

Strengthening Law Enforcement to Address White-Collar Financial Crime in South Africa's Private Sector

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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.

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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.¹ 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.² The escalation in white-collar financial crimes hinders the economic growth³ needed to address the persistent unemployment crisis leading to widespread hardship, declining living standards for numerous people, and decreased tax revenue.⁴ The prevention, prosecution and punishment of white-collar financial crimes are of paramount importance to ensure the effective functioning of the criminal justice system,⁵ since crime should have consequences. While white-collar financial crime is not as straightforward to detect as conventional crimes because of its discreet nature,⁶ 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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¹ Interpol 2023 <https://www.interpol.int/en/Crimes/Financial-crime/Our-role-in-fighting-financial-crime>; Interpol 2023 <https://www.interpol.int/en/Crimes/Financial-crime>; National Treasury 2011 <http://www.treasury.gov.za/twinpeaks/20131211%20%20Item%20%20A%20safer%20financial%20sector%20to%20serve%20South%20Africa%20better.pdf> 73.

² Gottschalk 2010 *Journal of Financial Crime* 442.

³ Saddiq and Abu Baker 2019 *Journal of Financial Crime* 910, 918; Abu *Effects of Corruption and Political Instability* 221; Kanu 2015 *International Journal of Small Business and Entrepreneurship Research* 14; Ocansey 2017 *European Scientific Journal* 388; Ogbuagu, Ubi and Effiom 2014 *Journal of Economics and Sustainable Development* 23; Dooley and Radke 2010 *Charleston Law Review* 635. Economic growth is prioritised by the United Nations as its 8th sustainable development goal. UN date unknown <https://www.un.org/sustainabledevelopment/sustainable-development-goals/>.

⁴ Levine 2012 <https://ecommons.cornell.edu/server/api/core/bitstreams/6ccf8e57-3a57-4813-ae16-8c6b59217aaa/content> 1; Blinder 1997 *American Economic Review* 241.

⁵ Cheng and Ma 2009 *Journal of Financial Crime* 176; Simpson and Koper 1992 *Criminology* 348; Hansen 2009 *Journal of Financial Crime* 35.

⁶ Gottschalk *et al* 2011 *International Journal of Information Management* 226.

Corruption is a form of white-collar financial crime which crests the agendas of various regional and international fora.⁷ In South Africa public sector corruption is at unimaginable proportions,⁸ 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,⁹ which has the prime aim of creating a capable and developmental state by fighting corruption, amongst other things.¹⁰ 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 inquiry¹¹ which have revealed a network of high-level public officials and state-owned enterprises that have facilitated or benefitted from corrupt activities.¹² 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,¹³ Despite the country's having made some progress in addressing the FATF-identified concerns,¹⁴ the prospects of avoiding delisting by the

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.

¹⁰ NPC date unknown https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf 450.

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.

¹² Anon date unknown <https://www.justice.gov.za/commissions/pic/docs/PIC-Commission-Report.pdf>; Nugent 2018 <https://www.thepresidency.gov.za/sites/default/files/SARS%20Commission%20Final%20Report.pdf>; Zondo date unknown https://www.statecapture.org.za/site/files/announcements/672/OCR_version_-_State_Capture_Commission_Report_Part_VI_Vol_IV_-_Recommendations.pdf.

¹³ National Treasury 2023 https://www.treasury.gov.za/comm_media/press/2023/2023022501%20FATF%20Grey%20Listing%20Fact%20Sheet.pdf; Investec 2023 https://www.investec.com/en_za/focus/economy/its-official-south-africa-greylisted-.html.

¹⁴ Ensor 2023 <https://bd.pressreader.com/article/281569475486615>.

scheduled review date on 31 January 2025 seem grim.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.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.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.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.¹⁹ The largest-ever corporate fraud in South Africa was committed at retailer Steinhoff International Holdings NV.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,

¹⁵ Bloomberg 2023 <https://businesstech.co.za/news/business-opinion/723418/south-africa-wont-get-off-the-grey-list-by-2025-new-firststrand-ceo/>. Moreover, the prosecution of state capture and corruption cases is proceeding at a slothful pace. Ensor 2023 <https://bd.pressreader.com/article/281599540154889>. Also see Masweneng 2023 <https://times-e-editions.pressreader.com/article/282226605445166>.

¹⁶ Ensor 2023 <https://bd.pressreader.com/article/281569475486615>.

¹⁷ Rondganger 2023 <https://www.iol.co.za/news/crime-and-courts/new-global-organised-crime-index-reveals-how-the-mafia-has-taken-over-south-africa-d93ed5a1-790f-4f25-8e5a-720735ea6449>.

¹⁸ Fischer-French 2023 <https://www.news24.com/citypress/business/ponzi-scheme-involving-more-than-2-000-clients-and-more-than-r3-billion-shakes-northern-suburbs-20231029>.

¹⁹ Cronje 2023 <https://www.news24.com/fin24/companies/sa-ponzi-scheme-mti-ordered-to-pay-r32bn-to-thousands-of-us-victims-20230915>.

²⁰ GIATOC 2022 <https://www.businesslive.co.za/fm/features/2022-09-21-solving-sas-white-collar-crime-puzzle/>; Van der Linde 2022 *PELJ* 2.

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.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 2018.²² 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.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.²⁴ Soon thereafter another *Ponzi* scheme was discovered with Fidentia Asset Management (Pty) Ltd, which cost investors some 400 million Rand.²⁵ There has also been an increase in private sector unethical conduct of price-fixing, collusive tendering and market allocation.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

²¹ Gumede 2022 <https://www.businesslive.co.za/bd/companies/2022-07-25-former-tonga-at-executives-r35bn-fraud-case-moves-to-high-court/>.

²² Mutau 2018 <https://www.corruptionwatch.org.za/wp-content/uploads/2018/10/VBS-Mutual-Bank-The-Great-Bank-Heist.pdf>.

²³ Maleke 2023 <https://www.iol.co.za/business-report/companies/eoh-rights-its-troubled-house-after-corruption-blow-for-irregular-dealings-with-the-department-of-water-and-sanitation-088ff223-3d9b-4c65-bb42-c2355fddfe4c>.

²⁴ Kasipo 2016 *AMLJA* 9.

²⁵ Kasipo 2016 *AMLJA* 9.

²⁶ Budhram and Geldenhuys 2018 *SACJ* 42-43.

specific reference to the financial sector regulators under the *Financial Sector Regulation Act*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*,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.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,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,³¹ with their root in attempting to secure an illegal advantage.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.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

²⁷ *Financial Sector Regulation Act* 9 of 2017 (the *FSR Act*).

²⁸ *Constitution of the Republic of South Africa*, 1996 (the *Constitution*).

²⁹ Budhram and Geldenhuys 2017 *SACJ* 7-8; Gottschalk *Explaining White-Collar Crime* 4.

³⁰ Gottschalk *Explaining White-Collar Crime* 4.

³¹ Budhram and Geldenhuys 2017 *SACJ* 7-8.

³² Gottschalk *et al* 2011 *International Journal of Information Management* 227.

³³ Interpol 2023 <https://www.interpol.int/en/Crimes/Financial-crime>.

of the *Protection of Constitutional Democracy against Terrorist and Related Activities Act* 33 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,

³⁴ Section 1(1) of the *FSR Act*.

³⁵ The financial sector laws set out in Schedule 1 of the *FSR Act* are the *Pension Funds Act* 24 of 1956, *Friendly Societies Act* 25 of 1956, *Banks Act* 94 of 1990, *Financial Services Board Act* 97 of 1990, *Financial Supervision of the Road Accident Fund Act* 8 of 1993, *Mutual Banks Act* 124 of 1993, *Long-term Insurance Act* 52 of 1998, *Short-term Insurance Act* 53 of 1998, *Financial Institutions (Protection of Funds) Act* 28 of 2001, *Financial Advisory and Intermediary Services Act* 37 of 2002, *Collective Investment Schemes Control Act* 45 of 2002, *Co-operative Banks Act* 40 of 2007, *Financial Markets Act* 19 of 2012 and *Credit Rating Services Act* 24 of 2012.

³⁶ Section 1(1) of the *FSR Act*.

³⁷ *Pension Funds Act* 24 of 1956.

³⁸ *Friendly Societies Act* 25 of 1956.

³⁹ *Banks Act* 94 of 1990.

⁴⁰ *Financial Services Board Act* 97 of 1990.

⁴¹ *Financial Supervision of the Road Accident Fund Act* 8 of 1993.

⁴² *Mutual Banks Act* 124 of 1993.

⁴³ *Long-term Insurance Act* 52 of 1998.

⁴⁴ *Short-term Insurance Act* 53 of 1998.

⁴⁵ *Financial Institutions (Protection of Funds) Act* 28 of 2001.

⁴⁶ *Financial Advisory and Intermediary Services Act* 37 of 2002.

⁴⁷ *Collective Investment Schemes Control Act* 45 of 2002.

⁴⁸ *Co-operative Banks Act* 40 of 2007.

⁴⁹ *Financial Markets Act* 19 of 2012.

⁵⁰ *Prevention of Organised Crime Act* 121 of 1998 (the *POCA*).

⁵¹ *Financial Intelligence Centre Act* 38 of 2001.

⁵² *Protection of Constitutional Democracy against Terrorist and Related Activities Act* 33 of 2004.

embezzlement, identity theft, cyber-attacks, money laundering, currency counterfeiting, intellectual property crime, computer virus attacks, social engineering and cyber-terrorism.⁵³ Bank fraud is a further form of financial crime of which there is a high incidence.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.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.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.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.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.⁵⁹ Concomitantly, the prosecution of such crimes is often filled with complexities that require specialised skills and frequently result in costly and long litigation.

2.2 White-collar crime

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

⁵³ Gottschalk 2010 *Journal of Financial Crime* 442; Toner 2009 *Journal of Financial Crime* 43; Chitimira and Ncube 2021 *PELJ* 23.

⁵⁴ Foodman 2006 *Banking LJ* 800.

⁵⁵ Cheng and Ma 2009 *Journal of Financial Crime* 168; Foodman 2006 *Banking LJ* 801-802.

⁵⁶ Budhram and Geldenhuys 2018 *Acta Criminologica* 27.

⁵⁷ GIATOC 2022 <https://www.businesslive.co.za/fm/features/2022-09-21-solving-sas-white-collar-crime-puzzle/>.

⁵⁸ PWC 2020 <https://www.pwc.co.za/en/assets/pdf/global-economic-crime-survey-2020.pdf> 16.

⁵⁹ Gottschalk *et al* 2011 *International Journal of Information Management* 227.

⁶⁰ Gottschalk *et al* 2011 *International Journal of Information Management* 227; Benson and Simpson *White-Collar Crime*; Hansen 2009 *Journal of Financial Crime* 29.

property committed by non-physical means and by concealment and deception for personal or organisational benefit.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.⁶² In short, white-collar crime is often a financial crime committed by upper-class members of society for personal or organisational gain.⁶³ White-collar crimes are difficult to prosecute because of the sophistication of the criminals, who disguise their activities with various complex transactions.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 *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 *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

⁶¹ Gottschalk *et al* 2011 *International Journal of Information Management* 227. Also see Benson and Simpson *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."

⁶² Gottschalk *et al* 2011 *International Journal of Information Management* 227. Also see Benson and Simpson *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.

⁶³ Gottschalk *Explaining White-Collar Crime* 4.

⁶⁴ Cheng and Ma 2009 *Journal of Financial Crime* 172.

Africa Better".⁶⁵ 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.⁶⁶ These proposals ultimately resulted in the enactment of the *FSR Act* on 21 August 2017,⁶⁷ which became operational on 1 April 2018.⁶⁸ 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*.⁶⁹ The statute establishes a comprehensive regulatory framework to oversee institutions that provide financial services and financial products,⁷⁰ including two financial sector regulators, the Prudential Authority (PA),⁷¹ and the Financial Sector Conduct Authority (FSCA).⁷² In addition, the *FSR Act* incorporates other financial sector regulators into its framework of financial sector regulatory bodies,⁷³ namely the Financial Intelligence Centre⁷⁴ and the National Credit Regulator.⁷⁵

The overall regulatory scheme envisaged by the *FSR Act* encompasses a holistic approach to combatting financial crime and to regulating and preventing financial institutions from complicity.⁷⁶ 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

⁶⁵ National Treasury 2011 <http://www.treasury.gov.za/twinpeaks/20131211%20Item%202%20A%20safer%20financial%20sector%20to%20serve%20South%20Africa%20better.pdf>; Rajendaran 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.

⁶⁶ National Treasury 2011 <http://www.treasury.gov.za/twinpeaks/20131211%20Item%202%20A%20safer%20financial%20sector%20to%20serve%20South%20Africa%20better.pdf> 2, 5, 8.

⁶⁷ GN R853 in GG 41060 of 22 August 2017.

⁶⁸ GN R169 in GG 41549 of 29 March 2018.

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.

⁷⁶ National Treasury 2011 <http://www.treasury.gov.za/twinpeaks/20131211%20Item%202%20A%20safer%20financial%20sector%20to%20serve%20South%20Africa%20better.pdf> 73-78.

crime.⁷⁷ 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.⁷⁸

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.⁷⁹ The FSCR is obliged to establish working groups or subcommittees regarding the prevention of financial crime, amongst other matters.⁸⁰ 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.⁸¹ 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.⁸² 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.⁸³ 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.⁸⁴ It is evident that the enforcement powers of the financial sector regulators under the *FSR Act* are limited to civil remedies to compel

⁷⁷ Sections 105(2)(b), 106(2)(d) of the *FSR Act*.

⁷⁸ Sections 143(1)(b)(ii)(cc), 143(3)(d), 144(2)(c), 144(3)(c) of the *FSR Act*.

⁷⁹ Section 79 of the *FSR Act*.

⁸⁰ Section 81(1)(a) of the *FSR Act*.

⁸¹ Section 79(3) of the *FSR Act*.

⁸² Section 79(2) of the *FSR Act*.

⁸³ Section 152(1) of the *FSR Act*.

⁸⁴ Section 278 of the *FSR Act*.

compliance with financial sector laws,⁸⁵ and launching civil claims to recover damages against persons who knowingly contravened these laws.⁸⁶

Criminal conduct in the financial sector remains an unfortunate reality. The powers of financial sector regulators cease when such misconduct is identified.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.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.

3.2 The SAPS

Under section 205(3) of the *Constitution*, the SAPS is the primary agency to investigate, prevent and combat crime in the country. This statement is supported by the *Criminal Procedure Act*⁸⁹ and the *South African Police Service Act*.⁹⁰ Procedures for the arrest, detention and questioning of suspects by the SAPS are prescribed by the *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

⁸⁵ Section 152(1) of the *FSR Act*.

⁸⁶ Section 278 of the *FSR Act*.

⁸⁷ See Kawadza 2015 *SA Merc LJ* 385 on weaknesses in the enforcement of financial crime.

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 *Tax Administration Act* 28 of 2011; *South African Reserve Bank Act* 90 of 1989; *Financial Services Board Act* 97 of 1990; and *Financial Intelligence Center Act* 38 of 2001. For further examples see Budhram and Geldenhuys 2017 *SACJ* 16.

⁸⁹ *Criminal Procedure Act* 51 of 1977 (the *CPA*).

⁹⁰ *South African Police Service Act* 68 of 1995 (the *SAPSA*).

provinces.⁹¹ 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.⁹² 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),⁹³ which is commonly known as the Hawks.⁹⁴ 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.⁹⁵ 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.⁹⁶

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.⁹⁷ 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.⁹⁸ Investigating directorates may also be established by the President to fall under the NPA and to investigate specific unlawful activities.⁹⁹

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

⁹¹ Sections 6, 11 and 12 of the *SAPSA*. Also see s 207(1) of the *Constitution*.

⁹² Budhram and Geldenhuys 2018 *Acta Criminologica* 28.

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.¹⁰⁰ The Investigating Directorate was formed in 2019 to investigate serious and complex corruption matters arising from public inquiry committees.¹⁰¹ 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*.¹⁰² It is the only agency solely dedicated to investigating corruption, although this mandate extends to corruption in the public sector only.¹⁰³ 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*.¹⁰⁴

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.¹⁰⁵ The prosecution and sentencing of criminal offenders are conducted in the High Court and the Magistrates' Courts as courts of first instance,¹⁰⁶ with their structure, powers and functions regulated by the *Superior Courts Act*¹⁰⁷ and the *Magistrates' Courts Act*.¹⁰⁸

The Magistrates' Courts comprise of district courts and regional courts.¹⁰⁹ 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

¹⁰⁰ NPA date unknown <https://www.npa.gov.za/specialised-commercial-crime-unit>.

¹⁰¹ NPA date unknown <https://www.npa.gov.za/investigating-directorate>.

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.

¹⁰⁴ NPA date unknown <https://www.npa.gov.za/asset-forfeiture-unit>.

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*.

¹¹³ Lekubu 2019 *Acta Criminologica* 85; Kasipo 2016 *AMLJA* 6.

¹¹⁴ Budhram and Geldenhuys 2017 *SACJ* 8-9.

¹¹⁵ ISS 2023 <https://issafrica.org/iss-today/the-problem-with-south-african-criminal-justice-performance-indicators>.

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

¹¹⁶ PWC 2020 <https://www.pwc.co.za/en/assets/pdf/global-economic-crime-survey-2020.pdf> 4.

¹¹⁷ Cheng and Ma 2009 *Journal of Financial Crime* 167.

¹¹⁸ Mutau 2018 <https://www.corruptionwatch.org.za/wp-content/uploads/2018/10/VBS-Mutual-Bank-The-Great-Bank-Heist.pdf> 31, 37.

¹¹⁹ *Local Government: Municipal Finance Management Act* 56 of 2003; Mutau 2018 <https://www.corruptionwatch.org.za/wp-content/uploads/2018/10/VBS-Mutual-Bank-The-Great-Bank-Heist.pdf> 38.

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

¹²¹ PWC 2020 <https://www.pwc.co.za/en/assets/pdf/global-economic-crime-survey-2020.pdf> 4.

¹²² Lekubu 2019 *Acta Criminologica* 84.

¹²³ NPC date unknown https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf 448.

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).

¹²⁵ Khampepe 2006 https://www.gov.za/sites/default/files/gcis_document/201409/khampeperptfinal-feb060.pdf 6.

¹²⁶ GIATOC 2022 <https://www.businesslive.co.za/fm/features/2022-09-21-solving-sas-white-collar-crime-puzzle/>; Marais *et al* 2020 *Without Prejudice* 29.

¹²⁷ Goga 2014 SACQ 68; the *Glenister I* case para 10.

¹²⁸ The *Glenister II* case para 6.

¹²⁹ Khampepe 2006 https://www.gov.za/sites/default/files/gcis_document/201409/khampeperptfinal-feb060.pdf 13-14.

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.¹³²

In the *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.¹³³ Subsequently, the draft legislation was approved by parliamentary assent to the *South African Police Service Amendment Act*,¹³⁴ and the *National Prosecuting Authority Amendment Act*,¹³⁵ which officially substituted the DSO for the DPCI.

These Amendment Acts were impugned, amongst others, in the *Glenister II* case, for the legislature's violation of a constitutional duty to establish an independent anti-corruption unit.¹³⁶ The Constitutional Court accepted that the State has a duty to create a sufficiently independent anti-corruption unit.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.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.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.¹⁴⁰

Parliament thereafter approved the *South African Police Service Amendment Act*¹⁴¹ in a bid to address the issues raised in the *Glenister II* case. In the *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 *Constitution* does not

¹³² The *Glenister I* case para 1.

¹³³ The *Glenister I* case para 37.

¹³⁴ *South African Police Service Amendment Act* 57 of 2008.

¹³⁵ *National Prosecuting Authority Amendment Act* 56 of 2008.

¹³⁶ The *Glenister II* case paras 17-18.

¹³⁷ The *Glenister II* case paras 189-191.

¹³⁸ The *Glenister II* case paras 217-227.

¹³⁹ The *Glenister II* case paras 228-247.

¹⁴⁰ The *Glenister II* case para 251.

¹⁴¹ *South African Police Service Amendment Act* 10 of 2012.

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.¹⁴² Upon its evaluation of the Amendment Act under consideration, the Constitutional Court held that, although some matters that it had stated in the *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.¹⁴³ Parliament thereafter assented to amend the *South African Police Service Amendment Act*,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.¹⁴⁵

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.¹⁴⁶ This situation is reflected in the NPA's annual report for 2022 to 2023, wherein it recounts a shortage of skilled prosecutors.¹⁴⁷ Specifically, prosecutors who are established and advanced at their jobs are in the 50 to 65 age range, while numerous

¹⁴² The *Glenister III* case paras 9, 21; the *Glenister II* case para 191.

¹⁴³ The *Glenister III* case para 112.

¹⁴⁴ *South African Police Service Amendment Act* 10 of 2012.

¹⁴⁵ Hoffman 2012 <https://accountabilitynow.org.za/hawks-saps-neither-effective-sufficiently-independent/>; Budhram and Geldenhuys 2018 *SACJ* 29.

¹⁴⁶ GIATOC 2022 <https://www.businesslive.co.za/fm/features/2022-09-21-solving-sas-white-collar-crime-puzzle/>.

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-editions.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. Sewsunker 2023 <https://www.citizen.co.za/witness/news/detective-shortage-in-sa/>; Singh 2023 <https://thestar.pressreader.com/article/281479281137225>.

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.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.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.¹⁵⁰ Companies should establish forensic units in their internal audit departments to strengthen their internal controls so that financial crimes can be properly investigated.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

¹⁴⁸ NPA date unknown <https://www.npa.gov.za/sites/default/files/uploads/NPA%20Annual%20Report%202022-23.pdf> 14.

¹⁴⁹ GIATOC 2022 <https://www.businesslive.co.za/fm/features/2022-09-21-solving-sas-white-collar-crime-puzzle/>.

¹⁵⁰ IoDSA 2016 *King IV Report* 20.

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.¹⁵²

Financial institutions, especially banks, are targeted by phishing scams and other cybercrimes committed through computers.¹⁵³ Financial institutions play an essential role in the fight against financial white-collar crime.¹⁵⁴ 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.¹⁵⁵

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*¹⁵⁶ 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.¹⁵⁷

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,¹⁵⁸ in a bid to enable law enforcement to investigate the incidents reported with due dispatch.

¹⁵² PWC 2020 <https://www.pwc.co.za/en/assets/pdf/global-economic-crime-survey-2020.pdf> 23.

¹⁵³ Chitimira and Ncube 2021 *PELJ* 23.

¹⁵⁴ National Treasury 2011 <http://www.treasury.gov.za/twinpeaks/20131211%20%20Item%20%20A%20safer%20financial%20sector%20to%20serve%20South%20Africa%20better.pdf> 73.

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*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.¹⁶⁰ The disclosure may be made to the whistle-blower's employer or external persons or bodies.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.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.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.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)

¹⁵⁹ *Protected Disclosures Act* 26 of 2000 (the *PDA*).

¹⁶⁰ Section 1 of the *PDA*.

¹⁶¹ Sections 5-9 of the *PDA*. Also see s 159 of the *Companies Act* 71 of 2008.

¹⁶² Section 1 of the *PDA*.

¹⁶³ NPC date unknown https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf 450.

¹⁶⁴ Zondo date unknown https://www.statecapture.org.za/site/files/announcements/672/OCR_version_-_State_Capture_Commission_Report_Part_VI_Vol_IV_-_Recommendations.pdf 23. In a parliamentary question session held in the latter part of 2023, Minister of Public Service and Administration, Noxolo Kievit, reportedly mentioned that the government is actively pursuing reforms aimed at providing incentives to individuals who expose corruption as whistle-blowers. Maqhina 2023 <https://themercury.pressreader.com/article/281625310056585>.

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.¹⁶⁵

The *CPA* does not currently provide for the possibility of a formal agreement to suspend criminal proceedings or to resolve them without a conviction.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.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.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

¹⁶⁵ Yoh 2019 *SCLR* 137-138.

¹⁶⁶ Section 105A of the *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).

¹⁶⁷ SALC 2002 https://www.justice.gov.za/salrc/reports/r_prj73_intrep6_2002aug.pdf.

¹⁶⁸ Zondo date unknown https://www.statecapture.org.za/site/files/announcements/672/OCR_version_-_State_Capture_Commission_Report_Part_VI_Vol_IV_-_Recommendations.pdf 23-24.

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

¹⁶⁹ Moosa 2023 <https://bd.pressreader.com/article/281608130119083>.

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.

¹⁷² Gottschalk 2014 *Journal of Investment Compliance* 57; Kennedy 2013 *Journal of Applied Social Science* 233.

¹⁷³ Gottschalk 2014 *Journal of Investment Compliance* 57.

and the DCPI.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.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.

6 Conclusion

We have explored the concept of white-collar financial crime and the significance of financial crime in terms of the *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.

¹⁷⁴ Mathe 2021 <https://mg.co.za/business/2021-03-19-saps-misplaced-financial-priorities-inhibit-it-from-tackling-commercial-crimes/>.

¹⁷⁵ Mkentane 2023 <https://www.businesslive.co.za/bd/national/2023-11-22-investigating-directorate-blames-lack-of-skills-for-its-court-defeats/>.

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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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
POCA	Prevention of Organised Crime Act 121 of 1998
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