to have a large role in directing an investigation.

Senior special investigators

As the name suggests, a SSI is simply someone who is more senior or experienced than a SI. A SSI will also be more likely to be a joint group-head in conjunction with a prosecutor (see *Prosecutors*), on more difficult projects (although SI’s can also be group heads on particular projects). Generally speaking, most, but by no means all, investigators who had previous investigating experience, particularly those who had previously been at IDOC or the SAPS special investigating units, would have been appointed as SSI’s. However, some recruits with years of experience were not appointed as SSI’s but as SI’s. Some of the new recruits taken on and trained at the inception of the DSO have also recently been appointed as SSI’s.

Chief investigating officers

Each regional office of the DSO also has a CIO. The CIO is not attached to any particular case, project or group, but oversees all the investigators and investigations. The CIO must also represent the interests of investigators at management level. The CIO is therefore a manager and deputy to the regional head, who is a deputy director of public prosecutions (a prosecutor).

The CIO's basic function is to ensure investigations are carried out properly, efficiently and swiftly and to set the standard for investigations in the region. The CIO is on the same "rank" as a deputy director; in some regions the CIO has also appointed a second-in-command.

There are also CIOs appointed at head office, at the level of the head of operations, and in specialist support divisions such as the Crime Analysis Division (see *Analysts*) and the Operational Support Division (see *Specialist Support*). The remuneration of CIOs matches the first three salary levels of deputy directors of public prosecutions.⁵¹

Prosecutors

Prosecutors are the second largest category of people in the DSO (18%). Their job-designations have titles that match those of prosecutors in the NPS, and their salaries are the same as those with equivalent rank and on similar salary scales in the NPS.⁵² Legislation provides that salary scales apply to different categories of deputy directors and prosecutors within the NPA as a whole.⁵³

Prosecutors in the DSO may therefore be public prosecutors, senior public prosecutors, state advocates, senior state advocates, directors or deputy directors or special directors of public prosecutions. The investigating director is a deputy national director of public prosecutions, assigned by the national director.

Prosecutors in the regions

Prosecutors in the regions are generally responsible for guiding projects or cases (see *Issues*). When the DSO first began operating, the idea was that each region of the DSO would be headed by a regional head, who is a deputy director of public prosecutions. Each region would be divided into groups, and each group would be headed by a prosecutor who would ultimately be

accountable for a project or case, since the aim of a project or a case within a project is to convict a suspect in court.

Since inception, therefore, prosecutors in the DSO have been far more than just prosecutors: they must take on a managerial and investigative role too. So while a prosecutor in the DSO remains an officer of the court with the primary function of prosecuting a matter in court, much of a prosecutor's time is spent on administration, on managing a team, and on advising on the progress of an investigation. At inception, the term prosecution-lead investigation was an accurate and unequivocal description of the DSO's operation.

However, in late 2001 the Gauteng region began experimenting with a different system, in which each group has two group heads, one of whom is a prosecutor, and one of whom is an investigator. Each group in Gauteng has at least two prosecutors, either a deputy director and a senior state advocate, or a senior state advocate and a state advocate, plus a number of investigators and sometimes other prosecutors, and perhaps an analyst. Each group also has at least one SSI who is also a project manager. In other words, there are two group heads or project managers in each group, one prosecutor and one investigator.

In most groups⁵⁴, prosecutors are assigned to specific projects with specific investigations. In addition, each case has a "lead investigator". The case would be the primary responsibility of the investigator, with the assigned prosecutor acting in an advisory capacity, until the matter is court-ready, after which the matter becomes the primary responsibility of the prosecutor.

In the rest of the regions, the joint prosecutor-investigator group-head system was a new introduction at the time the interviews were conducted. In the Eastern Cape region, usually a group of ten consists mostly of SI, plus a senior state advocate who is a group-head, mainly working in court, and the group-head SSI.

In the Western Cape region, although projects do generally stay within groups, each team on a particular project might consist of different members from different groups, depending on the skills required for the particular project, but each team has at least analysts, investigators, a lead investigator, and undercover agents as well as the group head prosecutor.

In the KwaZulu-Natal region, while groups are lead by a prosecutor ("a case manager"), there is also a project manager on each case who might be a SI or a SSI. This region was also the only region at the time which appeared to have a system of "standby duty" for the groups on a rotational basis. The group on

standby spends the week taking information from the public, whether in person or by telephone. Where it seems there might be a worthwhile case arising from such information, this goes to the case intake committee. The committee has weekly meetings to see whether these might fall within the mandate (see *Mandate*). The case is then allocated to a group for a pre-preparatory investigation. After this is done they report back to the committee, who will then send the matter on to head office for a decision on whether an investigation is to be declared or not.

The region was forced to adopt this standby system because of the vast number of complaints coming directly to the DSO from the public, which were not possible simply to refer back to the SAPS or another responsible agency. These matters that arise from standby and are sent to head office after a preparatory investigation, were seldom “declared”. As a result of so many non-declarations, this region began limiting these preparatory investigations to interviewing only one person, in order not to waste time and resources.

In Gauteng, a somewhat similar system is in place whereby one particular group receives all new matters (whether from the public or elsewhere), conducts a preliminary investigation, and makes a recommendation to the regional head. That is, the group makes a determination: is there a crime? Is it within the DSO’s mandate? If yes, the regional head then applies to head office for authority to investigate the matter, which will then be investigated by that group or by another group. The composition of this group changes over a certain period of time. The danger for members of this group, is frustration at always doing preparatory investigations, and seldom having a “real” case. Gauteng region also found that few such matters were declared.

The change from unequivocal “prosecution-lead” investigation, to the double-headed group structure, appeared to arise out of investigators feeling that prosecutors are not always best-placed to properly lead an investigation, and a desire for more control over investigation by investigators themselves. Some prosecutors did indeed feel uncomfortable in the lead role, feeling it compromised their duty as an officer of the court (see *Issues*) and was not one of their core competencies; they would like, for example, the administrative duties of running a group to fall to the investigator group head.

Other prosecutors felt, on the contrary, that some investigators simply refused to acknowledge that ultimately, it is the prosecutor who must stand up in court and argue and win the case. The prosecutor, ultimately bearing the burden of authority, should therefore also have ultimate authority in directing the

investigation to obtaining the evidence that will be presented in court. Others argued that this double-headed system could have been avoided if prosecutors had simply followed less unwise management techniques, and behaved less like lawyers and more like managers.

Ultimately, it seems logical that what transpires in reality in each group depends on the personalities involved, and despite the fact that there might by name be two group heads, there will in the end be one group head who holds greater sway within the group. It remains to be seen how this issue will resolve. It is by no means a bad thing that there is experimentation and evolution in the way groups work in the DSO, as long as a spirit of pragmatism prevails, such that what works and what doesn't work is honestly acknowledged and acted upon. The DSO should remain open to flexibility and experimentation.

Regional heads

All regional heads of the DSO are also prosecutors, usually deputy directors of public prosecutions. Regional heads are responsible for overall running of their regional offices, and for exerting authority over the members in the regions. However, they have far less authority than a deputy director in the NPS. They have no power alone to decide to initiate a full DSO investigation – they can only decide on “pre-preparatory” investigations (see *Mandate*), in which the members involved do not have use of the full DSO powers, as the matter has not yet been “declared” or the members “designated”. All preparatory investigations and full investigations have to be authorised by the investigating director, according to NPA policy.⁵⁵

To initiate a matter, a regional head has to provide a motivation including existing evidence, as to how the matter appears to fall under the DSO's operational mandate (see *Mandate*). Regional heads can therefore only make a recommendation as to whether a matter should be taken on. Ordinarily, regional heads also cannot alone authorise applications for other aspects of investigations, such as summonses.⁵⁶ For an authorisation to undertake a trap or undercover operation,⁵⁷ the regional head may approach the local office of provincial director of public prosecutions, or the national director's office.⁵⁸ An application for an interception and monitoring order (“wire tap”)⁵⁹ has to go via the relevant operational management desk (see *Desks*).⁶⁰ Although an application for search warrants can be approved by the investigating director or a deputy director and therefore by the regional head,⁶¹ the persons conducting the search must be designated in writing by the investigating director.

There are four regional offices of the DSO. The Cape Town office is responsible for the region covering the Western and Northern Cape. Cape Town members at the time of writing were accommodated in three different offices in central Cape Town, as these were the old IDOC, IDSEO and TRC offices; plans to find single accommodation have been unsuccessful since 1999. At the time of writing, Tommy Prins was still incumbent regional head in Cape Town, but has resigned to take up private practise.

The Durban office is responsible for the region covering KwaZulu-Natal and the Free State, and the office is located in central Durban, although plans are afoot to move the office into the suburbs. The regional head at the time of writing is Lawrence Mwrebi. The East London office is responsible for the Eastern Cape and is located in central East London. The regional head at the time of writing is Karen Geyer. This is the smallest of the DSO regional offices.

The Pretoria office is responsible for provinces in the northern part of South Africa. Their offices are located in a Pretoria suburb, not far from the offices of the NPA. At the time of writing Gerhard Nel is the regional head. This is the largest of the DSO regional offices.

Desks

Since November 2001, four “operational management desks” have been established at the DSO head office, in the office of the head of operations. All of these “desks” are deputy directors of prosecutions. The function of the desks is to assist the head of operations and the head of the DSO in processing the authorisations (see *Regional Heads*) requested from the regions. Each desk deals with a different category of crime.⁶²

At the time of writing, the serious and economic offences desk position is filled by Sacks Maphoma; the public sector corruption desk by Sibongile Mzinyathi; the desk dealing with offences in terms of the Prevention of Organised Crime Act (such as racketeering) by Faiek Davids, although he may soon be moving to another position, while the traditional syndicate organised crime desk position had not been filled.

Some have criticised the creation of these desk heads as creating a layer of bureaucracy between the head of operations and the regions. The categories have also been criticised as being of little practicality, given that most DSO matters straddle these categories. However, the desk structure is defended on the

basis that it is impossible for the head of operations alone to peruse all authorisations thoroughly, and partitioning the work by crime type allows expertise and knowledge over time to be developed in these categories; this helps the DSO to be careful about the matters it takes on. This careful operation of the DSO is to be applauded; however, it remains true that possibly as a consequence, the DSO takes on a very small number of cases per year (see *Performance*).

Head of operations

The NPA Act provides for an investigating director to assist the head of the DSO in the execution of his functions. This position is occupied by the head of operations, who at the time of writing was Geoph Ledwaba. The office of the head of operations manages and oversees all functions relating to the operations of the DSO, in support of the head of the DSO.

The head of operations and the head of the DSO authorise all investigations launched by the DSO, whether regionally or nationally. The main functions of the head of operations, in conjunction with the head of the DSO, are to:

- Consider and authorise investigations referred by the regional heads
- Monitor progress on current priority investigations
- Report on all operational activities
- Authorise applications to court for interception and monitoring orders
- Consider all racketeering and other organised crime prosecutions.

For many months after the resignation of Percy Sonn as head of the DSO, Leonard McCarthy occupied both the position of head of operations and head of the DSO (in an acting capacity) until confirmation of his appointment as head in April 2003, and promotion of Geoph Ledwaba. This illustrates the extent to which the two roles overlap, so that the head of the DSO works closely with the head of operations.

Head of the DSO

The head of the DSO is a deputy national director of public prosecutions, who is assigned by the national director. Bulelani Ngcuka confirmed the appointment of Leonard McCarthy as head of the DSO in April 2003, ending months of uncertainty. The head of the DSO is responsible for the overall functioning of the DSO, and confers closely with the head of operations on all authorisations.

Analysts

At the time of writing, analysts comprised less than 2% of the members of the DSO. Yet their importance is somewhat out of proportion to their numbers. Analysts have suffered much uncertainty as to the exact nature of their role, and the Crime Analysis Division as such of the DSO was only properly finalised in November 2002. Lack of understanding of analysts' role by other DSO members, and lack of training, may also have led to their under-utilisation in the past: many analysts might have spent time doing "fieldwork" or other investigator-type activities. The DSO employs senior and junior analysts, but the distinction is not simply one of seniority; senior and junior have a somewhat different role.

Senior analysts

The senior analyst is a strategic analyst, who will for each region analyse the broader criminal climate and trends in the region concerned, and provide strategic direction; their role revolves around the analysis of intelligence and identifying proactive investigations. However, these analysts are reliant on access to outside intelligence, as the intelligence which comes from the DSO itself is largely case-specific. Senior analysts also do research such as tracking hijackings, by for example, interviewing convicted persons to find out routes for stolen vehicle sales. The senior analyst must help management plan for the year ahead.

Junior analysts

The junior analyst has a far more technical role, and is intricately involved with actual cases through analysis of data, using computer software such as iBase or Analyst's Notebook. Those junior analysts who have been trained in the use of this software have been invaluable on some DSO cases. This software can be used, for example, to analyse reams of telephone records, thereby to identifying links between people and so help to direct an investigation.

Another example is extensive use of analyst skills on the Road Accident Fund (RAF) cases, to analyse medical records, appointments, and claims made to the RAF, so that inconsistencies and improbabilities could be picked up. For example, analysis of records showed one doctor supposedly having examined 50 people in one day, all with serious injuries. Without an analyst skilled in

such software, huge volumes of data are simply impenetrable by an ordinary investigator. The analyst therefore helps direct investigators as to whom to target for further investigation; the links and diagrams created are not necessarily “evidence” as such. In order to do their work, analysts are sometimes heavily reliant on data capturers, to convert hard copy into electronic data which can be analysed (see *Administrative Support*).

Some junior analysts received excellent training from the NIA in the use of this type of software. NIA has its own analysts, which it uses for the purposes of crime intelligence. The NIA training was highly specific to South Africa and South African legislation and therefore of great use. However, some senior analysts have not had the technical training that the junior analysts have had, and sometimes don't understand the role of junior analysts, and the use to which they could also be put in helping with strategic analysis. At the time of interviews, some analysts had not been trained and felt unsure of their role. On the other hand, analysts who had been trained and had convinced their colleagues of their usefulness on particular cases, found themselves overwhelmed by requests for assistance on projects.

The Crime Analysis Division

There has been much discussion within the DSO about the need for better intelligence in order proactively to target investigations, and as a result the Crime Analysis Division (CAD) has been established at head office. Senior and junior analysts ordinarily based at CAD, may be assigned to projects in the regions as required. CAD is run by a chief investigating officer. On a strategic level, the CAD provides support to DSO head office management through the identification of trends and tendencies on the South African and international crime scene and the production of crime threat analyses.

Rapid Operational Support Centre

Within CAD there is also being established the Rapid Operational Support Centre (ROSC), which provides a service to access information held by other government agencies as well as private institutions: it is intended to be the conduit through which all informational operational assistance to the DSO will flow. At present, the information technology support for ROSC is being finalised, as are protocols with other agencies. However, ROSC is already operational and handles more than 200 requests each year, obtaining

information from diverse sources such as the various cell phone service providers and the Department of Home Affairs.

Administrative Support

This group of people comprise 14% of the DSO, only just over half of whom are located at regional level rather than head office. They are office managers, finance officers, human resources officers, administrative assistants, senior administrative clerks, senior secretaries, data capturers, typists, receptionists, switch operators and messengers.

Data capturers also play a crucial role in the work of analysts (see *Analysts*). Before volumes of data can be analysed with the appropriate software, they have to be reduced to an electronic form. The data capturers of the Crime Analysis Division either enter the data manually, or, where technically feasible, scan the information with optical scanners. About 20% of all administrative support people are data capturers.

The consensus among DSO members seems to be that the DSO has not taken to heart the maxim “a lawyer (or anyone else for that matter) is only as good as his or her secretary (or filing clerk, or messenger)”, and there are simply far too few support personnel available to all DSO members. Only regional heads in the regions have their own secretaries. While it is true that as a result of the shared services model adopted by the NPA that much administrative work is conducted by Corporate Services or Human Resources at the NPA head office, and it is also true that the modern office does not require a secretary for each prosecutor or manager, it does seem rather anomalous finding high-paid deputy directors doing their own photocopying.

Furthermore, the way in which Corporate Services operates means that much administrative paperwork has to be done in the regions anyway, and then posted to head office. An administrative assistant, for example, will be used for organising (via head office) vehicle hire, subsistence and travel allowances (S&Ts), leave, salaries, office buying, and the paying of all accounts such as telephones and car hire.⁶³ (Support staff might also, for example, be responsible for liaising with the SAPS when fingerprint identification is required.) Most payments are made from head office, with the regions having very small budgets and authorisation limits of their own – they can only make payments of up to R5000. Each region does have both a financial officer and an office manager; yet what is needed is probably more administrative assistants.

However, there is not much that can be done immediately, as the posts for administrative personnel in the NPA were frozen and had been frozen for some time at the time of writing; furthermore, there is unlikely to be a change in the shared-services model as it was adopted ostensibly to save costs via economies of scale, but probably more likely as a tight means of expenditure control. Corporate Services is thus likely to remain part of the NPA, and the DSO as part of the NPA must continue to operate through Corporate Services. Nevertheless, some improvement from head office administration can be expected, since the entire Human Resources department of the NPA was suspended for suspected corruption after a DSO investigation in June 2003 – so at the very least these corrupt and inefficient staff, which impacted negatively on the whole NPA, will be replaced.

It is worth noting that in the US Federal Bureau of Investigations (FBI), in January 2002, there were 11,000 special agents supported by 16,000 professional support personnel – a ratio of almost 1.5 support persons for each agent – so there is precedent for a higher proportion of support staff (see *International Comparison*). While it is of course good to know the DSO is a “lean” organisation consisting predominantly of operational people, it does not help if these people are kept away from their core competencies by the need to complete administrative work. Perhaps one administrative assistant per group would be a good ratio.

Specialist Support

The remaining 2% of the DSO may be considered to be specialist support. Although they might be either prosecutors or investigators originally, their functions have become highly specialised.

Operational Support Services

The Operational Support Division provides operational support to projects conducted by the regions. This support includes conducting surveillance operations, assisting investigators with the interception and monitoring of suspects, performing high-risk arrests, and protecting witnesses. Operational support staff are based at head office, and must therefore do much travelling around the country to carry out their support function. There are, however, a limited number of DSO members based in the regions who have the skills to do, for example limited surveillance or photography, but the majority of this work is done by operational support.

Training and Development

The division has only five “trainers” and three information technology trainers (as well as administrative staff). The DSO also does not have its own training facility. Consequently, almost all DSO training is “bought” or “outsourced”. Most training arranged is specialist, such as training in financial investigation, or training in analysis. Some diversity management training has also occurred. The groups trained are usually small, of between five and 30 people, except for the new recruits group.

The training division was also responsible for co-ordinating the foundation training of new recruits who were South African trained (some of the trainers or lecturers themselves came from other organisations, such as the SAPS, or Technikon SA). Mixed reports were received about the South African foundation training, with many showing disdain for its “boot camp” nature, and some felt it did not prepare them adequately for work in the DSO. However, the earlier international training was also not without problems (see *People*).

The division is also responsible for conducting “certification examinations” for new recruits: they are supposed to amass certain “core skills” in their probationary first 24 months of “on-the-job” training. The division has also conducted a skills audit of the DSO, in order to extrapolate to future needs of the organisation.

Much of the early training of investigators was done by arrangement with the US FBI and the UK Metropolitan Police at Scotland Yard. While the former consisted of the usual training FBI agents receive, the focus of the latter was on conducting successful investigations in a human rights environment (see *Investigators*).

Head of Strategic and Investigative Support

The head of strategic and investigative support, Ayanda Dlodlo, oversees all those support entities of the DSO that are located at head office, that is, CAD, ROISC, Operational Support Services, Training and Development, and Administration. The planned forensic services component will also fall under the head of strategic and investigative support. This position is on the same level as the head of operations, who oversees the desks and the regions, and therefore also reports to the head of the DSO.

Associated NPA Services

There are a number of entities within the NPA that are closely associated with the DSO, although they are not utilised by the DSO alone.

Crime Information Collection Unit

The Crime Information Collection Unit (CICU) is an entity within the NPA located at head office. The CICU is a rapid response unit that will carry out raids and searches and otherwise gather information, in support of envisaged prosecutions, particularly priority investigations and those with a national focus. It appears that at present the CICU works both for the NPA generally and the DSO. It consists mainly of persons with a background in investigation. The CICU is a relatively new entity and its strategic focus is not yet clear; it is also not clear whether it will remain within the NPA generally, or become part of the DSO.

Corporate Services

The NPA has chosen a shared services model to provide support to the various NPA components – the NPS, AFU, DSO and supplementary services in the NPA such as the Specialised Commercial Crime Unit (SCCU), Sexual Offences and Community Affairs Unit (SOCA) and Witness Protection Unit (WPU).

Corporate Services is responsible for Human Resource Management and Development Services, Financial Services, Information Management Services, and Administration and Logistical Services. The efficient operation of this entity is therefore essential for the efficient operation of the DSO, as well as of other NPA entities. Internal interviews indicated that Corporate Services was not operating efficiently; however, that was prior to the suspension of the entire human resources component of Corporate Services after a DSO investigation uncovered corruption in the component. Performance of this entity should improve once new staff is brought in; a shared services model is highly reliant on good implementation to be successful.

Asset Forfeiture Unit

The AFU is not part of the DSO, as is commonly assumed. It is part of the NPA, and brings forfeiture applications in support of any investigation, whether on

behalf of the SAPS or the DSO. The AFU has been careful to maintain good relations with SAPS detectives as well as DSO investigators. The AFU consists of prosecutors who have detailed understanding of the provisions of the POC Act, in particular those relating to civil and criminal forfeiture contained in Chapter 5 and 6 of the POC Act (see *Context*).⁶⁴ The Unit is headed by Juliana (Ouma) Rabaji, a special director of prosecutions, who was appointed after Willie Hofmeyer was promoted to the position of deputy national director. Hofmeyer was subsequently appointed to oversee the Special Investigating Unit (see *Comparative Performance*).⁶⁵

Special National Projects Unit

The Special National Projects unit, responsible for prosecutions arising out of the Truth and Reconciliation Commission (TRC) report, was initially part of the DSO and located at the NPA head office. However, in March 2003, this was restructured as the Priority Crimes Litigation Unit (PCLU) within the NPA and outside the DSO, with Anton Ackerman appointed to head the unit as a special director of public prosecutions.⁶⁶ This Unit is also responsible for ensuring NPA compliance with the Rome Statute⁶⁷. This would include any issues incidental to the International Criminal Court.

Conclusion

The DSO is inextricably part of the NPA. The DSO is also dependent on various entities outside of the DSO and within the NPA for its efficient operation. Units and people within the DSO are highly specialised, making teamwork essential. The organograms (see *Figure 1* and *Figure 2*) below summarise the various entities discussed in this chapter and show where they fit in within the DSO, and also show the position of the DSO within the NPA.

Figure 1: National Prosecuting Authority

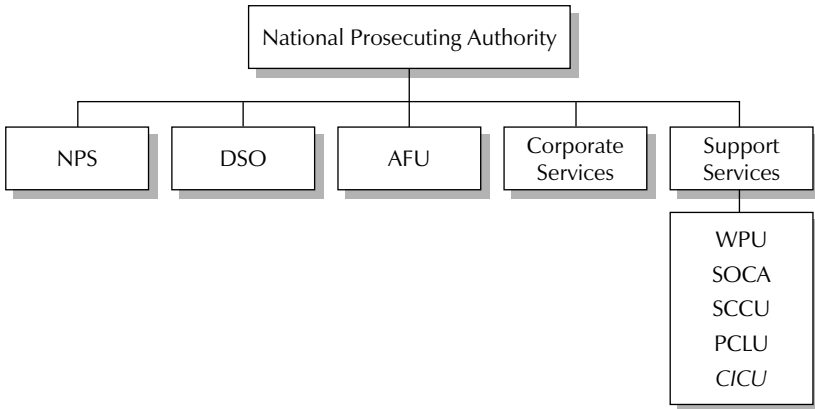
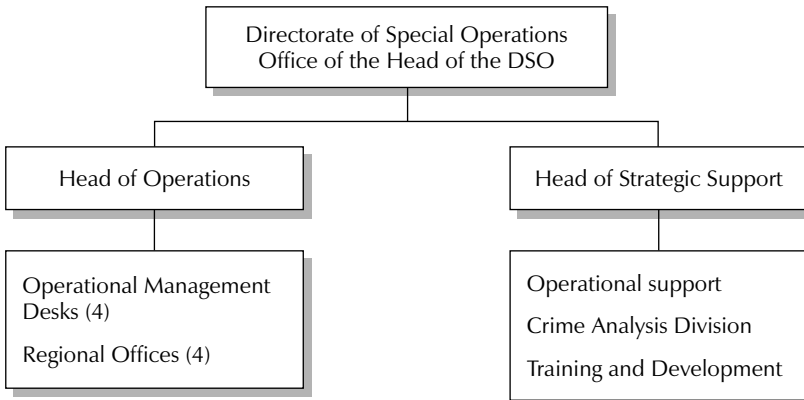


Figure 2: Directorate of Special Operations



CHAPTER 6

MANDATE

What is the mandate of the DSO? Given the oft-mentioned problem of overlap with the work of the South African Police Service (SAPS), the accusations of “cherry picking” levelled against the DSO, or concerns that the DSO might use case-selection as a tool for political manipulation, the question is an important one: what is supposed to be the work of the DSO, and how does the DSO choose its cases? Indeed, the broader public might well ask: why did the DSO investigate this case, but not that one? Clarifying the mandate of the DSO should provide the answer to that question.

What is a ‘mandate’?

The term “mandate” itself is not one which is without difficulty: the word means “an official or authoritative instruction or command”⁶⁸ or a “judicial or legal command from superior; commission to act for another”⁶⁹. In law enforcement circles in South Africa, the word has changed its meaning somewhat to take on something of the character of a description of *jurisdiction* (for example, by crime type), or *terms of reference* or even *criteria for intake*.

So, for example, the national commissioner of the SAPS approves the mandates of the various SAPS specialised units. These mandates are supposed to clarify the kinds of cases to be investigated, for example, by a Serious and Violent Crime Unit, or an Organised Crime Unit, rather than at an ordinary police station. A mandate lists certain kind of crimes, perhaps circumscribed geographically or in terms of a class of victims.⁷⁰

A specialised unit is authorised by the mandate to take on matters which match those listed – in other words, matters which fall under their mandate. Should they be faced with a crime that does not match this list, the unit would be able to say “we do not have the mandate to investigate this crime”.

A perennial problem with police mandates is that they provide an illusion of clarity. No matter how clear a mandate, someone in authority will always have

to decide, in a particular matter, whether a case falls within that mandate. In some cases, this might be clear, but in others, not.

One mandate which is particularly clear is that of the Independent Complaints Directorate (ICD) (see *Comparative Performance*). This is because the ICD mandate revolves around the known identity of a possible perpetrator (a police official) and their task is to identify *whether* a crime was committed by a police official, rather than *who* perpetrated the crime.

However, most police mandates revolve instead around crime types, which could become very confusing. Indeed, the rationalisation of the specialised units of the SAPS was to some degree a recognition that crimes and criminals do not keep to tidy boundaries: hence the creation of broadly-mandated units out of specifically-mandated units. For example, the former taxi violence, firearms, and diamond and gold units now all form part of the organised crime units. Imagine one set of facts involving smuggling of firearms by taxi owners with payment in diamonds – under the old system, who would have had the mandate? Now, this set of facts falls comfortably within the mandate of the organised crime units of the SAPS.⁷¹

The DSO's legislative mandate

Within the DSO, and among those who were involved with the drafting of the legislation to create the DSO, a distinction is made between the DSO's *legislative* mandate, and its *operational* mandate. The DSO's legislative mandate (its instruction from Parliament as to the work it must do) in the NPA legislation can be summarised as follows: the DSO has the aim of doing anything necessary for criminal proceedings on offences committed in an organised fashion, or relating to any other offences proclaimed by the president in the Gazette.⁷² In other words, the aim of the DSO must be to investigate "organised crime" and anything else the president by proclamation determines it should investigate. Thus far, the president has not proclaimed any further class of offences.

The definition of "organised fashion"⁷³ in the NPA legislation on the DSO is very similar to the definitions of "pattern of racketeering activity"⁷⁴ and "pattern of criminal gang activity"⁷⁵ contained in the Prevention of Organised Crime Act, possibly reflecting the legislature's intention that the special racketeering⁷⁶ and criminal gang⁷⁷ offences in that act should be DSO matters (see *Context*).

Interviews with those involved in the drafting of the DSO legislation indicated that the DSO's legislative mandate was designed to be broad so that almost any matter could, in terms of the legislation, be argued to fall within the DSO legislative mandate. This was done intentionally so that the DSO would be able to avoid "jurisdictional" arguments in court. It is clear that this legislative mandate is by no means an exclusive mandate – the legislation expressly provides that the SAPS retains all of its policing and investigating powers.⁷⁸

However, such a broad legislative mandate is obviously not a useful operational mandate. Given the limited capacity of the DSO, the operational mandate of the DSO must be far more circumscribed. At the time the DSO was conceived, it was envisaged by the drafters of the founding legislation that the DSO would have a *negotiated* operational mandate. To paraphrase one highly placed interviewee:

"The broad legislative mandate of the DSO was done for legal reasons. The operational mandate must be political, in the sense that the DSO must sit down with for example the Minister of Justice and other key people and work through the type of cases, via analysis of intelligence. The DSO must always keep a reserve for serious things that might crop up, though. The DSO must analyse and audit capacity and decide how many cases people are going to do. Then the DSO must engage with the police and everyone involved; everyone must be on board, there must be buy-in on every level, from the politicians, the police, to intelligence... the DSO must be careful of doing ad hoc 'sexy things'; there must be a set programme."

Subsequent to the launch of the Scorpions significant changes occurred in the general law enforcement environment. Then-commissioner of police George Fivaz was replaced in January 2000 by the current commissioner Jackie Selebi, whose attitude to the Scorpions was less amenable than that of the previous commissioner, possibly because of a desire to defend the image of his police force against a media delighting in unfavourable comparison. Matters were not helped when video footage of a SAPS dog-handler setting his dog on an illegal immigrant was initially taken to the DSO for investigation, rather than to the ICD or the SAPS itself.

During the time between the launch of the DSO and the promulgation of their legislation, the significant press the DSO received, and clashes over turf with the police, made it less and less likely that any kind of negotiated mandate, at least with the SAPS, could be achieved. The legislation, promulgated in early 2001, provided for a Ministerial Committee consisting of members of

Cabinet to sit down and devise procedures to co-ordinate the activities of the DSO, including procedures for the transfer of investigations to or from the DSO, and where necessary the responsibility of the DSO in specific matters.⁷⁹

The DSO itself attempted to draft a protocol applicable to law enforcement agencies for signature by this committee in 2001, but the draft's provisions clearly only had advantages from the DSO's point of view, and was consequently dead-in-the-water. At the time of writing, the s31 committee had still failed to meet, and political developments (see *History*) meant that the committee would be unlikely to meet in the near future to iron out these "procedures" as envisaged by the drafters of the legislation.

The DSO's operational mandate

Nevertheless, the show must go on, and the DSO developed its own criteria for intake of cases after an audit and review of the DSO's case load in 2001, and spent much time refining the DSO's strategic focus on the basis of available intelligence as well as its legislative mandate. The fruit of these labours is the well-known "Circular One"⁸⁰, which outlines both the general and particular criteria which the investigating director will apply before authorising an inquiry or "declaring a matter in terms of s28".

The investigating director of the DSO may investigate any matter which, in his opinion, involves a "specified offence" – one which is related to organised crime or any other categories determined by the president.⁸¹ These matters can be brought to his attention by members of the public⁸², but it is not necessary for the matter to have been brought to his attention by the public for a declaration of an investigation to be made.⁸³ A matter can also be referred by the national director.⁸⁴

In deciding whether to declare an investigation, in terms of Circular One, the first criterion is that the matter concerned must fall within the strategic focus areas of the DSO. The DSO has refined these as being: drug trafficking, organised violence (including taxi violence, urban terror and street gangs), precious metals smuggling, human trafficking, vehicle theft and hijacking syndicates, serious and complex financial crime, and organised public corruption.

These strategic focus areas are an amalgam of matters which had already been important in the DSO's work (for example, taxi violence in KZN, the bombs and gangs in the Western Cape), with an eye on what might come in future, according to available intelligence (for example, human trafficking).

There are a further fourteen general criteria or factors that must be taken into account: What is the seriousness and scope of the offences to be targeted? Are the offences being committed in an organised fashion? Is the syndicate to be targeted well-established, and what impact is it having on its geographical area of operation? To what extent is the syndicate transnational or national, in the sense that it has links with other syndicates and its operation covers more than one jurisdictional area of the High Court? Is the criminal activity involved or complex, and does it comprise at least five persons? What has been the outcome of previous law enforcement efforts in neutralising the syndicate, and would the DSO's team or multidisciplinary approach be more appropriate? Is there potential for applying any provisions of the POC Act? Is the organisation more of a threat than other known criminal enterprises? What is the syndicate worth, and how much money has been involved where economic offences have occurred? To what extent has the syndicate penetrated legitimate structures in the public and private sector? What potential exists for joint task teams with specialised units of the SAPS? Would the involvement of the DSO neutralise potential future loss on markets or industries? What is the public interest, particularly the impact on society as a whole rather than a select group of victims, and what is the potential future risk to society of the offences? And finally, what would be the cost of the investigation?

In addition to the above comprehensive considerations, there are also further criteria that are specific to the kinds of offences involved. These usually include a threshold that must be met of the amounts of money involved in the matter. For example, a corruption matter has a threshold of R500 000, while serious economic offences should involve actual loss of R5m. Organised crime's threshold is R1m, while drug syndicates are set at a threshold of R5m.

Not only must these general and specific factors and criteria be thoroughly considered and canvassed in a request to authorise a matter, the request must cover twenty other specific details around the proposed project, including a list of members who should be "designated" in terms of the legislation to deal with the matter. This request is made to the head of operations, via the operational management desk heads (see *Desks*).

The mandate of the DSO is therefore complex and the procedure for authorisation is highly burdensome. This is arguably as it should be, for the authorisation of an investigation which is likely to consume expensive DSO resources must be carefully considered, and in terms of the principles of administrative law, the investigating director must be able to demonstrate that

he applied his mind to the matter. Nevertheless, this operational mandate, necessary evil that it is, suffers from the same flaws which nearly all mandates of law enforcement structures suffer, whether in South Africa or abroad.

First, it is almost impossible to know even some of this detail about a syndicate or a series of offences to support an authorisation *prior to investigation*: a classic Catch-22 situation – you can't investigate until you're authorised, and you can't be authorised until you've investigated.

The legislation does however provide for the authorisation of a preparatory investigation prior to the authorisation of a full investigation⁸⁵ to obtain enough evidence to justify a full investigation; unfortunately, exactly the same stringent criteria are applied by the head of operations to the authorisation of a preparatory investigation. Regional heads may *enquire* into a matter in order to obtain further evidence to justify an authorised investigation, but such an enquiry must proceed without the special powers which DSO members designated to an authorised investigation enjoy.

Furthermore the system of preparatory investigations and “pre-preparatory enquiries” gives the impression to outside parties that the DSO has begun work on a case (as a *preparatory investigation* or an even less formal *enquiry*) and then drops the matter (when it transpires the criteria are not met and the case is not authorised). This can lead to resentment from outside agencies, who are then left to pick up the pieces, while the evidence may have disappeared or the leads gone cold. Investigators within the DSO often feel discomfort when advising interested parties that the matter will not be pursued by the DSO.

Second, the mandate sets the same financial standard for the whole country, yet the country is patently not financially homogenous: R100 000 in Umtata is arguably equivalent to R1m in Johannesburg. How many cases in the Eastern Cape will make the grade? Third, the mandate revolves around types of crime rather than types of criminals: are not those involved in organised crime probably involved in a multiplicity of crime types?

Possibly most importantly, this operational mandate has been drawn up without any negotiation with any entity outside the DSO, or any instruction from the Ministerial Committee – which, arguably the DSO is entitled to do in terms of the legislation, in the absence of action from the Ministerial Committee. In a sense, Circular One is consequently not a mandate at all in the true sense, but rather a set of internal terms of reference.

Furthermore, the DSO has run into criticism, even from within the organisation, that too much time is spent deciding on what to do, rather than on doing things; some feel “rather do something less serious than nothing”. On the other hand, others fear the DSO will become overrun with more trivial matters, much as the former Heath Unit (now the Special Investigating Unit) was accused of doing (see *Performance*), if it does not apply stringent case selection criteria.

In summary then, the question: why this matter, and not the next, is answered by the terms of Circular One. As to the question, does the DSO cherry-pick? On the contrary, it seems rather than cherry-pick, Circular One ensures that the DSO instead picks the bad eggs, looking only for the really serious matters.

But what about the problem of overlap with the SAPS? An obvious problem with the DSO’s mandate, both legislative and operational, is that organised crime is also a priority of the SAPS, which has a number of specialised units whose mandate it is to investigate the threat of organised crime (see *Comparative Performance*). Some critics suggest that it is a waste of resources for both the DSO and the SAPS to be covering organised crime.

Indeed, it is true that examples of parallel investigations by the DSO and the various specialised units of the SAPS were raised in interviews. However, examples of joint task teams consisting of both DSO and SAPS members were also mentioned. Furthermore, others – even some in the SAPS – feel that the existence of the DSO has led to both productive competition as well as fruitful co-operation between the DSO and SAPS.

From this point of view, if there is overlap, then the solution is not to disband the DSO, but to tinker with its mandate and the procedure by which it takes on cases as well as improve communication, to minimise the extent of overlap and number of parallel investigations.

Furthermore, it is also argued that organised crime in South Africa is such that more than one approach to combating it is in all likelihood justified, and that there is more than enough work to go around for the various agencies concerned. This point of view sees the existence of both the DSO and the SAPS as an important safety net, such that if one entity cannot or will not investigate a matter, the option remains for the other to do so.

CHAPTER 7

PERFORMANCE

The question is asked constantly: how good are the Scorpions? Do they really have a high success rate? Do they have an actual impact, rather than just a perceived impact? How should their performance be measured? How do they compare with other entities?

Absolute Performance

The table below (see *Table 1*) illustrates a number of quantitative measures relating to the DSO's performance in the most recent year for which such data was kept, 2002/2003. Alone, this quantitative data about the DSO does not tell us much, but there are a few things which can be gleaned from *Table 1*.

On average, 90% of cases prosecuted result in convictions. In one region of the DSO, the rate is even higher, at 97%. This suggests that the DSO is astute in choosing to prosecute only those cases likely to be successful in court. The data also suggests that the DSO is unlikely to make a frivolous arrest: the ratio of envisaged and finalised prosecutions to arrests is 92%, suggesting that almost all arrests lead to prosecutions.

The DSO also appears to have been somewhat restrained in carrying out searches: only 166 searches were conducted, which works out to about one per finalised investigation. Again, this suggests that searches are conducted only where necessary, thereby not squandering resources.

The asset forfeiture potential figures suggest that the DSO also has the potential to pay for itself; however, potential is very different from actual amounts forfeited and it remains to be seen if these amounts will be realised; furthermore, this is reliant on the Asset Forfeiture Unit.

It is very difficult to judge whether the overall number of cases finalised, and the length of time taken to complete an investigation, reflects well or poorly on the DSO. On the face of it, the numbers seem small and the period over which investigations are carried out seems long. However, the DSO is not in

Table 1: Directorate of Special Operations Performance	
Quantitative Measure	2002/2003
Number of pending investigations	169
Number of finalised investigations	167
Number of persons arrested	318
Number of searches conducted	166
Number of finalised prosecutions	117
Number of convictions	104
Number of pending prosecutions	177
<i>Convictions as % of finalised prosecutions</i>	90%
<i>Pending and finalised prosecutions as % of arrests</i>	92%
Average time from declaration to end date of last prosecution	23 months & 3 weeks
Average number of court days per prosecution	11.7 days
Asset forfeiture potential (pending and finalised investigations)	R317.93m
DSO budgeted expenditure	R267m
Number of DSO employees	531

Source: DSO Annual Report 2003 Draft 2; summarised version of key activities

the business of chasing *numbers* of convictions; one difficult case resulting in an important conviction can be far more important than a large number of convictions that would have less of an impact- consider the difficulty and impact of one conviction in the arms deal matter.

However, until the details of a finalised conviction are made public, we cannot know whether it was a difficult or easy prosecution, or a prosecution with impact or not, and whether it warranted a 24 month or longer investigation. In other words, quantitative measures of DSO performance are of little use, except to compare the DSO with itself on a yearly or bi-yearly basis.

In essence, the numbers alone can hide both good and bad actual performance. For example, a sudden increase in cases convicted might indicate the DSO is taking on easy matters and ignoring the more difficult. The only way

accurately to measure DSO performance, is in a qualitative manner, on a case by case basis. Given the limited number of cases, this should not be difficult for those with access to the appropriate information to do.

The crime environment in which the DSO has worked over the period assessed should be taken into account. For example, consider what might have occurred had the DSO in the Western Cape ignored the problem of the numerous bombs exploding over Cape Town during the 1998-2000 period, but chosen instead to prosecute 200 fraudsters rather than 20 bombers?

On the other hand, should the crime environment be such that, for example, numerous cases of low level corruption are endemic and debilitating to a region, should the DSO “wait around” for a “big” matter which might not appear, or should the DSO seek to dispose of as many of these smaller matters as possible, given their cumulative negative impact? Many argue that taking on less complicated matters is a waste of DSO resources; others counter-argue that it is exactly these less difficult cases in which less experienced investigators could be allowed to gain experience; at the same time, it is important for the DSO to be doing something rather than being under-utilised.

Many interviewees inside and outside of the DSO spoke of the need to measure the DSO’s performance in more pragmatic terms – has the DSO disrupted or ended the particular criminal activity or organisation targeted? – rather than by convictions only. Such an honest, qualitative measurement can only be taken by those with considerable expertise and access to crime intelligence, and who have thorough access to DSO matters on a case by case basis. Ordinarily, such detail can only be released once a matter has been finalised, to avoid jeopardising the DSO’s work.

While the public has a high approval rating for the DSO, and informed external interviewees also reported a high rating, they admitted they had little real knowledge about the DSO and based their ratings on media reports. DSO members were far more circumspect when rating their own performance, and that of the DSO, and expressed some discomfort at inflated expectations that had been created by media coverage of the DSO.

Case Studies

During interviews, DSO members were asked to name some completed cases, or cases having impact, in which they felt the DSO had performed well,

or which demonstrated the value of the DSO's method of operation or particular skills. These "case studies" will be considered here.⁸⁶ While only successful cases will be canvassed, it is suggested that the DSO should report to the Ministerial Committee or some other independent body, on cases which have been unsuccessful, in order that such a body might arrive at a qualitative assessment of performance and come up with an accurate performance rating for the DSO.

Hout Bay Fishing Industries

This matter, declared in June 2001, was an investigation into offences allegedly committed in respect of the harvesting and exporting of South African lobster by Hout Bay Fishing Industries (Pty) Ltd (HBFI) and its affiliated companies, as well as officials of the Department of Environmental Affairs (DEAT), and Customs and Excise.

This is the first occasion that the extensive powers contained in the Marine Living Resources Act were invoked in full. The investigation was conducted by a multi-disciplinary task team comprising the DSO, DEAT, the South African Revenue Service and the Asset Forfeiture Unit, and spanned a number of continents.

On 30 April 2002, following a ten-month investigation, Arnold Maurice Bengis, chairman of HBFI, pleaded guilty to 28 charges of contravening the Marine Living Resources Act. He admitted that between 1999 and 2001 the company had knowingly and intentionally participated in the over fishing of Rock Lobster *Jasus lalandii* and Hake *Merluccias capensis*.

A director of the company, Colin van Schalkwyk, pleaded guilty to 301 charges of corruption relating to the bribing of fisheries inspectors. Under the terms of a plea bargain, HBFI forfeited the fishing vessel Sandalene. The total penalty imposed on HBFI amounted to R40 million, including R750 000 for legal costs. Van Schalkwyk received a sentence of R1 million, or five years' imprisonment, and a five-year suspended sentence.

A group of independent fishermen (in collaboration with HBF) were convicted for contravening the Marine Living Resources Act, and for corruption, and sentenced to fines ranging between R50 000 to R100 000, with imprisonment terms in the alternative. Ten officials attached to the Department of Marine and Coastal Management (MCM) were convicted of corruption, for having

received bribes from HBF, and were sentenced to a fine of R50 000 or two years imprisonment.

SA Hake (Pty) Ltd was uncovered as having entered into a joint venture with HBF in respect of over-harvested hake to the value of R12 million. The Asset Forfeiture Unit finally attached the boat, Eagle Star, used in this venture, which has now been forfeited and will be used by DEAT to protect South Africa's marine resources. SA Hake and its director were convicted and fined R150 000 and R100 000 respectively.

While this matter was seen as an extremely successful, some commentators felt that the DSO should have capitalised on the expertise gathered in this case, and the team work with other agencies, to target the fishing industry generally in the Western Cape, which is widely believed to have elements of corruption throughout. Nevertheless, the case does demonstrate how the DSO is able to work on joint task teams with a number of organisations, harnessing their various skills, as well as to put to good use the relevant legislation. The forfeitures effected demonstrates the potential for DSO cases to "pay for themselves". The guilty pleas obtained also suggest that watertight DSO cases may save considerable expense and court time, by persuading the accused to plead guilty.

Nigerian "419" scams

This project resulted in the first three convictions of racketeering in terms of the Prevention of Organised Crime Act. Nigerian nationals used the identity of South African institutions, particularly the South African Reserve Bank, abroad, with the purpose of perpetrating "Advance Fee Fraud" (popularly known as the 419 scam, because of the relevant provision in Nigerian law passed to outlaw this conduct).

During 2002, 18 Nigerian nationals were convicted. Three of them paid fines to the amount of R700 000 in addition to the periods of imprisonment imposed, which in the case of three accused, amount to 50 years. Seventeen illegal immigrants were also deported.

This case was important because of the impact on the way in which South African institutions are viewed abroad, and also emphasising the ability of the DSO to work on matters with an international component, and to put to use the provisions contained in the Prevention of Organised Crime Act.

Road Accident Fund matter

The Road Accident Fund (RAF) pays compensation in respect of people injured or killed in road accidents through the negligent driving of a motor vehicle in South Africa. This DSO matter relates to the fraudulent transactions conducted by claimants, doctors, attorneys and touts in respect of claims made against the RAF. This is an ongoing investigation, being conducted by all the regional offices of the DSO, which was originally initiated by the Heath Unit (see *Comparative Performance*).

Due to the large volume of data involved, this investigation made good use of the skills of data capturers and analysts: dates and times of appointments, accident dates and other details are cross-referenced by the software in order to pinpoint improbabilities and therefore likely fraud which can be investigated. In the 2001/2002 year, 27 professionals were arrested on charges of fraud; at the time of writing the matter had not been concluded in court.

Again, this matter demonstrates the ability of the DSO to work with and within other agencies, in this case the RAF. As a result of the investigation, certain loopholes in claims procedure have been identified which should lead to a lower incidence of future fraud in respect of claims made against the RAF. The loopholes identified by the DSO also fed into the Satchwell Commission⁸⁷, which has made wide-ranging recommendations on reform of the RAF, demonstrating the potential for long-term impact of such investigations.

Land Bank matter

The Land and Agricultural Development Bank of South Africa (Land Bank) provides financial services in respect of farming enterprises. The Land Bank case involved fraudulent loan applications (for false purposes and fictitious clients), and the use of fraudulent supporting documents, false and inflated securities, corrupt payments and bribes by corrupt officials, and alleged members of syndicates.

The estimated amount of known fraudulent transactions at the beginning of the investigation was R3.8 million. This figure increased dramatically as the investigation progressed to a figure exceeding R100 million. In 2002, three of the accused were given prison sentences of five years, 12 years and 15 years respectively.

This case demonstrates the ability of the DSO successfully to conduct complicated financial investigations. It also demonstrates how one case can rapidly, after thorough investigation, reveal the true extent of a problem, with increasingly large amounts of money involved.

Comparative Performance

Judging relative performance is also difficult to do, since no other organisation in the law enforcement environment is quite like the DSO. Indeed, in many instances we are comparing very different things. However, some of the functions of the DSO and other agencies are the same, and we can attempt some form of basic comparison. The comparative exercise below does provide some insight, in particular, as to comparative cost of various agencies' investigations.

The National Prosecuting Service

Comparing the performance of the DSO with the National Prosecuting Service (NPS) at first seems to make the DSO's performance seem both meagre and expensive; however, looking a bit closer at the figures suggests the type of convictions obtained by the NPS are such that the DSO's convictions might be worth the cost.

The National Prosecuting Service is an entity within the NPA responsible for criminal prosecutions generally. According to a review of the NPA, in the 2001 year 358123 cases were finalised by the NPS with a verdict, with 81% resulting in a conviction and 19% in an acquittal.

In other words, the conviction rate is remarkably high; anyone being tried in a South African court has a four in five chance of being found guilty. This puts the DSO's "90% conviction rate" into some perspective; the DSO figure is a remarkable achievement, but so is the rate of 81% achieved by ordinary prosecutors.

Given the NPS's and DSO's respective budgets (see *Table 2*), this means each of their successful convictions in effect "costs" R2231 and R2.6m respectively, if one rather crudely divides convictions by the entire budgeted expenditure for each entity. To make a fairer comparison, however, one needs to add in the detective service budget also to account for the investigative compo-

ment; the “cost” is then R11 994, so that each DSO conviction is worth 214 ordinary convictions. (This crude calculation unfortunately cannot take into account the cost of assistance by other agencies to the DSO’s work, as this is difficult to quantify.)

Is this cost ratio of 214 to one an appropriate ratio? To uncover the answer, we have to attempt a qualitative assessment of the type of cases resulting in convictions; we already have a flavour of the DSO matters from the case studies presented above. Obviously, we cannot look at NPS matters on a case by case basis; however, we can consider convictions by crime type.

An analysis of prosecution figures for the year 2000 shows that no serious crime category (for example, murder, rape, aggravated robbery) other than drug crimes accounted for more than 2% of all convictions obtained. This is not just because fewer serious crimes are committed than less serious crimes. The main reason is because a low proportion of reported serious crimes result in a conviction in court. Only drug crimes (49%) and murder (18%) had more than 10% of reported crimes being matched by a conviction.

Table 2: Comparative Budgets							
R1000	1999/00	2000/01	2001/02	2002/03	2003/04	2004/05	2005/06
NPA Total⁸⁹	484 366	605 151	724 111	948 568	1020682	1090332	1155722
Public Prosecutions⁹⁰	446 874	531 797	502 189	647 398	693 423	740 721	785 134
DSO⁹¹	16 774	49 471	197 116	267 000	290 735	310 592	329 228
SIU⁹²	16 894	17 739	21 419	22 958	25 535	27 194	28 851
ICD⁹³	23 660	25 512	26 715	31 902	36 833	40 995	44 392
Detective Service Total⁹⁴	2624773	2831366	3105310	3478572	3743582	4069015	4385846
Organised Crime⁹⁵	812 107	865 158	800 068	949 013	899 341	960 028	1022931
Commercial Crime⁹⁶	122 594	137 297	140 316	151 873	137 996	147 804	157 679

Source: Estimates of National Expenditure 2003, Votes 23, 24 and 25

Clearly, a high proportion of NPS convictions must be of a less serious nature. This is confirmed by the fact that in 2001, as many as 88% of all cases finalised with a verdict were finalised in the district court as opposed to the regional court⁹⁷. The vast majority of serious crimes such as murder, rape, aggravated robbery and car theft are prosecuted in the regional courts. Less serious offences such as assault, shoplifting, malicious injury to property and driving related offences are prosecuted in the district courts.⁹⁸ In 2001, the conviction rate in the district courts was 83% while the rate was only 66% in the regional courts.⁹⁹

Furthermore, in 2001, some 423 890 cases were withdrawn by the prosecution – more than were prosecuted by the NPS. While this may be an astute move on prosecutors' part to avoid failing in court, in much the same way as the DSO is astute in choosing cases to prosecute, it is important to note that the number of cases going to court declined from 1994 (350 200) to 1999 (271 057) and has only in 2001 reached 1994 levels (358 123) again.

In other words, while the NPS has a good conviction rate, the actual number of prosecutions carried out has only recently reached 1994 levels, and the category of crime for which convictions are obtained, are in general the less serious crimes. While the convictions obtained by the DSO may seem expensive, when seen in this light, it might well be they are worth the cost, given the relative seriousness and complexity of the crimes involved.

The Detective Service

The DSO and the SAPS are obviously not easily comparable entities. The DSO consists of fewer than 600 people based at four regional offices and one head office; the SAPS consists of more than 120 000 people at more than 1000 police stations and at specialised units. Furthermore, the SAPS must both police and investigate all crime, while the DSO gets to choose which crimes it will investigate, and has the responsibility of investigating and prosecuting only, and no other police functions.

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However the detective service says it is unfair to measure their performance by looking at conviction rates (as a proportion of reported crimes) because they are not solely responsible for the success of a matter in court.¹⁰⁰ While it is understood that the detection rate, the disposal rate and the number of cases taken to court (all performance indicators used by the Detective Service) are indeed appropriate measures of performance for the detective service, the detective service should also acknowledge and indeed take credit for the role it plays in securing convictions.¹⁰¹

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But what about the specialised units of the detective service? These entities are of a size and nature which make comparison with the DSO somewhat easier. The organised crime units, the serious and violent crime units and the commercial crime units have arisen out of the restructuring of the former plethora of specialised units in the detective service.¹⁰²

The SAPS has 24 serious and violent crime units with 677 detectives; 24 organised crime units with 723 detectives; 17 commercial crime units with 626 detectives; one serious economic offences unit with 24 detectives; and 46 Family Violence and Child Protection Units (FCPU) with 755 detectives.¹⁰³ The DSO, by comparison, has four regional offices and a head office, with 531 members.

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The data for the year ending March 2003 shows that a total of 17 676 commercial cases were reported. During that period, 3045 arrests were made and 2660 convictions were obtained (although both these arrests and convictions may have related to crime reports in previous years).¹⁰⁵ This implies that the investigation preceding each conviction "cost" R57 095, if we repeat our crude calculation applied earlier to the DSO.

Again, the DSO seems expensive in comparison, about 45 times more expensive per conviction (although we have not taken into account the prosecution costs of these commercial cases). However, if we look closely at the type of convictions, we find that of these 2660 convictions, 428 related to stolen credit or other cards, 273 to stolen cheques, and 1466 to "other fraud". These do not on the face of it seem of a difficult or complex nature, in the absence of greater detail on the nature of cases investigated.¹⁰⁶ Apart from this rough typology, we have no insight as to the comparative complexity or difficulty of all the cases on which convictions were obtained, so it remains difficult to say whether the expense ratio of 45-to-one is appropriate or not.

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The Special Investigating Unit

The Special Investigating Unit's predecessor, the Heath unit under Judge Willem Heath, was created in terms of the Special Investigating Units and Special Tribunals Act¹¹⁵. One of the unit's first jobs was to try to recover millions of rands identified by the Heath Commission, established in June 1995 to investigate maladministration in the Eastern Cape.¹¹⁶ When the Heath unit began investigating personal injury (road accident) lawyers, their association took him to the Constitutional Court.

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The SIU has had a much lower media profile since Heath's departure, and Hofmeyr has not challenged the government on the SIU's funding, as Heath did, claiming the unit was under-funded. Each investigation referred to the SIU is proclaimed in the *Government Gazette*. The SIU was excluded from investigating the arms deal matter, as the President did not proclaim the matter for the SIU.

The SIU accumulated a significant backlog of work, which may take up to three years to complete. During the 1999/2000 financial year, 82 cases were completed by the SIU through the Special Tribunal. More recent figures on the number of cases finalised were unfortunately not available. A Special Report of the Auditor General verified that the SIU saved, recovered or protected the loss of state assets and funds to the value of R1.3bn during the financial year to March 1999. Audited figures for the period 1 April 1999 to 31 March 2000 indicated that the Unit recovered, saved or prevented the loss of some R168 million, of which R112 million was in cash recoveries.¹²⁰ The budget of the DSO is almost 12 times larger than the budget of the SIU (see *Table 2*).

Conclusion

The DSO appears to have an excellent record of success in obtaining convictions in matters it chooses to prosecute, and does not waste resources with frivolous arrests or searches. However, comparison with other entities, although a problematic exercise, suggests that there is room for the DSO to take on more matters. This appeared to be confirmed by frustration expressed by some interviewees, who felt that they themselves and the DSO could be taking on more work. The number of cases taken on at present, although admittedly of a difficult and complex nature, is small, and each case is therefore effectively very costly, given the expanding budget of the DSO.

CHAPTER 7

PERFORMANCE

The question is asked constantly: how good are the Scorpions? Do they really have a high success rate? Do they have an actual impact, rather than just a perceived impact? How should their performance be measured? How do they compare with other entities?

Absolute Performance

The table below (see *Table 1*) illustrates a number of quantitative measures relating to the DSO's performance in the most recent year for which such data was kept, 2002/2003. Alone, this quantitative data about the DSO does not tell us much, but there are a few things which can be gleaned from *Table 1*.

On average, 90% of cases prosecuted result in convictions. In one region of the DSO, the rate is even higher, at 97%. This suggests that the DSO is astute in choosing to prosecute only those cases likely to be successful in court. The data also suggests that the DSO is unlikely to make a frivolous arrest: the ratio of envisaged and finalised prosecutions to arrests is 92%, suggesting that almost all arrests lead to prosecutions.

The DSO also appears to have been somewhat restrained in carrying out searches: only 166 searches were conducted, which works out to about one per finalised investigation. Again, this suggests that searches are conducted only where necessary, thereby not squandering resources.

The asset forfeiture potential figures suggest that the DSO also has the potential to pay for itself; however, potential is very different from actual amounts forfeited and it remains to be seen if these amounts will be realised; furthermore, this is reliant on the Asset Forfeiture Unit.

It is very difficult to judge whether the overall number of cases finalised, and the length of time taken to complete an investigation, reflects well or poorly on the DSO. On the face of it, the numbers seem small and the period over which investigations are carried out seems long. However, the DSO is not in

Table 1: Directorate of Special Operations Performance	
Quantitative Measure	2002/2003
Number of pending investigations	169
Number of finalised investigations	167
Number of persons arrested	318
Number of searches conducted	166
Number of finalised prosecutions	117
Number of convictions	104
Number of pending prosecutions	177
<i>Convictions as % of finalised prosecutions</i>	90%
<i>Pending and finalised prosecutions as % of arrests</i>	92%
Average time from declaration to end date of last prosecution	23 months & 3 weeks
Average number of court days per prosecution	11.7 days
Asset forfeiture potential (pending and finalised investigations)	R317.93m
DSO budgeted expenditure	R267m
Number of DSO employees	531

Source: DSO Annual Report 2003 Draft 2; summarised version of key activities

the business of chasing *numbers* of convictions; one difficult case resulting in an important conviction can be far more important than a large number of convictions that would have less of an impact- consider the difficulty and impact of one conviction in the arms deal matter.

However, until the details of a finalised conviction are made public, we cannot know whether it was a difficult or easy prosecution, or a prosecution with impact or not, and whether it warranted a 24 month or longer investigation. In other words, quantitative measures of DSO performance are of little use, except to compare the DSO with itself on a yearly or bi-yearly basis.

In essence, the numbers alone can hide both good and bad actual performance. For example, a sudden increase in cases convicted might indicate the DSO is taking on easy matters and ignoring the more difficult. The only way

accurately to measure DSO performance, is in a qualitative manner, on a case by case basis. Given the limited number of cases, this should not be difficult for those with access to the appropriate information to do.

The crime environment in which the DSO has worked over the period assessed should be taken into account. For example, consider what might have occurred had the DSO in the Western Cape ignored the problem of the numerous bombs exploding over Cape Town during the 1998-2000 period, but chosen instead to prosecute 200 fraudsters rather than 20 bombers?

On the other hand, should the crime environment be such that, for example, numerous cases of low level corruption are endemic and debilitating to a region, should the DSO “wait around” for a “big” matter which might not appear, or should the DSO seek to dispose of as many of these smaller matters as possible, given their cumulative negative impact? Many argue that taking on less complicated matters is a waste of DSO resources; others counter-argue that it is exactly these less difficult cases in which less experienced investigators could be allowed to gain experience; at the same time, it is important for the DSO to be doing something rather than being under-utilised.

Many interviewees inside and outside of the DSO spoke of the need to measure the DSO’s performance in more pragmatic terms – has the DSO disrupted or ended the particular criminal activity or organisation targeted?- rather than by convictions only. Such an honest, qualitative measurement can only be taken by those with considerable expertise and access to crime intelligence, and who have thorough access to DSO matters on a case by case basis. Ordinarily, such detail can only be released once a matter has been finalised, to avoid jeopardising the DSO’s work.

While the public has a high approval rating for the DSO, and informed external interviewees also reported a high rating, they admitted they had little real knowledge about the DSO and based their ratings on media reports. DSO members were far more circumspect when rating their own performance, and that of the DSO, and expressed some discomfort at inflated expectations that had been created by media coverage of the DSO.

Case Studies

During interviews, DSO members were asked to name some completed cases, or cases having impact, in which they felt the DSO had performed well,

or which demonstrated the value of the DSO's method of operation or particular skills. These "case studies" will be considered here.⁸⁶ While only successful cases will be canvassed, it is suggested that the DSO should report to the Ministerial Committee or some other independent body, on cases which have been unsuccessful, in order that such a body might arrive at a qualitative assessment of performance and come up with an accurate performance rating for the DSO.

Hout Bay Fishing Industries

This matter, declared in June 2001, was an investigation into offences allegedly committed in respect of the harvesting and exporting of South African lobster by Hout Bay Fishing Industries (Pty) Ltd (HBFI) and its affiliated companies, as well as officials of the Department of Environmental Affairs (DEAT), and Customs and Excise.

This is the first occasion that the extensive powers contained in the Marine Living Resources Act were invoked in full. The investigation was conducted by a multi-disciplinary task team comprising the DSO, DEAT, the South African Revenue Service and the Asset Forfeiture Unit, and spanned a number of continents.

On 30 April 2002, following a ten-month investigation, Arnold Maurice Bengis, chairman of HBFI, pleaded guilty to 28 charges of contravening the Marine Living Resources Act. He admitted that between 1999 and 2001 the company had knowingly and intentionally participated in the over fishing of Rock Lobster *Jasus lalandii* and Hake *Merluccias capensis*.

A director of the company, Colin van Schalkwyk, pleaded guilty to 301 charges of corruption relating to the bribing of fisheries inspectors. Under the terms of a plea bargain, HBFI forfeited the fishing vessel Sandalene. The total penalty imposed on HBFI amounted to R40 million, including R750 000 for legal costs. Van Schalkwyk received a sentence of R1 million, or five years' imprisonment, and a five-year suspended sentence.

A group of independent fishermen (in collaboration with HBF) were convicted for contravening the Marine Living Resources Act, and for corruption, and sentenced to fines ranging between R50 000 to R100 000, with imprisonment terms in the alternative. Ten officials attached to the Department of Marine and Coastal Management (MCM) were convicted of corruption, for having

received bribes from HBF, and were sentenced to a fine of R50 000 or two years imprisonment.

SA Hake (Pty) Ltd was uncovered as having entered into a joint venture with HBF in respect of over-harvested hake to the value of R12 million. The Asset Forfeiture Unit finally attached the boat, Eagle Star, used in this venture, which has now been forfeited and will be used by DEAT to protect South Africa's marine resources. SA Hake and its director were convicted and fined R150 000 and R100 000 respectively.

While this matter was seen as an extremely successful, some commentators felt that the DSO should have capitalised on the expertise gathered in this case, and the team work with other agencies, to target the fishing industry generally in the Western Cape, which is widely believed to have elements of corruption throughout. Nevertheless, the case does demonstrate how the DSO is able to work on joint task teams with a number of organisations, harnessing their various skills, as well as to put to good use the relevant legislation. The forfeitures effected demonstrates the potential for DSO cases to "pay for themselves". The guilty pleas obtained also suggest that watertight DSO cases may save considerable expense and court time, by persuading the accused to plead guilty.

Nigerian "419" scams

This project resulted in the first three convictions of racketeering in terms of the Prevention of Organised Crime Act. Nigerian nationals used the identity of South African institutions, particularly the South African Reserve Bank, abroad, with the purpose of perpetrating "Advance Fee Fraud" (popularly known as the 419 scam, because of the relevant provision in Nigerian law passed to outlaw this conduct).

During 2002, 18 Nigerian nationals were convicted. Three of them paid fines to the amount of R700 000 in addition to the periods of imprisonment imposed, which in the case of three accused, amount to 50 years. Seventeen illegal immigrants were also deported.

This case was important because of the impact on the way in which South African institutions are viewed abroad, and also emphasising the ability of the DSO to work on matters with an international component, and to put to use the provisions contained in the Prevention of Organised Crime Act.

Road Accident Fund matter

The Road Accident Fund (RAF) pays compensation in respect of people injured or killed in road accidents through the negligent driving of a motor vehicle in South Africa. This DSO matter relates to the fraudulent transactions conducted by claimants, doctors, attorneys and touts in respect of claims made against the RAF. This is an ongoing investigation, being conducted by all the regional offices of the DSO, which was originally initiated by the Heath Unit (see *Comparative Performance*).

Due to the large volume of data involved, this investigation made good use of the skills of data capturers and analysts: dates and times of appointments, accident dates and other details are cross-referenced by the software in order to pinpoint improbabilities and therefore likely fraud which can be investigated. In the 2001/2002 year, 27 professionals were arrested on charges of fraud; at the time of writing the matter had not been concluded in court.

Again, this matter demonstrates the ability of the DSO to work with and within other agencies, in this case the RAF. As a result of the investigation, certain loopholes in claims procedure have been identified which should lead to a lower incidence of future fraud in respect of claims made against the RAF. The loopholes identified by the DSO also fed into the Satchwell Commission⁸⁷, which has made wide-ranging recommendations on reform of the RAF, demonstrating the potential for long-term impact of such investigations.

Land Bank matter

The Land and Agricultural Development Bank of South Africa (Land Bank) provides financial services in respect of farming enterprises. The Land Bank case involved fraudulent loan applications (for false purposes and fictitious clients), and the use of fraudulent supporting documents, false and inflated securities, corrupt payments and bribes by corrupt officials, and alleged members of syndicates.

The estimated amount of known fraudulent transactions at the beginning of the investigation was R3.8 million. This figure increased dramatically as the investigation progressed to a figure exceeding R100 million. In 2002, three of the accused were given prison sentences of five years, 12 years and 15 years respectively.

This case demonstrates the ability of the DSO successfully to conduct complicated financial investigations. It also demonstrates how one case can rapidly, after thorough investigation, reveal the true extent of a problem, with increasingly large amounts of money involved.

Comparative Performance

Judging relative performance is also difficult to do, since no other organisation in the law enforcement environment is quite like the DSO. Indeed, in many instances we are comparing very different things. However, some of the functions of the DSO and other agencies are the same, and we can attempt some form of basic comparison. The comparative exercise below does provide some insight, in particular, as to comparative cost of various agencies' investigations.

The National Prosecuting Service

Comparing the performance of the DSO with the National Prosecuting Service (NPS) at first seems to make the DSO's performance seem both meagre and expensive; however, looking a bit closer at the figures suggests the type of convictions obtained by the NPS are such that the DSO's convictions might be worth the cost.

The National Prosecuting Service is an entity within the NPA responsible for criminal prosecutions generally. According to a review of the NPA, in the 2001 year 358123 cases were finalised by the NPS with a verdict, with 81% resulting in a conviction and 19% in an acquittal.

In other words, the conviction rate is remarkably high; anyone being tried in a South African court has a four in five chance of being found guilty. This puts the DSO's "90% conviction rate" into some perspective; the DSO figure is a remarkable achievement, but so is the rate of 81% achieved by ordinary prosecutors.

Given the NPS's and DSO's respective budgets (see *Table 2*), this means each of their successful convictions in effect "costs" R2231 and R2.6m respectively, if one rather crudely divides convictions by the entire budgeted expenditure for each entity. To make a fairer comparison, however, one needs to add in the detective service budget also to account for the investigative compo-

ment; the “cost” is then R11 994, so that each DSO conviction is worth 214 ordinary convictions. (This crude calculation unfortunately cannot take into account the cost of assistance by other agencies to the DSO’s work, as this is difficult to quantify.)

Is this cost ratio of 214 to one an appropriate ratio? To uncover the answer, we have to attempt a qualitative assessment of the type of cases resulting in convictions; we already have a flavour of the DSO matters from the case studies presented above. Obviously, we cannot look at NPS matters on a case by case basis; however, we can consider convictions by crime type.

An analysis of prosecution figures for the year 2000 shows that no serious crime category (for example, murder, rape, aggravated robbery) other than drug crimes accounted for more than 2% of all convictions obtained. This is not just because fewer serious crimes are committed than less serious crimes. The main reason is because a low proportion of reported serious crimes result in a conviction in court. Only drug crimes (49%) and murder (18%) had more than 10% of reported crimes being matched by a conviction.

Table 2: Comparative Budgets							
R1000	1999/00	2000/01	2001/02	2002/03	2003/04	2004/05	2005/06
NPA Total ⁸⁹	484 366	605 151	724 111	948 568	1020682	1090332	1155722
Public Prosecutions ⁹⁰	446 874	531 797	502 189	647 398	693 423	740 721	785 134
DSO ⁹¹	16 774	49 471	197 116	267 000	290 735	310 592	329 228
SIU ⁹²	16 894	17 739	21 419	22 958	25 535	27 194	28 851
ICD ⁹³	23 660	25 512	26 715	31 902	36 833	40 995	44 392
Detective Service Total ⁹⁴	2624773	2831366	3105310	3478572	3743582	4069015	4385846
Organised Crime ⁹⁵	812 107	865 158	800 068	949 013	899 341	960 028	1022931
Commercial Crime ⁹⁶	122 594	137 297	140 316	151 873	137 996	147 804	157 679

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In an unanimous decision by Chaskalson JP, the Court held that the appointment of a judge to head the SIU violated the separation of powers required by the Constitution, and that the presidential proclamation authorising the investigation into Road Accident Fund matters was also invalid (for other reasons); the first order of invalidity was suspended for a year, but the second was immediate.¹¹⁷

The proclamation creating the Heath unit was therefore repealed and another proclamation was issued in July 2001 which appointed Willie Hofmeyr head of a new SIU with new terms of reference.¹¹⁸ The proclamation also provided that the cases being investigated by the Heath unit must be taken on by the SIU, and that the SIU's terms of reference should broadly be to investigate corruption or maladministration in state institutions.¹¹⁹

The SIU has had a much lower media profile since Heath's departure, and Hofmeyr has not challenged the government on the SIU's funding, as Heath did, claiming the unit was under-funded. Each investigation referred to the SIU is proclaimed in the *Government Gazette*. The SIU was excluded from investigating the arms deal matter, as the President did not proclaim the matter for the SIU.

The SIU accumulated a significant backlog of work, which may take up to three years to complete. During the 1999/2000 financial year, 82 cases were completed by the SIU through the Special Tribunal. More recent figures on the number of cases finalised were unfortunately not available. A Special Report of the Auditor General verified that the SIU saved, recovered or protected the loss of state assets and funds to the value of R1.3bn during the financial year to March 1999. Audited figures for the period 1 April 1999 to 31 March 2000 indicated that the Unit recovered, saved or prevented the loss of some R168 million, of which R112 million was in cash recoveries.¹²⁰ The budget of the DSO is almost 12 times larger than the budget of the SIU (see *Table 2*).

Conclusion

The DSO appears to have an excellent record of success in obtaining convictions in matters it chooses to prosecute, and does not waste resources with frivolous arrests or searches. However, comparison with other entities, although a problematic exercise, suggests that there is room for the DSO to take on more matters. This appeared to be confirmed by frustration expressed by some interviewees, who felt that they themselves and the DSO could be taking on more work. The number of cases taken on at present, although admittedly of a difficult and complex nature, is small, and each case is therefore effectively very costly, given the expanding budget of the DSO.

CHAPTER 8

ISSUES

Prosecution-lead investigation, which been adopted by the DSO, has implications for the ethics of prosecutors – is this cause for concern? Armed with new legislation and a new way of investigating, the DSO has the potential to be a powerful force. Is it constitutional that the DSO falls under the national director’s office? The national director’s power, relevant also to DSO investigations, lies in the power of veto; what are the implications of this power, and how might pressure be brought to bear on a national director? What are the implications for the democratic principle of the separation of powers? How accountable is the DSO? What possible solutions are there for these problems?

Ethics and prosecution-lead investigations

One of the main aspects of DSO operation is the idea of “prosecution-lead” investigations (see *Operation*). This is controversial because the danger is that a prosecutor who becomes intimately involved in an investigation, may become ethically compromised:

“The object of a criminal investigation and a criminal prosecution is not to secure a conviction – it is to serve the interests of justice... The prosecutorial role is a role that is distinctive from the investigative role, and the great contribution that the prosecutor brings to the investigation is a professional detachment and objectivity.”¹²¹

Traditionally, prosecutors do not become involved in criminal investigations. The functions and professional duties of prosecutors and investigators have traditionally been separate. The ethical duty of a prosecutor, as an officer of the court, is primarily to the court, to assist the court in making a just decision. Prosecutors must assist the court to arrive at a just verdict, and not simply secure a conviction at all cost. This includes, for example, divulging possibly exculpatory evidence to the court where it exists, or assisting in putting the version of an unrepresented accused before court.

The national director himself is very aware of the problems raised by prosecution-lead investigation, and presented a paper on the topic at a conference in Durban in 2001¹²². In this paper, he suggests that the need to move from the traditional “detached” way in which prosecutors work, arose because the law had evolved to such an extent that the success of prosecutions, particularly in respect of organised crime, would often be compromised on legal technicalities. Simply involving legal expertise at an earlier stage alleviates the problem. He explains:

“The prosecutor can review the work of the investigator and can avert any potential challenges to the admissibility of evidence early on. When investigative methodologies like interception and monitoring of telecommunications and undercover operations are embarked upon, the investigators have the benefit of the prosecutor’s expert legal advice right from the start ... At a strategic level the prosecutor is able to guide the investigation to ensure that the goal of a successful prosecution is achieved. At a practical level, the prosecutor is also available to assist in making strategic decisions about which witnesses to offer indemnity to and to assess what the impact on an overall investigation will be of accepting a plea in a specific instance.”¹²³

He suggests practical ways for the prosecutor involved in prosecution-lead investigation to avoid becoming ethically compromised. Most importantly, the prosecutor must at all costs avoid becoming a witness to facts or incidents, which might later require testimony in court:

“Integration or closer co-operation between the investigator and prosecutor should not be equated with role confusion. The distinction between the role of the investigator and prosecutor should not become blurred. The investigator is still the best person to perform the function of collecting the evidence. The prosecutor can review, advise and direct the investigator, however all the time mindful of the fact that he or she remains an officer of the court with certain ethical obligations. It is important that the prosecutor maintain a healthy distance from the actual gathering of evidence in order to ensure that these ethical obligations are not compromised. The prosecutor is there to guide the investigation not to do the job of the investigator. The prosecutor has to at all times be wary not to end up as a fact witness. There may well be cases where a prosecutor has become so steeped in the investigation that he should not prosecute that particular criminal case. By and large this situation can be avoided and care

should be taken to do so. Failure to do so will result in the prosecutor being called as a witness and therefore precluded from conducting the prosecution, which defeats the purpose behind assigning the prosecutor the case from the onset."¹²⁴

Prosecution-lead investigation is not new in South Africa. In the 1980s prosecutors began to take on a more active investigative role. For example, during the Goldstone Commission¹²⁵ the then Attorney-General of the Transvaal, Jan d'Oliveira, was mandated by the State President to investigate allegations of illegal police hit squads with the assistance of carefully selected police officers. More recently, during the early 1990s, the threat of organised crime led to the creation of police units to deal with the problem, and attorneys-general or their staff often assisted these units. Legislation promulgated in 1991 gave senior prosecutors and their staff the power to investigate and prosecute serious economic offences, via the Office for Serious Economic Offences (OSEO)¹²⁶ the predecessor of the investigating directorates established by the NPA Act. The DSO is however the first entity in which prosecutors and investigators work together as a team within the same organisation on a continuous basis.

The involvement of the prosecution in the investigation of crime has therefore historically tended to occur where there is a suspect, but admissible evidence (as opposed to intelligence) is required to support a criminal conviction. Traditionally, a police investigation begins with an allegation of a crime, followed by a search for a suspect. Prosecutorial involvement in investigations tends to occur in situations where identified persons (corrupt policemen; known organised crime groups) appear to be involved in crime or appear successfully to have avoided being implicated in a crime, and although suspicion surrounds them, admissible evidence has not yet been obtained. Continuing this trend, the NPA legislation requires that the DSO focus its activities on organised crime,¹²⁷ and thus far some of the DSO's work has been "intelligence-based" and "proactive", in that information (as opposed to evidence) supplied by intelligence sources identifies suspects who should be targeted for investigation and prosecution.

Under the national director of public prosecutions

The DSO is directly under the authority of the national director. Although he is not the actual head of the DSO, he has the power of veto over all prosecutions of offences, including those investigated by the DSO, and he is the ultimate authority over the DSO as an entity within the NPA. This section will consider the argument that the DSO under the NPA is unconstitutional. It will

consider the nature of the national director's power over all prosecutions, and the implications for the separation of powers.

The constitutional question

Some have questioned the constitutionality of the existence of the DSO under the NPA rather than the SAPS, or at all. There may come a time when the issue is tested in court. Until then, it remains a moot point. This monograph does not provide an expert constitutional opinion, but directs the reader, with some discussion, to the constitutional provisions that might be relevant to this question.

At the outset it should be noted that should the DSO be made to fall under any entity other than the NPA, *it would no longer be the DSO as such*. By definition, the DSO is the investigating arm of the NPA. Removing the DSO from the NPA, would remove from it the power to prosecute, which is essential to the operation of the DSO. Therefore the DSO cannot operate as it does anywhere other than in the NPA. Should it be removed from the NPA, it would no longer be the same kind of organisation. The DSO as it has been conceived can only exist in the NPA.

Nevertheless, there is still an argument that the DSO, *as conceived*, is unconstitutional, which must be considered. Those who question the existence of the DSO outside of the SAPS point to the constitutional provision that provides that there must be "a single police service"¹²⁸. At the same time, this section also says, "other than the security services established in terms of the constitution, armed organisations or services may be established only in terms of national legislation"¹²⁹. This provision envisages that Parliament may provide for other armed services, such as the DSO, as long as they don't amount to a police service. What has to be considered, therefore, is whether the DSO is operating as a police force. Assuming that amounting to a police service would require an entity to have objects, powers and functions similar to the SAPS, then it appears that the DSO is not a police service as it is currently operating, save in that it also investigates crime. But investigating crime is only one of the many functions of the SAPS. Should the DSO begin to mirror the operation of the SAPS, by taking on more SAPS-like functions, or should it be argued to be doing so, a problem might indeed arise in respect of this constitutional provision.

The activity of the DSO (as part of the NPA) that is particularly controversial and mirrors the police is that of investigation. Prosecution is obviously not controversial, as that is the main function of the NPA of which the DSO is part.

But investigation is one of the objects of the SAPS. The constitutional provision setting out the objects (aims) of the SAPS covers a broad range of objects, including the investigation of crime. These objects are manifestly not in the domain of the police service only. For example, “securing the inhabitants of the Republic”¹³⁰ would also be an object of the SA National Defence Force and the National Intelligence Agency. This would tend to suggest that objects of the SAPS are not exclusive to the SAPS. Consequently, other entities, such as the DSO, may also therefore have the object of investigating crime. Hence it appears the constitution does not exclude other entities, including the NPA and by extension the DSO, from investigating crime. But if the constitution does not prevent the NPA from investigating, does it empower the NPA to investigate?

The constitution provides that the national director has the exclusive power to institute prosecutions on behalf of the state (see *Veto Power*). At the same time, the constitution provides that the national director has the power to carry out any “necessary functions incidental to instituting criminal proceedings”. It could be argued that this includes the further investigation of certain crimes to ensure successful prosecution. Many institutions other than the DSO carry out investigations incidental to their functions – such as the Auditor-General, or the South African Revenue Service.

The investigation of crime is therefore not the exclusive preserve of the SAPS; furthermore, it could be argued that the constitution specifically empowers the NPA and therefore the DSO to carry out investigations incidental to prosecutions.

Indeed, the legislature seems to share this opinion. The legislature obviously envisaged a constitutional challenge to the DSO, and took the unprecedented step of attempting to head that off with its own opinion on the question. The preamble to the NPA amendment act creating the DSO says, “the constitution does not provide that the prevention, combating or investigating of crime is the exclusive function of any single institution” (see *History*).

The source of the discomfort around the DSO’s position in the NPA may lie more with discomfort as to the power held by the national director, the *de facto* head of the DSO (see *History*). The source of the national director’s power lies in the power of veto over all prosecutions, including those undertaken by the DSO. Ironically, the constitutional court has already considered the question of this veto power, and confirmed it in the certification of the constitution. The veto power of the national director will be considered in the next section.

Veto power

The National Prosecuting Authority Act of 1998 removed the independence of provincial attorneys-general and gave South Africa a single, national, prosecuting authority, as required by the constitution.¹³¹ Once the act was passed, the “national director of public prosecutions” (dubbed by the press the “super-AG”) could veto the decisions of the provincial attorneys-general (termed “directors of public prosecutions”) and indeed of any prosecutor in the NPA, which now of course includes those in the DSO.

This is because the constitution and the NPA Act provide that the national director “may review a decision to prosecute or not to prosecute” after consulting the relevant DPP and taking representations from the accused, the complainant and any other person deemed relevant by the national director.¹³² “After consultation” implies that consultation must take place, but there need not be consensus – the phrase “in consultation” implies consensus. This means that ultimately, it is the national director’s decision to take.

Why was the creation of a “super-AG” controversial, even though required by the constitution? The independence of provincial attorneys-general had previously been strengthened by the Prosecution Act of 1992, which made the attorney-general in each province independent of the executive, and accountable to Parliament only. The fear was that the NPA Act was a step backward for the independence of provincial attorneys-general. On the other hand, some commentators felt the 1992 Act had been a reactionary attempt by the old regime to entrench the nine incumbent attorneys-general, some of whom had participated in aggressive prosecutions of political cases during apartheid.

The other fear was that as a tenured presidential appointment, who could only be removed by the president and Parliament, the national director could not be guaranteed to act either impartially, or independently of the interests of the executive. Impartiality is an issue because the NPA Act provides that the president appoints the national director for a non-renewable term of 10 years (and provincial directors of public prosecutions for life): the concern is that an appointee of the executive could be party-political. The president may remove the national director on the grounds of the national director’s continued ill-health, misconduct, incapacity to carry out his duties efficiently, or on the grounds that the national director is no longer a fit and proper person to hold office.¹³³ This has given rise to the concern that because the appointee’s continuing tenure depends on the president’s continuing good opinion of the appointee, the national director’s

independence may be threatened as there will be pressure not to act contrary to the wishes of the executive.

Then-president Nelson Mandela appointed Bulelani Ngcuka the first national director, in August 1998.¹³⁴ The perception that Ngcuka was an ANC insider, fed into concerns about party-political impartiality. He had been a member of the National Council of Provinces for the ANC since 1994, and the ANC's chief whip¹³⁵. From 1990–1994 he had been a member of the ANC's constitutional committee, and he represented the ANC at the Codesa negotiations and the multiparty talks in Kempton Park. Opposition parties at the time of his appointment expressed their concern about Ngcuka's close political affiliations with the ruling party, but noted that his work in Parliament had been commendable.

The first controversy that raised fears about the national director's possible impartiality took place in December 1998. The Transvaal Provincial Division of the High Court refused bail to three cadres of the ANC (known as the 'Eikenhof three')¹³⁶ who had been convicted and sentenced in 1994 for the murder of a woman and two children at Eikenhof near Johannesburg, and who now brought an appeal on the basis of new evidence arising from the Truth and Reconciliation Commission. This evidence suggested that members of the Pan Africanist Congress (PAC) might instead have been responsible for the murders.

Prior to the hearing of the appeal, the national director instructed the prosecutor of the case to withdraw his opposition to the bail application, despite the fact that the state had indicated that it would oppose the appeal. However, the Supreme Court of Appeal subsequently set aside the conviction and sentence of the three, appearing to vindicate the national director's position, but said the matter should be retried if the state felt it still had a case against the three. The national director declined to re-prosecute them.¹³⁷

Subsequently, the national director appeared to demonstrate his impartiality when there was no hesitation in the prosecution of ANC stalwarts Winnie Madikizela-Mandela¹³⁸, and more recently, Tony Yengeni¹³⁹.

The investigation into the arms deal by the DSO has raised further interesting questions as to the independence from executive influence of the national director. On the one hand, some commentators perceive him to have acted independently by even allowing an investigation by the DSO into deputy president Jacob Zuma's role, and the media has cast him in opposition to Zuma and ANC loyalists in the matter. (Strictly speaking, the decision to conduct an investigation in the first place should lie with the investigating director and not

the national director (see *Mandate*) although in practice, there is indeed close conferral with the national director on important matters.)¹⁴⁰

On the other hand, some critics point to the fact that the DSO has not used all the powers (such as those of search and seizure) it could have used in investigating Zuma's role, and that his ultimate decision to veto any prosecution ostensibly on the basis of lack of evidence was therefore disingenuous.

Whatever the truth might be, the arms deal matter has thrown the national director's powerful position into the spotlight (see *History*), as well as his dependence on the president and Parliament for his tenure.¹⁴¹ Whatever may transpire in respect of the present national director, the issues remain. The position of national director is an extremely powerful one, not least because of the impact that a veto power has on the democratic principle of separation of powers, which will be discussed in the next section.

Separation of powers

In the modern state, a prosecutor, particularly a national prosecutor, plays a role that inevitably impinges on the principle of separation of powers. The instinctive discomfort many feel around the national director's power, particularly in regard to his decision not to prosecute the deputy president, lies with this principle.

"Separation of powers" refers to the principle of democratic constitutional theory that the business of government should be divided along natural lines into the power to make law (legislative), the power to enforce law (executive), and the power to resolve disputes arising under law, including deciding on whether actions undertaken by the other two branches fall within the law (judicial). The idea is that each branch of government must have the power and the incentive to guard its own sphere and to counter the abuses of the other two.

The position of the prosecution service in any country is interesting in that close analysis reveals that it runs the risk of straddling both the executive and judicial spheres. In South Africa, this risk is exacerbated, because the decision to prosecute is arguably as important as the ultimate decision of the judiciary (guilty or not guilty) in a particular matter. This is because very few reported crimes are prosecuted with a verdict¹⁴² and furthermore, approximately 80% of all crimes which are prosecuted, result in a conviction: in other words, the decision to prosecute or not is of primary importance. (In countries which have automatic prosecution, the prosecution has no such discretion not to prosecute.)

The prosecution therefore in reality has a quasi-judicial function (only those crimes it chooses are prosecuted, and those it chooses have a high probability of resulting in a conviction) yet it is firmly positioned under the executive branch of government. The DSO, as a division of the NPA, is equally firmly under the executive branch; indeed the chain of command goes from the DSO's investigating director to the national director straight to the president. Furthermore, given the success rate of DSO matters prosecuted (more than 90% result in a conviction – see *Performance*) the DSO has an even stronger quasi-judicial function in reality.

How then, are possible abuses by the prosecution in a democracy countered in terms of the theory of separation of powers? It is clear that the decision to prosecute a matter does not pose a problem because whether a conviction is obtained depends in the final analysis on the judiciary; in theory, even a malicious prosecution will not succeed if the judiciary finds there is not enough evidence to prove the charge. However, a decision *not* to prosecute is more problematic, as there is no input into the outcome of such a decision from another branch of government.

In theory, the failure on the part of the prosecution to carry out its obligations, in particular, by declining to pursue allegations of wrongdoing by members of the executive, leaves only recourse to the legislature, to whom the prosecution is accountable.¹⁴³ Parliament can therefore call the prosecution to account for the decisions it takes, particularly decisions to prosecute or not to prosecute. Although this is theoretically possible, an academic paper has argued that in political systems where the president is elected by the legislature and therefore by the majority party in Parliament, the probability of Parliament calling the prosecution to account for its failure to prosecute is low.¹⁴⁴ This thesis appears to hold true in South Africa, where the majority party in Parliament effectively elects the president, and Parliament has yet to call the national director to account for his failure to prosecute on any matter, including the arms deal matter and the deputy president's role in that matter.

Conclusion

It may well be that it is not the mere fact that the DSO falls under the NPA that causes critics to suggest that the DSO should be moved or disbanded. The constitutional position on that point, although not clear, certainly leans towards confirming the view that the DSO may exist under the NPA. Instead, the powerful nature of the national director's position, now enhanced with

the DSO as a powerful tool of investigation armed with organised crime legislation, may be the real cause of discomfort among DSO critics. Ironically, the national director's most important power, the veto power, appears to be constitutionally sanctioned.

The real problem is the lack of appropriate accountability structure for the NPA and DSO, which take account of the separation of powers. Such structures could call the national director to account for his failure to investigate or prosecute a particular matter as well as oversee the conduct of DSO investigations generally. The proper functioning of the NPA and the DSO is at present almost entirely dependent on the integrity of the national director alone. Are there solutions for this problem?

Parliament ordinarily would be the body to call the national director to account for his decisions not to prosecute. However, as we have seen, that is unlikely in a political system such as South Africa's (see *Separation of Powers*). Another option would be for a national director's decision not to prosecute to be reviewed by the judiciary in terms of administrative law – after all, as we have seen, such a decision not to prosecute is quasi-judicial in nature, so it would be appropriate for the judiciary to review such decisions. Ordinarily, such a solution would require a litigant with *locus standi* (an interest in the matter) to bring the matter before the courts. This is not a satisfactory solution, as there will not always be a litigant with both the means and the will to bring a matter before the courts. Private prosecution is also not a useful option, for the same reason. Should reform of the DSO legislation be contemplated, a provision requiring automatic judicial review of any decision not to prosecute in a matter declared and fully investigated by the DSO should be considered for inclusion in any amending legislation, particularly given the large amount of state resources consumed by a single DSO investigation (see *Performance*).

What about decisions to conduct a DSO investigation, and decisions to use the powerful tools contained in the POC Act and the DSO legislation? Again, impartial and appropriate use of these tools is largely dependent on the integrity of the national director. There is international precedent for such laws being abused. In both the USA and Nigeria, forfeiture laws were put to inappropriate use. In Nigeria, forfeiture laws were used disproportionately against a particular ethnic group, the Ibo people living in the former Biafra area of Nigeria. In the US, forfeiture applications were often brought in trivial matters solely as a moneymaking exercise, prior to reform of US forfeiture law. While similar abuses may not yet have occurred in South Africa, and South African

legislation is less prone to abuse, the potential does exist for decisions around choosing where to wield power to be influenced inappropriately. While most such decisions will be routine and uncontroversial, to whom is the DSO or the national director accountable in the event of a dubious decision or series of decisions?

The Ministerial Committee provided for in the DSO legislation that is supposed to “determine procedures” for referral of matters to the DSO consists solely of members of the executive – that is, cabinet ministers (see *Mandate*). Furthermore, it is not clear that the committee is given the power in terms of the legislation to exert a general oversight function over the DSO: oversight is an after-the-fact-function, while mandate is more in the nature of before-the-fact guidelines, or procedures. The Ministerial Committee is therefore not an appropriate body to exercise oversight over the DSO, particularly where the investigation of public figures, especially members of the executive, is concerned. Compare the composition of this committee to that of the UK’s National Crime Squad Service Authority, which exercises oversight over the UK’s National Crime Squad (see *International Comparison*). The UK committee consists largely of independent members (although appointed by the responsible minister) and others from the law enforcement environment. Should reform of the DSO legislation be contemplated, provision for an oversight body consisting to some degree of persons other than the executive, should be considered for inclusion in amending legislation.

CHAPTER 9

INTERNATIONAL COMPARISON

South Africa's DSO is often likened to the United States' Federal Bureau of Investigation (FBI). In the public imagination, the FBI is the FBI that is portrayed in countless feature films and television shows; and the "Scorpions" are South Africa's version of the FBI. This impression was cemented when the first batch of DSO trainees were sent to the FBI's Quantico for training. But is the analogy strictly correct? And what are the implications of the differences between the FBI in the United States, and the DSO in South Africa? How does the legal nature and environment of the DSO compare to other countries' special national investigative agencies, other than the FBI?

The United States of America¹⁴⁵

The FBI is the principal investigative arm of the United States (US) Department of Justice. It is not a national police force; rather it is one of 32 federal agencies with federal law enforcement responsibilities. For example, the Drug Enforcement Administration is another federal agency tasked with the enforcement of drug law, while the Bureau for Alcohol, Tobacco and Firearms (ATF) has as its primary investigative responsibility the enforcement of federal firearms statutes and the investigation of arsons and bombings that are not in furtherance of terrorism.

The important word here is "federal". A federal government was created by the Constitution of the United States of America in 1776. The US has 50 state governments plus the government of the District of Columbia.¹⁴⁶ In general, matters that lie entirely within state borders are the exclusive concern of state governments. These include regulations relating to property, and the state criminal code. The federal government requires that state governments be democratic in form and that they adopt no laws which contradict or violate the federal constitution, or the laws and treaties of the US, including criminal provisions.

The Attorney-General serves as head of the Department of Justice and as chief law enforcement officer of the federal government, and must supervise the

administration of the law enforcement operations of the Department of Justice including the FBI, and represent the US in legal matters generally¹⁴⁷

The US has no national police force as such; it has state and local police agencies that have a high degree of autonomy, and jurisdiction that is largely territorially determined. The FBI's investigative mandate is only over *federal* crimes; that is, crimes which are a violation of federal rather than state or local law.

The FBI's mandate is the broadest of all US federal investigative agencies: it investigates all federal criminal violations that have not been specifically assigned by the US Congress to another federal agency, such as the DEA or ATF. The FBI's federal investigative functions fall into the following categories: civil rights; counter terrorism; foreign counterintelligence; organised crime and drugs; violent crimes and major offenders; and financial crime.

Crimes that involve a violation of local, state and federal laws will often be investigated by task forces composed of both FBI agents and local and state agencies. All of this is related to the US' structure as a federal nation, composed of states with high degree of autonomy, including the ability to impose income taxes and create criminal law.

South Africa, by contrast, does not have a federal structure. Although South Africa has nine provinces, these do not have a high degree of autonomy; nor do they raise their own income taxes; and they have a limited legislative competence and an even more limited exclusive legislative competence.¹⁴⁸ Hence the law of the land in South Africa is largely national law. There also exists a national police force, the South African Police Service (SAPS), which has jurisdiction over the whole of South Africa, and which has the power to investigate all crimes committed in South Africa.¹⁴⁹ Although South Africa now also has a number of municipal police forces, these have no investigative powers; they engage only in visible policing and patrols. South Africa already therefore has an investigative body that has jurisdiction to investigate crime with links across the country: the SAPS.

The FBI, by contrast, investigate crimes across states in the US which state and local police cannot, that is, crimes involving "interstate commerce", as well as crimes which the US Congress has determined are federal in nature. However, both the FBI and the DSO are similarly positioned: the FBI in the US Department of Department of Justice, and the DSO within South Africa's single prosecuting authority, which falls under the responsibility of the Minister of Justice and Constitutional Development.

When the FBI was established in the US in 1908, it was not taken for granted, as it is today, that the US needed a federal investigative service. During the 1800s Americans tended to look to cities, counties and states to fulfil most government responsibilities, including the investigation of crime. This is the opposite of the position in South Africa immediately prior to the creation of the DSO: South Africa has a highly centralised government, and South Africans tend to look to the central government to fulfil most government responsibilities, although many responsibilities are devolved, particularly to local government level.

National government in the US in the 1800s only had jurisdiction over matters that crossed over boundaries, such as interstate commerce and foreign affairs. However, by the 1900s increased transport and communication links between states encouraged a climate more favourable to the establishment of a strong investigative tradition within the federal government.

The FBI began as a force of Special Agents created in 1908 by Attorney General Charles Bonaparte, during Theodore Roosevelt's presidency. Prior to that, the US Department of Justice had no investigators of its own except for a few special agents who carried out specific assignments for the Attorney General, and a force of Examiners (trained as accountants) who reviewed the financial transactions of the federal courts. The Department of Justice also used funds appropriated to investigate federal crimes, to hire private detectives, and also investigators from other federal agencies.

By 1907, it became clear that the Department of Justice most frequently called upon Secret Service "operatives" to conduct investigations. These operatives were good at their job, but expensive. Furthermore, they reported to the Chief of the US Secret Service, and not to the US Attorney General. Not only did this situation frustrate Bonaparte, but the US Congress in 1908 also passed a law preventing the Department of Justice from hiring Secret Service operatives.

Soon thereafter, Bonaparte appointed a force of special agents within the Department of Justice. Ten former Secret Service employees and a number of Department of Justice investigators became special agents of the Department of Justice. Bonaparte ordered them to report to Chief Examiner Stanley W. Finch. This is generally seen as the beginning of the FBI, although the force was only named the FBI in 1909 when the title of Chief Examiner was also changed to Chief of the Bureau of Investigation. When the Bureau was established, there were few federal crimes. The Bureau of Investigation primarily

investigated violations of laws involving national banking, bankruptcy, naturalisation, antitrust, and land fraud.

In 2002, the FBI consisted of 11 000 Special Agents and 16 000 professional support personnel. The FBI has its headquarters in Washington, DC, as well as 56 field offices, 400 satellite offices, 40 foreign liaison posts (known as legal attaches) and four specialised field installations. The FBI's authority to investigate specific criminal violations, and the FBI's powers is conferred by a number of laws passed by the US Congress.¹⁵⁰

The Committee on the Judiciary of the US Senate exerts oversight over the Department of Justice, of which the FBI is part. The US Office of Investigative Agency Policies was established to co-ordinate selected policies and activities of law enforcement entities within the Department of Justice. In 2001, the US Office for Law Enforcement Co-ordination was created, responsible for improving FBI co-ordination and information sharing with state and local law enforcement and public safety agencies.

South Africa's DSO is therefore similar to the US' FBI in that it forms part of the NPA, just as the FBI is a part of the US Department of Justice. The DSO's powers are contained in the NPA Act. Similarly, it is the Minister of Justice and the Justice Committee of Parliament, rather than the Safety and Security Committee, which exerts oversight over the DSO, due to the DSO's positioning within the NPA.

In its method of operation, the FBI is also similar to the DSO in that its members have legal knowledge and conduct investigations with an emphasis on obtaining evidence for ultimate prosecution. However, in the FBI all professional persons are "special agents", while the DSO makes a distinction between "prosecutors" and "special investigators" and makes use of "prosecution-lead" team investigations.

However, the main *raison d'être* of the FBI – the need for a federal investigative agency – does not exist in South Africa for the DSO. This does not mean that the DSO does not have its own reasons for being, which are specific and peculiar to South Africa.

The FBI and the DSO are also not the only national special investigative agencies that exist worldwide; we will consider the position of a further six countries. The characteristics of those countries and their law enforcement agencies are summarised in the table below (see *Table 3a* and *Table 3b*).

Table 3a: Countries' Characteristics (general)							
Country	Federal State	Central State	Large country (top 30)	Large population (top 30)	High crime rate (murder >5 per 100 000)	National criminal law only	State criminal law also
Australia	*		*				*
Canada	*		*			*	
Nigeria	*		*	*	*?		*
USA	*		*	*	*		*
Botswana		*			*	*	
NZ		*				*	
RSA		*	*	*	*	*	
UK		*		*		*	

Source: CIA World Fact Book

Table 3b: Countries' Characteristics (law enforcement)						
Country	National police only	State and local police	Special national crime agency	Special agency also a police force	Special agency run by A-G office	Special agency recent
Australia		*	AFP	*		
Canada		*	RCMP	*		
Nigeria	*		NDLEA?			
USA		*	FBI		*	
Botswana	*					
NZ	*					
RSA	*		DSO		*	*
UK		*	NCS	*		*

Source: Derived from text

The United Kingdom¹⁵¹

Police chiefs in the United Kingdom (UK) have been debating the idea of a “British FBI” since the late 1980s. On retiring, Sir Kenneth Newman, former Metropolitan Police commissioner, spoke of the need for a UK national detective agency to combat organised criminals who did not recognise geographical boundaries.¹⁵²

More recently, in July 2003 British Prime Minister Tony Blair told an international criminal justice conference in London that the UK government was looking at the idea of a new agency to tackle organised crime “which could share intelligence, expertise and investigative talent”¹⁵³.

This is despite the fact that since the 1980s the UK has seen the creation of the National Criminal Intelligence Service (NCIS), with a staff of 1200, supplying police forces with intelligence and analysis of organised crime; and the National Crime Squad (NCS), which includes 1330 detectives and 420 support staff conducting operations predominantly concentrated on drug traffickers.¹⁵⁴

The new “UK FBI” is proposed to be a merger of the NCIS, the NCS, as well as part of customs and excise, which has 350 officers in its national intelligence division and 1,500 operational officers in the investigation service.¹⁵⁵ A review of these agencies, sparked by claims that the fight against serious and organised crime was being damaged by inefficiency and rivalry between overlapping agencies, found evidence that the agencies did not always share information and that a merger could improve crime fighting and be cheaper in the long term.¹⁵⁶

However, some commentators believe Blair is merely using the threat of a merger to force the separate agencies to co-operate more closely.¹⁵⁷ Others feel a merger would not solve these problems, and cite a recent UK audit commission report on local authorities which showed that merging departments often did not improve collaboration (separate fiefdoms continued) and found that the council which achieved the greatest collaboration had not merged its departments. Nevertheless, a cabinet committee under the chairmanship of Blair has been appointed and is likely to make its recommendation before the end of 2003.¹⁵⁸

The UK agency most similar to South Africa’s DSO at the time of writing, then, is the NCS, as the NCIS focuses on criminal intelligence, rather than on the investigation and prosecution of crime. The establishment of the NCS in April 1998 represented a significant milestone in the 170-year history of British

policing. British policing has always been of a local nature, with local police authorities being responsible for policing throughout the United Kingdom. Indeed, there are 44 local police authorities in the UK.¹⁵⁹ This proliferation of police forces in the UK lead to the establishment of the Association of Chief Police Officers (ACPO) in the 1950s so that policing policies could be developed on behalf of the Police Service as a whole, rather than in 44 forces separately.¹⁶⁰

However, it is only more recently in UK policing history that the need for regional and national special investigative agencies became apparent, largely as a result of the changing nature of crime in the UK, particularly the rise of organised crime. A need for national *criminal* intelligence (as opposed to national security or foreign intelligence) also became apparent in the UK.

The National Crime Squad is said to have been created directly as a result of a July 1995 report by the UK Parliament's Home Affairs Select Committee on the threat of organised crime and its impact on the UK. The report said:

"If the response to serious and organised crime is to be sharpened and made more effective, the present structure of separate Regional Crime Squads ... needs to be replaced by a more nationally co-ordinated structure."

The UK government and Parliament, together with the police service represented by the Association of Chief Police Officers, supported this proposal and the Police Act 1997, Chapter 2, gave effect to the NCS, as well as the NCIS.¹⁶¹ The function of the NCS is defined in the Act as follows:

*The function of the National Crime Squad shall be to prevent and detect serious crime which is of relevance to more than one police area in England and Wales.*¹⁶²

The National Crime Squad may also –

- (a) *at the request of a chief officer of police of a police force in England and Wales, act in support of the activities of his force in the prevention and detection of serious crime;*
- (b) *at the request of the Director General of National Criminal Intelligence Service (NCIS), act in support of the activities of NCIS;*
- (c) *institute criminal proceedings;*
- (d) *co-operate with other police forces in the United Kingdom in the prevention and detection of serious crime;*

- (e) *act in support of other law enforcement agencies in the prevention and detection of serious crime.*¹⁶³

This echoes the ostensible reasons for and legislative focus of the DSO. The DSO was created in 1999, at the same time as organised crime in South Africa was beginning to become problematic. The legislation creating the DSO was an amendment to the NPA Act, and the preamble to this act makes it clear that crimes committed in an “organised fashion” were to be the focus of the DSO. Furthermore, in terms of s7 (1)(a) of the NPA Act, the DSO can investigate, analyse and keep information, and “institute criminal proceedings” relating to offences committed in an organised fashion, or any offences proclaimed by the President in the Government Gazette.

However, an important difference from the DSO, is that save where crime is of relevance to more than one police area, matters are referred to the NCS by other Chiefs of Police, or the NCS acts in support of other agencies. In other words, the NCS does not take on matters of its own accord unless they straddle geographical boundaries.

UK Regional Crime Squads, which were the precursors of the National Crime Squad, were first created in the UK in 1964 as a result of concern about the frequency with which criminals were committing crime across police force borders and the fact that local officers were ill-equipped effectively to deal with the trend.

These regional squads were originally formed into nine regions covering England and Wales. They were comprised of detective officers seconded from police forces within the region for up to five years. Each regional squad was commanded by a Detective Chief Superintendent selected by and accountable to a Committee of the constituent forces Chief Constables and funded through a collaboration agreement between the constituent forces under the supervision of a regional Police Authority.

This echoes to some degree what happened in South Africa’s DSO, albeit over a much shorter time frame: the transformation of more regional organisations, consisting of seconded staff, transforming into a larger national organisation. The Office for Serious Economic Offences (OSEO) was created by the OSEO Act¹⁶⁴ in 1991. This became an “Investigating Directorate” when the NPA Act was passed in 1998. The NPA Act created “Investigating Directorates” which were regionally based within the NPA to deal with certain particular types of intractable crime, and so for a brief time we had the Investigating Directorate

for Serious Economic Offences (IDSEO) and the Investigating Directorate for Organised Crime and Public Safety (IDOC). These directorates consisted largely of investigators seconded from the SAPS and other government agencies, as well as prosecutors in the NPA. It was these directorates, which operated as the DSO at the launch of the organisation in September 1999, and their members formed the DSO with the passing of the NPA Amendment Act¹⁶⁵. Of course, the major difference is that the DSO is located in the NPA, rather than forming an independent police organisation.

Over the years, UK Regional Crime Squads grew to attempt to match the criminals they were mandated to target. Unlike police forces, they were meant proactively to target those responsible for serious criminal offences regionally, nationally and internationally, rather than simply investigating crimes in a reactive manner. This again has an echo with one of the ideas behind of the DSO: to proactively target known criminals, rather than react to crimes.

In 1993 the UK Regional Crime Squads were amalgamated into six regions covering England and Wales. They were based at 44 locations throughout the country, mainly in secret premises within areas of significant criminality and close to main arterial roads. The regions were broadly similarly equipped and trained and worked to similar policy and procedures. Due to their nature, their priorities tended to reflect a regional rather than a national agenda. But they reportedly did achieve successes against major criminals operating on a national and international scale. In South Africa, IDOC also at first concentrated on regional crime phenomena, such as the Richmond murders in KwaZulu-Natal and gangs in the Western Cape, showing some success.

On 1 April 1998 the NCS was established through the amalgamation of these six Regional Crime Squads, inheriting their staff, premises, equipment and workload. The National Squad is commanded by a Director General, assisted by a Deputy Director General, a Director of Business Support, and two Assistant Chief Constables operating from a headquarters in London. For operational purposes, the NCS is divided geographically into Eastern, Northern, and Western operational units each directed by a Detective Chief Superintendent Chief Constable based in London, Wakefield and Bristol respectively. This is similar to the DSO's four regional offices, in Cape Town, Durban, East London and Pretoria, headed by Deputy Directors of the NPA, known as Regional Heads.

The NCS is staffed by officers seconded from police forces in England and Wales with support staff employed by the NCS Service Authority and has up

to 1330 police officers and 420 support staff at more than 30 locations around the UK. In this the squad is different from the DSO in that the DSO no longer relies solely on seconded police officers but appoints special investigators and prosecutors on a permanent basis. The DSO also does not have such a favourable ratio of support staff, and indeed has about a third the total staff complement of the NCS.

The NCS national headquarters includes operational and administrative support functions such as human resources, finance, information technology and business development, but many aspects of these and other functions are devolved to local level and carried out by specialist support staff. In the DSO, the NPA head office carries out most such functions and there are very few support personnel in the regional offices of the DSO.

The NCS targets criminal organisations committing serious and organised crime which transcends national and international boundaries, typically drug trafficking, immigration crime, illegal arms trafficking, money laundering, counterfeit currency, kidnap and extortion. This is broadly similar to the DSO.

The NCS has 30 branch offices situated in semi-secret locations, most of them away from other police sites. A typical branch is managed by a detective chief inspector, with one, two or three groups of officers, consisting of a detective inspector, and teams of detective sergeants and constables. All officers are trained in static and mobile surveillance and related skills, many are also trained in financial investigation, use of firearms, informant handling, undercover techniques, intelligence analysis and other specialist areas. The principal focus is on the criminals rather than the crimes. Operations take many months, and even years, to come to fruition in terms of arrests and disruption of criminal activity. In comparison, the DSO does not have small branch offices within the regions, but instead five to 15 groups of about five to 10 members consisting of prosecutors, investigators and analysts all operate from the regional office. However, the kind of operation conducted is broadly similar.

The National Crime Squad Authority has a statutory responsibility to ensure that the National Crime Squad is efficient and effective.¹⁶⁶ The Authority comprises 11 people in all:

- five independent members (including the Chairman) appointed by the Home Secretary;

- two elected members from local police authorities nominated by the Association of Police Authorities;
- two Chief Constables nominated by the Association of Chief Police officers;
- a representative of HM Customs and Excise; and
- one Home Office official to represent the Home Secretary, making 11 in all.

Objectives and performance targets for the NCS are set by the Home Secretary and the NCS Service Authority who publish them in an Annual Service Plan. The Director General has an obligation to publish a report on the performance of the NCS against those objectives and targets at the end of each year. The NCS Service Authority, after consultation with the Director General, is also obliged to inform the Home Secretary of the annual budgetary requirements of the NCS on which he makes a determination following a period of consultation. The budget is then collected from each police force of England and Wales through a levy process. In comparison, funding of the DSO is contained in the Budget Vote of the Department of Justice, as a sub-programme of the NPA.

A series of objectives and planning targets, which determine in more detail how the resources of the NCS are directed, is set within the terms of the Police Act 1997 by the Home Secretary and the Service Authority. The authority publishes an annual service plan, setting out the objectives. The Director-General in his Annual Report subsequently reports upon success against those objectives. Both are public documents incorporated in one document.

In comparison, the DSO is supposed to be complemented by a Ministerial Committee created in terms of s31 of the NPA Act, which is supposed to determine policy, procedure and the responsibility of the DSO in respect of certain matters. However, to date this committee has never met for this purpose. The Committee is also composed only of members of Ministers in Cabinet, unlike the NCS Service Authority, which consists of persons at a lower level and only has one person representing the Home Office. The DSO Audit and Review Report 2001 of the DSO was a confidential document not widely available.

Nigeria

Like South Africa, Nigeria has a national police force, yet unlike South Africa, Nigeria is a federal state, and each state may make its own criminal law. Nigeria's Federal Investigation and Intelligence Bureau (FIIB), is part of the Nigeria Police Force, and is responsible for the investigation of crimes generally. Another Agency, the National Drug Law Enforcement Agency (NDLEA) appears to fall outside the NPF and is responsible for enforcing drug laws only.

South Africa is about 30% larger than Nigeria, but Nigeria has a population three times as large as South Africa. The Federal Republic of Nigeria consists of 36 states and one territory.¹⁶⁷ The legal system is based on English common law, but incorporates aspects of Islamic and tribal law. Both federal and state governments may make criminal law¹⁶⁸, but where state law is in conflict with national law, national law prevails.¹⁶⁹ Some states have recently introduced *Sharia* (Muslim law).¹⁷⁰

The Nigeria Police Force (NPF) is designated by s214 of the 1999 Nigerian Constitution as Nigeria's national police with exclusive jurisdiction throughout the country.

*"There shall be a police force for Nigeria, which shall be known as the Nigeria Police Force, and subject to the provisions of this section no other police force shall be established for the Federation or any part thereof."*¹⁷¹

Constitutional provision also exists, however, for the establishment of separate NPF branches; one such branch is the Port Security Police:

*"The National Assembly may make provisions for branches of the Nigeria Police Force forming part of the armed forces of the Federation or for the protection of harbours, waterways, railways and air fields."*¹⁷²

"Zonal Commands" were introduced to the NPF during military rule in 1986. The NPF has 37 Police Commands and 12 Zonal Commands. (The Force Headquarters operates as a Police Command). This is somewhat similar to the structure of the SAPS, which has national, provincial, area and local levels of authority. The 12 Zonal Commands are retained in the NPF today.

In 1989 a reorganisation of the NPF was announced by the then Armed Forces Ruling Council (AFRC). (The AFRC was the supreme lawmaking body

in Nigeria's political system of military federalism at the time, formerly known as the Supreme Military Council.) Under the new structure of the NPF, a Federal Investigation and Intelligence Bureau (FIIB) would be set up within the NPF as the successor to the Directorate of Intelligence and Investigation. Three directorates in the FIIB were established for operations, administration, and logistics, each headed by a deputy inspector general.

The FIIB focuses on investigations, while the non-FIIB component of the NPF focuses on visible policing, crowd control, and combating crime generally.¹⁷³ The FIIB is not restricted to investigating specific types of crime or offenders; there are other very small special policing agencies, much like specialised units of the SAPS, focusing on organised crime, financial crime and trafficking in people.¹⁷⁴

FIIB personnel do not get any special treatment in the NPF; if anything, non-FIIB police may "look down" on their FIIB colleagues, as investigative work appears to be relatively under-resourced in the NPF and most cases are solved through confessions or catching offenders "in the act".¹⁷⁵ The NPF as a whole does not have a good reputation among the public in Nigeria.¹⁷⁶ The public apparently does not distinguish between FIIB police and non-FIIB police,¹⁷⁷ much as South Africans do not as a matter of course distinguish between uniform police and detectives in the SAPS.

The National Drug Law Enforcement Agency Decree 48 of 1989, established the National Drug Law Enforcement Agency (NDLEA) and gave it the sole power to enforce laws against the cultivation, processing, sale, trafficking, and use of hard drugs, and to investigate persons suspected of dealings in drugs. This decree was passed by the then military regime in response to the US "de-certification" of Nigeria. The US' annual "certification" procedure provides for economic sanctions for those who are decertified, in order to persuade nations to co-operate in the "war on drugs". Decrees are laws made under the military regime.¹⁷⁸

The first three heads of the NDLEA were drawn from the ranks of the police. After initially doing well, the agency was thereafter dogged with corruption allegations. The fourth, NDLEA head, after another bout of "de-certification" by the US, was an army brigadier-general.¹⁷⁹ This military appointment was accompanied by the passing of a number of draconian decrees allowing for questionable powers of search along with the forfeiture powers in Decree 48,¹⁸⁰ which, it is alleged were used particularly to target the Ibo people of the south. Allegations of Ibo persecution stem from the days of the Biafran war when the

area known as Biafra in which the Ibo live, attempted to secede from Nigeria in the 1960s.¹⁸¹ After 1999, the NDLEA head was again drawn from the ranks of the police. The NDLEA has therefore had a chequered history.

Australia¹⁸²

Unlike South Africa, Australia has a federal structure, as well as state-run police services. The police body with national jurisdiction is the Australian Federal Police (AFP), which enforces Commonwealth (federal Australian) criminal law, and protect Commonwealth and national interests from crime in Australia and in other countries. The Commonwealth of Australia is a federalist government composed of a national government and six state governments, plus two territories that have been granted self-government.¹⁸³

Unlike South Africa and Canada, Australian states are primarily responsible for the development of criminal law, although the federal government does also make criminal legislation. Queensland, Western Australia, and Tasmania are described as “code” states because they have enacted criminal codes. New South Wales, Victoria, and South Australia are regarded as “common law” states because they have not attempted codification. In practice there is little difference in the elements of the criminal law between the “code” and “common law” states. The *Criminal Code Act of 1995* codifies Australian federal criminal law. Commonwealth crimes include fraud, drug importation and trafficking, people smuggling, electronic crime (e-crime), and crime against the environment.

Seven Australian states have their own state police services which deal with everyday crime.¹⁸⁴ State policing agencies have their own intelligence, forensic, organised crime, anti-terrorist, and hostage negotiations units. The AFP provides community policing services to the people of the Australian Capital Territory, Jervis Bay, and external territories such as Norfolk Island and Christmas Island.

The AFP is Australia’s international law enforcement and policing representative, and the chief source of advice to the Australian Government on policing issues. AFP priorities are set through ministerial direction. The AFP focus includes handling special references from Government, and combating:

- organised crime;
- transnational crime;

- money laundering;
- major fraud;
- illicit drug trafficking; and
- e-crime.

At the Federal level the Commonwealth Attorney General's Department is the key agency with responsibility for law, order and national security. There are two Ministers, the Attorney General and the Minister for Justice and Customs. The AFP falls under the Minister for Justice and Customs, and more recently has had a high profile with the mounting terrorist threat. The AFP played a significant role in tracking down the Bali bombers and in setting up a police force in the Solomon Islands¹⁸⁵.

Botswana¹⁸⁶

Like South Africa, Botswana has a national police force with national jurisdiction, and does not have a federal political structure. Botswana is about half the size of South Africa, but its population is about 5% the size of South Africa's.¹⁸⁷

The Botswana Police Act says that the police force must operate throughout the country to protect life and property, prevent and detect crime, repress internal disturbances, maintain security and public tranquillity, apprehend offenders, bring offenders to justice, duly enforce all written laws with which it is directly charged and generally maintain peace.¹⁸⁸ The police must also perform such military duties within Botswana as may be required of it under the authority of the President, as Commander-in-Chief of the armed forces.

The Police force is divided into three divisions, namely North, South- Central and South. The divisions are headed by a Divisional Commander. The Police Services are divided into eight branches namely; General Duties, Criminal Investigation Department, Special Support Group, Special Branch, Traffic, Telecommunications and Transport, Police College and Departmental Management. Botswana does not have another specialist police agency outside of the Botswana Police.

Canada¹⁸⁹

The Royal Canadian Mounted Police is the Canadian national police service and an agency of the Ministry of the Solicitor-General of Canada. The RCMP

is unique in the world in that it is at the same time a national, federal, provincial and municipal policing body. The RCMP enforces or polices the law throughout Canada. These are laws made by, or under, the authority of the Canadian Parliament. However, administration of justice within the provinces, including enforcement of the Criminal Code, is part of the power and duty delegated to provincial governments in Canada.

Canada's political structure can be described as a federal constitutional monarchy. Canada has three territories and 10 provinces.¹⁹⁰ It is considered to be a federal state, since the various powers are divided between the central government and the provincial governments. The powers of the territorial governments (as opposed to the provincial governments) are delegated by the federal government. The federal government is responsible for matters that concern Canada as a whole, such as inter-provincial and international trade, national defence, the banking and monetary systems, the fisheries, and, unlike the US and Australia, the criminal law.

Canadian criminal law is based on the Canadian *Criminal Code*, submitted to the Canadian Parliament and originally enacted in 1892. Over the years, numerous amendments and revisions have been made. In 1955, a revised Criminal Code came into force. The Criminal Code is derived almost exclusively from the principles of English criminal jurisprudence and is uniform across the country. Under the terms of the 1867 Constitution Act, the Canadian federal government has exclusive jurisdiction to legislate criminal law.

The RCMP's Federal Policing Service is provided across Canada, but at the same time the RCMP contracts its services out to certain provinces and municipalities. The RCMP provides police services under the terms of policing agreements to all provinces (except Ontario and Quebec, which have their own police services), and to the territories of Yukon and Northwest, and under separate municipal policing agreements to 199 municipalities.

The RCMP therefore acts on federal, provincial and local level, but other provincial and local police agencies outside of the RCMP also exist, such as the Toronto Police Service or the Ontario Provincial Police. In 1999, there were more than 55,000 police officers and 20,000 civilian personnel delivering police services under all the police agencies in Canada,¹⁹¹ while the RCMP alone in 2002 had an actual strength of just over 21 000 people.

Like the UK, Canada has the Canadian Association of Chiefs of Police (CACP), which was founded in Toronto on September 6, 1905. It was first known as

the “Chief Constables Association of Canada” and adopted its current name in the early 1950s.¹⁹²

The RCMP itself is organised under the authority of the RCMP Act. In accordance with the Act, it is headed by the Commissioner, who, under the direction of the Solicitor-General of Canada, has the control and management of the RCMP and all matters connected with the RCMP. The Solicitor General is a minister of the Canadian cabinet appointed by the Prime Minister, and the minister’s portfolio consists of the Department of the Solicitor-General, the Royal Canadian Mounted Police (RCMP), the Canadian Security Intelligence Service (CSIS), the Correctional Service of Canada (CSC), and the National Parole Board (NPB).

In the US, the term has a different meaning, and the principal function of the Office of the Solicitor General is to represent the federal government before the Supreme Court, and the office falls under that of the US Attorney-General.¹⁹³ In Canada, the Attorney-General of Canada, while being the chief law officer of the Crown (government), is at the same time the Minister of Justice and therefore a member of Cabinet. The office of Minister of Justice is concerned with questions of policy and their relation to the justice system.

The Federal Policing Service of the RCMP is responsible for organised crime law enforcement, and their aim is to:

“work with the community, clients and partners to target organised crime and provide a quality policing service through problem solving, education, prevention and enforcement of Federal Statutes and Laws of Canada in an effort to provide safe homes and communities.”¹⁹⁴

Organised crime, is a priority for the RCMP. According to the RCMP:

“Organised crime poses a serious long-term threat to Canada’s institutions, society, economy and to the quality of life of our citizens. For 2003/2004, the RCMP organised crime strategy will focus on “Reducing the threat and impact of Organised Crime”. Critical to our success in countering the growth of these groups, and dismantling or disrupting their structures and sub-groups, is the improved co-ordination, sharing and use of criminal intelligence in support of integrated policing, law enforcement plans and strategies as well as initiatives designed to communicate the impact and scope of organised crime. Operations will provide leadership in developing and implementing intelligence-led, tactical operational plans, in partnership with other

police and law enforcement agencies. But leadership, as part of integrated policing, does not always mean that we will be the lead agency responsible for a particular tactical plan."¹⁹⁵

New Zealand

New Zealand Police is a national police force which is de-centralised into 12 districts.¹⁹⁶ Each district has a central station from which subsidiary and suburban stations are managed. New Zealand Police is responsible for enforcing criminal law, which is uniform across the country. New Zealand Police have about 400 police stations and 8 800 staff. There is no other criminal investigative agency in New Zealand.

New Zealand is a constitutional monarchy. The Queen of New Zealand, Queen Elizabeth II, is the Head of State. The Queen's representative is the Governor-General who has all the powers of the Queen in relation to New Zealand. Although an integral part of the process of government, the Queen and the Governor-General remain politically neutral. New Zealand has a single chamber of Parliament known as the House of Representatives. New Zealand is a country of similar size to the United Kingdom, but with a population only about 7% the size of the UK's.

The Criminal Investigation Branch (CIB) of the New Zealand Police is dedicated to investigating and solving serious crime, and targeting organised crime and recidivist criminals. Staff who work in the CIB are drawn from the Uniform Branch and then undergo an intensive period of training in law and the latest techniques in investigation. Their job is to investigate serious crimes such as homicides, aggravated violence, sexual offending, drug offences, crimes against society, and fraud. They are based across New Zealand. Detectives routinely carry out protracted investigations into organised groups or individuals who habitually commit crimes.

Summary

Of the seven countries compared to South Africa (see *Table 3a and 3b*), South Africa's DSO appears to be most similar to the United States' FBI in terms of its position within the prosecuting arm of government, and its jurisdiction and type of work (over the whole country, specific serious crimes, particularly organised crime).

However, the DSO finds itself in a country which is, in terms of its political and policing structure, least similar to the US, which has a federal structure, state criminal law, and state and local police, and no national police force as such.

Larger, more populous countries (see charts), tend to be federal, and to have many state and local police agencies, as well as a federal policing agency. Nigeria and South Africa are the exceptions, Nigeria in that it is federal, yet has a national police force.

Most countries which are centrally rather than federally organised have national police forces, except for the United Kingdom, which has historically always had local police. Of the nations with national police, both Botswana and New Zealand have small populations less than 10% the size of South Africa's, while Nigeria has almost 10 times the population of South Africa. Other than South Africa, none of the centrally organised countries also have a special agency like the DSO with a broad investigative mandate.

CONCLUSION

The DSO is an innovation in South African law enforcement which has had a profound impact on the way in which complicated cases are investigated and prosecuted. The legal infrastructure within which the DSO is situated is not without problems, however, especially in respect of ensuring a balance of the DSO's independence, accountability and impartiality. Where the DSO investigates, cases appear to be thoroughly and successfully investigated. DSO case selection, however, is a laborious process, which appears to be impacting on the amount of work done by the DSO. Like any new organisation, the DSO has also experienced internal challenges in creating a new kind of law enforcement organisation.

NOTES

1. At inception, the research team consisted of the author, Antoinette Louw (ISS), Martin Schönteich (ISS) and Darwin Franks of the NPA. Ted Leggett (ISS) assisted with one interview. Anton du Plessis (ISS) assisted in finalising the monograph.
2. Five researchers conducted the interviews; the author conducting 56 of these (72%), including all of the interviews with DSO personnel.
3. The name “Scorpions” will be used when referring to the period prior to the promulgation of the legislation bringing the Directorate of Special Operations, or DSO, into existence. Thereafter the official name will be used.
4. South African Press Association (SAPA) 1 September 1999.
5. The Directorate of Special Investigations was the name first mooted for what ultimately became the DSO.
6. SAPA 1 September 1999.
7. SAPA 1 September 1999.
8. Percy Sonn was a deputy national director of public prosecutions. Sonn practised as an attorney for 12 years, focusing primarily on defending accused against the state. He was admitted as an advocate in 1989 and practised at the Cape Bar for six years. Thereafter he joined the office of the attorney-general of the Western Cape rising to the position of deputy attorney-general. In November 1998, he was appointed to head the investigating directorate: organised crime and public safety (IDOC).
9. National Prosecuting Authority Amendment Act 61 of 2000.
10. The Act provides that the Committee comprises—
 - “(a) the Cabinet members responsible for—
 - (i) the administration of justice, who is the chairperson thereof;
 - (ii) correctional services;
 - (iii) defence;
 - (iv) intelligence services; and
 - (v) safety and security; and
 - (b) any other Cabinet member designated from time to time by the President.”The Committee may conduct its business and proceedings at its meetings as it deems fit.

11. King Commission of Inquiry into Cricket Match-fixing, presided over by Judge Edwin King, established May 2000. Advocate Botohi was Leader of Evidence for the Commission.
12. The “arms deal” is the arms procurement package concluded by the South African government in 1999, then valued at R43.8bn, which has been dogged by allegations of corruption.
13. On 29 July 2003, SAPA reported that president Mbeki said talks on a resolution of the tension (between the SAPS and the DSO) had focused on finding ways to rationalise work between the two organisations, should they remain separate entities, and that a possible alternative was the Scorpions becoming a specialised police unit. Mbeki said: “The function, the task and the specialisation that was required of the Scorpions has not gone away. But how to locate them, where to locate them, how to manage the relationship between the two is an issue. It was inherent from the beginning that there would be this tension.”
14. The Act provides as follows: “s31. Ministerial Co-ordinating Committee.—(1) There is hereby established a committee, to be known as the Ministerial Co-ordinating Committee (hereinafter referred to as the Committee), which may determine—
 - (a) policy guidelines in respect of the functioning of the Directorate of Special Operations;
 - (b) procedures to co-ordinate the activities of the Directorate of Special Operations and other relevant government institutions, including procedures for—
 - (i) the communication and transfer of information regarding matters falling within the operational scope of the Directorate of Special Operations and such institutions; and
 - (ii) the transfer of investigations to or from the Directorate of Special Operations and such institutions; and
 - (c) where necessary—
 - (i) the responsibility of the Directorate of Special Operations in respect of specific matters; and
 - (ii) the further procedures to be followed for the referral or the assigning of any investigation to the Directorate of Special Operations.”
15. Hefer Commission of Inquiry into allegations of spying against the national director of public prosecutions, Mr BT Ngcuka, presided over by Judge Joos Hefer, established September 2003. The terms of reference were altered on a number of occasions, before reaching this formulation.
16. The “war on drugs” refers to the criminalisation of the trade in drugs and the enforcement of that criminalisation.
17. The mostly Muslim organisation People Against Gangsterism and Drugs (PAGAD) was implicated in the more than 20 bomb blasts which occurred in the Cape

Town metropolitan region in 1998–1999.

18. On 11 September 2001 suicide terrorist attacks destroyed the twin towers in New York, USA, by hijacking and flying passenger jets into the buildings. Another hijacked passenger jet flew into the Pentagon.
19. Transitional states are those making the transition from a non-democratic form of government to one of democracy; South Africa, as well as the former communist countries of the former Eastern bloc, are included in this definition.
20. Transnational organised crime refers to the existence of criminal groups engaging in organised crime which are not based exclusively nor operate exclusively in any one country.
21. Article 2(a) *United Nations Convention against Transnational Organised Crime*.
22. For example, the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*; the *Council of Europe Convention on Laundering, Search Seizure and Confiscation of the Proceeds of Crime*; the *United Nations Convention against Transnational Organised Crime* (Palermo Convention). The *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* adopted by the UN in 1988 already required of signatory states that they adopt anti-drug laws, money-laundering laws, laws against criminal gangs, and forfeiture laws.
23. See for example US Border Security Assessment of South African Ports of Entry/Exit, submitted by US Customs Service, Office of International Affairs, February 12, 1997.
24. See for example, Shaw, M. *Organised Crime in Post-Apartheid South Africa*. ISS Paper No. 28, January 1998.
25. U.S. Department of State 1996 International Narcotics Control Strategy Report, March 1997. United States Department of State. Bureau for International Narcotics and Law Enforcement Affairs.
26. Callahan, TJ. Why South Africa can't go it alone in the fight against crime. Africa Policy Information Center (APIC) document. 26 January 1997.
27. According to Callahan (see above), in addition to the opening of Drug Enforcement Administration (DEA) and FBI offices in 1997, US-sponsored activity in South Africa prior to 1997 included: the US Customs Service conducted several courses in border, air and seaport control for South African and neighbouring country police; the US Marshal's Service provided technical assistance for South Africa's witness protection program; the US Department of the Treasury held several courses on methods to thwart money laundering; and the DEA conducted several drug enforcement seminars and has helped SANAB establish a trafficker database.

28. The Prevention of Organised Crime Act 121 of 1998, which replaced the Proceeds of Crime Act 76 of 1996.
29. The Racketeer Influenced Corrupt Organizations Act of 1970 is contained in Title 18, Chapter 96, of the *United States Code*.
30. The contents of this section are drawn from an unpublished book "Papering over the cracks: the law and organised crime" written by the author, in her capacity as contract researcher at the Institute for Human Rights and Criminal Justice Studies at TechnikonSA.
31. South Africa had already begun to address the issue of terrorism because of the spate of bombings in Cape Town and the bombings allegedly by a conspiracy of the far right. The former was investigated largely by the DSO and the NIA; the latter by the SAPS, largely for pragmatic reasons as to who had the better intelligence at their disposal.
32. All demographic information about the DSO was obtained directly from the DSO.
33. UK Foreign Office Daily Bulletin, 18 May 2000: UK/South Africa Bilateral Forum.
34. *Ibid*.
35. Fact Sheet: US Assistance to South Africa, Office of the Spokesman, US Department of State, Washington, DC, September 3, 2002.
36. All demographic information about the DSO was obtained directly from the DSO.
37. In s30 (2) National Prosecuting Authority Act 32 of 1998.
38. See s37 Criminal Procedure Act 51 of 1977.
39. See Chapter 2 Criminal Procedure Act 51 of 1977.
40. *Ibid*.
41. See Chapter 5, ss39-53, Criminal Procedure Act 51 of 1977.
42. See Chapter 2 Criminal Procedure Act 51 of 1977.
43. See s38 Criminal Procedure Act 51 of 1977.
44. See s13 (8) South African Police Service Act 68 of 1995.
45. See s13 (11)(a) and (b) South African Police Service Act 68 of 1995.
46. See s29 National Prosecuting Authority Act 32 of 1998.
47. See s19B National Prosecuting Authority Act 32 of 1998.
48. See s19A National Prosecuting Authority Act 32 of 1998.

49. See s19B (3) National Prosecuting Authority Act 32 of 1998.
50. Compare *Government Gazette* No. 25450, 9 September 2003, Notice No. R1298 with *Government Gazette* No. 23671, 26 July 2002. From July 2002 the salary range was from R89 598 to R325 653. In July 2003, the range was from R66 330 to R296 175. The 2002 range included CIO's salaries.
51. See *Government Gazette* No. 24988, 28 February 2003, Notice No. R331. This implies, that as of 1 January 2003, that CIO salaries range from R410 112 to R472 017.
52. For prosecutor's salary ranges, see *Government Gazette*, No. 25450, 9 September 2003, Notice No. R1299. Prosecutors' salaries range from R71 967 to R296175. For Deputy Directors, see *Government Gazette* No. 24988, 28 February 2003, Notice No. R331. Deputy Directors' salaries range from R410 112 to R536 547.
53. See s18(2) National Prosecuting Authority Act 32 of 1998.
54. In at least one group in Gauteng, the group operated such that individual matters are not assigned to any particular prosecutor in the group. Projects are instead assigned to each investigator, such that one investigator will have at least two projects which he or she will lead. The prosecutors are not assigned to any matter; instead they assist on all the projects of the group. When a matter is court-ready, then it is decided which prosecutor will go to court. Therefore all prosecutors in the group are aware of and able to do all the cases. The group meets once a week to co-ordinate, and it is then that each investigator says what assistance is needed with their matter. Then the matters are prioritised and it is decided where to put all the resources.
55. See NPA Policy Directive Part 45 (Investigating Directorates), A (Inquiries by Investigating Directorates) B.107.1; while this directive appears only to refer to categories of offences proclaimed by the President in the *Gazette* (see *Mandate*), in practise all inquiries have to be authorised by the Investigating Director.
56. NPA Policy Directive 45.A. B.107.4.
57. In terms of s252A of the Criminal Procedure Act 51 of 1977.
58. The Office of the Head of Operations: DSO. Circular:1. Effective Date 8 November 2001. Signed: Acting Investigating Director Adv. LF McCarthy 7-11-2001.
59. In terms of the Interception and Monitoring Prohibition Act No 127 of 1992.
60. The Office of the Head of Operations: DSO. Circular:1. Effective Date 8 November 2001. Signed: Acting Investigating Director Adv. LF McCarthy 7-11-2001.
61. NPA Policy Directive 45.A. B.108.

62. Office of the Head of Operations: DSO. Circular One. Effective Date 8 November 2001.
63. The DSO does not own its vehicles but hires them.
64. For a detailed discussion of forfeiture, see Redpath J. in *Forfeiting rights? Asset forfeiture and rights African Security Review* July 2000.
65. See *Government Gazette* No. 23242, 15 March 2002, Proclamation No 24, 2002.
66. See *Government Gazette* No. 24876, 23 May 2003, Proclamation No 46, 2003, 24 March 2003.
67. The Rome Statute of the International Criminal Court, which entered into force on 1 July 2002, established the International Criminal Court.
68. Collins English Dictionary.
69. The Concise Oxford Dictionary.
70. For example, in 2001 the Serious and Violent Crime Unit of the SAPS was mandated, *inter alia*, to investigate murders involving prominent persons, the judiciary, politicians or members of the SAPS.
71. For a detailed analysis, see Redpath J in *Leaner and Meaner? Restructuring the Detective Service*, ISS Monograph No 73, May 2002.
72. National Prosecuting Act 32 of 1998, s7.(1)(a): There is hereby established in the Office of the National Director an Investigating Directorate, to be known as the Directorate of Special Operations, with the aim to—
 - (i) investigate, and to carry out any functions incidental to investigations;
 - (ii) gather, keep and analyse information; and
 - (iii) where appropriate, institute criminal proceedings and carry out any necessary functions incidental to instituting criminal proceedings, relating to—
 - (aa) offences or any criminal or unlawful activities committed in an organised fashion; or
 - (bb) such other offences or categories of offences as determined by the President by proclamation in the Gazette.
73. National Prosecuting Act 32 of 1998, s7.(1)(b): 'For the purpose of subparagraph (aa), "**organised fashion**" includes the planned, ongoing, continuous or repeated participation, involvement or engagement in at least two incidents of criminal or unlawful conduct that has the same or similar intents, results, accomplices, victims or methods of commission, or otherwise are related by distinguishing characteristics.'
74. Prevention of Organised Crime Act 121 of 1998, s1: "**pattern of racketeering activity**" means the planned, ongoing, continuous or repeated participation or

involvement in any offence referred to in Schedule I and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule1’

75. Prevention of Organised Crime Act 121 of 1998 s1: **“pattern of criminal gang activity”** includes the commission of two or more criminal offences referred to in Schedule 1: Provided that at least one of those offences occurred after the date of commencement of Chapter 4 and the last of those offences occurred within three years after a prior offence and the offences were committed—on separate occasions; or on the same occasion, by two or more persons who are members of, or belong to, the same criminal gang.
76. See s2 Prevention of Organised Crime Act 121 of 1998 for the racketeering offences.
77. See s9 Prevention of Organised Crime Act 121 of 1998 for the criminal gang offences.
78. National Prosecuting Act 32 of 1998, s26(2): Nothing in this Chapter or section 7(1), or any proclamation issued in terms of section 7, derogates from any power or duty which relates to the prevention, combating or investigation of any offences and which is bestowed upon the South African Police Service in terms of any law.
79. National Prosecuting Authority Act 32 of 1998, s31(1): There is hereby established a committee, to be known as the Ministerial Co-ordinating Committee (hereinafter referred to as the Committee), which may determine—
 - (a) policy guidelines in respect of the functioning of the Directorate of Special Operations;
 - (b) procedures to coordinate the activities of the Directorate of Special Operations and other relevant government institutions, including procedures for—
 - (i) the communication and transfer of information regarding matters falling within the operational scope of the Directorate of Special Operations and such institutions; and
 - (ii) the transfer of investigations to or from the Directorate of Special Operations and such institutions; and
 - (c) where necessary—
 - (i) the responsibility of the Directorate of Special Operations in respect of specific matters; and
 - (ii) the further procedures to be followed for the referral or the assigning of any investigation to the Directorate of Special Operations.
80. The Office of the Head of Operations: DSO. Circular:1. Effective Date 8 November 2001. Signed: Acting Investigating Director Adv. LF McCarthy 7-11-2001.

81. See Chapter 5 National Prosecuting Authority Act 32 of 1998, read with the definition of “specified offence” contained in s1.
82. National Prosecuting Authority Act 32 of 1998 s27: Reporting of matters to Investigating Director.—If any person has reasonable grounds to suspect that a specified offence has been or is being committed or that an attempt has been or is being made to commit such an offence, he or she may report the matter in question to the head of an Investigating Directorate by means of an affidavit or affirmed declaration specifying—
 - (a) the nature of the suspicion;
 - (b) the grounds on which the suspicion is based; and
 - (c) all other relevant information known to the declarant.
83. National Prosecuting Authority Act 32 of 1998 s28(1)(a): If the Investigating Director has reason to suspect that a specified offence has been or is being committed or that an attempt has been or is being made to commit such an offence, he or she may conduct an investigation on the matter in question, whether or not it has been reported to him or her in terms of section 27.
84. National Prosecuting Authority Act 32 of 1998 s28(1)(b): If the National Director refers a matter in relation to the alleged commission or attempted commission of a specified offence to the Investigating Director, the Investigating Director shall conduct an investigation, or a preparatory investigation as referred to in subsection (13), on that matter.
85. National Prosecuting Authority Act 32 of 1998 s28(13): If the Investigating Director considers it necessary to hear evidence in order to enable him or her to determine if there are reasonable grounds to conduct an investigation in terms of subsection (1) (a), the Investigating Director may hold a preparatory investigation.
86. Detail on the cases mentioned by DSO members was also obtained from the DSO Annual Report 2003, Draft 2.
87. Commission of Inquiry into the Road Accident Fund, presided over by Judge Kathy Satchwell.
88. Schönteich, M. *Criminal Justice Year in Review*: 2001. 24 June 2002. ISS.
89. Programme 4, Vote 24 (Justice and Constitutional Development).
90. Sub-programme of National Prosecuting Authority, Programme 4, Vote 24 (Justice and Constitutional Development).
91. *Ibid.*
92. Sub-programme of Auxiliary and Associated Services, Programme 5, Vote 24 (Justice and Constitutional Development).
93. Vote 23 (Independent Complaints Directorate).

94. Programme 4, Vote 25 (Safety and Security).
95. Sub-programme of Detective Service, Programme 4, Vote 25 (Safety and Security).
96. Ibid.
97. Schönsteich, M. *Criminal Justice Year in Review: 2001*. 24 June 2002. ISS.
98. Ibid.
99. Ibid.
100. See SAPS Annual Report 2002/2003, p60, for SAPS comments in this regard.
101. If we are to berate the NPS for the high number of withdrawals of cases from court, we also need to look at the role the detective service plays in this regard. The prosecution service claims it in turn cannot be held responsible for cases which are poorly investigated by the detective service and therefore cannot go to court and must be withdrawn. Nevertheless, given the backlog in the courts, it is not clear that even if the detective service were to present more and better prepared dockets to the prosecution, that there would be a capacity on the part of the NPS to take up these cases.
102. For more on the restructuring of the units, see Redpath, J, Leaner and Meaner? *Restructuring the Detective Service*, ISS Monograph No.73. May 2002.
103. 2003 Budget Review, Vote 25 (Safety and Security), p575. Note that the more recent SAPS Annual Report 2002/2003 says there are 828 FCPU detectives.
104. SAPS Annual Report 2002/3 p62.
105. Ibid, Table 23, p63.
106. For a complete breakdown of the crime types, see Table 23, SAPS Annual Report 2002/3 p63.
107. SAPS Annual Report 2002/3 p57.
108. Ibid, p60.
109. South African Police Service Act 68 of 1995; see Chapter 10.
119. The full mandate of the ICD covers deaths of persons in police custody or as a result of police action; involvement of SAPS members in criminal activities; prohibited police conduct; poor police service; failure by the police to assist domestic violence victims; offences by members of the Municipal Police Services.
111. See ICD Standard Operating Procedure (SOP), SOP 4, Effective 1 May 1999.
112. ICD Annual Report 2002/2003 p31.
113. Ibid.

114. Ibid.
115. Special Investigating Units and Special Tribunals Act 74 of 1996.
116. *Business Times* June 1999.
117. South African Association of Personal Injury Lawyers v Heath 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC).
118. Government Gazette Vol. 433, No. 22531, 31 July 2001, Regulation Gazette, No. 7128, Proclamation No. R. 118, 2001.
119. The full terms of reference are: Serious maladministration in connection with the affairs of any State institution; improper or unlawful conduct by employees of any State institution; unlawful appropriation or expenditure of public money or property; unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing upon State property; intentional or negligent loss of public money or damage to public property; corruption in connection with the affairs of any State institution; or unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of the public or any category thereof.
120. Department of Public Service and Administration: Corruption Assessment Report 2003.
121. Sherman, T. Issues facing management of the prosecution, transcript of a speech contained in a report of the proceedings: Empowering prosecutors for effective and responsive prosecutions in the new millennium, 9–12 November 1999, Regency Hotel, East London, pp. 22–23.
122. *Prosecution-lead Investigation: A practical overview*. Presented by Bulelani Ngcuka, National Director of Public Prosecutions. 2nd World Conference on Modern Criminal Investigation, Organised Crime and Human Rights, Durban South Africa 5 December 2001.
123. Ibid.
124. Ibid, p13.
125. The Goldstone Commission of Inquiry regarding the prevention of public violence and intimidation (the Goldstone commission), 1991 to 1994.
126. The Investigation of Serious Economic Offences Act, No. 117 of 1991, repealed by the National Prosecuting Authority Act 32 of 1998.
127. See s7(1)(a)(aa) National Prosecuting Authority Act 32 of 1998.
128. See s199(1) Constitution of the Republic of South Africa Act 108 of 1996.
129. See s199(3) Constitution of the Republic of South Africa Act 108 of 1996.

130. See s205(3) Constitution of the Republic of South Africa Act 108 of 1996.
131. See s179, Constitution of the Republic of South Africa Act 108 of 1996. The Constitutional Court confirmed this provision of the Constitution at paragraphs 140 and 141 in CCT 23/96, Certification of the Constitution of the Republic of South Africa, 1996.
132. See s179(5)(d) Constitution of the Republic of South Africa Act 108 of 1996 also contained in s22(2)(c) National Prosecuting Authority Act 32 1998.
133. See s12(6)(a) National Prosecuting Authority Act 32 of 1998. Parliament must confirm the removal of the national director, or restore him or her to office.
134. Because Mandela stepped down after only one term as president, in 1999, this timing means that each national director's tenure will overlap with presidential terms such that the national director will be appointed by the incumbent president's predecessor, assuming subsequent presidents win elections and take the two full terms allotted them by the constitution, and assuming the national director does not vacate office before his time is up.
135. The chief whip of a political party is responsible for maintaining discipline among, securing attendance of, and giving necessary information to party members; as such, intricately involved with the party.
136. The three are Siphwe Bholo, Titi Ndweni and Sipho Gavin.
137. The three were released from Johannesburg Prison in November 1999.
138. Madikizela Mandela was convicted on 43 charges of fraud and 25 of theft on 24 April 2003. The following day she was sentenced to five years imprisonment, with one year suspended for five years. The sentencing magistrate said she should serve eight months in prison, and the remainder in community service. On conviction, she announced she would resign as member of Parliament, chairperson of the ANC women's league, and member of the ANC's National Executive Committee. At the time of writing, her appeal against conviction and sentence had not yet been heard.
139. Yengeni was found guilty of fraud on 13 February 2003, and acquitted on corruption charges, in terms of a plea bargain agreement. He was sentenced to four years in prison, without the option of a fine, on 19 March 2003. Yengeni was chief whip of the ANC before resigning as chief whip on being charged and arrested for crimes on which he was ultimately convicted. He resigned as member of Parliament on being convicted. At the time of writing, his appeal against sentence had not yet been heard.
140. Whether the national director has acted impartially or not, the point to be made is that the ultimate decision on whether to prosecute or not remains with the national director and not with the DSO. This would be the case also if the SAPS had investigated the matter and handed it over to the NPA for prosecution.

Where an investigation has been carried out by the SAPS, the national director would still decide whether to prosecute, but the National Commissioner of the SAPS would have influence over how the investigation was to be conducted.

141. The national director's removal from office by the president is theoretically possible should the Hefer Commission find that he was a spy or that he has abused his office, as this would allow the president to find that that he is not a fit and proper person for the position of national director. Such a removal must be confirmed by Parliament.
142. See Paschke, R. *Conviction rates and other outcomes of crimes reported in eight South African police areas*, Research paper 18, Project 82, South African Law Commission, Pretoria (undated) which showed only 11% of cases tracked resulting in either a conviction or an acquittal.
143. See s35(1) of the National Prosecuting Authority Act 61 of 1998. The Constitution also provides in s55(2)(b)(ii) that Parliament must maintain oversight over any organ of state. The Minister of Justice and Constitutional Development has political responsibility over the prosecution, in terms of s 179(7) of the Constitution of the Republic of South Africa Act 108 of 1996.
144. Van Aaken, Salzbuger & Voigt. *The Prosecution of Public Figures and the Separation of Powers: Confusion within the Executive Branch*. German Working Papers in Law and Economics. Paper 11, Volume 2003.
145. Information not otherwise footnoted on the FBI in this section is drawn from the US Department of Justice website, www.usdoj.gov
146. Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming.
147. US Attorney's Manual 1-2.101.
148. These are detailed in Schedules 4 and 5 of the Constitution of the Republic of South Africa Act 108 of 1996 (as amended).
149. S205 of the Constitution of the Republic of South Africa Act 108 of 1996.
150. Title 28, United States Code, Section 533, authorises the Attorney General to appoint officials to detect and prosecute crimes against the United States. Title 18, United States Code, Section 3052, specifically authorises Special Agents and officials of the FBI to make arrests, carry firearms, and serve warrants. Title 18, United States Code, Section 3107, empowers Special Agents and officials to

make seizures under warrant for violation of federal statutes. Title 28, Code of Federal Regulations, Section 0.85, outlines the investigative and other responsibilities of the FBI, including the collection of fingerprint cards and identification records; the training of state and local law enforcement officials at the FBI National Academy; and the operation of the US National Crime Information Centre and the FBI Laboratory.

151. Information in this section is drawn largely from the UK Police Service Act 1997, the ACPO website <http://www.acpo.police.uk>, the UK police service portal <http://www.police.uk>, and the National Crime Squad website <http://www.nation-crimesquad.police.uk>
152. *The Guardian* 9 July 2003.
153. *The Guardian* 8 July 2003.
154. *The Guardian* 9 July 2003.
155. *The Guardian* 8 July 2003.
156. *Ibid.*
157. *The Guardian* 9 July 2003.
158. *The Guardian* 8 July 2003.
159. The 44 regional police forces are the Avon & Somerset Constabulary, Bedfordshire Police, Cambridgeshire Constabulary, Cheshire Constabulary, City of London, Cleveland Constabulary, Cumbria Constabulary, Derbyshire Constabulary, Devon & Cornwall Police, Dorset Police, Durham Constabulary, Dyfed Powys Police/Heddlu Dyfed Powys, Essex Police, Gloucestershire Constabulary, Greater Manchester Police, Gwent Constabulary/Heddlu Gwent, Hampshire Constabulary, Hertfordshire Constabulary, Humberside Police, Kent County Constabulary, Lancashire Police, Leicestershire Constabulary, Lincolnshire Police, Merseyside Police, Metropolitan Police (New Scotland Yard), Norfolk Constabulary, Northamptonshire Police, Northumbria Police, North Wales Police/Heddlu Gogledd Cymru, North Yorkshire Police, Nottinghamshire Police, Police Service of Northern Ireland, Scottish Police Forces, South Wales Constabulary/Heddlu De Cymru, South Yorkshire Police, Staffordshire Police, Suffolk Constabulary, Surrey Police, Sussex Police, Thames Valley Police, Warwickshire Police, West Mercia Police, West Midlands Police, West Yorkshire Police, Wiltshire Police. The non-geographic police forces in the UK are the British Transport Police, Ministry of Defence Police, UK Atomic Energy Constabulary, Port of Dover Police, The National Crime Squad.
160. The ACPO's members are police officers who hold the rank of Chief Constable, Deputy Chief Constable or Assistant Chief Constable, or their equivalents, in the 44 forces of England, Wales and Northern Ireland, national police agencies and certain other forces in the UK, the Isle of Man and the Channel Islands, and cer-

tain senior non-police staff. There are presently 280 members of ACPO. The ACPO has the status of a private company limited by guarantee. As such, it conforms to the requirements of company law and its affairs are governed by a Board of Directors. It is funded by a combination of a Home Office grant, contributions from each of the 44 Police Authorities, membership subscriptions and by the proceeds of its annual exhibition.

161. The UK Police Service Act 1997 provides in s2(2) that: The functions of NCIS shall be—
 - (a) to gather, store and analyse information in order to provide criminal intelligence,
 - (b) to provide criminal intelligence to police forces in Great Britain, the Royal Ulster Constabulary, the National Crime Squad and other law enforcement agencies, and
 - (c) to act in support of such police forces, the Royal Ulster Constabulary, the National Crime Squad and other law enforcement agencies carrying out their criminal intelligence activities.
162. s48(2) UK Police Service Act 1997.
163. s48(3) UK Police Service Act 1997.
164. Office for Serious Economic Offences Act 117 of 1991.
165. National Prosecuting Authority Amendment Act 61 of 2000.
166. s47 UK Police Act 1997.
167. s3 *Constitution of the Federal Republic of Nigeria, 1999*. The states are Abia, Adamawa, Akwa Ibom, Anambra, Bauchi, Bayelsa, Benue, Borno, Cross River, Delta, Ebonyi, Edo, Ekiti, Enugu, Gombe, Imo, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Lagos, Nasarawa, Niger, Ogun, Ondo, Osun, Oyo, Plateau, Rivers, Sokoto, Taraba, Yobe and Zamfara. The territory is the Federal Capital Territory of Abuja.
168. Part 1 of the Second Schedule of the *Constitution of the Federal Republic of Nigeria* lists the exclusive legislative competencies of the National Assembly. Listed in the schedule are, among others, matters relating to drugs and poisons, and rules of evidence.
169. s4(5) *Constitution of the Federal Republic of Nigeria, 1999*.
170. Nigeria is about 40% Christian and 50% Muslim, according to the CIA's World Fact Book.
171. See s214(1) *Constitution of the Federal Republic of Nigeria, 1999*.
172. See s214(2) (c) *Constitution of the Federal Republic of Nigeria, 1999*.
173. Information obtained from Innocent Chukwuma, the executive director of the

Nigerian “Centre for Law Enforcement Education” (CLEEN).

174. Ibid.

175. Ibid.

176. See for example Odion Okeida “Wanted: a new police force” *Niger Delta Congress* March 2002: www.nigerdeltacongress.com; Isioma J Madike “What a friend in police” *Daily Independent Online* September 12, 2003: www.dailyindependentng.com; Abdulrazaque Bello-Barkindo “Ralph Ige’s Bunkum and the Despicable Family” www.gamji.com

177. Information obtained from Innocent Chukwuma, the executive director of the Nigerian “Centre for Law Enforcement Education” (CLEEN).

178. Since democratic government came to Nigeria in mid-1999 under President Olusegun Obasanjo, it was decided that all decrees made up to 1990 would become Acts. Decrees after 1990 will have to be assessed and passed by the Nigerian Federal Parliament.

179. Uwiagbo Alab. NDLEA: A decade of drug law enforcement in Nigeria.

180. Ibid.

181. Hallet, R. Nigeria: Politics and Corruption. Lecture. UCT Summer School. January 2001.

182. The information in this section is largely taken from the Australian Federal Police website <http://www.afp.gov.au>

183. The states and territories are New South Wales, Northern Territory, Queensland, South Australia, Tasmania, Victoria, and Western Australia and the Australian Capital Territory. [see note on page79]

184. New South Wales, Northern Territory, Queensland, South Australia, Tasmania, Victoria, and Western Australia.

185. On 12 October 2002 a bomb blast in Bali killed 2002 people, many of them Australians. At the time of writing, 18 people had been convicted in Indonesian courts for their roles in the bombings, with a further 12 awaiting trial.

186. The information in this section is largely taken from the Botswana government website http://www.gov.bw/government/ministry_of_state_president.html

187. Botswana has about 1.7m people.

188. See s6, Botswana Police Act.

189. The information in this section is largely taken from the RCMP website <http://www.rcmp-grc.gc.ca>

190. Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and

Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Prince Edward Island, Quebec, Saskatchewan, Yukon Territory.

191. Canada e-book

192. <http://www.sass.ca/cacppage.htm>

193. US Attorney's Manual 1-2.104.

194. http://www.rcmp.ca/fps/federalservices_e.htm

195. http://www.rcmp.ca/organizedcrime/index_e.htm

196. Northland, North Shore Waitakere Rodney, Auckland City, Counties Manukau, Waikato, Bay of Plenty, Eastern, Central, Wellington, Tasman, Canterbury, Southern.