Abstract

With the government’s focus on combatting public sector corruption and violent crime, the plight of white-collar financial crime in the private sector is of subordinate priority. This contribution seeks to explore means to enhance the capacity of law enforcement agencies to combat white-collar financial crime in the private sector.

We clarify the salient terminology and give an overview of the role of financial sector regulators in financial crime prevention in South Africa, focussing on the Financial Sector Regulation Act 9 of 2017. Financial sector regulators have an important role to play against financial crime, though they are dependent on the criminal justice system to protect the financial sector against criminals. This section is followed by an overview of the role and functions of the South African Police Service, the National Prosecuting Authority, and the court system. We identify difficulties which may hinder the prosecution of white-collar financial crime. First, there is a tendency that companies do not investigate conduct that may amount to white-collar financial crime, and otherwise do not report such incidents. Second, there is a need for a specialised and independent law enforcement agency to attend to serious white-collar financial crime. There is also a skills shortage in the National Prosecuting Authority relative to the intricacies of white-collar financial crime.

As remedial measures, companies ought to apply the corporate governance principles of King IV more robustly. Artificial intelligence can also be utilised to prevent white-collar financial crimes committed in cyberspace. Private sector agencies should be vested with a more comprehensive duty to report white-collar financial crime to the authorities, and the protection and scope of whistle-blowers should be increased. We propose the introduction of Deferred Prosecution Agreements, as well as cooperation between the State and the private sector, to weaken capacity constraints in the prosecution process.

Keywords

White-collar financial crime; Financial Sector Regulation Act; Financial sector regulators; Whistle-blowers; Deferred Prosecution Agreements.
1 Introduction

The global and rapid growth of white-collar financial crime in recent years undermines the integrity of financial systems and threatens financial stability and a strong and safe financial system. White-collar financial crimes place a significant burden on national resources in view of the need for costly prosecutions and the loss of potential tax revenues, amongst other things. The escalation in white-collar financial crimes hinders the economic growth needed to address the persistent unemployment crisis leading to widespread hardship, declining living standards for numerous people, and decreased tax revenue. The prevention, prosecution and punishment of white-collar financial crimes are of paramount importance to ensure the effective functioning of the criminal justice system, since crime should have consequences. While white-collar financial crime is not as straightforward to detect as conventional crimes because of its discreet nature, offenders of financial crimes become confident when these crimes are inconsistently prosecuted, buoyed by the hope that they will evade apprehension.

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4 Levine 2012 https://ecommons.cornell.edu/server/api/core/bitstreams/6ccf8e57-3a57-4813-ae16-8c6b59217aaa/content 1; Blinder 1997 American Economic Review 241.
Corruption is a form of white-collar financial crime which crests the agendas of various regional and international fora. In South Africa public sector corruption is at unimaginable proportions, and in recent decades the government has taken several steps to combat the problem. For instance, in 2012 President Jacob Zuma announced the government’s National Development Plan, which has the prime aim of creating a capable and developmental state by fighting corruption, amongst other things. These aspirations were soon dissipated by reports of state capture, but since taking office President Cyril Ramaphosa has introduced renewed initiatives to address the after-effects of state capture and the widespread corruption and maladministration in the public sector. This has included the establishment of three judicial commissions of inquiry which have revealed a network of high-level public officials and state-owned enterprises that have facilitated or benefitted from corrupt activities. The improved schemes have not borne the desired fruit, however. In February 2023 South Africa was placed on the increased monitoring list (grey list) of global financial crime watchdog the Financial Action Task Force (FATF) because of its poor track record of prosecuting bribery and corruption. amongst other reasons, Despite the country’s having made some progress in addressing the FATF-identified concerns, the prospects of avoiding delisting by the

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7 De Man 2022 PELJ 2. The offence of corruption has its roots in the common law crime of bribery, being the practice of tendering or accepting a private advantage as a reward for the performance of a duty. Watney 2019 TSAR 750; Cordell 2020 THRHR 564.
8 Budhram and Geldenhuys 2018 Acta Criminologica 25. Public sector corruption is conservatively estimated to annually cost the economy some R27 billion and 76 000 jobs. Magobotiti 2021 TRW 108.
9 Hereafter NDP.
11 These are the Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector (the State Capture Commission); the Commission of Inquiry into Tax Administration and Governance by the South African Revenue Service; and the Commission of Inquiry into Allegations of Impropriety Regarding the Public Investment Corporation.
scheduled review date on 31 January 2025 seem grim.\textsuperscript{15} This is largely attributed to the country’s slow response to rectifying the deficiencies relating to the investigation and prosecution of complex money laundering and financial crimes.\textsuperscript{16}

Organised crime has made a substantial impact on South African society as well. As indicated by the Global Organised Crime Index, released in September 2023, South Africa ranked seventh out of 193 countries in terms of the prevalence of organised crime within its borders. The global report suggests that these criminal activities are frequently exacerbated by corrupt connections, and they have firmly established a criminal economy, which in turn has eroded trust in the government and law enforcement.\textsuperscript{17}

Meanwhile South Africa is currently grappling with a significant escalation of white-collar financial criminal activities in the private sector. This phenomenon has become conspicuous through the emergence of corporate fraud scandals in recent years, implicating some of the nation’s most prominent corporations. For example, in October 2023, it was revealed that a trustee associated with the BHI trust had orchestrated a Ponzi scheme that, based on initial estimates, swindled around 2 000 South African investors out of approximately 3 billion Rand.\textsuperscript{18} In September 2023 federal courts in the United States of America ordered South African-based Mirror Trading International to return the equivalent of 32 billion Rand to American victims of an international Ponzi scheme centered on crypto currencies.\textsuperscript{19} The largest-ever corporate fraud in South Africa was committed at retailer Steinhoff International Holdings NV.\textsuperscript{20} In March 2019 forensic auditors reported that over a decade a small group of executives had implemented fictitious and irregular transactions worth 106 billion Rand,


\textsuperscript{16} Ensor 2023 https://bd.pressreader.com/article/28156947548615.


which battered the pension funds and personal wealth of millions of South Africans. Correspondingly a forensic investigation at sugar multinational Tongaat Hulett revealed how the company’s profits were overstated by 239% and its assets by 34% when executives overvalued sugar cane and backdated land sales. This has resulted in a share price plunge of over 97% in the past five years.\textsuperscript{21} In the so-called heist of VBS Mutual Bank, large-scale internal fraud to the sum of some 2 billion Rand resulted in the bank’s demise in 2018.\textsuperscript{22} At technology giant EOH, several former employees and board members allegedly committed serious governance failures and wrongdoing between 2015 and 2017, including over-billed contracts worth 47 million Rand and 750 million Rand worth of claims where there had been no valid work.\textsuperscript{23} Barry Tannenbaum was dubbed as South Africa’s Bernie Madoff after it had surfaced that he operated South Africa’s biggest Ponzi scheme worth 12 billion Rand.\textsuperscript{24} Soon thereafter another Ponzi scheme was discovered with Fidentia Asset Management (Pty) Ltd, which cost investors some 400 million Rand.\textsuperscript{25} There has also been an increase in private sector unethical conduct of price-fixing, collusive tendering and market allocation.\textsuperscript{26}

Given the government’s pronounced emphasis on addressing a surge in public sector corruption and violent crime offences, it is plausible that efforts to counteract the escalating wave of white-collar financial crime offences in the private sector might have been relegated to a lower priority. In this contribution we explore means to enhance the capability of law enforcement agencies to combat white-collar financial crime perpetrated in the private sector. White-collar financial crimes that are significant because of their complexity, seriousness, impact or repercussions will occasionally receive special emphasis, as well as those committed by individuals in companies.

We describe the terms white-collar crime and financial crime and the statutory import of the latter term. This will be followed by an overview of the statutory framework to regulate, police and prosecute white-collar financial crimes. Attention will be given to the financial regulatory system, with

\textsuperscript{24} Kasipo 2016 \textit{AMLJA} 9.
\textsuperscript{25} Kasipo 2016 \textit{AMLJA} 9.
\textsuperscript{26} Budhram and Geldenhuys 2018 \textit{SACJ} 42-43.
specific reference to the financial sector regulators under the *Financial Sector Regulation Act*\textsuperscript{27} in combatting financial crime, the South African Police Service (SAPS) and the National Prosecuting Authority (NPA) as the State's primary law enforcement agencies in terms of the *Constitution of the Republic of South Africa*,\textsuperscript{28} and the judiciary. Then we will explore shortfalls in the criminal justice system and propose ways to manage and prevent the occurrence of white-collar financial crime in the private sector and to strengthen the capacity of law enforcement agencies.

### 2 Denotation of financial crime and white-collar crime

Although the term "financial crime" is occasionally utilised interchangeably with phrases such as "white-collar crime" and "corporate crime", it is important to distinguish these notions.\textsuperscript{29} Although "financial crime" is the sole term endowed with specific statutory significance in our law, nuanced variances further differentiate these concepts. According to Gottschalk,\textsuperscript{30} financial crime makes up an expansive category of criminal activities. White-collar crime represents a particular subset of financial crime, denoting "financial crime by individuals in the elite." Corporate crime makes up a distinct manifestation of white-collar crime, signifying "financial crime by individuals in the elite to benefit the organisation."

#### 2.1 Financial crime

Financial crimes are characterised by an absence of violence, a motive of financial acquisition, an actual or potential loss and an element of misrepresentation or deceit,\textsuperscript{31} with their root in attempting to secure an illegal advantage.\textsuperscript{32} According to Interpol's crime classification, there are sixteen categories of crime, of which financial crime forms one cluster, ranging from basic theft or fraud committed by individuals to large-scale operations masterminded by organised criminals with a foot on every continent.\textsuperscript{33} In the *FSR Act* the legislature defines a financial crime as an offence in terms of a financial sector law; an offence in terms of sections 2, 4, 5 and 6 of the *Prevention of Organised Crime Act* 121 of 1998; an offence in terms of the *Financial Intelligence Centre Act* 38 of 2001; and section 4

\textsuperscript{27} Financial Sector Regulation Act 9 of 2017 (the FSR Act).

\textsuperscript{28} Constitution of the Republic of South Africa, 1996 (the Constitution).

\textsuperscript{29} Budhram and Geldenhuys 2017 SACJ 7-8; Gottschalk Explaining White-Collar Crime 4.

\textsuperscript{30} Gottschalk Explaining White-Collar Crime 4.

\textsuperscript{31} Budhram and Geldenhuys 2017 SACJ 7-8.

\textsuperscript{32} Gottschalk et al 2011 International Journal of Information Management 227.

of the Protection of Constitutional Democracy against Terrorist and Related Activities Act33 of 2004.\(^{34}\) The definition of financial sector laws as provided in the FSR Act includes the FSR Act itself, the laws listed in Schedule 1 of the FSR Act,\(^ {35}\) and the regulations and regulatory instruments made in terms of these Acts.\(^ {36}\)

It can therefore be concluded that financial crimes comprise of offences in terms of the following legislation: the FSR Act, the Pension Funds Act,\(^ {37}\) the Friendly Societies Act,\(^ {38}\) the Banks Act,\(^ {39}\) the Financial Services Board Act,\(^ {40}\) the Financial Supervision of the Road Accident Fund Act,\(^ {41}\) the Mutual Banks Act,\(^ {42}\) the Long-term Insurance Act,\(^ {43}\) the Short-term Insurance Act,\(^ {44}\) the Financial Institutions (Protection of Funds) Act,\(^ {45}\) the Financial Advisory and Intermediary Services Act,\(^ {46}\) the Collective Investment Schemes Control Act,\(^ {47}\) the Co-operative Banks Act,\(^ {48}\) the Financial Markets Act,\(^ {49}\) the Prevention of Organised Crime Act,\(^ {50}\) the Financial Intelligence Centre Act,\(^ {51}\) and the Protection of Constitutional Democracy against Terrorist and Related Activities Act.\(^ {52}\)

Common examples of financial crimes include mortgage fraud, medical fraud, corporate fraud, point of sale fraud, currency fraud, health care fraud, insurance fraud, and acts such as insider trading, tax violations, kickbacks,
embezzlement, identity theft, cyber-attacks, money laundering, currency counterfeiting, intellectual property crime, computer virus attacks, social engineering and cyber-terrorism.\textsuperscript{53} Bank fraud is a further form of financial crime of which there is a high incidence.\textsuperscript{54} Bank fraud includes, amongst other things, counterfeiting banknotes, cheque fraud, bank account fraud, letter of credit fraud, credit card fraud, illegal credibility letters, embezzlement and the bribery of bank officials.\textsuperscript{55}

Ultimately, financial crimes range from low to high level and from petty to grand and involve public officials, individual members of the public, companies and corporates.\textsuperscript{56} Although it is difficult to quantify their direct economic cost, the multifaceted harms of financial crimes cannot be overstated. For example, eroding the tax base and faith in the financial system, impeding much-needed development, perpetuating inequality, and giving organised crime the ability to expand into the illicit economy.\textsuperscript{57} They yield direct costs to corporations from where such crimes are committed, as well as indirect losses of opportunity costs, reputational damage to a name or brand and loss of market position, and they negatively impact on employee morale and productivity.\textsuperscript{58}

A common difficulty for law enforcement agencies is the detection of financial crime. This is because of the complicated record and accounting systems that form part of modern commerce, which give offenders the room to alter financial spreadsheets, statements and accounts.\textsuperscript{59} Concomitantly, the prosecution of such crimes is often filled with complexities that require specialised skills and frequently result in costly and long litigation.

\subsection*{2.2 White-collar crime}

Some leading organisational behaviourists describe white-collar crime in terms of offence and the offender.\textsuperscript{60} Regarding the offence, they contend that white-collar crime has the characteristics of being a crime against

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\textsuperscript{54} Foodman 2006 \textit{Banking LJ} 800.
\textsuperscript{56} Budhram and Geldenhuys 2018 \textit{Acta Criminologica} 27.
\textsuperscript{57} GIATOC 2022 https://www.businesslive.co.za/fm/features/2022-09-21-solving-sas-white-collar-crime-puzzle/.
\end{flushleft}
property committed by non-physical means and by concealment and deception for personal or organisational benefit.\textsuperscript{61} Regarding the offender, it is maintained that white-collar crime is committed by privileged people in the elite who are wealthy, highly educated and socially connected.\textsuperscript{62} In short, white-collar crime is often a financial crime committed by upper-class members of society for personal or organisational gain.\textsuperscript{63} White-collar crimes are difficult to prosecute because of the sophistication of the criminals, who disguise their activities with various complex transactions.\textsuperscript{64} With corporate crimes perpetrated from within companies, there are frequently intricate management structures which are manipulated to shield the perpetrators from culpability, burdening the prosecution with complexities.

In this contribution we examine key issues relating to the prosecution of white-collar crime as a species of financial crime. We are continuing to review the legal framework for the regulation and prevention of white-collar financial crime in South Africa.

3 The legal framework for the regulation and prosecution of white-collar financial crime

3.1 The role of the financial sector regulators

South Africa has multiple regulatory bodies to supervise, monitor, and enforce compliance with legislation. In view of the wide range of financial crimes displayed in the \textit{FSR Act}, such crimes fall in the province of several regulators. We focus on a specific category of regulators, namely the financial sector regulators in terms of the \textit{FSR Act}, by providing an outline of their powers and functions in relation to financial crimes.

In 2007 the South African Department of National Treasury launched a review of the country's financial regulatory system, which in February 2011 occasioned a policy paper entitled "A Safer Financial Sector to Serve South

\textsuperscript{61} Gottschalk \textit{et al} 2011 \textit{International Journal of Information Management} 227. Also see Benson and Simpson \textit{White-Collar Crime} 1-17 on Edwin H Sutherland, who coined the term in 1937 and defined it "as a crime committed by a person of respectability and high social status in the course of his occupation."

\textsuperscript{62} Gottschalk \textit{et al} 2011 \textit{International Journal of Information Management} 227. Also see Benson and Simpson \textit{White-Collar Crime} 18-45 on the eight offences that most scholars would agree are white-collar-type crimes, namely securities violations, antitrust violations, bribery, bank embezzlement, mail and wire fraud, tax fraud, false claims and statements, and credit and lending institution fraud.

\textsuperscript{63} Gottschalk \textit{Explaining White-Collar Crime} 4.

\textsuperscript{64} Cheng and Ma 2009 \textit{Journal of Financial Crime} 172.
Africa Better". This document provided a comprehensive review of the key challenges facing the financial sector and proposed the roadmap of a renewed financial regulatory framework for South Africa. These proposals ultimately resulted in the enactment of the FSR Act on 21 August 2017, which became operational on 1 April 2018. The FSR Act introduced the Twin Peaks system of financial regulation in South Africa. The prevention of financial crimes is one of the objects of the FSR Act. The statute establishes a comprehensive regulatory framework to oversee institutions that provide financial services and financial products, including two financial sector regulators, the Prudential Authority (PA), and the Financial Sector Conduct Authority (FSCA). In addition, the FSR Act incorporates other financial sector regulators into its framework of financial sector regulatory bodies, namely the Financial Intelligence Centre and the National Credit Regulator.

The overall regulatory scheme envisaged by the FSR Act encompasses a holistic approach to combating financial crime and to regulating and preventing financial institutions from complicity. For example, the PA is tasked with the formulation of prudential standards and the FSCA with conduct standards to reduce the risk of financial institutions and their key personnel engaging in conduct that amounts to or contributes to financial crime.

65 National Treasury 2011 http://www.treasury.gov.za/twinpeaks/20131211%20Item%202%20A%20safer%20financial%20sector%20to%20serve%20South%20Africa%20better.pdf; Rajendran 2012 http://www.ifmr.co.in/blog/2012/03/06/approaches-to-financial-regulation-and-the-case-of-south-africa/comments that this document set out proposals for strengthening the financial regulatory system. The core of the policy was the adoption of the Twin Peaks model of financial regulation in South Africa. It was in part a recognition of the fact that there had been a global shift from the single regulator model to the Twin Peaks model after the crisis.


69 Section 7(1)(e) of the FSR Act.

70 See ss 2-3 of the FSR Act for the definitions of financial service and financial product.

71 Established in terms of s 32(1) of the FSR Act.

72 Established in terms of s 56(1) of the FSR Act.

73 See s 1(1) of the FSR Act for the definition of a financial sector regulator.

74 Established in terms of s 2 of the Financial Intelligence Centre Act 38 of 2001 to combat money laundering activities and the financing of terrorist and related activities.

75 Established in terms of s 12 of the National Credit Act 34 of 2005 to oversee the regulation of the South African credit market.

crime. The PA and FSCA can also issue specific directives if a financial institution or a key individual in such an institution is or is likely to be involved in financial crime, to stop the financial institution from being involved in a financial crime, and to reduce the risk that it may be so involved.

The FSR Act further establishes the Financial System Council of Regulators (the FSCR) as a body to facilitate cooperation and collaboration as well as consistency of action between the institutions represented by it. The FSCR is obliged to establish working groups or subcommittees regarding the prevention of financial crime, amongst other matters. The membership of the FSCR comprises the Directors-General of the National Treasury, the Department of Trade and Industry and the Department of Health, as well as the Chief Executive Officers of the PA and the National Credit Regulator, the Registrar of Medical Schemes, the Director of the Financial Intelligence Centre, the Commissioners of the FSCA, the National Consumer Commission, the Competition Commission, and the Deputy Governor of the South African Reserve Bank. This body deals with noncompliance with financial regulations to enhance the integrity of the financial sector regulatory regime and to provide interagency coordination between regulators on issues of legislation, enforcement and market conduct, thus ensuring that information is shared and regulation is coordinated. The powers of the FSCR do not extend to the prosecution of criminal offenders. Its composition excludes the SAPS and the NPA.

The FSR Act determines that the responsible authority for a financial sector law may commence proceedings against a person in the High Court for an order to ensure compliance with the financial sector law. A person, including a financial sector regulator, who suffers a loss because of a contravention of a financial sector law by another person, may recover the amount of the loss by action in a court of competent jurisdiction against the other person and against any person who was knowingly involved in the contravention. It is evident that the enforcement powers of the financial sector regulators under the FSR Act are limited to civil remedies to compel
compliance with financial sector laws,\textsuperscript{85} and launching civil claims to recover damages against persons who knowingly contravened these laws.\textsuperscript{86}

Criminal conduct in the financial sector remains an unfortunate reality. The powers of financial sector regulators cease when such misconduct is identified.\textsuperscript{87} For redress in the criminal justice system, financial sector regulators must hand over matters to the SAPS and the NPA, although they may still play a vital supporting role by providing fact-finding, investigative and expert help to the SAPS and the NPA.\textsuperscript{88}

We do not propose that regulators be given additional powers relating to the prosecution of offenders of white-collar financial crimes. In our submission the current legal framework is adequately equipped to deal with criminal conduct in the financial sector. However, challenges arise in the practical application of this framework. We accordingly propose that systemic problems be addressed within the confines of the framework. To contextualise our suggestions, we proceed with an overview of the roles, functions, and powers of the SAPS and the NPA, as the State’s key law enforcement agencies in the criminal justice system, and the judiciary.

\subsection*{3.2 The SAPS}

Under section 205(3) of the \textit{Constitution}, the SAPS is the primary agency to investigate, prevent and combat crime in the country. This statement is supported by the \textit{Criminal Procedure Act}\textsuperscript{89} and the \textit{South African Police Service Act}.\textsuperscript{90} Procedures for the arrest, detention and questioning of suspects by the SAPS are prescribed by the \textit{CPA}, while the SAPSA provides for the organisation, regulation and control of the SAPS.

The SAPS is headed by the National Commissioner, who is appointed by the President and is vested with its overall control and management, including the appointment of Provincial Commissioners for each of the

\textsuperscript{85} Section 152(1) of the \textit{FSR Act}.
\textsuperscript{86} Section 278 of the \textit{FSR Act}.
\textsuperscript{87} See Kawadza 2015 \textit{SA Merc LJ} 385 on weaknesses in the enforcement of financial crime.
\textsuperscript{88} There are some regulatory bodies that have investigative powers independent of the SAPS and the NPA, for example the SARS, the South African Reserve Bank and the Financial Intelligence Center. None of them have the power to prosecute, however. See \textit{Tax Administration Act} 28 of 2011; \textit{South African Reserve Bank Act} 90 of 1989; \textit{Financial Services Board Act} 97 of 1990; and \textit{Financial Intelligence Center Act} 38 of 2001. For further examples see Budhram and Geldenhuys 2017 \textit{SACJ} 16.
\textsuperscript{89} \textit{Criminal Procedure Act} 51 of 1977 (the \textit{CPA}).
\textsuperscript{90} South African Police Service Act 68 of 1995 (the \textit{SAPSA}).
provinces. The Detective Service of the SAPS comprises the Crime Investigation Service (station level investigators who are general crime investigators), Commercial Crime Investigations, Organised Crime Investigations, the Anti-Corruption Unit, and others. Less serious white-collar financial crimes fall under the Detective Service. Specialised units in the SAPS investigate serious white-collar financial crime, most notably the Commercial Crime Unit and the Directorate for Priority Crime Investigation (the DPCI), which is commonly known as the Hawks. The mandate of the DPCI is not limited to white-collar financial crime but includes "national priority offences", which are coordinated by a ministerial committee. The head of the DPCI is appointed by the Minister of Safety and Security for a non-renewable term between 7 and 10 years and may be removed from office on grounds permissible in terms of employment legislation.

### 3.3 The NPA

In terms of section 179 of the Constitution, the NPA is the sole agency allowed to prosecute offenders on behalf of the State. Besides the prosecution of offenders, the powers of the NPA extend to powers of investigation. The National Prosecuting Authority Act (the NPAA) sets forth provisions regarding the organisation, regulation and control of the NPA, while the CPA deals with the procedures when an accused is brought before a criminal court. The NPA is headed by the National Director of Public Prosecutions (NDPP), who is appointed by the President and holds office for a non-renewable term of 10 years, unless removed on grounds permissible in terms of labour law. Investigating directorates may also be established by the President to fall under the NPA and to investigate specific unlawful activities.

The NPA conducts investigations and prosecutions through several business units, investigative directorates and units established by

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91 Sections 6, 11 and 12 of the SAPSA. Also see s 207(1) of the Constitution.
93 The DPCI was established in 2009. See s 9 of the South African Police Service Amendment Act 57 of 2008.
94 Chapter 6A of the SAPSA.
95 Sections 17B(a) and 17I of SAPSA. Serious and priority corruption is investigated by components of the DPCI, namely Serious Corruption, which include the Anti-Corruption Task Team, Serious Commercial Crime and Serious Organised Crime. Budhram and Geldenhuys 2018 Acta Criminologica 28.
96 Sections 17CA(1) and 17DA(2) of the SAPSA.
97 Section 22(4)(a)(i) of the National Prosecuting Authority Act 32 of 1998 (the NPAA).
98 Section 179(1) of the Constitution; ss 5(2)(a), 10, 12 and 22(1) of the NPAA.
99 Sections 7 and 26-29 of the NPAA.
legislation beyond the NPAA, for example the Investigating Directorate, the Specialised Commercial Crime Unit, the Special Investigating Unit and the Asset Forfeiture Unit. Of these, only the Specialised Commercial Crime Unit is tasked solely with the investigation of financial white-collar crimes, although its powers are restricted to cases identified by the NDPP and the DPCI. The Investigating Directorate was formed in 2019 to investigate serious and complex corruption matters arising from public inquiry committees. Its focus is therefore corruption in the security section, state-owned enterprises and other high-level public corruption. The Special Investigating Unit was established as a specialised unit within the NPA by the Special Investigating Units and Special Tribunals Act. It is the only agency solely dedicated to investigating corruption, although this mandate extends to corruption in the public sector only. The purpose of the Asset Forfeiture Unit is the recovery and confiscation of assets, which are instrumental to offences or the proceeds thereof, under the POCA.

3.4 The judiciary

The South African judiciary is independent from the legislative and executive branches and subject only to the Constitution. It vests in the Constitutional Court, the Supreme Court of Appeal, the High Court and the Magistrates' Courts. The prosecution and sentencing of criminal offenders are conducted in the High Court and the Magistrates' Courts as courts of first instance, with their structure, powers and functions regulated by the Superior Courts Act and the Magistrates’ Courts Act. The Magistrates’ Courts comprise of district courts and regional courts. District courts have jurisdiction over less serious offences; for example, matters for which a maximum fine of 120 000 Rand may be imposed or which justify imprisonment for not longer than 3 years. Regional courts may impose fines to a maximum of 600 000 Rand and imprisonment to a

102 Special Investigating Units and Special Tribunals Act 74 of 1996; SIU date unknown https://www.siu.org.za.
103 The Special Investigating Unit has been criticised for its orientation towards resolving cases in the civil courts as opposed to the criminal justice system. Bruce 2014 SACQ 55.
105 Sections 165-166 of the Constitution.
106 Section 165(1) of the Constitution also provides for other courts established or recognised by statute.
107 Superior Courts Act 10 of 2013 (the Superior Courts Act).
108 Magistrates’ Courts Act 32 of 1944 (the Magistrates’ Courts Act).
109 Sections 1-2 of the Magistrates’ Court Act.
maximum of 15 years.110 Within the ranks of the regional courts some are designated as Specialised Commercial Crimes Courts, which are dedicated solely to commercial crimes within their jurisdiction, including white-collar financial crimes.111

The High Court comprises of nine divisions, each with territorial jurisdiction over the persons and triable offences in the areas for which they are composed.112 Although there is no limitation on the criminal offences that may be dealt with by the High Court, most criminal matters are brought to district courts and regional courts as courts of first instance and the High Court usually hears only the most serious cases in terms of their complexity and consequences.

4 Challenges in the prosecution of white-collar financial crime

With a plethora of regulatory authorities and law enforcement agencies, and a comprehensive and independent judicial system, South Africa has a sturdy legal framework to address white-collar financial crime. Notwithstanding, the country's performance in combatting white-collar financial crime remains unsatisfactory because of the difficulties in identifying complex white-collar financial crime and securing convictions through the criminal justice system.113 We discuss some such challenges below.

4.1 Detection and report to the authorities

Considering the manner in which the SAPS presents crime statistics in its annual reports, there is a challenge in ascertaining the precise quantity of new white-collar financial crime cases that are routinely referred to the police annually.114 The challenge is further intensified by the inherent absence of a seamless link between SAPS statistical data and the comprehensive annual reporting conducted by the NPA.115 This deficiency effectively prevents the establishment of a definitive correlation between the

110 Section 92(1) of the Magistrates' Court Act; GN R217 in GG 37477 of 27 March 2014. See also ss 286(1) and 286A(1) of the CPA; s 51 of the Criminal Law Amendment Act 105 of 1997; s 89 of the Magistrates Courts Act.
111 Altbekker 2002 SACQ 32.
112 Sections 6, 21 of the Superior Courts Act.
reported instances of white-collar financial crimes and the subsequent prosecutorial actions undertaken in response thereto.

Regardless, there is an implicit systemic difficulty that various occurrences of white-collar financial crime are not brought to the attention of law enforcement agencies. In 2020 PWC surveyed 245 companies in South Africa that had lost 1.7 billion dollars to fraud in the preceding year. An alarming tendency borne out by the survey was that 66% of the occurrences of fraud were not reported to law enforcement. One may assume that such reluctance to report might be a result of a lack of trust that the authorities will effectively action the allegations raised. Also, corporations seek to deal with matters internally in fear of facing reputational damage when internal irregularities are reported. There are strong indications, however, that numerous companies run away from the problem by failing to investigate it, or by failing to take matters beyond the investigative level. PWC shows that 42% of the respondents did not conduct internal investigations, 59% of the incidents were not reported at the board level and 72% were not reported to the company auditors. 116

Besides the general lack of reporting of white-collar financial crimes, perpetrators of these crimes are often at the helm of companies, which enables them to manipulate and conceal their activities from internal company processes, the regulatory authorities and the law enforcement authorities in order to avoid detection. According to experiences in China, the largest bank frauds are committed or facilitated by people inside the banks such as the directors and executives. 117 A similar situation occurred in South Africa, where officials at VBS Mutual Bank were accused of assisting friends and business partners to attain huge bank loans without proper security. 118 It was also found that officials had given kickbacks to municipal officials to persuade them to invest their municipalities’ funds at VBS, in contravention of the Municipal Finance Management Act. 119 Such incidents are apparently on the rise. 120 PWC shows that fraud by senior

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120 Also see further examples in 1 above.
management rose to 34% in 2020 from 20% in 2018, while accounting and financial statement fraud rose from 22% to 34%.121

4.2 Independence of law enforcement agencies

The SAPS operates several units tasked with investigating, preventing, and addressing instances of white-collar financial crime in the private sector. While most are handled by the Detective Service, matters of exceptional gravity, impact, complexity or consequence may warrant referral to either the Commercial Crime Unit or the DPCI of the SAPS. Such cases may also fall within the purview of the Specialised Commercial Crime Unit of the NPA. Three prominent specialised units operating under the auspices of two distinct law enforcement agencies thereby address highly significant instances of white-collar financial crime in the private sector. In assessing the efficacy of this framework, it is instructive to draw insights from the discourse surrounding analogous structures designed to combat corruption, particularly in the realm of public sector corruption.

There is a multitude of corruption and similar crime fighting units in the SAPS and the NPA. This multi-agency approach poses challenges in terms of effective coordination, the duplication of investigations and functions, and inter-agency conflicts. Lekubu122 therefore suggests that there should be a large-scale single anti-corruption unit to combat corruption, such as in some other jurisdictions. The possibility of having a single anti-corruption agency was explored but rejected in the NDP for the country’s lack of an institutional foundation to support such an agency, in particular a well-regulated administrative culture, alongside a large and well-resourced police service.123 In view of the endemic penetration of corruption in the public sector, calls persist for the establishment of an overarching anti-corruption unit.

Should this materialise, a consequent question would be whether the unit should be situated under the NPA or the SAPS, where it would be subject to executive oversight, or whether it should be subordinated to direct parliamentary oversight. The seriousness of this concern is illustrated by a triad of Constitutional Court decisions about the disestablishment of the

122 Lekubu 2019 Acta Criminologica 84.
former Directorate of Special Operations (the DSO) and its replacement with the DPCI.\(^{124}\)

The DSO, colloquially known as the Scorpions, was established in 2001 by the former President Thabo Mbeki to investigate and prosecute complex criminal cases. It stemmed from the need to curb the penetration of organised crime in the SAPS, and it was therefore established under the auspices of the NPA.\(^{125}\) The DSO was regarded as a highly effective and significant crime fighting unit because of its fresh approach of combining intelligence, investigation and prosecution and its wide discretion to pick matters for investigation.\(^{126}\) It undertook various high-profile investigations in political and sophisticated criminal cases, including the investigation of prominent members of the ANC, the arrest and conviction of Shabir Shaik in relation to the arms deal, and the investigation of Brett Kebble and the JCI.\(^{127}\)

Disquiet soon surfaced from the criminal justice and intelligence communities about the location of the DSO under the NPA as opposed to the SAPS.\(^{128}\) President Mbeki therefore appointed the Khampepe Commission of Inquiry to investigate the concerns. In 2006 the Khampepe Commission issued a report wherein it recommended that the DSO should continue to be within the NPA, since there was nothing unconstitutional in the DSO’s sharing a mandate with the SAPS.\(^{129}\) Although the report was approved by cabinet,\(^{130}\) the ANC passed a resolution at its 2007 national conference calling for a single police service and the dissolution of the DSO.\(^{131}\) In 2008 cabinet approved draft legislation which proposed the

\(^{124}\) Glenister v President of the Republic of South Africa 2009 1 SA 287 (CC) (the Glenister I case); Glenister v President of the Republic of South Africa 2011 3 SA 347 (CC) (the Glenister II case); and Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa 2015 1 BCLR 1 (CC) (the Glenister III case).


\(^{127}\) Goga 2014 SACQ 68; the Glenister I case para 10.

\(^{128}\) The Glenister II case para 6.


\(^{130}\) The Glenister I case para 12.

\(^{131}\) The Glenister I case para 15; the Glenister II case para 8. According to Bruce 2014 SACQ 55 this was motivated by President Jacob Zuma and other members of the political elite wanting to insulate themselves from legal liability for alleged acts of corruption.
relocation and amalgamation of the DSO with the SAPS, and introduced it for parliamentary approval.\textsuperscript{132}

In the \textit{Glenister I} case the applicant challenged the cabinet's decision to approve the draft legislation. The Constitutional Court declined to entertain the merits of the application because it would be premature for the court to intervene before parliament had considered the draft legislation.\textsuperscript{133} Subsequently, the draft legislation was approved by parliamentary assent to the \textit{South African Police Service Amendment Act},\textsuperscript{134} and the \textit{National Prosecuting Authority Amendment Act},\textsuperscript{135} which officially substituted the DSO for the DPCI.

These Amendment Acts were impugned, amongst others, in the \textit{Glenister II} case, for the legislature's violation of a constitutional duty to establish an independent anti-corruption unit.\textsuperscript{136} The Constitutional Court accepted that the State has a duty to create a sufficiently independent anti-corruption unit.\textsuperscript{137} On analysis of the Amendment Acts in question, the Constitutional Court concluded it had infringed the independence that is required of the DPCI. In the first instance, the absence of specially secured employment for DPCI staff could create the possibility of a DPCI member being threatened or feeling threatened with removal for failing to yield to pressure in a politically unpopular investigation.\textsuperscript{138} Second, the national priority offences that the DPCI could investigate were expressly subordinated to policy guidelines issued by members of the cabinet. As things stood, the DPCI was unduly restricted to decide the cases it could investigate.\textsuperscript{139} The Amendment Acts were therefore nullified, but the declaration of invalidity was suspended for 18 months in order to grant the legislature an opportunity to cure the defects.\textsuperscript{140}

Parliament thereafter approved the \textit{South African Police Service Amendment Act}\textsuperscript{141} in a bid to address the issues raised in the \textit{Glenister II} case. In the \textit{Glenister III} case a renewed constitutional attack was launched on this statute for the lack of independence of the DPCI, amongst other things. The Constitutional Court emphasised that the \textit{Constitution} does not

\begin{itemize}
  \item \textsuperscript{132} The \textit{Glenister I} case para 1.
  \item \textsuperscript{133} The \textit{Glenister I} case para 37.
  \item \textsuperscript{134} \textit{South African Police Service Amendment Act} 57 of 2008.
  \item \textsuperscript{135} \textit{National Prosecuting Authority Amendment Act} 56 of 2008.
  \item \textsuperscript{136} The \textit{Glenister II} case paras 17-18.
  \item \textsuperscript{137} The \textit{Glenister II} case paras 189-191.
  \item \textsuperscript{138} The \textit{Glenister II} case paras 217-227.
  \item \textsuperscript{139} The \textit{Glenister II} case paras 228-247.
  \item \textsuperscript{140} The \textit{Glenister II} case para 251.
  \item \textsuperscript{141} \textit{South African Police Service Amendment Act} 10 of 2012.
\end{itemize}
require that the DPCI be absolutely independent but that it be merely adequately independent, and that it was a practical possibility for an adequately independent anti-corruption unit to be within the SAPS.\textsuperscript{142} Upon its evaluation of the Amendment Act under consideration, the Constitutional Court held that, although some matters that it had stated in the \textit{Glenister II} case had not been adequately addressed, the legislation was constitutionally compliant in general. Save for striking out the deficient provisions, the court ruled that the statute remained in force.\textsuperscript{143} Parliament thereafter assented to amend the \textit{South African Police Service Amendment Act},\textsuperscript{144} which became effective in September 2022.

Despite these amendments to the SAPSA, there remains scepticism whether the DPCI is an adequately independent crime fighting unit. This is on account of the perception of corruption in the SAPS and the implication of recent police commissioners in criminal activity. Similar concerns prevail in connection with the executive branch that coordinates the DPCI. Given that those that oversee the DPCI could be able to influence the DPCI to turn a blind eye where required, there is a sentiment that a unit such as the DPCI could be adequately independent and effective only if it fell under parliamentary oversight and not oversight by the executive branch.\textsuperscript{145}

\subsection*{4.3 Skill shortages}

In a presentation to Parliament in 2021 NDPP Shamila Batohi alluded to the fact that the NPA is plagued by a lack of skill and capacity to dedicate staff to complex and voluminous matters.\textsuperscript{146} This situation is reflected in the NPA’s annual report for 2022 to 2023, wherein it recounts a shortage of skilled prosecutors.\textsuperscript{147} Specifically, prosecutors who are established and advanced at their jobs are in the 50 to 65 age range, while numerous

\begin{itemize}
\item \textsuperscript{142} The \textit{Glenister III} case paras 9, 21; the \textit{Glenister II} case para 191.
\item \textsuperscript{143} The \textit{Glenister III} case para 112.
\item \textsuperscript{144} \textit{South African Police Service Amendment Act} 10 of 2012.
\item \textsuperscript{146} GIATOC 2022 https://www.businesslive.co.za/fm/features/2022-09-21-solving-sas-white-collar-crime-puzzle/.
\item \textsuperscript{147} The shortage of skills in the NPA has been exacerbated by substantial budget cuts to government departments, as announced by cabinet in August 2023. It is expected that the accompanying increase in fiscal constraints in the NPA may soon result in a reduction in the number of prosecutors. Jika 2023 https://times-e-editons.pressreader.com/article/281535115725086. In addition to prosecutors, there has also been a drastic decline in adequately experienced police personnel. Specifically, the number of detectives in the SAPS has dropped by 8 000 in recent years. Sewusunker 2023 https://www.citizen.co.za/witness/news/detective-shortage-in-sa/; Singh 2023 https://thestar.pressreader.com/article/281479281137225.
\end{itemize}
prosecutors and investigators in specialised units who are below the age of 40 have not yet acquired skills relating to the crime types that specialised units are tasked with. The NPA therefore identified the need for building specialisation through training courses and on-the-job skills transfer.\textsuperscript{148}

As has reportedly been remarked by Glynnis Breytenbach, former head of the Specialised Commercial Crime Unit, it takes 10 years to make someone into a good, effective prosecutor, but it takes 20 years if you want a specialist as is required in cases involving the complexities of large scale white-collar financial crime.\textsuperscript{149}

5 Reformative measures

The problem areas that we highlighted reveal that effective crime fighting must start prior to the involvement of authorities, by companies getting their houses in order and governing their affairs ethically and properly managing unlawful conduct. There is also a need to improve the obligations of companies to report internal occurrences of white-collar financial crime and to protect individuals who want to volunteer information about such occurrences to the authorities. Penalising wrongdoers may not always be the solution to the problem and there ought to be more scope for constructive strategies to compel companies to bring their internal affairs up to standard. From the law enforcement side, there is a need for dedicated skills and expertise to focus on white-collar financial crime. We propose the following measures.

5.1 Corporate governance

The large-scale tendency of companies deliberately concealing unlawful activities or failing to investigate and report, either internally or to the authorities, contrasts with the tradition of corporate governance advanced by the King IV report. This includes an ethical culture, effective control and legitimacy.\textsuperscript{150} Companies should establish forensic units in their internal audit departments to strengthen their internal controls so that financial crimes can be properly investigated.\textsuperscript{151} They also ought to have fraud and corruption risk response strategies in place and these should be subjected to improved regulatory oversight. In its survey (mentioned before) PWC

\textsuperscript{149} GIATOC 2022 https://www.businesslive.co.za/fm/features/2022-09-21-solving-sas-white-collar-crime-puzzle/.  
\textsuperscript{150} IoDSA 2016 King IV Report 20.  
\textsuperscript{151} Ocansey 2017 European Scientific Journal 388.
found that only half of the companies that they surveyed are dedicating resources to risk assessment and fraud.  

Financial institutions, especially banks, are targeted by phishing scams and other cybercrimes committed through computers. Financial institutions play an essential role in the fight against financial white-collar crime. To adhere to the requirement for effective control, financial institutions should utilise artificial intelligence to detect and prevent cybercrimes promptly before any harm can be done by criminals who try to commit such crimes.

5.2 Statutory duty to disclose

Once instances of white-collar financial crime have surfaced in an organisation, there is no general obligation to report it to the authorities. Section 34(1) of the Prevention and Combatting of Corrupt Activities Act contains a broad but not a general reporting duty. This duty vests in "persons in authority", which includes chief executives and any manager, secretary or director of a company. It extends to reporting corruption-related offences in terms of the PCCAA, such as theft, fraud, extortion, forgery or uttering a forged document, but only if such an offence involves an amount of 100 000 Rand or more.

In view of the rise of white-collar financial crime in companies, we propose that a wider duty to report such incidents be imposed by statute. In the first instance, provision should be made for a reporting duty regarding a more inclusive set of white-collar financial crimes than the subject of section 34(1) of the PCCAA. Second, the duty should be imposed on any individual and not only on those in positions of authority. Third, there should not be a monetary threshold for the crimes that are reportable. Last, a time limit to report a crime to the authorities should be imposed, as with comparable legislation, in a bid to enable law enforcement to investigate the incidents reported with due dispatch.

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153 Chitimira and Ncube 2021 PELJ 23.
155 Chitimira and Ncube 2021 PELJ 23.
156 Prevention and Combatting of Corrupt Activities Act 12 of 2004 (the PCCAA).
157 Sections 34(1) and 34(4) of the PCCAA.
158 For example, s 54 of the Cybercrimes Act 19 of 2020.
5.3 Whistle-blowers

The Protected Disclosures Act\textsuperscript{159} seeks to protect whistle-blowers who report occurrences of wrongdoing voluntarily. The legislation is restricted to disclosures related to the conduct of the whistle-blower's employer or a fellow employee or worker concerning, amongst other things, the likelihood or deliberate concealment of a criminal offence or a legal obligation.\textsuperscript{160} The disclosure may be made to the whistle-blower's employer or external persons or bodies.\textsuperscript{161} Whistle-blowers are protected from being adversely affected in the employment relationship in retaliation for the disclosure, for example by being subjected to disciplinary action, being dismissed or being transferred against the whistle-blower's will.\textsuperscript{162}

In the NDP the government concedes shortfalls in the PDA, specifically that its scope is limited to whistle-blowers in a formal employment relationship to the exclusion of other persons in commercial relationships with the relevant organisation. The government is also aware that the PDA does not adequately protect the confidentiality of whistle-blowers.\textsuperscript{163} In the final report of the State Capture Commission, Chief Justice Raymond Zondo proposes further legislative intervention by creating monetary incentives to whistle-blowers and the possibility of immunity from criminal proceedings if the whistle-blower is complicit in the conduct disclosed.\textsuperscript{164}

In our opinion broadening the range of potential whistleblowers, their protection and incentives, would be a constructive means to advance the reporting of white-collar financial crime incidents to the law enforcement authorities.

5.4 Deferred Prosecution Agreements

Several jurisdictions, including the United Kingdom and the United States of America, have incorporated Deferred Prosecution Agreement (DPA)
systems into their prosecutorial frameworks regarding white-collar financial crime of substantial magnitude. A DPA is a voluntary agreement between a prosecuting authority and a company (not an individual) in terms of which the prosecution of an offence is suspended in exchange for the company’s agreeing to fulfil certain conditions. This may include the full disclosure of incriminating facts, the repayment of criminal proceeds, the payment of a penalty, the implementation of a compliance policy, and assisting in an investigation. Should the company not comply with the agreed conditions, the prosecution may be resumed.\textsuperscript{165}

The \textit{CPA} does not currently provide for the possibility of a formal agreement to suspend criminal proceedings or to resolve them without a conviction.\textsuperscript{166}

In the Sixth Interim Report on the Simplification of Criminal Procedure, published in 2002, the South African Law Commission (now the South African Law Reform Commission) proposed legislation to formalise procedures for out-of-court settlements in criminal cases that terminate prior to convictions.\textsuperscript{167} The proposals have not been implemented, although they could have served as fertile ground for the development of a DPA system in South Africa. In the recent final report of the State Capture Commission, Chief Justice Zondo calls on the government to introduce legislation for the creation of a DPA system.\textsuperscript{168}

A DPA system is a formidable tool in the legal arsenal, affording both companies and the justice system a pragmatic means to address complex corporate misconduct while preserving valuable resources and offering incentives for responsible corporate behaviour. It presents a myriad of potential advantages in the legal landscape. Instances of large-scale corporate white-collar financial crime often usher in complexities and a substantial volume of documentary evidence that require specialised expertise to navigate. This can subsequently lead to protracted and costly litigation proceedings. In scenarios where the prosecution seeks to attribute liability to corporate directors, it may encounter prolonged defenses involving intricate management structures designed to shield these directors from culpability. The execution of a DPA, which temporarily or

\textsuperscript{165} Yoh 2019 \textit{SCLR} 137-138.
\textsuperscript{166} Section 105A of the \textit{CPA} provides the possibility of a written plea and sentence agreement between the prosecution and the defence, but if such agreement is endorsed by the court it results in a conviction. See s 105A(8).
permanently removes the matter from the prosecutorial system, can significantly yield time and save resources, all the while addressing the issue through an alternative approach.

To further incentivise companies to voluntarily publish the occurrence of wrongdoing, the prospect of engaging in discussions regarding a DPA could be presented as an attractive option, offering a more lenient outcome than what would be otherwise expected. There is the potential enticement for companies to implement internal compliance measures as an alternative to facing criminal convictions. A DPA can mitigate the collateral damage inflicted upon innocent third parties, including employees and contractors. By circumventing the reputational harm, lost contracts and diminished share prices that often accompany a criminal conviction, a DPA may play a valuable role in preserving the interests of these stakeholders.

5.5 Specialised and independent law enforcement agency

There are currently three notable law enforcement agencies in South Africa that combat large-scale white-collar financial crime in the private sector: the Commercial Crime Unit, the DPCI of the SAPS and the Commercial Crime Unit of the NPA. The mandates of the SAPS units are susceptible to undue interference from criminals, specifically organised crime syndicates, as has been shown by the history of some past National Commissioners of the SAPS. The NPA's Specialised Commercial Crime Unit is limited to the matters which are referred to it by either the DPCI or the NDPP. This means that the unit does not have the discretion to investigate cases on its own initiative, which can lead to delays and inefficiencies.

In order to address these shortcomings, we propose the establishment of a single crime unit dedicated to large-scale or very serious instances of financial white-collar crime in the private sector, in relation to its complexity, seriousness, impact or repercussions. This unit ought to have a wide discretion to decide which matters to investigate and ought to be equipped with the intelligence gathering, investigative powers, and prosecution capabilities previously held by the DSO. It would be suitably located under the NPA, as the only State agency with both investigative and prosecuting powers.

Although there is a strong case to be made for an anti-corruption unit to report to Parliament,169 these dynamics apply only to a lesser extent to

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white-collar financial crimes in the private sector. We do not advance that the proposed unit falls under the direct supervision of the legislative branch.

We believe that the establishment of a single crime unit would be a significant step in the fight against large-scale white-collar financial crime in the private sector. This unit would be better equipped to investigate and prosecute these crimes, and it would be less susceptible to political interference.

5.6 Training of prosecutors

The mere appointment of additional prosecutors to the NPA would not address its challenges in retaining and developing the skills necessary to navigate the complex and specialised field of white-collar financial crime. This can be achieved only if there is a dedicated approach in the NPA aimed at skills transfer. This ought to be augmented with specialised training. Law enforcement institutions should provide courses in forensic investigations.¹⁷⁰ As public institutions, universities ought to assist by collaborating with the NPA to provide specialised undergraduate curricula, short learning programmes, diplomas or certificates in the scarce skills required, such as forensic accounting.¹⁷¹

5.7 Cooperation between the State and private agencies

Considering the magnitude and intricacy of certain white-collar financial crime investigations, South African companies employ corporate investigators, including corporate, private and forensic accountants, auditors and legal professionals, for their internal inquiries into such matters. In other jurisdictions it is not uncommon for companies to also engage the services of social workers, criminologists and loss prevention specialists.¹⁷² These professional services can offer significant support to law enforcement investigations, such as by interpreting financial documents.¹⁷³ The associated professional expenses may nonetheless exceed the financial capacities of the strained public funding allocations to law enforcement. Steinhoff International Holdings NV, for example, disbursed 30 million Rand to PWC for a forensic report, which it subsequently shared with the NPA.

¹⁷⁰ Ocansey 2017 European Scientific Journal 388.
¹⁷¹ Ocansey 2017 European Scientific Journal 388.
and the DCPI.\textsuperscript{174} Unless a company voluntarily opts to defray such expenses, the State could find itself without access to highly valuable professional services that could significantly bolster its investigative capabilities.

The NPA ascribes its consistent delay in prosecuting state capture to a scarcity of specialised forensic accountants, auditors and financial investigators among its personnel.\textsuperscript{175} Policymakers should contemplate strategies for cost-sharing between the private sector and the State as part of a more comprehensive initiative aimed at fostering effective collaboration and support, to combat the substantial prevalence of white-collar financial crime.

\section*{6 Conclusion}

We have explored the concept of white-collar financial crime and the significance of financial crime in terms of the \textit{FSR Act}. As shown by our analysis, South Africa has a robust legal framework of regulatory, policing, and prosecuting authorities to combat white-collar financial crime. As further shown, despite this, the law enforcement agencies are facing an uphill battle due to challenges experienced within the existing framework.

The problem areas that we have highlighted show that the obstacles to combatting white-collar financial crime are not solely in the governmental sphere but start at the grass-roots level of inadequate corporate governance in companies and a lack of disclosure to the authorities. White-collar financial crime is a societal problem which calls for interventions on a broader scale than merely the governmental level. We accordingly propose that the broad approach should be one of a partnership between the State and private industry to address the issue. Commensurately, the focus ought to be wider than leaving it to the authorities to conduct crime fighting on their own. More should be expected from the way corporations conduct their internal affairs to let the authorities know about wrongdoing in their midst. The private sector should also assist the State with financial help to carry the costs of expert assistance in the prosecution process. It is also required that the State dedicate more focus to large scale white-collar financial crime in the structures and personnel required to combat this tendency.

\begin{footnotesize}
\begin{itemize}
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\item \textsuperscript{175} Mkentane 2023 \url{https://www.businesslive.co.za/bd/national/2023-11-22-investigating-directorate-blames-lack-of-skills-for-its-court-defeats/}.
\end{itemize}
\end{footnotesize}
We have highlighted some suggested areas of improvement, although we know our suggestions seek to address the symptoms but not the underlying cause of white-collar financial crime. This is because the root lies beyond our reach, namely the fibre of society and the ethos in companies that are increasingly deviating from the path that ought to be expected of a sensible citizenry. An ultimate solution can be achieved only by developing an unwavering societal focus and commitment to improvement for the good of all.

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Zondo RMM date unknown Judicial Commission of Inquiry into State Capture Report: Part VI Volume 4: All the Recommendations

List of Abbreviations

AMLJA Anti-Money Laundering Journal of Africa
ANC African National Congress
Banking LJ Banking Law Journal
CPA Criminal Procedure Act 51 of 1977
DPCI Directorate for Priority Crime Investigation
DPA Deferred Prosecution Agreement
DSO Directorate of Special Operations
EOH Enterprise Outsourcing Holdings
FATF Financial Action Task Force
FSCA Financial Sector Conduct Authority
FSCR Financial System Council of Regulators
FSR Act Financial Service Regulation Act 9 of 2017
GIATOC Global Initiative Against Transnational Organised Crime
ISS Institute for Security Studies
IoDSA Institute of Directors South Africa
JCI Johannesburg Consolidated Investment Company Limited
NDP National Development Plan
NDPP National Director of Public Prosecutions
NPA National Prosecuting Authority
NPAA  National Prosecuting Authority Act 32 of 1998
NPC  National Planning Commission
PA  Prudential Authority
PCCAA  Prevention and Combatting of Corrupt Activities Act 12 of 2004
PDA  Protected Disclosures Act 26 of 2000
PELJ  Potchefstroom Electronic Law Journal
PWC  Pricewaterhousecoopers
RSA  Republic of South Africa
SA Merc LJ  South African Mercantile Law Journal
SACJ  South African Journal of Criminal Justice
SACQ  South African Crime Quarterly
SALC  South African Law Commission
SAPS  South African Police Service
SAPSA  South African Police Service Act 68 of 1995
SARS  South African Revenue Service
SCLR  Singapore Comparative Law Review
SIU  Special Investigating Unit
THRHR  Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TRW  Tydskrif vir Regswetenskap
TSAR  Tydskrif vir die Suid-Afrikaanse Reg
UN  United Nations
VBS  Venda Building Society