

# **An Analysis of the Independence the Special Investigating Unit as an anti-corruption agency in South Africa**

by

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## **Declaration**

I submit this thesis in acknowledgment that the compilation of the work contained herein is entirely my own and that wherever I have had to refer to the work of other authors or academics, I have duly acknowledged them as sources of information and I confirm that I have neither previously in its entirety nor in part, submitted the same work for the purposes of obtaining any other qualification.

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March 2017

## Abstract

Arguments relating to anti-corruption agencies have grown in prominence over the last two decades. These arguments have been largely related to the various international agreements binding countries on how best to deal with corruption and the minimum requirements that should be considered in the establishment of Anti-corruption agencies. Critically, key to the effectiveness and impact of anti-corruption agencies are their independence, which renders the agency impartial and free from favour and/or prejudice. Many academics and international organisations call for the independence of anti-corruption agencies tirelessly so as to embed the knowledge necessary for the implementation of independent agencies. The Special Investigating Unit is no different as its mandate is core to both the South African constitutional and anti-corruption imperatives. Hence these must be seen and function independent of political or other influence. The independence of anti-corruption agencies cuts through three critical aspects that must be considered when determining the level of independence it enjoys. These include: organisational, functional and financial independence. The South African Special Investigations Unit does enjoy some independence. However, the emerging question is whether it is independent to the degree that it complies with South Africa's Constitutional obligations in terms of what is required by existing international obligations or agreements as ratified by South Africa. Establishing the Unit's overall independence against the test of national legislation and that of the international requirements therefore, paves the way for a critical analysis of the Unit's organisational, functional and financial independence; which are the focus of this inquiry. The research results show, that while the Unit does not stand out overwhelmingly against international standards, its current statutory independence along with its associated far-reaching powers, appear to have enabled it to remain effective in the fight against corruption. There does however, appear to be a need for some legislative amendments which would only serve to enhance its independence and improve its positioning in South Africa as one of the key, if not *the* key anti-corruption agency, in South Africa.

## Opsomming

Pleidooie in verband met anti-korrupsie agentskappe het oor die afgelope twee dekades toenemend na vore gekom. Hierdie pleidooie het grootliks verband gehou met die verskillende bindende internasionale ooreenkomste tussen lande ten opsigte van die beste manier om korrupsie te hanteer en die minimum vereistes wat by die vestiging van anti-korrupsie agentskappe in ag geneem moet word. Kritiek in hierdie verband is hul onafhanklikheid – die sleutel tot die effektiwiteit en impak van anti-korrupsie agentskappe – wat die agentskap onpartydig en vry van gunste en / of vooroordeel stel. Baie akademici en internasionale organisasies pleit onvermoeid vir die onafhanklikheid van anti-korrupsie agentskappe ten einde die kennis wat vir die implementering van onafhanklike agentskappe nodig is, in te bed.

Die Spesiale Ondersoekeenheid is geen uitsondering nie; sy mandaat is sentraal in beide die Suid-Afrikaanse grondwetlike en in teenkorrupsie-imperatiewe. Gevolglik moet dit onafhanklik van politieke of ander invloede gesien word en ook so funksioneer. Die onafhanklikheid van anti-korrupsie agentskappe betrek drie kritieke aspekte wat oorweeg moet om die vlak van onafhanklikheid wat geniet word, te bepaal, naamlik organisatoriese, funksionele en finansiële onafhanklikheid. Die Suid-Afrikaanse Spesiale Ondersoekeenheid geniet wel 'n mate van onafhanklikheid. Die vraag wat opduik is egter of dit sodanig onafhanklik is dat dit aan Suid-Afrika se grondwetlike verpligtinge in terme van bestaande internasionale verpligtinge voldoen, of aan ooreenkomste soos deur Suid-Afrika bekragtig.

Om die algehele onafhanklikheid van die Eenheid teen die toets van nasionale wetgewing en dié van die internasionale vereistes te bepaal, het dus die weg vir 'n kritiese analise van die Eenheid se organisatoriese, funksionele en finansiële onafhanklikheid gebaan. Dit was die fokus van hierdie ondersoek. Die navorsingsresultate toon dat die eenheid, alhoewel dit nie oorweldigend by internasionale standaarde uitstaan nie, wel deur sy huidige statutêre onafhanklikheid en sy verwante verreikende mag in staat gestel word om effektief te bly in die stryd teen korrupsie. Dit blyk egter dat daar 'n behoefte bestaan vir 'n sommige wetswysigings wat sal dien om die eenheid se onafhanklikheid te bevorder en sy posisie in Suid-Afrika as een van die belangrike, indien nie die heel belangrikste anti-korrupsie agentskap nie, te verbeter.

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## Acronyms and Abbreviations

ACIMC	- Anti-Corruption Inter-Ministerial Committee
ACSC	- Anti-Corruption Select Committee
ACTT	- Anti-Corruption Task Team
CPIB	- Corrupt Practices Investigative Bureau
DCEC	- Directorate on Corruption and Economic Crime
DOJ&CD	- Department of Justice and Constitutional Development
DPCI/Hawks	- Directorate of Priority Crimes Investigation
DSO/Scorpions	- Directorate of Special Operations
HoU	- Head of the Unit
DHoU	- Deputy Head of the Unit
ICAC	- Independent Commission Against Corruption
INTOSAI	- Institute of Supreme Audit Institutions
JMA Act	- Judicial Matters Amendment Act
NDPP	- National Director of Public Prosecutions
SAPS	- South African Police Services
SARS	- South African Revenue Service
SC	- Senior Counsel
SIS	- Special Investigative Services
SIU	- Special Investigating Unit
The Constitution	- The Constitution of the Republic of South Africa Act 106 of 1996
The NPA Act	- The National Prosecuting Authority Act 32 of 1998
The Public Protector Act	- The Public Protector Act 23 of 1994
The SIU Act	- The Special Investigating Unit and Special Tribunals Act 74 of 1996
UNCAC	- United Nations Convention Against Corruption

## **Chapter 1: Introduction to the independence of anti-corruption agencies**

### **1.1 Introduction**

More than two decades into democracy, corruption has presented itself as the most challenging phenomena for the South African government. Although corruption is identified as a global phenomenon, Webb (2005:151) points out that it is especially in developing countries that it manifests itself unchecked. These sentiments are qualified by Gbadamosi (2006:262), in a paper on Botswana's Anti-Graft Agency Experiences, where he points out that unethical practices and corruption issues have become one of the greatest challenges to Africans and their leaders. Gbadamosi (2006:262) notes further, that these challenges manifest in threats to: economic growth, democratic stability, sustenance and general developmental efforts.

On the public sociology of ethics and corruption, Pillay (2014:53) highlights that awareness about corruption has increased proportionately to the overwhelming number of corruption matters reported. These Pillay (2014:53) notes, could become increasingly synonymous with societal degradation in a country which neglects the implementation of stringent anti-corruption measures or reforms. According to the United Nations Office on Drugs and Crime (UNODC, 2014) in commenting on corruption and development on International anti-corruption day, democracy is considered as a prerequisite for development, and is threatened when corruption prevails. The increase in corruption within South Africa requires that the South African government intensify its efforts to improve the functionality of institutions charged with investigating and combating corruption. The provisions for such efforts are provided in Section 181 of Chapter 9 of the Constitution of the Republic of South Africa Act 108 of 1996 (RSA, the Constitution, 1996b), which requires that institutions supporting constitutional democracy should be strengthened. This, in light of the argument by the United Nations Office on Drugs and Crime (2014), will seek to protect the fundamentals of democracy. The effect is that, agencies charged with an anti-corruption mandate in South Africa, or at least one of the key agencies, should be strengthened, whether through legislation, resourcing and/or budgetary support. In essence this implies the degree of autonomy or independence provided to the agency which in South Africa's case, is a Constitutional imperative. As a result, the

intensity of South Africa's anti-corruption efforts should be measured by the level or degree of independence afforded to its anti-corruption agencies.

## 1.2 Motivation or Rationale

Anti-corruption efforts in South Africa cannot be over-emphasized as there is a need to enhance efforts to curb corruption in order to limit its negative effect on the growth and development of the economy. This is illustrated by Tamukamoyo (2013:10), who points out that the financial implications of the increase in fraud and malfeasance in the public sector, between 2006-2007, cost the taxpayer R130.6 million. By 2011-2012 however, Allwright (2013), a senior forensics manager at law firm Edward Nathan Sonnenbergs, in a report on "the real state of the nation" concluded that this amount had increased to almost R930 million.

The steady decline of ethical behaviour in governments around the world is highlighted by Pauw, Woods, Van Der Linde, Fourie and Visser (2009:342), who warned that if this type of behaviour was not averted by way of decisive action by government, service delivery failures could result which would:

- "Compromise public sector efficiency;
- Rob the poor;
- Distort public spending;
- Cause a country to lose its potential to provide for the well-being of its citizens; and
- Promote a negative and even damaging international reputation."

Pauw *et al.* (2009:348) further identifies three essential causes of ethical failures namely: dishonesty, opportunity and motive. According to Irwin (2011:9) in her interpretation of a survey conducted in 2010 by Transparency International, these failures appear to be prevalent in the context of the South African public sector as it was found that bribery, corruption and fraud was still considered to be a problem. The survey presented the view that corruption was considered to be more prevalent in public, than private sectors. In addition Irwin (2011:9) points out that one of the major issues confronting South Africa, was the "low credibility of law enforcement officials." This, according to McBride, Pillay and Dramat (2016) in an online article on Politicsweb, coupled with government's apparent efforts to derail agencies critical in the fight against corruption by virtue of its attack on senior officials of the Independent Police



Investigative Directorate (IPID), Directorate for Priority Crimes Investigation (DPCI/Hawks) and the South African Revenue Service (SARS) including Robert McBride, Anwar Dramat and Ivan Pillay; presents the emerging necessity for significant effort to be levered into strengthening the independence of institutions responsible for investigating and combating corruption in order to eliminate prospective corrupters and corrupted, no matter what hierarchical positions they occupy in the country.

Over the past few years, arguments relating to anti-corruption agencies have grown in prominence in South Africa. This has resulted in heightened arguments and deliberations over their independence. McBride *et al.* (2016) petitioned the Constitutional Court with the contention that independent State institutions required constitutional protection. They alluded to the successive “removal” of senior officials that had served their institutions with distinction; to the “remarkable coincidence” in the methods used to remove them; the individuals involved; and, their “intersecting interests”. The trio argue that attacks on individuals responsible for these institutions undermine the fight against corruption. They point out that their respective plights emanate from investigations by their individual institutions into what they term “a common thread” of matters involving “individuals or entities with questionable relationships to those in public office” (McBride *et al.*, 2016).

Perhaps the most prominent argument for the independence of anti-corruption agencies came about after the disbandment of the Directorate of Special Operations or the Scorpions (DSO/Scorpions) in 2008, and their incorporation into the DPCI/Hawks within the South African Police Services (SAPS) (Berning & Montesh, 2012). Essentially Bruce (2008:11) indicates that the tensions between the ruling party and the Scorpions emanated from as early as 2001 after the National Prosecuting Authority had approved the arms deal investigation. Progressively however, it is highlighted that the then National Director of Public Prosecutions (NDPP) Bulelani Ngcuka, while condemning the actions of Schabir Shaik (convicted fraudster) and former financial adviser to Jacob Zuma; announced a decision not to prosecute Jacob Zuma. A subsequent negative finding against Ngcuka led to his resignation in 2004. By April 2005 and 2006, the African National Congresses’ (ANC) hostility towards the Scorpions grew as the Unit took on politically sensitive cases against the former ANC Chief Whip, Tony Yengeni (convicted and imprisoned on the arms deal); ANC Parliamentarians implicated in the Travelgate saga; and, corruption charges against the former National Commissioner of Police, Jackie Selebi for which he was convicted and sentenced to 15 years imprisonment (Bruce, 2008:11-13).

In fact, while Moe Shaik (2008:7); brother of Schabir Shaik, challenged the so-called “unbridled power” of the National Prosecuting Authority and Scorpions labelling their abuse of power as a “festering sore”; and questioning who prosecutes the top officials of these respective agencies for their abuse of power; Irwin (2011:10) in concurrence, associates the disbandment of the Scorpions on the premise that it compromised its objectivity by virtue of investigations into the then Deputy President Jacob Zuma, which appeared to be politically influenced. This appears to have led to the subsequent collapse of the corruption trial against Jacob Zuma and the abolishment of the Scorpions. Interestingly, Shaik’s (2008:3-9) article which was published in the SA Crime Quarterly No. 24 during June 2008, argued for the dissolving of the Scorpions at the very time that it was disbanded in June 2008.

There have been many arguments over the years relating to the independence, or the lack thereof of key corruption-fighting agencies, some including the Hawks, the Special Investigating Unit (SIU), the Public Protector, and the National Prosecuting Authority. In fact as early as October 1999, Camerer (1999:8) at the 9th International anti-corruption conference, highlighted the concern raised by the then Justice Minister Dullah Omar as to whether the SIU should “continue existing as an independent body, given the existence of the Public Protector and the Auditor General.” The argument raised by government was whether a rationalisation of agencies was necessary in order to rather consider a consolidated single agency instead of a number of agencies with overlapping mandates or focus. In the same occasional paper, Camerer (1999:2) identified four critical aspects necessary for anti-corruption agencies to function effectively, including amongst other things: adequately skilled and knowledgeable staff with special investigative powers; elite information sharing and co-ordination; and, operational independence. Camerer (1999:3) goes on to argue that anti-corruption agencies must be both shielded from political interference, and guaranteed “operational independence”.

On the eve of the disbanding of the Scorpions in June 2008, Bruce (2008:15) already argued the principle that criminal justice agencies like the Scorpions, be permitted to investigate individuals in positions of authority “without fear or favour.” He challenged the ANC at the time, to influence government to enforce guidelines regulating relationships between senior government officials and heads of “investigative” and “prosecutorial” agencies to both “discourage and prevent” political interference and manipulation. He argues that the disbanding of the Scorpions and the “concentration” of investigative powers in the form of the Hawks under the police would in fact only heighten the problem of political interference and

send a negative message to investigative agencies that they would face punishment if they dared pursue senior party officials (Bruce, 2008:15).

In a Mail and Guardian article (2011), the Public Protector's spokesperson Oupa Segalwe is cited as having argued that the need for the Public Protector sourcing the SIU's assistance with a SAPS investigation was due to the fact that the office of the Public Protector had pointed out on numerous occasions, that it did not have the necessary resourcing and capacity to fully execute its mandate. This was a rather peculiar and compromising revelation for an institution like the Public Protector which ought to have enjoyed "Constitutional" independence, where organisational, functional and financial independence should have been guaranteed. Almost in concurrence, De Lange (2012) in an online article, goes on to point out that the Constitutional Court required that whatever anti-corruption capacity was decided upon, such agency should be "adequately resourced" and free from political interference to "ensure its independence."

A further argument posed by Tamukamoyo (2013:12) on a close examination "of the three most important agencies responsible for tackling corruption, namely the Hawks, National Prosecuting Authority and SIU; was that a fundamental shortcoming has been a failure to entrench their independence". He goes on to argue that "while South Africa ticks the boxes for having the agencies in place, the characteristic that allows them to be successful, namely independence, is sorely missing."

Hartley (2012) in a Business Day article on the risks faced by the SIU to investigate corruption, highlights that financial and operational functionality are affected through a lack of independence. Hartley (2012) further points out that an advisory was used by the SIU Head of Corporate Governance and Risk Management, Advocate Gerhard Visagie in 2012, to Parliament's Justice Committee, on the Unit's financial limitations and its effects on the SIU's functionality as an anti-corruption agency. Hawker (2015) attributes this advisory as being linked to a legal opinion that prevented the Unit from billing government departments for the cost of its investigations. The resultant effect according to Visagie in Hartley (2012) was that the staffing of the Unit was reduced by an estimated 100 forensic investigators. Additionally, the appointment procedure for the Head of the SIU was publicly criticized in Hawker (2015), by Newham from the Institute of Security Studies, who suggests that there have been problems in the SIU with poor leadership appointments by the Presidency. This is supported by Tamukamoyo's (2013:17) view that leadership instability can weaken the effectiveness of an institution like the SIU.

Efforts at securing the necessary degree of independence would be impossible if political will is absent, as political interference is often the major contributor to lower levels of independence within anti-corruption agencies (Tamukamoyo, 2013:19). South Africa currently has several institutions mandated to investigate, and prosecute corruption. The most prominent of them being the Hawks, the Public Protector and the SIU (RSA, National Anti-Corruption Forum, 2005). This research has however, focused specifically on the independence of the SIU as an anti-corruption agency in South Africa. The study takes cognisance of several past events that relate to anti-corruption agencies. These include the controversial demise of the Scorpion's and its re-generation as the Hawks. Further, the recent attack on the Public Protector's credibility over the Nkandla investigation, as well as the recent effects of the delayed appointment of the SIU Head are important in considering the independence and functionality of anti-corruption agencies within South Africa, and particularly for the SIU (Tamukamoyo & Mofana, 2013).

Research on the SIU's independence as a corruption fighting institution is a fairly new area of research and is somewhat limited. Although there have been some documents, articles and media publications relating to anti-corruption agencies in general, and more especially the disbanding of the Scorpions and the introduction of the Hawks, and their independence at being placed within the Police Service, there has been no significantly focused, or in-depth research delving into the independence of anti-corruption agencies like the SIU, in South Africa. This research therefore sought to provide some answers to the research problem of whether the SIU indeed enjoys the degree of independence required of agencies entrusted with combating corruption. It is hoped that this research will provide a baseline of information for further research, and it is from this perspective that this investigation sought to contribute to the body of knowledge related to anti-corruption agencies. This study kept its focus primarily within the ambit of the SIU, but also drew on some insight and facts relating to some of the other prominent anti-corruption agencies in South Africa. The research examined the SIU's independence, and in so doing examined the extent to which it enjoyed organisational, functional and financial independence and concurrently, the effect thereof on its ability to execute its respective mandate of combating corruption in South Africa.

The rationale of the study was motivated by a number of factors that include the local and global need for independent anti-corruption agencies as envisaged by international legal instruments like the UNCAC and Southern African Development Community (SADC) Protocol against corruption, to which South Africa is party to. It is evident too that the level

of corruption in South Africa is particularly high according to Uwimana (2016) on Sub-Saharan Africa, in Transparency International's Corruption Perception Index 2015, who points out that South Africa is one of the continent's powerhouses showing serious corruption with no improvement. Leadership and financial constraints in relation to the SIU have also been publicized. In addition, there appears to have been a number of Constitutional court challenges relating to enforcement agencies on their authority, independence and mandate amongst other things.

Some of these court challenges include that of the Presidency on the authority of the Public Protector; civil society against the Police Minister on the independence of the Hawks; Robert McBride, Anwar Dramat and Ivan Pillay on political interference relating to the removal of senior management from agencies like the IPID, Hawks and SARS (McBride, Dramat & Pillay, 2016). These constitutional court findings and precedents guide current practice and it is therefore critical that the manner in which South African agencies are organized, function and financed; must meet constitutional muster as well as international standards. In this vein, studies into the independence of South African anti-corruption agencies like the SIU, will be a critical step at seeking appropriate remedies and progressive guidance.

### **1.3 Background**

The predecessor to the SIU - the Heath Commission, was established in 1996 in terms of the Proclamation R72 of 1997. Subsequently, according to a Constitutional Court judgement by Yacoob J (2008), in *Chagi and others v Special Investigating Unit (CCT 101/07) [2008] ZACC 22*, the then Head of the Heath Commission, Judge Willem Heath, had to step down as a result of the ruling that a sitting Judge could not be the Head of the SIU. As a result, the SIU was established in 2001 by virtue of Presidential Proclamation R118 of 2001 (RSA, Proclamation R118, 2001) which repealed proclamation R72 of 1997 (RSA, Proclamation R72, 1997) that established the Heath Commission. The SIU was headed by then Presidential appointment: William Andrew Hofmeyr. The Unit grew from a staff compliment in 2001 of sixty seven members to currently more than five hundred (Walker, 2013). The SIU over the years since 2001 has made contributions towards the investigation of fraud, corruption and maladministration within and against the public sector.

The SIU was able to facilitate prompt prosecutions through a multi-agency approach with the Scorpions/Hawks and National Prosecuting Authority, make disciplinary recommendations against public servants suspected of having defrauded the public sector; as well as recover ill-begotten gains from identified fraudsters and corrupt public servants (Somiah, 2016). On the 09<sup>th</sup> December 2011, President Zuma by way of General Notice 899 of 2011 published in Government Gazette No. 34849 removed Hofmeyr as Head of the SIU and appointed Willem Hendrik Heath as Head of the SIU. According to Hawker (2015) however, barely a month later, due to some controversy around his public comments relating President Mbeki and Zuma, Heath resigned.

Yet again, the SIU was without a Head at which point, President Zuma announced Advocate Nomgcobo Jiba as the Head of the SIU. Barely weeks later however, Advocate Nomvula Mokhatla was appointed as Acting Head of the SIU in terms of General Notice 196 of 2012 published in Government Gazette No. 35136. Subsequently, in an AllAfrica.com article “*SIU Head – 19 months and waiting*”, the Shadow Deputy Minister of Justice and Constitutional Development, Schafer (2013) indicated that it had been nineteen months prior to July 2013 that Advocate Nomvula Mokhatla had been acting in the position as SIU head having been formally appointed by President Zuma after Hofmeyer, the previous Head of the Unit, had returned to the leadership of the Asset Forfeiture Unit within the National Prosecuting Authority. The appointment and tenure of Adv. Mokhatla as Acting Head for a period of close to two years, as well as the President’s delay in making a permanent appointment to the position of Head of the SIU, had attracted a huge outcry, public debate and criticism in the media.

In addition, and on its financial standing, Hartley (2012), in a Business Day article presented the dilemma faced by the SIU in terms of its funding crises as set out by the SIU’s Head of Corporate Governance and Risk Management: Advocate Gerhard Visagie. In an attempt to resolve this issue, Advocate Visagie advised that the SIU initiated and submitted a Judicial Matters Amendment Bill in consultation with the Department of Justice and Constitutional Development (DOJ&CD), for an amendment to its founding legislation to enable it to bill departments for investigations conducted on its behalf, as previously; funding was obtained through baseline funding from the DOJ&CD as well as through cooperative “service-level agreements” between the SIU and the department under investigation (Judicial Matters Amendment Act 11 of 2012 – [the JMA Act]).

According to Hofmeyer (2007) in his presentation to Parliament's Standing Committee on Public Accounts (SCOPA) during the General report of the Auditor-General 2006/07; funding as a result of service level agreements contributed greatly to the SIU's budget, but the Unit wanted to limit its reliance on department's monies as not all investigations were the result of *cooperation* between the SIU and departments. In this case the SIU would place a reliance on National Treasury for additional funding. These situations had a negative effect on the SIU's financial independence and ability to investigate maladministration, fraud and corruption within and against government (Somiah, 2016).

The SIU's dependence on the DOJ&CD for its budget allocation, may be indicative of a lack of financial independence, as well as a dependence on various departments under investigation by virtue of service level agreements with the respective departments; hence its request for legislative amendments to enable it to charge departments for forensic services and, to compel departments to pay for SIU investigative services rendered (the JMA Act). The JMA Act has been enacted and now enables the SIU to charge for its services and compels departments or agencies to pay for the SIU's services and further requires of the departments or agencies rather than the SIU, to approach Treasury should they encounter funding problems to pay for the SIU's services. Although this development has enhanced the SIU's financial capability somewhat, delays and non-payment for services rendered by the SIU to government departments; have been encountered (Lubita, 2016). This development also did not eliminate the SIU's reliance on the DoJ&CD for its baseline budget.

In addition, the reliance on the President for the appointment of the Head of the Unit has already received a fair amount of criticism, in that the appointment is seen as political rather than independent. Further, delays by the President in the appointment of a permanent Head have an adverse effect on the Unit's independence and its ability to fulfil its mandate of investigating corruption (Tamukamoyo, 2013:16-17). In the article "*SIU Head – 19 months and waiting*" Schafer (2013) indicates that reports from members of the SIU suggest that Advocate Mokhatla appears to have lost all interest in the SIU, and that the consequences of her disastrous tenure were becoming more and more apparent. She went on to criticize the Presidency for not making a timely appointment of the SIU Head and insisted that it was "high time that the President complied with his obligation to appoint an SIU Head" urgently (Schafer, 2013).

The overwhelming criticism of the President by the media as well as opposition political parties in respect of the timely appointment of a permanent head for the SIU gained momentum and

eventually led to the appointment of Advocate Vasantraï Soni: Senior Counsel (SC) in October 2013 (RSA, Government Gazette 36940, 2013). Based upon the abovementioned issues and concerns, the issue of the independence of anti-corruption agencies in South Africa, especially the SIU cannot be ignored. It is for this reason that this study seeks to interrogate the extent to which the SIU actually enjoys the degree of independence required of it to function effectively as an anti-corruption agency.

The Jakarta Principles provide some basis as to the composition of anti-corruption agencies and further, proposes guidelines that could assist in securing the independence of anti-corruption agencies. This study therefore sought to analyse the SIU as an anti-corruption agency focusing specifically on its organisational, functional and financial independence in the execution of its mandate, by reviewing the Unit's current legislative form and mandate in relation to Chapter 9 institutions and, the level of independence that should be expected of an institution set up as an anti-corruption agency. International insights and perspectives on anti-corruption agencies were also sought and reviewed in relation to the South African context.

## **1.4 Conceptual Framework**

### **1.4.1 Corruption**

Corruption is certainly no new phenomenon. In fact Bosman (2012:6) points out that one of the most famous cases of corruption in antiquity in as early as 399 BC, was that of Socrates who was brought to trial in an Athenian court, found guilty and condemned to death for allegedly "not recognizing the gods the city recognizes,... introducing new divinities,... and corrupting the youth". The essence of the indictment against Socrates was that he taught subversive ideas that corrupted the minds of his pupils which would purportedly lead to the so-called grave consequence of irreverent and politically irresponsible actions and, cause intergenerational conflict in the city.

Current legislation governing corruption is much more specific than what prevailed in as early as 399 BC and the punishment is most certainly not death. In fact thus far, of the corrupt in society or at least those that have seen their day in court like the ex-National Commissioner of Police: Jackie Selebi who received a 15 year jail term for corruption (Newham, 2012); have gotten off far more lightly in comparison to Socrates. In fact, Socrates actions in 399 BC when



measured up to the ‘current-day’ corrupt in society, would make him more of a Saint than a sinner. Progressively over the years however, corruption has certainly evolved and so too have methods and efforts by governments, aimed at curbing this scourge. Many such efforts have comprised the establishment of anti-corruption agencies or bodies to function in an investigative capacity, to identify, investigate and prosecute corruption.

A documentary and content analysis search was conducted for success stories from the international environment in terms of anti-graft structures, models and independence; from which South Africa could adapt, learn and develop, optimal independent institutions which would help strengthen Constitutional democracy in the country. Significantly, Marshall (2006:234), in the Role of Parliament in Curbing Corruption, suggests that “parliaments should promote the independence and adequate staffing of anti-corruption commissions and other specialized agencies” as they have the legislative authority to influence the provision of independence to anti-corruption agencies.

While the South African Development Community (SADC) Protocol against corruption provides an in-depth definition of acts corruption in Article 3 of the SADC Protocol (2001:2-3), it defines corruption as “any act ... [including] bribery or any other behaviour in relation to persons entrusted with [public office] responsibilities ... which violates their duties as public officials ... [for the purposes of] obtaining an undue advantage of any kind for themselves or others”, Bosman (2012:2) simply describes corruption as “the abuse of a public or an official position in one’s own interest”. In the South African context, section 3 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 creates and defines the general offence of corruption simply as, the giving or receiving of a gratification for acting inappropriately. Although this Act provides an extensive breakdown of this definition, the difference that can be concluded between the two former and latter definitions is that while the two former definitions place specific emphasis on persons of public office, the latter lays emphasis on “any person”. This means that both private and public persons may be implicated in corruption. This is evidenced by the State’s conviction of a private person, Schabir Shaik for corruption in *S v Shaik and Others (CCT 86/06) [2007] ZACC 19; 2008 (2) SA 208 (CC); 2007 (12) BCLR 1360 (CC); 2008 (1) SACR 1 (CC)*. As a result a surmised definition of corruption can simply be construed as, the giving or receiving of *any gratification by any person* in exchange for any inappropriate act related to state functions.

### 1.4.2 Institutional Independence

Hussman, Hechler & Penailillo (2009:29) in referring to the three categories of institutional independence as identified by the Institute of Supreme Audit Institutions (INTOSAI), recognises organisational, functional and, financial independence as key categories. These they define as:

- **“Organisational Independence:** refers to the least possible degree of government participation in the appointment of authorities, implementation of functions and decision-making.
- **Functional Independence:** refers to ensuring that the agency can carry out its functions without the undue interference of any third party or the executive.
- **Financial Independence:** refers to the impossibility of the government to impede or restrict the agency’s activities by reducing its budget and/or budget of other associated agencies”.

Hussman *et al.* (2009:21) further point out that although these conceptual definitions relate to Supreme Audit Institutions (SAI’s), they are in fact broadly applicable in understanding the forms of independence relating to preventative agencies in various political and legal contexts. It is therefore evident that in the context of this study, the independence of anti-corruption agencies refers to institutions that are autonomous, not subject to the influence, control, action or jurisdiction of others in the execution of its work. Interestingly, on independence, Kuris (2012) argues that while it matters:

“it is neither necessary nor sufficient for such independence to be formally built into the agency’s structure within the government system. Rather, independence depends upon carefully drafted rules, especially for the selection and removal of agency leadership”.

This study has drawn on significant insight from the following main source in relation to the core focus of this research being the independence of anti-corruption agencies: *“The South African Anti-Corruption Architecture”*, published by the Basel Institute on Governance: International Centre for Asset Recovery (Pereira, Lehmann, Roth, Attisso, 2012). The significance of this document was its key findings and recommendations as a result of its mandate by the German Federal Ministry for Economic Co-operation and Development to implement the Public Service Reform Programme in South Africa. Due to the fact that amongst other areas, the Public Service Reform Programme, according to Pereira *et al.* (2012:8), supports the effective implementation of the national anti-corruption programme of South

Africa, and since there have been an addition of new organisations and structures to the institutional framework in 2011, research was deemed necessary with an aim to conduct an in-depth analytical study of the anti-corruption architecture in South Africa.

Chapters 3, 4 & 5 of the study by Pereira *et al.* (2012) has offered great value to this research as it analysed the international framework which explores different models of single and multi-agency approaches for the anti-corruption framework, South African legislation and the structure of its anti-corruption framework, and it further presented an overview of different country models and their anti-corruption framework. This study focused on three of the nine key findings, and one of the eight recommendations made by Pereira *et al.* (2012:9) as follows:

**Key Findings:**

- The Constitutional Court's ruling in respect of the need for an independent anti-corruption body with structural and operational autonomy;
- South Africa's comprehensive anti-corruption architecture composes of a range of important institutions which address corruption from different angles; and
- The rules and regulations are sometimes unclear and not transparent and therefore undermine the effectiveness of the anti-corruption architecture of South Africa and hinder the independence of the anti-corruption institutions.

**Recommendation:**

- Ensuring the independence and impartiality of the institutions comprising the anti-corruption architecture of South Africa.

Despite the above key findings and recommendations, Peirera *et al.* (2012:8) clearly pointed out that South Africa's multi-agency anti-corruption model was however, fully compatible with applicable international standards and in line with good practice of other comparable countries. The Anti-Corruption Task Team (ACTT) established by the Presidency during 2010, is a typical example of this type of model. Heilbrunn (2006:135) on Anti-Corruption Commissions, in the Role of Parliament in Curbing Corruption; presents a view that South Africa's multi-agency anti-corruption model may, in fact, prove effective when he indicates that "numerous governments have adopted anti-corruption commissions despite growing evidence that such commissions fail to reduce corruption". However, in a later elaboration which supports the focus of this study, he further indicates that "evidence of dysfunctional anti-corruption

commissions is manifest in the numerous agencies that lack independence from the executive” (Heilbrunn, 2006:135).

Similarly, Van Vuuren (2008:67), a member of the Institute for Security Studies, at the third National Anti-Corruption Summit; held the view that South Africa did not need a single anti-corruption agency given the current political environment. His view was that South Africa should proceed with its ‘multi-headed dragon’ (multi-agency) approach due to its significant investment on advanced legal frameworks, strategy and institutions mandated to combat corruption. In hindsight however, he later pointed out that; South Africa did need an ‘*independent*’ anti-corruption agency free from political meddling; quoting the location of the Hawks under the SAPS as having the potential of attracting interference from the executive, in high profile cases.

## **1.5 Research problem**

In an Internet Online article De Lange (2012) presents Paul Hoffman SC’s view that South Africa was failing as a State and therefore urgent corrective steps were necessary to address the influx of corruption. This coupled with flawed appointment processes by the President of heads of the SIU as pointed out by in a Kgosana & Eggington (2011) in a Timeslive article; and, public condemnation of the Public Protector’s office by various senior government officials and other individuals of the political elite within the ANC as reflected on the Constitutionally Speaking website (2014), has lent significant momentum to a barrage of public criticism relating to the precarious situation of anti-corruption agencies in South Africa including the Hawks, the Public Protector and the SIU. Newham (2012), in a Moneyweb article, further points out that South Africa was not only obligated to have an anti-corruption agency that was structurally and operationally independent, it also had to be seen as independent by the public.

The issue of the independence of the SIU surfaced during the recently criticized appointment of the Head of the SIU, as well as the recent legislative amendments regarding the Unit’s funding (RSA, Judicial Matters Amendment Act 11 of 2012). As a result of developments, relating to the delay in the appointment of the SIU head and its effect on operations, as well as some of its politically sensitive investigations, there have been some arguments relating to the

independence of the SIU. Additionally, the SIU's status of its investigation into the highly publicized and often criticized Nkandla security upgrades at the President's private residence, changed from completed, to ongoing on the SIU's website, just before the May 2014 general elections (News24, 2 April 2014). Other incidents include the delayed and controversial appointment of the Head of the SIU (Schafer, 2013), and legislative amendments (Reeves 2012:23).

The research question that arose therefore was whether the Special Investigating Unit enjoyed sufficient independence as required of an anti-corruption agency in South Africa. The study therefore sought to encapsulate attempts at determining the degree of deviation in the levels of independence within the Special Investigating Unit comparatively, to some of the other established anti-corruption agencies in South Africa. Additional terms of references for this research were the key findings and specifically the recommendation made by Pereira *et al.* (2012) for South Africa to ensure the independence and impartiality of anti-corruption institutions, as well as the recent Glenister III (2014) judgement on the matter of the *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others, CCT 07/14 and CCT 09/14*. This case related to the placement of the Hawks within the SAPS and the Constitutional court's ruling that South Africa needed an independent anti-corruption body with structural and operational autonomy.

As a result, the emerging question or concern was whether the SIU, as a key role-player in anti-corruption, mandated through its enabling legislation the SIU Act, enjoyed the independence and autonomy required of an anti-corruption agency. The results of this study aims to indicate whether the SIU's organisational, functional or financial independence is in line with what is required for it to function as an anti-corruption agency. It is assumed that should the results of this research present evidence that the SIU was sufficiently independent, then this would indicate that there were no impediments to the functioning of the SIU as a statutorily independent, anti-corruption agency. These aspects will be elaborated on further in a later chapter during the analysis and interpretation of the research data.

## **1.6 Objectives of the study**

The objectives of the study are:

- To assess the nature and the level of independence of the SIU and the challenges thereof;
- To compare the SIU's level of independence in relation to other anti-corruption agencies in South Africa;
- To determine what the international standards and practices are in terms of the establishment and mandates of anti-corruption agencies;
- To establish the level of compliance by South Africa in terms of its international multi-lateral anti-corruption obligations; and
- To make recommendations based on the research findings on the degree of independence which is incumbent of an anti-corruption agency in South Africa.

## **1.7 Research Questions**

The research questions guiding this investigation are:

- What is the level of independence of the SIU and the challenges thereof?
- Examine the SIU's level of independence in relation to other anti-corruption agencies in South Africa.
- Identify what the international standards and practices are in terms of the establishment and mandates of anti-corruption agencies.
- Determine the level of compliance by South Africa in terms of its international multi-lateral anti-corruption obligations.
- What recommendations, based on the research findings on the degree of independence which is incumbent of an anti-corruption agency in South Africa, can be made?

## **1.8 Research Design and Methodology**

This study comprised of an empirical study as it entailed a qualitative case study approach to study the independence of the selected institution through a comprehensive qualitative literature review and semi-structured interviews which were targeted to all 32 SIU managers nationally with the aim of securing responses from the total population of managers responsible

for the supervision, coordination and operational execution of SIU mandated investigations. Although the geographical area of the research was not restricted to Gauteng, but extended to SIU managers nationally, availability and access to managers around the country became problematic.

As a result however, the bulk of the research participants that responded, were from the Pretoria office as they could be easily accessed and reminded to complete the questionnaire. The response rate was 12 of the 32 managers, or 37% of the total population sample. This represented at least one-third of the total operational management population in the Unit. Accessibility problems to some respondents outside of Gauteng resulted in the semi-structured questionnaires being emailed to the participants upon which telephonic interviews for further clarification, were held based on the questionnaire. Participants were requested to document their responses on the emailed questionnaire and return them via email. These responses were then retrieved via email and collated and indexed using anonymous, avatar detail e.g. SIU-1 to SIU-12, and archived for later analysis and interpretation.

The managers were selected using non-probability, purposive sampling as the participants had to have been knowledgeable and competent to provide specific detail of their on-the-job experience relating to independence in the execution of the Unit's mandate. Semi-structured questions were posed to the participants to elicit real-life experiences pertaining to the independence or lack thereof within the SIU. Questions and the recording of responses did not contain personal details of the respondents in order to maintain anonymity and to ensure that they would be more open and amenable to providing objective responses. A case study approach was used to specifically analyse, the independence of the SIU. Participants were given the assurance of confidentiality in respect of their responses.

The objective in using this case study and action research approach was explicitly "directed at understanding the uniqueness and idiosyncrasy" of the independence of the SIU in all its complexity as suggested by Welman & Kruger (1999:190); and what should also be borne in mind, is the fact that information sourced from an expert need not necessarily be accepted unilaterally without first examining such evidence or information. He goes on to argue that we may even call on the opinion of friends or peers to obtain knowledge instead of experts (Welman & Kruger 1999:2-3).

In addition, by virtue of the researcher being a member of the SIU and with the associated first-hand access to day-to day operational exposure, information and research participants,

participant observation was also utilised to document specific and, day-to-day observations between 2014 and 2016; on the composition of the Unit and how it operated as an anti-corruption agency. As a member of the Unit, the researcher also adopted the action research approach as a reflective practitioner to source relevant information from within the Unit. Reason and Bradbury (2001) describes action research as a “participatory, democratic process concerned with developing practical [knowledge] ... in pursuit of worthwhile human purposes” which seeks to bring together “action and reflection, theory and practice, in participation with others, in pursuit of practical solutions to issues of pressing concern to people” for the purposes of enhancing such persons and communities. Where possible, efforts were made to obtain primary sources of information instead of secondary sources, this by way of interviews, participant observation, and action research. .

Relevant documents were analysed using content analysis by searching for key themes and words relating to the independence of anti-corruption agencies. The information retrieved from literature and other sources, but more especially from members of the SIU, through the semi-structured interviews and questionnaires were subject to stringent internal and external criticism. This was mainly due to the view that members would either attempt to protect the interests of the SIU by being biased, or criticize the SIU’s current level of independence to force intervention from the respective authorities as it would be in their own interests as members of the Unit to secure a higher degree of independence which would, in turn, secure their tenure of service in the SIU. The caution here was therefore that the respondents could be more subjective than objective in their responses. Respondents selected first had to fit the profile of having adequate knowledge and experience within these organisations to be able to provide informed responses to the questions (Welman, Kruger & Mitchell, 2012:63).

The questions in the semi-structured questionnaire focused squarely on three aspects of the independence factor of the SIU, namely: organisational, functional and financial independence.

## **1.9 Data collection**

An extensive literature review was conducted to gather academic insight into the area of study and to conceptualize the problem. Academic insights from the literature review were reviewed against the results of personal insights and real-life experiences derived from the questionnaire



to provide meaningful data that served to address the research problem. The study was both empirical and non-empirical comprising of a qualitative and quantitative review of data relating to the independence of anti-corruption agencies and, specifically; the SIU.

An empirical qualitative approach was utilized to obtain primary data. A minimum of five years' experience within the organisation served as criteria for the research participants. With the fourteen year existence of the SIU, participants with experience within at least this period of time were deemed to be able to present practical insight into the SIU's independence and the effect thereof on the execution of its functions and mandate. The non-probability, purposive sampling technique used to select the candidates for the interviews was based on the presumption that they manage and therefore influence, and are involved in investigative operations, the execution of which, requires a certain degree of independence. A semi-structured questionnaire circulated amongst all 32 managers of the SIU with a view to obtaining responses of at least one third of the total population. Of these 12 SIU managers responded. With easy access to the research participants, the questionnaires were administered to participants both personally for members within the Pretoria office, and via email to members at the regional offices as this served to minimize the cost of the research due to problems with accessibility of some participants.

It is important to note that as a member of the SIU since 2005 and progressing through the ranks from Chief Forensic Investigator to management over the years, the researcher was in a unique position to allow for the first-hand experience and observations of the Unit's operational environment which provided relevant information and data on the Unit's progressive operational evolution. As a result, the researcher also employed an action research, reflective practitioner approach in the gathering of information and data relevant to the research which essentially entailed working with practitioners through partnership and participation as envisaged by Huang (2010:93) who presents action research as "an orientation to knowledge creation that arises in the context of practice, and requires researchers to work with practitioners".

Critically, this type of research in the context of analysing the SIU's independence as an anti-corruption agency, is not only intended at understanding the phenomenon of independence, but to also effect desired change as a path to generating knowledge and empowering stakeholders, like the SIU as an organisation in the anti-corruption realm; as to the appropriateness of the independence it enjoys as an anti-corruption agency.

In taking on the role of a reflective practitioner, participant observation was employed which resulted in the extensive use of notes and observations within the Unit. This documented process unfolded between the years 2013 and 2016, and resulted in the production of rich texts that documented day-to-day observations and developments, which were used in the write up of this research. This method revealed valuable first-hand, primary data which offered some support to primary data obtained from the interviews questionnaires. For the purposes of this study, the observation notes were categorized and captured against the three dimensions of independence namely: organisational, functional and financial.

It is important to note here that:

- the SIU did not fund this investigation;
- Ethical standards were maintained in terms of sensitivity of information;
- Names of respondents are provided only where they have agreed; and
- The information interrogated in this investigation does not compromise the legality or confidentiality of ANY of the cases investigated by the SIU;
- No case-sensitive information not already forming public record, has been discussed.

Additional data was sourced through semi-structured interviews with an ex-Programme Manager of the SIU to provide some historical context to the SIU's operations and obstacles during its early teething days. Follow-up, clarification interviews were also conducted with a Senior Forensic Lawyer for additional context to the SIU's operations.

The research also entailed the use of an empirical design through which secondary data was gathered through a qualitative, content analysis approach by reviewing media publications, on-line articles, legislation, academia, government publications and other relevant literature. The main source of data for this research was however, the primary data obtained from the interviews as it was envisaged that these personal insights would provide valuable answers otherwise not available amongst literature. This was as a result of minimum academic research having been conducted into the independence of anti-corruption agencies in South Africa. The results of these two processes were then meaningfully interpreted to provide insight on the focus of this study.

## 1.10 Research Limitations

There were two main limitations to this study. The first related largely to a very limited pool of documented and published articles and/ or research on the issue of anti-corruption agencies, especially in regards to the South African context. The second limitation, which had a profound impact not only on the scope but duration taken to complete this investigation, can only best be understood through a documentation of the journey towards obtaining permission.

Having initiated the research during early 2013, the researcher commenced with a comprehensive literature review assuming that the obtaining of primary data through interviews with members of the SIU would not prove a challenge. The researcher's confidence was based on the fact that permission for previous similar academic research on anti-corruption was given by the then Acting Head of the SIU, Advocate Nomvula Mokhatla. As the research progressed however, and on seeking permission in writing during early 2014 from the newly appointed Head of the SIU Advocate Vasantraï Soni SC, the researcher was met with an obstacle, in that the Head of the SIU raised concerns relating to the confidentiality of information that would be obtained through the required research interviews.

Despite negotiations with the Head, by providing a list of the proposed questions along with an indication that the research would not entail extracting any operationally sensitive material, the permission sought was not forthcoming. As a result, the researcher was forced to revisit the research focus to an alternate anti-corruption agency. The researcher then, in an attempt to marginally shift the focus of the study, sought permission in writing, from the Head of the DPCI, General Anwar Dramat. Unfortunately, no response was received to this request.

What became apparent to the researcher was that despite the media and societal outcry relating to the prevalence and effects of corruption in South Africa and the increasingly overwhelming criticism of the independence of its anti-corruption agencies, both agencies directly affected by the criticism, evidently failed to see the potential of research in this area with a view to effectively adding value or contributing positively towards South Africa's anti-corruption efforts, as well as to the independence of its anti-corruption agencies. In hindsight however, perhaps both agencies perceived this type of research to be a threat to their very existence.

This study was therefore stalled midway and the research focus and data collection methods initially envisaged, had to again be reviewed and revisited. However, still intent on the research problem of the independence of anti-corruption agencies, it was decided that the research would continue with a study of the independence of the SIU based on an in-depth literature study, using a grounded-theory approach. Predominantly, a comprehensive literature study was followed with this research with a focus on researching publicly available material including annual reports, departmental reports, parliamentary reports, government publications, legislation, the mass media, journal articles, articles, academia, and other available literature relating to anti-corruption agencies.

Coupled with this, it was observed that the SIU, over recent years, had experienced increased staff turnover at senior levels, generally due to better job opportunities outside the SIU, and therefore it was decided that semi-structured interviews could be conducted with ex-SIU members who had occupied management level positions within the Unit prior to their departure. This data collection method however, would have had to be approached with caution as the possibility of bias did exist where members may have left the SIU as disgruntled staff. The questions therefore had to be structured in such a way that biased responses were minimized or completely eliminated.

The essence of the research, including the motivation and rationale therefore, did not change significantly as the focus was still on the independence of the SIU as an anti-corruption agency in South Africa; although the population sample had changed slightly.

In 2015, the Head of the SIU was approached again in a final desperate bid to obtain the requisite permission to conduct research within the Unit. Permission was granted by Advocate Soni. This approval however came along with interesting perspectives for consideration during the course of the research. Without intending to interfere with the research approach, Advocate Soni (2015) punted the following aspects as having some significance to the research:

“First, having regard to the principles governing our constitutional dispensation and the applicable statutory measures, is the SIU required to be independent. Second, having regard to the manner in which it has gone about fulfilling its statutory (and constitutional) mandate, is the SIU independent (as it should be on a proper interpretation of the applicable principles and statutory measures). Third, is the SIU seen, by those who are to be interviewed, as independent”.

These perspectives warranted some thought processing and revealed themselves to be relevant to this research and were therefore incorporated into the research questionnaires which were to be administered to SIU managers by way of semi-structured interviews, to extract qualitative data.

### **1.11 Data analysis**

The data sourced from literature including books, legislation, reports, on-line articles and academic papers, websites and other statistical data was analysed using content analysis by searching for keywords, themes and their frequency, relating to the independence of anti-corruption agencies. Main concepts and themes from various academia and publications were collated onto excel and indexed for use in the study. Participant observation notes were transcribed from hard copy to electronic format in the three dimensions of independence and subsequently analysed according to frequency and relevance to the research. The responses from the questionnaires were collated in typed format and thereafter populated on Microsoft excel (See Appendix 1) where after the data was analysed according to the frequency of responses relating to specific themes, namely: organisational, functional and financial independence. The interview questions were semi-structured, prompting real-life practical responses from the participants.

### **1.12 Summary of Chapters**

Having provided a brief overview, background and the methodology to be followed to address the research questions, a literature review unfolds in Chapter Two which serves to provide a conceptual framework for anti-corruption agencies both in a national and international context.

Chapter Three provides a case study analysis of the legislative framework within which the SIU works, its mandate, current structural and institutional form, resource and skills capacity. Further, it covers an analysis of the SIU's independence in relation to the prescripts governing the SIU's mandate and operations in relation to its organisational, financial and functional

independence by interpreting the results of the case study research within the organisation, in conjunction with applicable documents, academic writing and other relevant literature.

Chapter Four presents the results of the content and documentary analysis as well as interviews with the selected managers within the SIU, which was analysed and interpreted in the context of the research to provide responses to the research questions that have guided the study.

The research findings and recommendations as well as the conclusion, is presented in Chapter Five. Here conclusions from the data interpretation and other pertinent inferences and information relating to the level of independence experienced currently in the selected anti-corruption agency, as well as some recommendations are offered, towards enhancing the independence of anti-corruption agencies in South Africa.

## **Chapter 2: Conceptual Framework for Anti-Corruption Agencies**

### **2.1 Introduction to Corruption in South Africa**

Pring (2015:2) notes that corruption has increased significantly over the last year within South Africa. Pring's comments form part of an Afro-Barometer Report which emphasises an increase in powerlessness amongst citizens, combined with increased levels of corruption, poor government responses to reported cases of corruption and poor perceptions by citizens of government responses to the prevalence of corruption. These poor perceptions seem to emanate from a deep-rooted deficiency within South Africa's institutions tasked with an anti-corruption mandate. Accordingly, Tamukamoyo (2013:19) warns that although South Africa has a laudable anti-corruption framework, positive results will only materialize in the fight against corruption if anti-corruption agencies are insulated from political interference and when independent people of unquestionable character are appointed to head such agencies. This sentiment is further collaborated by one of South Africa's opposition political parties, the Democratic Alliance (2015:21) which, in its paper on 'Defending our Democracy', pointed out that it was critical that any democracy protects its institutions to enhance their effective functioning and their independence regardless of who is heading up the executive.

Research according to Pring (2015:6), points out that more than 83% of South Africans surveyed alluded to perceptions of increased corruption over the preceding 12 months while 79% thought "poorly of their governments' anti-corruption efforts with around four-in-five saying that their government was doing badly in fighting corruption (Pring, 2015:11). In a prior period however, Richmond and Alpin (2013), in the 2011-2013 Afro-Barometer Report, found that 66% of South Africans rated the government's handling of the fight against corruption as 'fairly or very badly'. This in essence represents an increase of 13%, from 66% during 2011-2013 to 79% in 2015 of South Africans who thought their government's anti-corruption efforts were poor.

In response to the prevailing situation, Pring (2015:2) calls for government to take more action against corruption. Pring's call is supported by Mantzaris (2016:63) who warns that corruption may be difficult to conquer or combat once it has reached endemic proportions. As a result, it

is important for government to act in response to this deepening crisis in consideration of the poor perceptions that citizens have of government.

## **2.2 Anti-Corruption Agencies in an International Context**

According to Kuris (2012:1), the need to manage corruption in the post-Cold War era, prompted the need for an international agenda on corruption. Consensus was reached in relation to the resultant effects of corruption on development with significantly varying responses to corruption in countries establishing specialized anti-corruption agencies. Kuris (2012:1) points out further that this consensus was “reflected in the priorities of [many, including: academics,] international donors and in the mandates of international law”.

The UNDP (2009:5) has noted that there has been acceptance that anti-corruption efforts are necessary, which has led to the emergence of a number of anti-corruption agencies as well as associated trends relating to such bodies. Some successes include the multi -purpose agencies of Hong Kong, Singapore, and Botswana. However, it must be noted that efforts to replicate these successes by other countries, and to promote the “formula of specialized multi-purpose agencies, have been largely disappointing” (UNDP, 2009:5). These sentiments are echoed by Camerer (2008:6) whose view was that many established dedicated anti-corruption agencies in Southern Africa were often “regarded as ineffective”. In fact, the UNDP’s interpretation of Article 36 of the United Nations Convention Against Corruption (UNCAC) requirements, is that anti-corruption bodies or agencies need be neither multi-purpose, nor specialized, nor singular (body or bodies). The emphasis is rather on the provision to these bodies or body of, ‘the necessary independence to enable the execution of functions free from undue influence’ (UNCAC, 2004:10).

Anti-corruption agencies, as suggested by the OECD (2008:31) are generally grouped into three models: multi-purpose with law enforcement powers; law enforcement type (single-function); and preventative, policy development and co-ordination institutions. In this regard, single-function agencies have investigative responsibilities while multi-purpose agencies operate with two or more (usually all) of the full range of anti-corruption functions identified by the OECD (2008:9) as follows:

- Policy development, research, monitoring and co-ordination;



- Prevention of corruption in power structures;
- Education and awareness raising; and
- Investigation and prosecution.

The current trend with anti-corruption agencies however, according to Chene (2012:2), appear to have originated with that of Singapore's single-function Corrupt Practices Investigation Bureau (CPIB) and Hong Kong's multi-function Independent Commission Against Corruption (ICAC). Whilst the international community sought out successful reforms against corruption, these two agencies appear to have withered the storm as solid "replicable" models that transformed their respective countries into "highly respected havens of transparency and lawfulness" (Kuris, 2012:3). Kuris (2012:3) further points out that as models that stood out amongst the international communities, these two agencies that "survived and gained strength" whilst others faded into "*irrelevance*"; demonstrated three critical assets including "political commitment, resource, and structure".

Interestingly, Kuris (2012:3) links these assets as having 'contributed to three factors of success [including] strength, independence, and sustainability'. The critical factors were that a strong and independent agency had the potential of influencing transitions in societal ideology into canvassing for anti-corruption reforms. This becomes difficult however without "working complementary institutions and conditions" that are conducive, "such as a political opportunity" amongst other things, which often presents itself through 'a scandal or economic crisis to which corruption contributed'. Similarly, the OECD (2008:10) points out that whilst some of the established criteria for effective anti-corruption bodies include "independence, specialization, adequate training and resources," the key prerequisite for the independence of these agencies is, a "genuine political will" to fight corruption.

### **2.3 Legal Instruments on Anti-Corruption**

As a result of the recognition of corruption as a subject of international concern, several international organisations including the United Nations, the Council of Europe, the Organization for Economic Cooperation and Development, the Organization of American States, the African Union, and the European Union, have collaborated at various stages, since the 1990's, to establish a multitude of legal instruments on corruption to address "common

standards for addressing corruption at the domestic level through its [criminalization], enforcement of anti-corruption legislation,” and prevention (OECD, 2008:18-19).

A common thread in some of these international legal instruments, comprising guidelines, treaties and conventions, was that of *independence* or the strengthening of bodies or agencies charged with tackling corruption. This thread as tabulated hereunder in Table 2.1.

**Table 2.1: Legal Instruments on Anti-Corruption**

ORGANISATION	REGIONAL / INTERNATIONAL LEGAL INSTRUMENT	YEAR	REFERENCE	GUIDELINES ON INDEPENDENCE OF ANTI-CORRUPTION BODIES/AGENCIES
Inter-American Convention	Inter-American Convention against Corruption	1996	Article III	Create, maintain and strengthen oversight bodies charged with preventing, detecting, punishing and eradicating corrupt acts
Council of Europe	Twenty guiding principles for the fight against corruption	1997	Principle 3	Ensure that corruption agencies or bodies enjoy the independence and autonomy appropriate to their functions and, are free from improper influence.
Council of Europe	Council of Europe Criminal Law Convention on Corruption	1998	Article 20	Entities specializing in the fight against corruption shall have the necessary independence in accordance with their legal system.
South African Development Community (SADC)	SADC Protocol against Corruption	2001	Article 4	Create, maintain and strengthen institutions responsible for implementing mechanisms for preventing, detecting, punishing and eradicating corruption.
African Union (AU)	AU Convention on Preventing and Combating Corruption	2003	Article 5	Establish, maintain and strengthen independent national anticorruption authorities or agencies.
United Nations Convention against Corruption (UNCAC)	UN Convention against Corruption	2004	Article 6 & 36	Grant anti-corruption bodies the necessary independence in accordance with their legal systems, to enable the execution of functions free from undue influence.

**Source: Adapted from OECD (2003:6-7)**

The Table emphasizes the prescriptive guidelines to member countries, presented by these international organisations on the establishing and maintaining of agencies or bodies charged with dealing with, and eradicating corruption; with amongst other things, a strong focus on independence.

## **2.4 South Africa's Legislative Framework Governing Anti-Corruption Obligations**

South Africa has a strong legislative framework for combating corruption (Pillay 2014:56). Coupled with a strong legislative framework, are anti-corruption strategies and policies. Additionally, South Africa is party to various international conventions and protocols which imposes certain obligations on the country as a signatory thereto. These obligations will be discussed briefly, in this chapter. Whilst there are many pieces of legislation in South Africa that either directly or indirectly support South Africa's key piece of anti-corruption legislation, the Prevention and Combating of Corrupt Activities Act 12 of 2004 (RSA, the PACOCA Act, 2004) , is the main guiding document beyond the Constitution. For the purposes of this investigation, this research will focus specifically on the provisions of the Constitution, and the PACOCA Act. These, this dissertation argues, impose an obligation on South Africa to enhance its anti-corruption initiatives as well as institutions mandated with combating corruption.

Section 181 of the Constitution (RSA, Constitution, 1996b) makes provision for the establishment of institutions that support Constitutional democracy. Given that South Africa was on the verge of a constitutional crisis as a result of the undermining of democratic institutions (Democratic Alliance, 2015:1); the prevalence of corruption and its damaging effects on democratic principles and values, and economic development, efforts and initiatives aimed at combating corruption need to be guided by the constitutional imperatives. In order to provide some basis for the legislative discussions and arguments, it is important to highlight the role and findings of the Public Service Commission (PSC) from as early as 2001.

### 2.4.1 Public Service Commission (PSC)

According to the PSC Website (RSA, PSC, 2016), the PSC; is a constitutionally mandated national body responsible for “investigating, monitoring and evaluating the organisation, administration and personnel practices of the public service” and advising national and provincial organs of state accordingly. In its State of the Public Service Report on the aspect of the legacy of apartheid (RSA, PSC, 2001a:10-11), the PSC suggested that the “apartheid state created opportunities for corruption and mismanagement at every level [including] the stripping of public resources by low-level officials as well as structural social engineering that promoted the emergence of a society based on nepotism and exclusivity”. In the same report, the PSC argued that one of the *key* challenges at the time facing the public sector related to, amongst other things, combating corruption and maladministration, and improving service delivery.

In its earlier report on *A Review of South Africa’s National Anti-Corruption Agencies* (RSA, PSC, 2001b:3), the PSC found that “South Africa’s complex political economy [had] given rise to several forms of corruption”. One of the many alleged causes being the fact that the new historically disadvantaged social forces governed the country in a context where the state was being seen as a major mechanism for the accumulation of wealth. The PSC also found that there were several state agencies in place for combating and preventing corruption. However, there was a need for central coordination of these agencies activities to improve their effectiveness. The suggestion by the PSC was that the absence of such coordination was not enough to motivate ‘for the establishment of a single anti-corruption agency’. What is noteworthy however is the PSC felt at the time, that the establishment would be costly and undesirable especially where the more “pressing priorities” were amongst other things: job creation and poverty alleviation.

The significance of the above aspect is that despite the growing negative views, both locally and internationally, on the effects of corruption on economic development and the ripple effects thereof on the poor, the PSC still felt that, more pressing than considering setting up a single anti-corruption agency or assessing & strengthening the country’s anti-corruption capacity in response to the key challenge of combating corruption, was job creation and poverty alleviation. Considering Treasury’s conservatively estimated R30 billion lost annually in government procurement due to fraud and corruption (Tamukamoyo, 2013:10), it might have been prudent for the PSC to reconsider its stance on anti-corruption agencies as early as 2001,

as this may have significantly alleviated the predicament the country currently finds itself in. Thirty billion rand is a considerable amount of money to be lost annually to fraud and corruption and one can only imagine the substantial economic growth and the resultant positive spin-offs this amount of money would have had on job creation and poverty alleviation, had significant efforts to curb corruption started as far back as 2001.

Conversely, now in recent years, approximately 14 years later, it is clearly evident that the opportunities for corruption and maladministration including the stripping of public resources, nepotism and exclusivity found by the PSC (RSA, PSC, 2001b:10-11) to have been created by the apartheid state was not exclusively in such era, but has compounded and now exists, and is practiced, more blatantly in the government sector than ever before. This is affirmed by Corruption Watch (2014:5) in its 2014 Annual Report, in which they point out, that there is increasing evidence that:

“people across all spheres of life, including many holding positions in the government and the ruling party, are becoming more intolerant of the way in which corruption seems to have become a way of life, a method of transactional engagement that allows people to sidestep official channels”.

In order for government to have effectively dealt with the “pressing priorities” of job creation and poverty alleviation, in hindsight, perhaps it would have been prudent for them to have considered dealing with all obstacles to government functionality.

#### **2.4.2 The Constitution**

An extract of selected, but relevant aspects from the preamble of the Constitution (RSA, Constitution, 1996b), reads as follows:

“We, the people of South Africa, ... through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to ... establish a society based on democratic values, social justice and fundamental human rights; lay the foundations for a democratic and open society in which government is based on the will of the people ...; Improve the quality of life of all citizens...”.

Section 2 of the Constitution (RSA, Constitution, 1996b) clearly prescribes that the Constitution “is the supreme law of the Republic and that [any] law or conduct inconsistent

with it, is invalid, and that the obligations imposed by [the Constitution] must be fulfilled”. Over the years, public outrage regarding corruption has been gaining momentum (Ndungane, 2014:6). Corruption and its associated negative effects on society, economic development and democratic order can more often than not, be seen to go against several rights that are entrenched in our Constitution, namely: the right to equality, human dignity, life, environment, housing, health care, food, water, social security and education. It is important to note that the Constitution (RSA, Constitution, 1996b) protects the abovementioned fundamental human rights and therefore offences of corruption, which prejudices society’s rights, committed by public officials in their capacity as government employees, could render the State liable for damages. This is especially relevant if it is proven that the State failed to act, or acted negligently in implementing reasonable governance or control measures to prevent such occurrences. By implication therefore, and in terms of section 7(2) of the Constitution, the Constitution imposes a positive obligation on the State to adopt adequate measures to protect these fundamental human rights.

Public sector corruption hampers service delivery by diverting public funds from sorely needed public or community projects or purposes e.g. housing, schools, water and sanitation, healthcare and its effects on a person’s well-being. The rise in public service protests signifies the frustration felt by ordinary citizens, who may potentially be in a position to bring successful cases of Constitutional infringements against government. This notion is reinforced in a Constitutional Court judgement in *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee and Others [2014] ZACC 31* paragraph 13, wherein the court found that local government’s obligations “to provide basic municipal services” are sourced from both the Constitution and legislation. This compels the municipality to provide that part of society dwelling within its boundaries, with basic municipal services whether a contractual relationship existed, or not. The court found that the State had a constitutional obligation in terms of section 7(2) of the Constitution (RSA, Constitution, 1996b), to respect, protect and promote the rights of society and that where access to basic human rights including water and sanitation fail to exist where it once did; this may constitute a violation of fundamental rights.

In fact what precludes a group, or groups of citizens from bringing about a “*class action lawsuit*” against government in relation to the lack of service delivery as a result of collusive behaviour or unbecoming conduct of public servants which may result in a loss of state funds destined for specific services to the public? In essence, national and provincial government as

the custodian of state funds (derived from taxpayers – ordinary citizens), is according to the Auditor General South Africa (2013:56-57), compelled to account and to ensure that stringent processes are in place to manage and safeguard these funds and to expend same with due diligence under the public finance management regulatory framework. What needs to be proven is that either poor systems, or poorly managed systems as a result of negligence or intentional misdemeanour, existed that may have permitted the loss of funds with the resultant prejudice to the taxpayers.

In fact the Auditor General South Africa (2013:57) already acknowledges and highlights the common concerns raised, that relate to accountability of officials; and emphasises the need for consequences for poor performance, misappropriation and fraud; that leaders must take action and implement remedies appropriate to the transgressions; and that, everyone must play their part. Interestingly, in *Women's Legal Centre Trust v President of the Republic of South Africa [2009] ZACC 20*, Cameron in paragraph 17 of the judgement, highlights the significance of the Constitutional section 7(2) obligation on the State to respect, protect, promote and fulfil the Bill of Rights. Further, the focus on the “State” is heightened by section 8(1) of the Constitution (RSA, Constitution, 1996b) which “binds the legislature, the executive, the judiciary and all organs of state” with a Constitutional duty and “primary burden” to secure the fulfilment of the rights as contained in the Bill of Rights.

In this regard, Olaniyan (2014:275) makes an interesting observation that the case of the state's failure to secure the independence of the Hawks as an anti-corruption agency, as a failure by the State to fulfil the requirements of its section 7(2) Constitutional obligations. He further argues that the extent to which a court may be able to sufficiently address a complaint of corruption with a causal link to human rights violations, along constitutional guidelines; depends on the ability of victims to bring these complaints to the courts, Human Rights Commission or other relevant bodies (Olaniyan, 2014:275). Only in hearing these matters more frequently by applying legal principles and precedents will we realise the successes of matters of this nature. The emerging sense however in light of our legal principles, appears to be that success may well be inevitable.

To assist South Africa in maintaining a democratic state with democratic values, social justice and fundamental human rights, section 181 of Chapter 9 of the Constitution sets out some of the institutions that are expected to support constitutional democracy. The Constitution (RSA,

Constitution, 1996b) prescribes that “these institutions are independent and subject only to the Constitution and the law and [are expected to] be impartial and [to] exercise their powers and perform their functions without fear, favour or prejudice”. Other organs of state are expected “to assist and protect these institutions to ensure their independence, impartiality, dignity and effectiveness”. The Constitution further prescribes that no person or organ of state may interfere with the functioning of these institutions. The Constitution makes these institutions only accountable to the National Assembly.

In fact, considering the endemic proportions that the prevalence of corruption has reached and its resultant effect on society and subsequent infringements, *albeit* indirectly, of the constitutional rights of society, it might be necessary for Parliament/the National Assembly to give due consideration as to whether the institutions listed in section 181 as at 1996, are sufficient and/or efficient enough, to support constitutional democracy in South Africa. Consideration should therefore be given as to whether the Public Protector as an investigating body into the affairs of the state, should be fully entrusted with the anti-corruption mandate, in collaboration with the Auditor General and/or other statutory or departmental agencies, or whether an independent anti-corruption agency should be established in terms of chapter 9 of the Constitution to combat corruption in the country especially considering the effects of corruption on economic development and society at large and the associated infringements on constitutional imperatives (Antonie, 2013:3). Alternatively, consideration could be given to strengthen other entities which have an anti-corruption mandate through legislative amendments which could make additional provision for the purposes of enhancing the organisational, functional and financial independence. In this regard, *political will* would be key.

### **2.4.3 The Prevention and Combating of Corrupt Activities Act (PACOCA)**

The Prevention and Combating of Corrupt Activities Act 12 of 2004 (PACOCA Act, 2004) points out a number of aspects in relation to its purpose. Most significantly, the Act provides for “the strengthening of measures to prevent and combat corruption and corrupt activities”. The Act also serves to clarify the offence of corruption and further criminalizes several offences relating to corrupt practices. It also caters for investigative measures relating to corruption, the establishment of a Register to restrict persons and enterprises convicted of corrupt activities,



reporting obligations of corrupt transactions on responsible persons and, extraterritorial jurisdiction in respect of corruption and related offences.

At the onset, the Preamble of the PACOCA Act (RSA, PACOCA Act, 2004) makes first reference to the Constitution, to the effect that, “the Constitution enshrines the rights of all people in the Republic and affirms the democratic values of human dignity, equality and freedom”. The preamble goes on to point out that “the Constitution places a duty on the State to respect, protect, promote and fulfil all the rights as enshrined in the Bill of Rights”. This Constitutional duty on the State itself, should be the key driver of anti-corruption efforts and initiatives, but practical, efficient and effective reforms.

The preamble to the PACOCA Act (RSA, PACOCA Act, 2004:2-4) makes it clear and acknowledges that:

“corruption and related corrupt activities undermine the said rights, endanger the stability and security of societies, undermine the institutions and values of democracy and ethical values and morality, jeopardize sustainable development, the rule of law and the credibility of governments, and provide a breeding ground for organized crime”.

Corruption has an impact on human rights, stability, security, institutionalism, ethics, morality, development, the rule of law, and credibility of governments (RSA, PACOCA Act, 2004:2). This knowledge or understanding suggests support for a vigorous approach towards combating corruption in the country. Whilst South Africa’s efforts may have to some degree been somewhat progressive and according to Tamukamoyo (2013:11) appeared to be doing well in adhering to anti-corruption conventions and protocols more needs to be done.

The PACOCA Act also affirms South Africa’s commitment to compliance with some of its international obligations with the South African Development Community Protocol against Corruption (SADC Protocol, 2001) and the United Nations Convention Against Corruption (UNCAC, 2004). The PACOCA Act thus provides for a comprehensive anti-corruption legislation. The Act, by making reference to South Africa’s Constitutional obligations, also sets out its national and international obligations in terms of dealing with corruption and related offences both in the country, and abroad.

#### 2.4.4 Other relevant legislation

South Africa has a multitude of other legislation that bears some other relevance to corruption in terms of prohibitions and so forth. Corruption Watch (2015:7-19) elaborates on some of the other relevant legislation which is presented in tabulated format in Table 2.2 below.

**Table 2.2: Other Relevant Legislation**

ACT	YEAR	PURPOSE
The Public Service Act (PSA)	1994	The PSA provides for the organisation and administration of the public service and prohibits outside remuneration without permission, for public service employees. The Code of Conduct prescribes that Public Servants must act in the best interests of the public and honestly; in dealing with public money, and to report fraud and corruption.
The Competition Act	1998	Certain conduct prohibited by the Competition Act also amounts to corruption under the PACOCA Act, eg. where tender processes are manipulated by way of cover pricing or any other form of collusion in contravention of the Competition Act
The Prevention of Organised Crime Act (POCA)	1998	The POCA is aimed at combatting organized crime; money laundering; criminal gang activities and racketeering activities. These offences are often closely linked to corrupt activities. The POCA provides for the forfeiture of assets obtained through criminal activities.
The Companies Act	1998	It provides for mandatory establishment of 'social and ethics' committees which must monitor the companies' activities, including the company's standing in terms of the OECD recommendations regarding corruption. It also provides that disclosures of illegal activity can be made to a broader category of people and entities than under the Protected Disclosure Act. It also requires the maintenance of systems and procedures for facilitating whistleblowing. Those who disclose information in terms of the Companies Act are given immunity from civil, criminal and administrative liability for that disclosure.
The Executive Member's Ethic Act and Code (EMEA)	1998	The EMEA provides for the establishing of a code of ethics for members of the Cabinet, Deputy Ministers and members of provincial executive councils. The Code of Ethics prohibits MECS from: undertaking any outside paid work; acting in a way that is inconsistent with their office; exposing themselves to a situation of conflict between their public and private interests; using their position to enrich themselves or act in a manner that compromises the integrity of their office.

The Witness Protection Act (WPA)	1998	The WPA provides for procedures for the protection of those who are witnesses who are giving evidence in commissions of enquiry, tribunals and criminal cases. People who blow the whistle on corruption are only protected under the WPA if they are witnesses in criminal proceedings.
The Public Finance Management Act (PFMA)	1999	The PFMA sets out specific obligations on organs of state to investigate corruption within the sphere of public procurement. The PFMA is applicable to both national or provincial government departments.
The Protected Disclosures Act (PDA)	2000	The PDA creates a framework for employees to disclose information about criminal or other irregular conduct in the workplace, and provides for protection against any employment-related reprisals as a result of such disclosures
The Promotion of Access to Information Act (PAIA)	2000	The PAIA promotes transparency in Government, as well as in the private sector and regulates how to access recorded information from both public and private bodies.
The Promotion of Administrative Justice Act (PAJA)	2000	The Promotion of Administrative Justice Act (PAJA) gives effect to the right to 'administrative action' that is lawful, reasonable and procedurally fair. It also provides for the right to request reasons for decisions taken.
The Municipal Finance Management Act (MFMA)	2003	The purpose of the MFMA is to secure sound and sustainable management of the financial affairs of inter alia municipalities in the local sphere of government. It also provides for measures for the combatting of abuse and corruption in the supply chain management system.

**Source: Adapted from Corruption Watch (2015:7-19)**

The above table is by no means exhaustive of other supportive legislation, but present a high-level overview of the critical pieces of legislation that support South Africa's anti-corruption prerogatives. The legislation also presents a chronological implementation of these prescripts which are often relevant pieces of legislation often used by South Africa's anti-corruption agencies to hold departments, entities and people to account.

#### **2.4.5 South Africa's Regional and International Obligations**

South Africa has according to the OECD (2003: 6), also acceded to and ratified a number of important international and regional anti-corruption initiatives as tabulated in Table 2.3 below; to enhance its anti-corruption efforts.

**Table 2.3: Anti-Corruption Instruments**

NO	ORGANISATION	PURPOSE
1	The Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions	To establish legally binding standards to criminalise bribery of foreign public officials in international transactions as well as other related measures to give effect to this.
2	The Southern African Development Community Protocol on Corruption (SADC Corruption Protocol)	This is the first sub-regional anti-corruption treaty in Africa set up to promote the development of anti-corruption mechanisms at national level, promote the co-operation in the fight against corruption by State Parties, and to harmonize of anti-corruption national legislation within the region.
3	The African Union Convention on Preventing and Combating Corruption (AUCPCC / AU Convention)	To promote and strengthen the development in Africa by each State Party, of mechanisms required to prevent, detect, punish and eradicate corruption and related offences in the public and private sectors and to further regulate cooperation among parties, harmonize policies and legislation, promote socio-economic development and, establish conditions to foster transparency and accountability in the management of public affairs.
4	The United Nations Convention against Corruption (UNCAC / the UN Convention)	To foster cooperation with member countries on aspects relating to the fight against corruption, including prevention, investigation and prosecution. To this end, South Africa has engaged in mutual legal assistance in the gathering and transferring of evidence for use in courts outside the country as well as asset recovery.

**Source: Adapted from OECD (2003: 6)**

The progressive development of South Africa's legislative framework and regional anti-corruption initiatives and strategies stemmed from its ratification and membership with these international and regional legal instruments. This has been key to South Africa's campaign to

root out corruption in the country. It is important that South Africa maintains its affiliation and momentum in this regard in order to curb and reduce the levels of corruption in the country in order to improve economic development and foreign investment confidence.

#### **2.4.6 The National Development Plan 2030 (NDP)**

According to the Minister and Chairperson of the National Planning Commission, Trevor Manuel, in his foreword in the National Planning Commission's Diagnostic Overview (June, 2011), the Commission was appointed by President Jacob Zuma in April 2010 to take an "independent and critical view of South Africa", to develop a vision for South Africa in the next 20 years, by identifying the key challenges and mapping out a path to achieve this vision. This set the tone for the National Development Plan 2030. One of the four areas singled out in the National Development Plan 2030 (2011:447-448) was the building of a "resilient anti-corruption system [through] anti-corruption efforts that" that foster the creation of a system that could function freely without political meddling and which can be supported by both public servants and society. In this proposal, the Commission proposed that a functioning anti-corruption system should have adequate staff and resources with "specific knowledge and skills; special legislative powers; high level information sharing and co-ordination; and operational independence". In addition, the Commission recommended that the independence of each agency should be strengthened to guard and protect them from political pressure. It was proposed that this should be done by increasing the agencies' specialist resources, as well as funding to employ skilled personnel and sophisticated investigative techniques.

Subsequent to the publication of the National Planning Commission's Diagnostic Report in June 2011, which served as a base document, the National Development Plan 2030 was released in November 2011. One of the measures proposed in the National development Plan 2030 (2011:57) to strengthen South Africa's anti-corruption arsenal was that "competent and skilled institutions like the Public Protector and the SIU need to be adequately funded and staffed and free from external influence". Furthermore, chapter fourteen of the National Development Plan 2030 (2011:446), emphasizes that "corruption undermines good governance, sound institutions and the effective operation of government in South Africa". The NDP therefore proposes the need for "an anti-corruption system that makes public servants

accountable, protects whistle-blowers and closely monitors procurement” (National Development Plan 2030. 2011:446).

Critically, the NDP 2030 explicitly points out that, “overcoming corruption and lack of accountability in society requires political will, sound institutions, a solid legal foundation and an active citizenry that holds public officials accountable.” The NDP’s vision for 2030 is for South Africa to have a zero tolerance towards the scourge of corruption, but more importantly, that anti-corruption agencies must have the sufficient and necessary resources, be independent and shielded from political influence, have the necessary powers to investigate corruption, and that their recommendations must be acted upon.

#### **2.4.7 The Medium Term Strategic Framework (MTSF)**

The MTSF is government’s strategic plan for the 2014-2019 electoral term, and reflects the governing party’s commitments in the election manifesto, which includes the implementation of the NDP. The aim of the MTSF (2014) “is to ensure policy coherence, alignment and coordination across government plans [and] alignment with [budget] processes”. One of the priorities of the electoral mandate in terms of the MTSF is “fighting corruption and crime” by reducing levels of corruption in the public and private sectors thereby improving investor confidence in South Africa (MTSF, 2014).

#### **2.4.8 The Public Service Anti-Corruption Strategy (PSACS)**

In his keynote address, at the Roundtable of the United Nations (UN) Global Compact Network in South Africa, Minister for Public Service and Administration, Chabane (2014:2) indicates that the PSACS has been a key driver for all public sector anti-corruption initiatives. It advocates an integrated and coherent approach to fighting corruption. The Strategy recognizes solid management practices to prevent, detect and combat corruption which would inevitably prevent any opportunity for corrupt practices (PSACS, 2002).

## 2.5 South Africa's Anti-Corruption Agencies

South Africa has several agencies that are tasked with the investigation and combating of corruption. The three most prominent of them, namely: SIU, the DPCI/Hawks and the Public Protector, based upon an analysis of the respective legislative mandates, are considered to be the only agencies with a common mandate to investigate offences referred to in Part 1 to 4 of the Prevention and Combating of Corrupt Activities Act, 12 of 2004 (RSA, PACOCA Act, 2004) with the exception of the Hawks whose mandate is not limited to offences referred to in Chapter 2 and section 34 of the PACOCA Act. The following table 2.4 provides an analysis of the three agencies' founding legislation and a comparative breakdown of their institutional form, appointment procedures, mandates and reporting lines.

**Table 2.4: Comparison of South Africa's Anti-Corruption Agencies: Public Protector, SIU and DPCI**

Agency	Type of Institution	Establishment	Appointment & Removal of the Head	Terms of Reference	Mandate	Reporting Line
Public Protector - 1994	Independent Chapter 9 Constitutional Institution	Chapter 9 of the Constitution / Parliament	The President, on recommendation by Parliament (National Assembly)	The Public Protector Act. It is competent to investigate, on its own initiative or on receipt of a complaint falling within its mandate.	Corruption; Maladministration in connection with the affairs of government at any level; Improper or dishonest act or omission, or offences referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, with respect to public money; Improper or unlawful enrichment, or receipt of any improper advantage, or	Required to report only to Parliament.

					promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function	
SIU - 2001 (previously , Heath Commision - 1997)	Independent Statutory Body	SIU Act / the President	President	The Special Investigating Unit & Special Tribunals Act 74 of 1996 (as amended); and only what is set out in relevant Presidential Proclamations. It cannot initiate investigations of its own volition on receipt of complaints falling within its mandate.	Corruption;  Serious maladministration in connection with the affairs of any State institution;  Offences referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, and which offences was committed in connection with the affairs of any State institution	Required to submit a final report to the Presidency; and to further report to Parliament, twice annually.
Directorate for Priority Crimes Investigatio n AKA Hawks – 2009 (previously , Scorpions – 1999)	National Government , Department of Police	The SAPS Act, as amended / The Minister of Police	The Minister of Police with the concurrence of cabinet	The SAPS amendment Act. It can initiate investigations on the receipt of a complaint falling within its mandate.	Corruption;  National priority offences which in the opinion of the head of the Directorate need to be addressed by the Directorate;  Selected offences not limited to offences referred to in Chapter 2 and section 34 of the Prevention and Combating of Corrupt Activities Act (Act No. 12 of 2004);  Any other offence or category of offences referred to it from time to time by the National Commissioner, subject to policy guidelines issued by the Ministerial Committee.	Required to report to the Minister of Police.



**Source: Adapted from the Public Protector Act; The SIU Act and the SAPS Amendment Act.**

These three agencies are core anti-corruption functionaries and despite their distinctive organisational structure, function and mandates, they often work in a complimentary and collaborative manner in the execution of their investigations (Somiah, 2016). This is done for example, by way of the Public Protector and the SIU's reliance on policing powers of the Hawks for criminal investigations, arrests and prosecutions on matters falling within their respective mandates where criminality is identified. There is also a reliance by the Hawks on the SIU for its forensic investigative expertise and skills as well as its civil litigation powers to recover unlawfully acquired State funds. Often, matters stemming from an SIU proclaimed investigation are investigated by the SIU's forensic capacity after which it is referred to the Hawks *via* the National Prosecuting Authority, for further criminal investigation and prosecution. Similarly, the Public Protector completes an investigation and refers criminality to the Hawks. This collaborative engagement is essential in the South African context to compliment power or functionary limitations across agencies.

## **2.6 Comparison of Anti-Corruption Agencies in the South African and International contexts**

There are a number of anti-corruption agencies in the international context. These agencies vary in their make-up and model or type. For the purposes of this research, a comparison of six countries' anti-corruption agencies including South Africa, was compiled as reflected in table 2.5 below, in relation to their descriptions, type, population volume, date of establishment as well as their respective Transparency International Corruption perception index and ranking over the last four years between 2012 and 2015.

The undermentioned table 2.5 was compiled using data extracted from the Transparency International's Corruption Perception Indexes (CPI) (Transparency International, 2012, 2013, 2014 & 2015), Heilbrunn (2004:3-10), and Country population statistics extracted from Infoplease.com (2016). The Table seeks to provide a comparative analysis of five countries and their anti-corruption agencies, to South Africa. Transparency International's data is

interpreted as the higher the CPI (score), the lower the rank and the cleaner the country. This information was scrutinized and is discussed in greater detail further in this section.

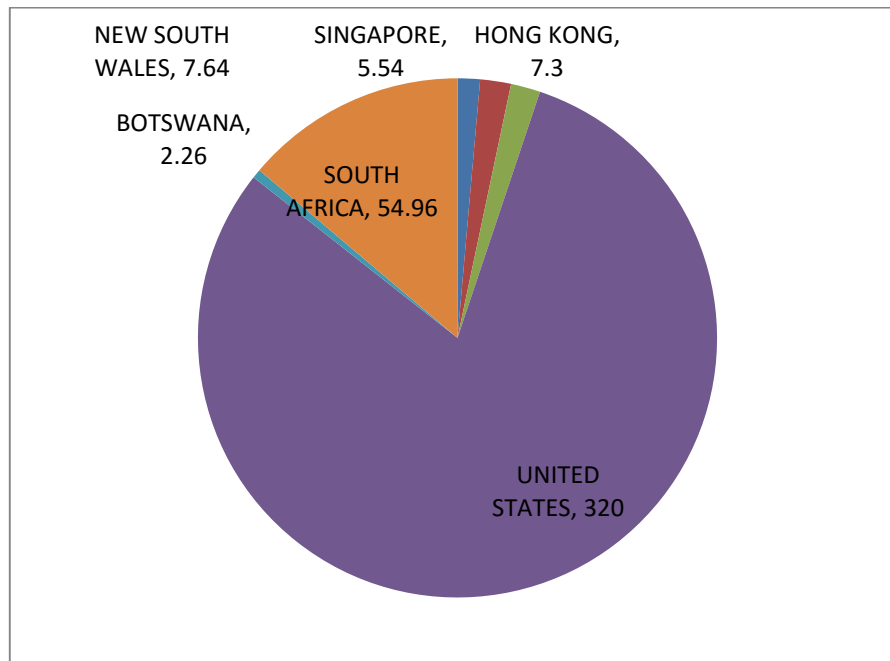
**Table 2.5: Comparison of Anti-Corruption Agencies in the South African and International Contexts**

COUNTRIES	ABBR	ANTI-CORRUPTION AGENCY	TYPE	POP/m	EST	RANK DIFF. 2015 /2012	POSITION	RANK	TOT. COUNTRIES	2015 CORR/PERC	POSITION	RANK	TOT. COUNTRIES	2014 CORR/PERC	POSITION	RANK	TOT. COUNTRIES	2013 CORR/PERC	POSITION	RANK	TOT. COUNTRIES	2012 CORR/PERC
SINGAPORE	CPIB	Corrupt Practices Invstgation Bureau	INVESTIGATIVE MODEL	5.54	1960	-3	1	8	167	85	1	7	174	84	1	5	175	86	1	5	174	87
NEW SOUTH WALES	ICAC	Independent Commission against Corruption	PARLIAMENTARY MODEL	7.64	1989	-6	2	13	167	79	2	11	174	80	2	9	175	81	2	7	174	85
UNITED STATES	USOGE	United States Office of Government Ethics	MULTI-AGENCY MODEL	320	1978	3	3	16	167	76	3	17	174	74	4	19	175	73	4	19	174	73
HONG KONG	ICAC	Independent Commission against Corruption	UNIVERSAL MODEL	7.3	1973	-4	4	18	167	75	3	17	174	74	3	15	175	75	3	14	174	77
BOTSWANA	DCEC	Directorate on Corruption and Economic Crime	INVESTIGATIVE MODEL	2.26	1994	2	5	28	167	63	4	31	174	63	5	30	175	64	5	30	174	65
SOUTH AFRICA	DPCI	Directorate for Priority Crimes Investigation	MULTI-AGENCY MODEL	55	2008	8	6	61	167	44	5	67	174	44	6	72	175	42	6	69	174	43

Source: Adapted from Transparency International Corruption Perception Indexes 2012 to 2015; Heilbrunn (2004:3-10), and, Country population statistics extracted from Infoplease.com (2016).

### 2.6.1 Population per million

The six countries, as reflected in Figure 2.1 below, have a diverse population volume from between 2.26m in Botswana, to 320m in the United States. The population volume may have an effect on the ability of the relevant anti-corruption agencies to combat corruption in the respective jurisdictions. This may therefore have an effect on the corruption perception index, where countries with a higher population volume, may attract a negative corruption perception, whilst countries with a smaller population volume, may attract a positive corruption index.

**Figure 2.1: Population per million in selected countries with anti-corruption agencies**

**Source: Adapted from table 5 - comparison of anti-corruption agencies in the South African and international contexts**

Of the four countries with the lowest populations, Singapore has the lowest corruption perception ranking of 8 in 2015, with the second lowest population of 5.54 million, whilst the USA has the third lowest corruption perception ranking of 16, with the highest population of 320 million. Singapore's corruption perception ranking of 8 is two times lower than USA's ranking of 16. Its population of 5.54 is more than 57 times smaller than the USA's. Similarly, whilst Singapore's corruption perception ranking of 8, is more than 7 times better than South Africa's ranking of 61, its population is about 10 times smaller than South Africa.

It is interesting to note that the four countries with the lowest corruption perception ranking of 28, 8, 18 and 13, have smaller populations ranging from 2.26, 5.54, 7.3 and, 7.64 million people, whilst South Africa with the highest ranking of 61, has a population of 55 million. This could infer that anti-corruption agencies, despite their type/model and/or independence, are more effective in countries with smaller populations. The USA figures however, bring this inference into doubt with its own massive population of 320 and corruption perception ranking of a fairly low, 16. This may suggest that perhaps the multi-agency model utilized by the USA is in fact, effective.

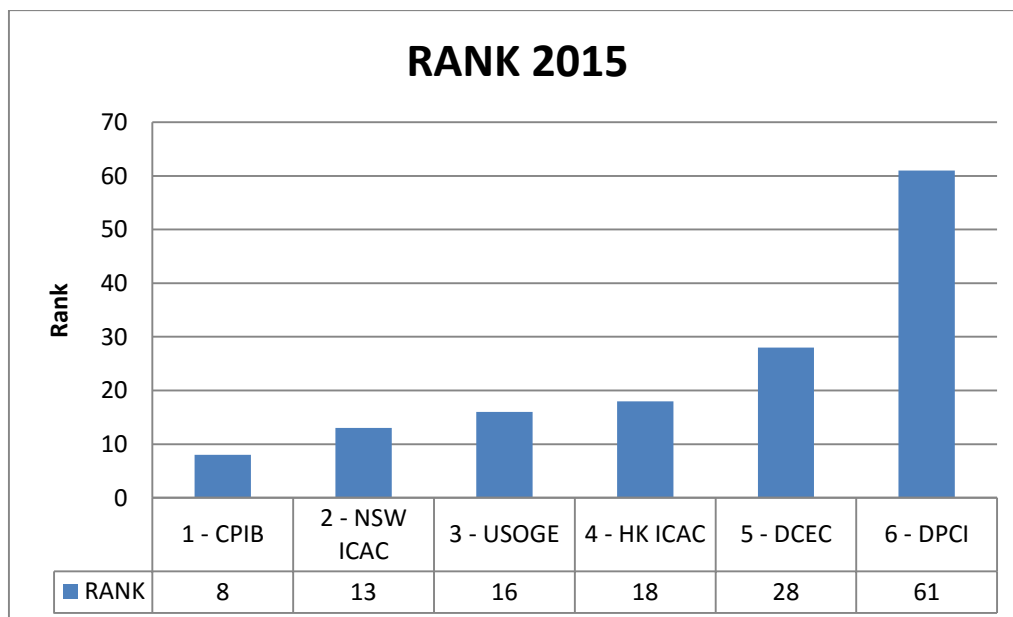
Within this context and comparatively, whilst the USA’s corruption perception ranking of 16 is almost 4 times lower than South Africa’s 61, its population of 320 million is still almost 5 times more than South Africa’s 55 million. This might be a good example of two countries, which, despite utilizing the same agency type (multi-agency model) with different population sizes, have different experiences and results where USA appears to be doing better than South Africa.

### 2.6.2 Transparency International Ranking – 2015

Transparency International ranks countries according to the level of corruption perception index, *ie.* between 0-100, with 0 being highly corrupt and 100 being very clean. Therefore, from Figure 2.2 below, it is evident that countries with a higher CPI score (very clean) ranked lower. This indicates that a country with a lower ranking is perceived as less corrupt.

The Transparency International Index, in the figure, shows Singapore’s CPIB’s ranking of 8 as the lowest of the six countries which essentially means that it has the highest CPI score indicating that it is very clean. Contrarily, South Africa’s higher ranking of 61 is indicative of a lower CPI score which suggests that it is perceived to be highly corrupt in comparison to the six countries assessed in Table 2.5 above.

**Figure 2.2: Transparency ranking in selected countries with anti-corruption agencies**



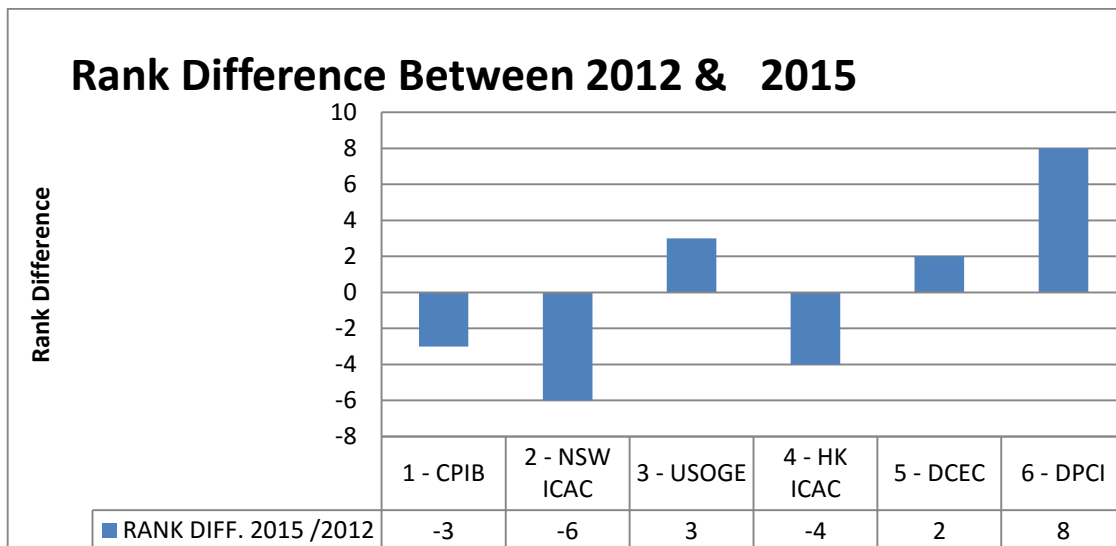
Source: Adapted from table 2.5 - Comparison of anti-corruption agencies in the South African and international contexts

### 2.6.3 Rank Difference between 2012 and 2015

Figure 2.3 below provides an indication of the rank difference between 2012 and 2015 between the six countries. While three of the countries present a decline in ranking from between -3 to -6, the other three shows an improvement from between 2 to 8. As indicated earlier, the higher the CPI (less corrupt), the lower the rank. In other words, Singapore ranking dropped from 5 in 2012 to 8 in 2015. This represents a drop by 3 positions in ranking as a result of the CPI decreasing from 87 in 2012 to 85 in 2015. This indicates an increase, albeit minimal, in the perceived levels of corruption in Singapore.

In stark contrast, South Africa’s ranking improved from 69 in 2012 to 61 in 2015. This represents an improvement by 8 positions in ranking as a result of the CPI increasing from 43 in 2012 to 44 in 2015. This indicates a decrease, albeit minimal, in the perceived levels of corruption in South Africa.

Figure 2.3: Rank difference between 2012 and 2015 in selected countries with anti-corruption agencies

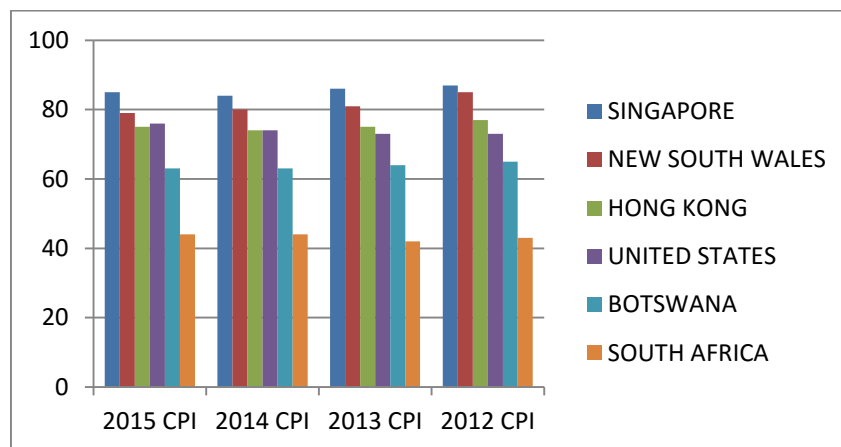


Source: Adapted from table 2.5 - comparison of anti-corruption agencies in the South African and international contexts

## 2.6.4 Corruption Perception Index between 2012 and 2015

Figure 2.4 below presents a fairly consistent view of the CPI scores for the six countries. The Figure indicates that Singapore has a consistently higher CPI score than the other 5 countries between 2012 and 2015. South Africa, on the other hand, has a consistently lower CPI score over the same period. The other 4 countries remain fairly consistent with their CPI scores. This represents a higher perception of corruption in South Africa (highly corrupt) than Singapore with a lower perception of corruption (very clean).

**Figure 2.4: Corruption perception index between 2012 and 2015 in selected countries with anti-corruption agencies**



**Source: Adapted from table 2.5 - Comparison of anti-corruption agencies in the South African and international contexts**

## 2.7 South Africa's Multi-Agency Approach towards Anti-Corruption

South Africa has an international obligation in terms of Article 38 of the UNCAC (2004:27), to take the necessary measures to maintain cooperation between its national authorities, including its public sector authorities and its officials. Additionally, it is required in terms of this Article, to maintain cooperation with its law enforcement authorities “responsible for investigating and prosecuting criminal offences”. Interestingly, Article 39 of the UNCAC also makes provision for “encouraging cooperation between national authorities (investigating and prosecuting authorities) and entities in the private sector, in particular; financial institutions” (UNCAC, 2004:28). In this regard, having ratified the UN Convention on the 22 November 2004, South Africa was bound in terms of Article 65 of Chapter VIII of the UNCAC (2004:53),

to take the necessary legislative and administrative measures “to ensure the implementation of its obligations” under the Convention.

South Africa is a constitutional democracy wherein the Constitution guides the establishment and functioning of state departments, institutions or agencies. Accordingly, on inter-agency coordination, the United Nations Office on Drugs and Crime (2013:10) aptly points out that section 41(1) of the Constitution (1996), requires all spheres of government to “cooperate with one another in mutual trust and good faith by fostering friendly relations, assisting and supporting one another, consulting on matters of mutual interest and adhering to agreed procedures”. This is generally achieved through mutual cooperation or the formal conclusion of a “Memorandum of Understanding” between two or more entities, agencies or departments. Coupled with this obligation, the United Nations Office on Drugs and Crime (2013:4) further points out that South Africa having ratified the UN Convention as an international legal instrument, is further bound to compliance with the UNCAC by virtue of section 231(2) and (4) of the Constitution. This section prescribes that “an international agreement binds the Republic after it has been approved by resolution in both houses of Parliament and a self-executing provision of such an agreement is law in the Republic, unless it is inconsistent with the Constitution or an Act of Parliament” (Constitution, 1996).

In line and in concurrence with these prescriptive UNCAC requirements as set out above, De Sousa (2008:19) suggests therefore, that it is essential for anti-corruption agencies ‘to establish healthy inter-institutional cooperation with the other bodies responsible for the preventing and combating of corruption (such as criminal investigation forces, the police, public prosecutors, courts, state supervision bodies, *etc.*)’. Instead of adopting a single powerful agency approach, South Africa has adopted a multi-agency approach in combating corruption. South Africa has a multitude of agencies responsible for anti-corruption work which according to the United Nations Office on Drugs and Crime (2013:9) are guaranteed investigative and operational independence.

These agencies cut across the various powers usually assigned to bodies that are set up to curb corruption. For example, as set out in the table hereunder presented as Table 2.6, while the Hawks are responsible for investigating corruption, they cannot prosecute offenders. These powers are conferred on the National Prosecuting Authority. While the Hawks can investigate and the National Prosecuting Authority can prosecute, the SIU can litigate civilly on behalf of government departments to recover illicit gains on behalf of the respective government

departments. Civil litigation is a power that is conferred on neither the Hawks nor the National Prosecuting Authority. These are but some of the critical powers which are normally applicable to anti-corruption agencies. These agencies amongst other things have a variety of powers which cannot curb corruption, nor make the impact necessary to eradicate corruption; without the complementary effort of its counterparts.

Table 2.6 below presents a comparative view of the powers of four main agencies in South Africa tasked to deal corruption from investigation to prosecution. The table was compiled with information that was extracted from the SAPS Act as amended (RSA, SAPS Act, 1995), the SIU Act as amended (RSA, SIU Act, 1996a), the National Prosecuting Authority Act (RSA, NPA Act, 1998) and the Public Protector Act (RSA, Public Protector Act, 2004), as well as from SIU Senior Forensic Lawyer (Maharaj, 2016).

**Table 2.6: Powers of South African Agencies that Investigate and Prosecute Corruption**

<b>POWERS TO...</b>	<b>HAWKS</b>	<b>SIU</b>	<b>PUBLIC PROTECTOR</b>	<b>NPA</b>
Investigate	X	X	X	X
Search and Seizure	X	X	X	X
Arrest;	X	-	-	-
Require from any person, particulars & information,	X	X	X	X
Subpoena any person to produce books, documents or objects	X	X	X	X
Subpoena and question any person under oath or affirmation at one of its own proceedings	-	X	X	-
To compel a person during its own proceedings, to answer any question which may expose him/her to a civil action/criminal charge (such evidence however may not be used in subsequent criminal proceedings)	-	X	-	-
Institute and conduct civil proceedings in its own name or on behalf of a State institution in a Special Tribunal or any court of law	-	X	-	-
Prosecute	-	-	-	X
Attach assets through civil litigation	-	X	-	-
Charge and recover fees from a State Institution for investigations/work done	-	X	-	-
Members qualified and admitted as advocates/ attorneys, may perform such work in a Special Tribunal or any court of law on behalf of the Unit or a State institution	-	X	-	-
Make systemic recommendations to state institutions	-	X	X	-
Make recommendations for disciplinary action	-	X	X	-



Make recommendations for civil action to the state attorney or to state institutions	-	X	-	-
Develop policy, research, monitor and co-ordinate anti-corruption efforts	-	-	-	-
Prevent corruption in power structures	-	-	-	-
Educate and raise awareness	-	-	-	-

**Source: Adapted from the SAPS Act (1995), SIU Act (1996a), NPA Act (1998) and Public Protector Act (2004).**

Pope & Vogl (2000) suggest that the relationship between an anti-corruption agency and the prosecuting authority is critical, and that their joint efforts must be seen to have “real impact leading to prosecutions and convictions or else they will be widely viewed as a farce”. It is important to note that no anti-corruption agency in South Africa has universal all-encompassing powers. However, their powers appear to complement each other and much emphasis is placed on collaboration. The SIU, in comparison, has far-reaching powers which cover both investigative and civil litigation powers, where no other agency has the powers of litigation. However, the SIU does suffer the lack of arrest and prosecutorial powers. This however does not seem to be restrictive in nature in the South African context as the country’s agencies seem to progressively follow the multi-agency approach. Interestingly s.12 of the SIU Act prescribes that non-compliance with directives, refusal and interference by any person with an SIU investigation carries a 5 year prison term, while other agencies carry minimal sentences. It is evident therefore that failure to cooperate with the SIU carries a greater penalty than that of its counterparts.

## Chapter 3: Case Study of the SIU as a South African Anti-Corruption Agency

### 3.1 Introduction

The SIU is a South African anti-corruption agency whose vision and mission is to work together with government, society and law enforcement agencies to combat corruption in society, through quality forensic investigations and litigation (Special Investigating Unit Annual Report 2010-2011, 2011:7). The SIU is one three agencies in South Africa that is tasked with an anti-corruption mandate. The other two are the DPCI and the Public Protector. The mandate as anti-corruption units is derived from the respective pieces of enabling legislation i.e. the SIU Act, Public Protector Act and the SAPS Amendment Act which empowers all three agencies to investigate matters certain offences which are criminalized by the PACOCA Act. The prerogative of establishing an SIU is that of the executive by way of a Proclamation. The SIU is an independent statutory body accountable to both the President and to Parliament. It is funded by the Department of Justice and Constitutional Development (RSA, Special Investigating Unit Annual Report 2010-2011, 2011:7).

According to the Special Investigation Unit website (SIU, 2016), the SIU was preceded by the Heath Special Investigating Unit which was established by President Mandela in 1996 as a statutory body in terms of the SIU Act for the purpose of “investigating serious malpractices or maladministration in connection with the administration of State institutions, State assets and public money as well as any conduct which may seriously harm the interests of the public” (RSA, SIU Act, 1996a). At that stage, the Unit was headed by Judge Willem Heath. The Unit at the time comprised of 67 members nationally (Walker, 2013). However, as a result of a Constitutional Court ruling in *South African Association of Personal Injury Lawyers v Heath and Others 2001 (1) SA 883 (CC)*, that a Judge could not head a Special Investigating Unit, Judge Heath resigned in 2001. Subsequent to this, the new SIU was established by the erstwhile President Thabo Mbeki by virtue of Proclamation R118, issued on 31 July 2001, to which he appointed William Andrew Hofmeyr as Head of the Unit (*Chagi and others v Special Investigating Unit 2009 (2) SA 1 (CC)*).

## 3.2 The SIU's legislative Mandate

The mandate of the SIU is to conduct multi-disciplinary forensic investigations; civil recovery of state assets and monies; recommending and supporting disciplinary processes arising from its investigations; referring criminal matters identified during the course of its investigations to appropriate law enforcement agencies; and, to provide an advisory service on systemic improvements in relation to government departments and state entities (Special Investigating Unit, 2016). The SIU executes its mandate by virtue of its founding and enabling legislation, the SIU Act. More importantly though, while the SIU Act provides for amongst other things, the powers and functions of the Unit, are derived from Presidential Proclamation that gives effect to the exercise of these powers. Critically, the SIU cannot exercise its investigative powers in the absence of a Presidential Proclamation (Maharaj, 2016).

### 3.2.1 The SIU Act

The key piece of legislation that governs the SIU's mandate and functioning is the SIU Act (RSA, SIU Act, 1996a) as amended. For the purposes of this research, the Act sets out the following relevant prescripts in relation to the SIU which must be noted:

- Section 2 sets out the basis for the establishment of an SIU;
- Section 3 sets out the composition of the Unit, including appointment procedures for the Head of the Unit and staff,
- Section 4 sets out the functions of the Unit;
- Section 5 sets out the powers of the Unit;
- Section 5A deals with the delegation of powers and functions by the Head of the Unit;
- Section 6 deals with search and seizure;
- Section 12 sets out the offences and penalties for non-compliance with the Act;
- Section 13 deals with the Liability of the Unit;
- Section 13A deals with the funding of the Unit; and
- Section 13 B deals with the Unit's financial accountability.

### **3.2.2 The Presidential Proclamation**

A proclamation essentially sets out the terms of reference for any SIU investigation. A proclamation is issued by the Presidency, either at the behest of the Presidency, or after the SIU on receipt of a complaint, submits a motivation for a proclamation to the Presidency. According to Maharaj (2016), any proclamation issued by the President is very specific in that it must contain a schedule which sets out the actual allegations which the SIU must investigate. As a creature of statute, the SIU is subject to the dictates of the Act. The Act as read with such proclamations do not allow for material deviations or out of scope investigations by the SIU. Any such work undertaken would be outside the ambit of the Act and therefore be regarded as invalid and unlawful.

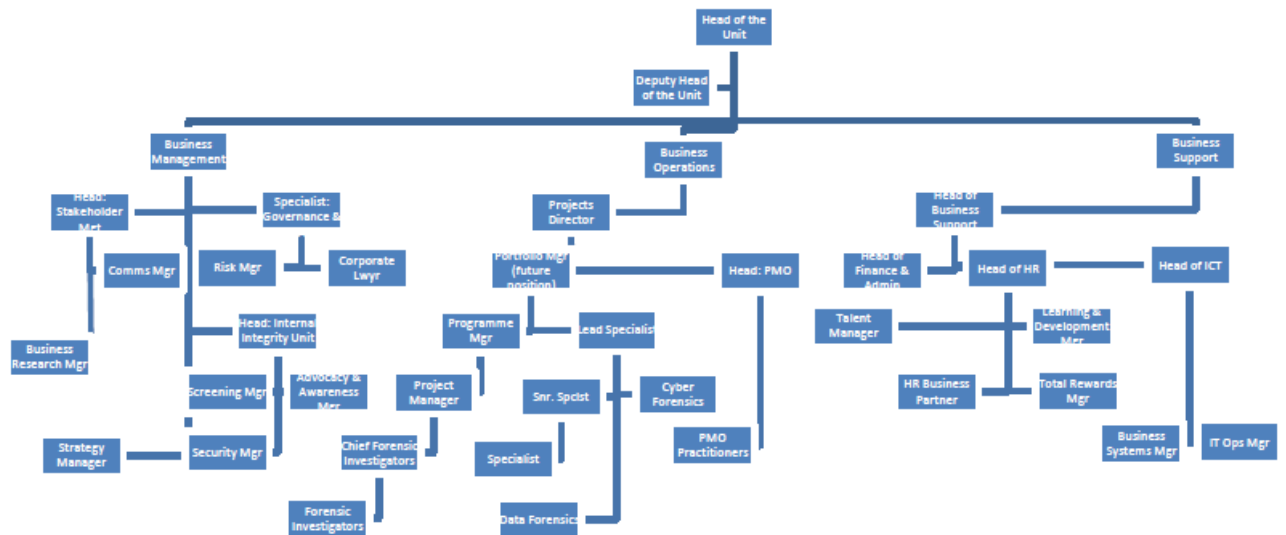
The SIU can in effect, only commence its investigations on receipt of a proclamation from the President as published in the Government Gazette. It can only use its powers and exercise its functions once this proclamation is published. The SIU cannot commence or initiate an investigation on receipt of a complaint from a member of the public or a state institution. If a complaint is indeed made to the SIU, the SIU must first without exercising any of its powers, assess the merits of such complaint against the scheme of the Act and then draft a motivation for a proclamation to the Presidency. Only once this motivation is considered and approved, is a proclamation signed by the President.

## **3.3 How the SIU operates as an anti-corruption agency**

### **3.3.1 The SIU Organisational Structure**

As a member of the Unit, the researcher has noted that the SIU operates with three core business divisions which include: Business Management; Business Operations; and, Business Support. Each of these divisions complement each other with Business Management handling the overall management of the organisation, Business Operations tasked with executing the core forensic investigative business of the Unit, and Business Support providing the required administrative support to all business units. All three business units fall under the direct supervision of the Head and Deputy Head of the Unit. The High level organisational structure is set out in Figure 3.1 below:

**Figure 3.1: High level organisational structure for the SIU**



**Source: Adapted from the Special Investigating Unit, Business Support Department; and, the SIU Annual Report 2012-2013 (2013:7)**

This organisational structure was approved and signed-off by the then Head of the Unit, Advocate Hofmeyr. The full and detailed structure however, still remains with identified future positions that have not been filled to date. The Unit is currently in a recruitment drive to fill these positions. In addition, the Unit has identified a need to review this Organisation Structure and has embarked on a review process to determine progressively since 2009, whether changes may now be necessary and the implications of such changes on the Unit (Personal Observation, 2015-2016).

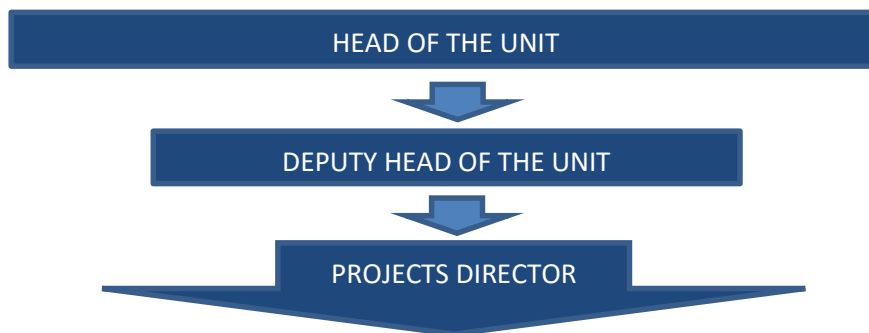
### 3.3.2 The SIU Operating Model

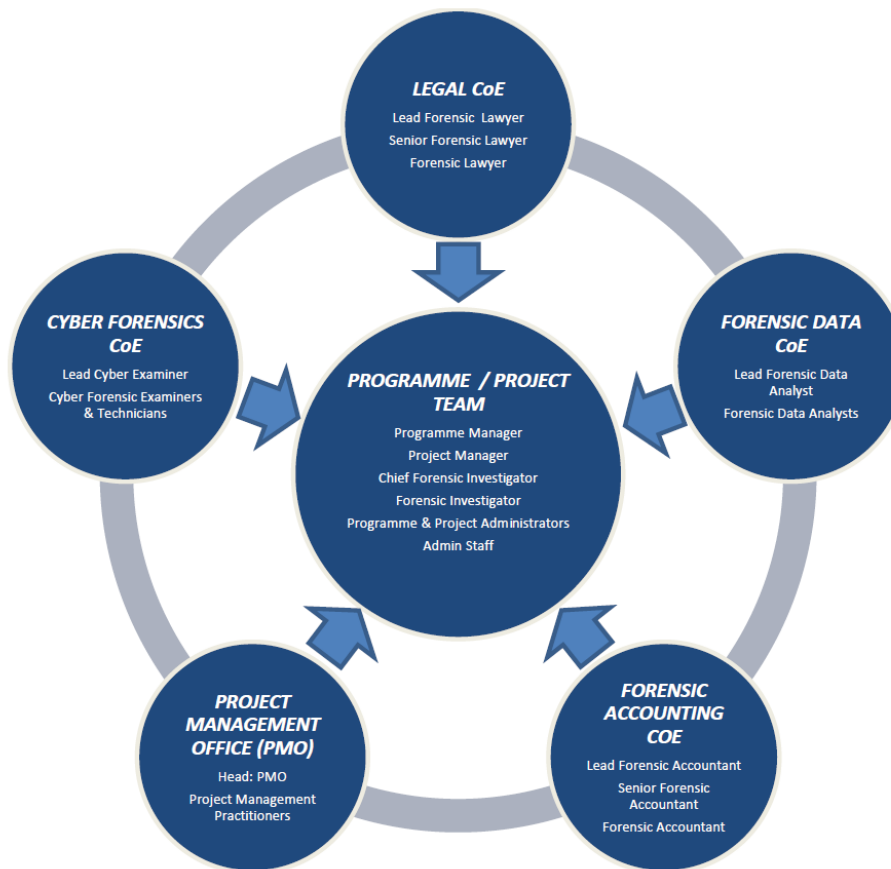
The SIU has a national presence in all nine provinces and each office comprises of a Regional Head and several project teams (Personal Observations, 2013; Gauteng, 2014-2016). Legal support is present at all offices, while the Cyber and Data Forensics divisions are situated at

the Unit's Head Office in Pretoria. The Accounting CoE has limited capacity but is available in some of the Unit's offices and are utilised as and when required.

On receipt of its mandate in terms of a Proclamation signed by the President, the SIU proceeds to scope an investigation and set-up a multi-disciplinary project team to initiate a forensic investigation into the allegations concerned. The Programme and Project teams are supported by the various centres of expertise (CoE's) including the Legal, Cyber, Data and Accounting CoE's. These divisions as reflected in SIU Operating Model set out in Figure 3.2 below, all form part of the Unit's core Business Operations and are supported by Business Support which include Finance, Human Resources and Information and Communication Technology (ICT), as set out in Unit's organisational structure. Once a Proclamation is signed, the Projects Director normally assigns a Programme Manager to assess and scope the matter, put together a programme and project team thereafter a project plan is developed for approval. Once this is completed and approved by the Projects Director, a forensic investigation ensues (Maharaj, 2016).

**Figure 3.2: SIU operating model**





**Source: Adapted from personal observations, 2013 to 2016, and Maharaj (2016)**

As a Project Manager, the researcher has been part of several project teams. The Project team works strictly in line with a project plan which is based on project management principles and is time-bound. All investigative activities identified during the scoping stage is set out in the project plan on Microsoft Project (MS Project), which is monitored and evaluated regularly until finalization. A Programme Manager exercises control and oversight and reports to the Projects Director on progress with programme/s which comprises a number of projects while a Project manager reports to the Programme Manager on project-based investigative activities. The Project Manager does the groundwork and the day-to-day management of the projects which include investigative guidance, team meetings, progress reporting, project review, and general staff management and administration (Personal Observation, 2013-2016).

With the exception of the Legal centre of expertise and the Project Management Office, all other centre of expertise work with the project teams as and when required by the Programme

and Project Managers. The Legal centre of expertise and the Project Management Office provide support to the teams from inception until finalization of a project. All respective centre of expertise are experts in their fields and can provide expert evidence and testimony in any court.

### **3.3.3 The functions and powers of the SIU**

During the course of an investigation, and by virtue of its functions and powers as set out in sections 4 and 5 of the SIU Act respectively, the SIU in exercising its powers in terms of section 4 of the SIU Act (RSA, SIU Act, 1996a) , may;

- Investigate all allegations regarding the matters concerned;
- Collect any evidence connected with its investigation;
- Institute civil proceedings in a Special Tribunal or any court of law for any relief to relevant to its investigations, itself or to a State institution;
- Refer incidents of criminality to the relevant prosecuting authority
- Not perform functions that are in conflict with its founding Act;
- Upon conclusion of its investigation, submit a final report to the President; and
- Submit a report at least twice a year to the Parliament on its investigations, activities, composition and expenditure.

The SIU in executing its functions in terms of section 5 of the SIU Act (RSA, SIU Act, 1996a), may:

- may determine the procedure to be followed in an investigation;
- charge and recover fees associated with its services from a State institution;
- request any information as may be reasonably necessary in its investigations;
- Subpoena any person by a notice in writing under the hand of the Head of the SIU or a duly delegated member to appear before it and produce any book, document or object under the control of such person;
- Administer an oath or affirmation on a person required to appear before it and question him or her;
- refer any matter which could best be dealt with by the Public Protector, to the Public Protector;



- institute and conduct civil proceedings in its own name or on behalf of a State institution in a Special Tribunal or any court of law; and
- bring any matter that justifies the institution of civil proceedings by a State Institution against any person, to the attention of the state attorney or the State institution concerned.

During the course of an investigation, the project teams will gather evidence relating to the allegations concerned which are within its terms of reference as contained in the relevant proclamation (Somiah, 2016). Although some of the Unit's intrusive powers are similar to that of the SAPS's search and seizure and section 205 subpoenas (RSA, Law of Criminal Procedure and Evidence Act 51 of 1977, 1977), the unit is in no way a substitute police force, as it can only investigate matters contained within its terms of reference. In other words, according to Maharaj (2016), its investigations are not open-ended and it cannot extend its powers. In this vein, the SIU's core function is to seek civil remedy for State institutions that may have been subjected to maladministration or criminality by its state officials or third parties. This is where the SIU must be seen to make the greatest impact, as it has to go after individuals or corporates (and their assets), that misappropriate state funds. All the SIU's investigations are guided by expert forensic lawyers, to ensure that investigations meet all legal standards before the necessary action can be recommended or taken (Maharaj, 2016).

Section 5 of the SIU Act (1996) empowers the SIU to bring civil proceedings including disciplinary action, against officials, to the attention of the State Institution concerned (Maharaj, 2016). In making this recommendation, and in support thereof, the SIU compiles a full dossier of evidence for submission to the State institution concerned so that the relevant action can be expedited speedily. The SIU also adopts a highly cooperative approach with other Law Enforcement Agencies in executing its functions, which in essence, is crucial to the success of anti-corruption initiatives (Special Investigating Unit Annual Report 2010-2011, 2011:9). This type of cooperation assists the SIU in complementing it where it lacks certain powers, access or authority. The cooperation extends to secondment of its members to other Law Enforcement Agencies and *vice versa* (Personal Observation, 2015-2016).

### **3.3.4 The SIU's intrusive powers**

#### ***3.3.4.1 The Power to subpoena persons***

According to Maharaj (2016), unlike any other agency, the SIU has highly intrusive powers. Specifically, section 5(2)(c) of the SIU Act allows the Unit to subpoena persons to appear before it in a hearing presided over by a delegated official of the Unit; to produce books, documents or objects relevant to an SIU investigation; and to be questioned under oath in relation to his/her knowledge about the relevant allegations/evidence. This section also empowers the Unit to compel such person to answer questions even if it incriminates him/her. However, such evidence shall not be admissible in any criminal proceedings except if the person stands trial on a charge of perjury (Personal Observation, 2014). Aside from evidence obtained where a person is compelled to answer, all other evidence obtained through the exercise of the SIU's section 5 functions, are admissible in any court of law.

#### ***3.3.4.2 The Power to search and seize***

The SIU's powers to search and seize are very similar to that of the police and, is intrusive. In some instances however, this has proven to be somewhat of a conundrum for the Unit. Particularly, there have been instances where the SIU has exercised its powers in terms of section 6 of the SIU Act, to enter and search premises and seize evidence related to its investigations. However, by virtue of overlapping investigations between the SIU, the Public Protector and the DPCI, sometimes evidence relevant to either agencies investigation may, by virtue of all three agencies having the power to search and seize, result in a clash of authorities where the same evidence is required. Often, evidence sought by the DPCI had already been seized by the SIU or vice versa; or evidence sought by the SIU had already been seized by the Public Protector (Personal Observation, 2014-2015). This has the potential to lead to frustration between agencies for relevant evidence. The question that arises here is which of these agencies would carry supreme authority in searching and seizing evidence and can they exercise these powers against each other? This may require further research from a legislative point of view.

#### **3.3.5 How the SIU investigates**

For the purposes of this investigation the researcher, using the participant observation approach, between 2013 and 2016, observed and documented the SIU's methodology and processes in pursuing its investigations. This methodology is set out as follows. The SIU prides itself with its forensic capabilities and is on par with many of its private forensic business counterparts, for example Deloitte & Touche, PriceWaterHouse Coopers, and Gobodo. The Unit executes all of its investigations following a project management approach which comprises the full project management life-cycle, from inception to close-out. Once a project plan is drawn up, the project team immediately sets out to gather all the relevant evidence by way of request for evidence, search and seizures, and interviews. The evidence is then recorded and subject to various investigative processes by briefing and utilising the Unit's various centres of excellence, which includes data extraction, data analysis, cyber examination, financial and cash flow analyses for financial transactions, procedural reviews of prescribed process.

The project team meets regularly, at least weekly, to discuss progress and developments on each activity performed on the investigation. Once these initial steps are concluded, the team sets out to conduct the field work as set out in the project plan and based on information found during the initial investigative steps. More often than not, the information retrieved from the initial investigative steps and feedback from the Unit's centres of excellence set the tone for the field work (Personal Observation, 2013-2016; and Somiah, 2016).

The team then sets out to interview all persons relevant to an investigation, with the Project Manager under the control and oversight of the Programme Manager; taking the lead and overseeing all investigative activities and assigning project activities to team members. During this time, the Chief Forensic Investigator investigates and supervises the Forensic Investigator's activities. Forensic Lawyers provide legal support on site, during operations. Interviews entail documenting responses by way of interview notes, while affidavits are drafted in consultation with Project Managers and the Unit's Forensic Lawyers. During this process additional relevant evidence is sourced (Personal Observation, 2013-2016; and Somiah, 2016).

Once the field work is finalized, the team commences with the chronological compilation of evidence. Parallel to this process, the team initiates a profiling of all persons suspected of wrongdoing. Additional information clarification sessions unfold and further supporting information and evidence is requested from other agencies. Throughout the investigative

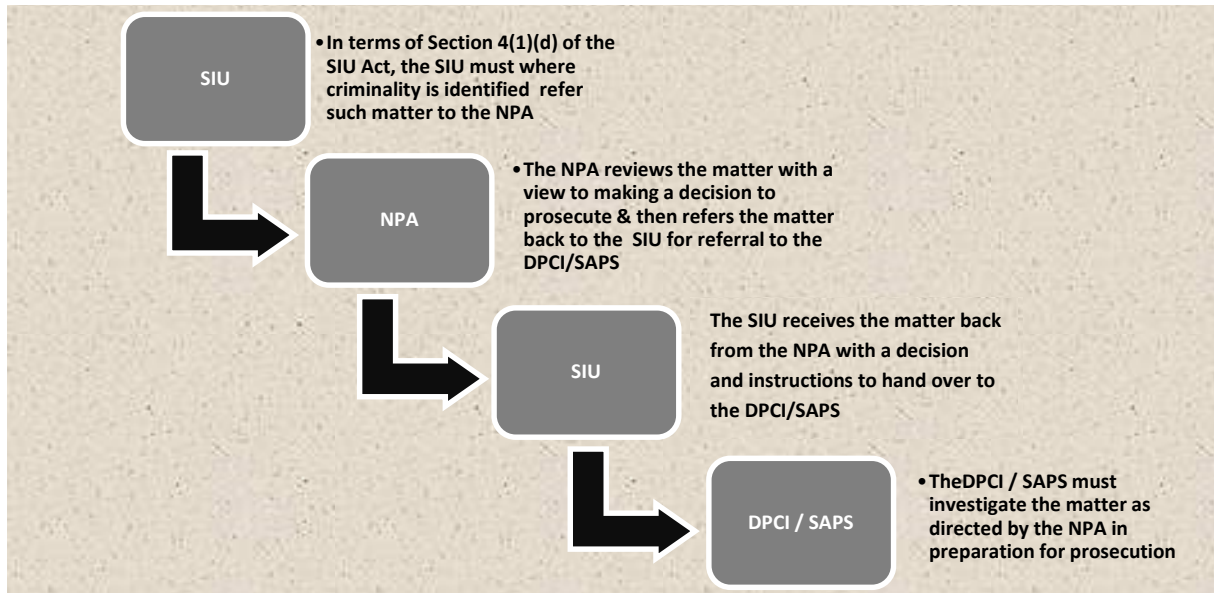
process, the steps are well documented and each completed activity is regularly updated on the project plan (Personal Observation, 2013-2016).

Once an evidence file is completed, the relevant referral letters and investigative reports are drafted by the investigator and according to Maharaj (2016), is reviewed by the Project Manager, Forensic Lawyer, Programme Manager and the Senior Forensic Lawyer before it is signed off by the Projects Director and Head of the Unit to go out to the relevant State departments or prosecuting authority. On finalization of all allegations relating to a Proclamation, the Programme Manager in consultation with the Project Manager, Project Team and Forensic Lawyers; drafts a final Presidential report for submission to the Presidency. This report is subject to a stringent set of reviews by the Project Manager, Forensic Lawyer, Programme Manager, Senior Forensic Lawyer, Projects Director and finally the Head of the Unit who signs off and submits the report to the Presidency. The matter is then concluded and closed off on the SIU record (Personal Observation, 2013-2016).

### **3.3.6 Referrals to the Relevant Prosecuting Authority**

The SIU like the police, where criminality is uncovered, must refer the matter to the National Prosecuting Authority for a decision to prosecute. In terms of section 4(1)(d) of the SIU Act, the SIU must refer any matter where evidence of criminality (fraud/corruption etc.) is identified to the National Prosecuting Authority. The National Prosecuting Authority is thereafter obliged to consider and determine the veracity of evidence submitted to it by the SIU. Once a decision is taken by the National Prosecuting Authority, the matter with the National Prosecuting Authority's instructions endorsed thereon, is referred back to the SIU to be referred to the DPCI. According to Maharaj (2016) as tabulated in Figure 3.3 below, the current process flow entails the following:

- The SIU refers matters where evidence of criminality is identified, to the National Prosecuting Authority;
- The National Prosecuting Authority considers the merits of the case, makes a decision and refers the matter back to the SIU with instructions to the SIU from the Head of the National Prosecuting Authority - the National Director of Public Prosecutions (NDPP); to hand over to the SAPS/DPCI;
- The SIU then hands the matter over to the DPCI/ SAPS.

**Figure 3.3: Multi-agency process flow - Referrals to the relevant Prosecuting Authority**

Source: Adapted from personal observations 2013-2016 and Maharaj (2016)

One of the challenges faced by the SIU in relation to referrals to the National Prosecuting Authority, is that all of its matters must be referred to the National Director of Public Prosecutions. Whilst historically matters where criminality was identified was referred directly to the respective regional jurisdictions of the SAPS and National Prosecuting Authority, during 2014, this process changed, under Advocate Soni's reign (Personal Observation, 2014). The effect was that in all matters where criminality was identified, the requirement was that the matters be referred directly to the office of the National Director of Public Prosecutions in Pretoria. With the SIU's presence and operations in nine provinces, this became a particularly frustrating process, as matters referred to the National Prosecuting Authority were becoming bottle-necked, and hence feedback to the SIU on the National Director of Public Prosecutions decisions to prosecute, was becoming a slow and long-drawn-out process (Personal Observation, 2014-2016).

The rationale offered by Advocate Soni's argument, was that the SIU Act made provision for matters only to be referred to the prosecuting authority and not directly to the SAPS/Hawks; as the SIU had previously done in collaboration with the SAPS/Hawks *and* the National

Prosecuting Authority (Personal Observation, 2014). This arrangement of referring matters from the SIU to the office of the National Director of Public Prosecutions was concluded through mutual agreement between Advocate Soni and Advocate Nxasana, the then National Director of Public Prosecutions. With the number of referrals made by the SIU over the last two years, it was inevitable that the perceived problems would escalate. With the increasing volume of referrals and slow feedback from the National Prosecuting Authority (Personal Observation, 2014-2016); a formal engagement ensued with a resolution to enhance the process flow between the SIU and office of the National Director of Public Prosecutions by way of a memorandum of understanding between the two agencies.

What is concerning despite both the SIU and the National Prosecuting Authority having a national decentralized presence in all provinces, with a view towards enhancing access and efficiency to its services, centralizing of criminal referrals to the office of the National Director of Public Prosecutions seemed counter-productive as critiqued by De Wet (2016) in a Mail & Guardian article on the National Prosecuting Authority's presentation of its annual report to Parliament where he points out that "key violent and white-collar crimes which [should] be dealt with swiftly as part of a [deterrence strategy] are languishing". In fact Mathews (2009:115) already raised the question of inefficiency of the criminal justice system singling out the National Prosecuting Authority despite it having had processes and protocols in place with a commitment to agreed "case flow management principles". He went on to argue that poor management was an impediment to service delivery and that a large proportion of cases were stalled at a national level. Mathews (2009:117) further criticises the organisational culture of the National Prosecuting Authority which appeared to be inward focused - *what the superior requires*; rather than outward focused - *what the customer requires*.

This process presented itself to be in conflict with the requirement of expediency as envisaged in the SIU Act where, while section 4(1)(d) made provision for the referral of matters 'pointing to the commission of an offence' to the relevant prosecuting authority; section 4(2) prescribes that an SIU inform the relevant prosecuting authority of such commission of an offence 'as soon as practicable' at which time, such evidence must be dealt with 'in a manner which best serves the interests of the public' (RSA, SIU Act, 1996a).

In interpreting the phrases "as soon as practicable" and "in a manner which best serves the interests of the public", whilst the first phrase speaks to expediency, promptness and efficiency, the second speaks to a Constitutional imperative (RSA, Constitution, 1996b). It is evident that

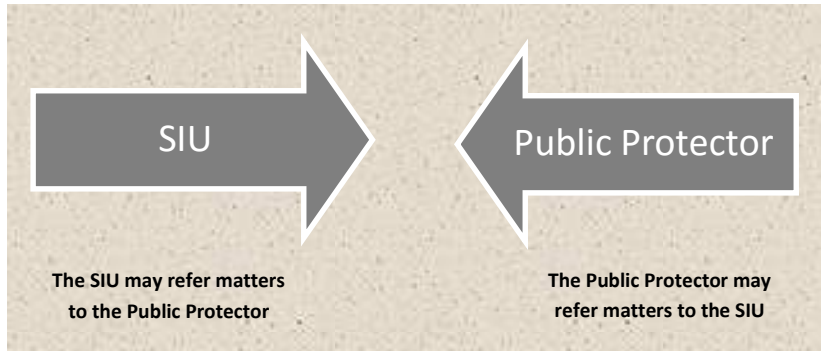
society's interests are safeguarded and preserved by the Constitution, and therefore, one would be inclined to interpret this phrase as suggesting 'in a manner which requires Constitutional priority and vigour'. So the question then is, how should one approach such a prescriptive requirement?

One potential response is: Firstly, the SIU Act prescribes that a matter be referred to a '*relevant prosecuting authority*'. Section 2 of the National Prosecuting Authority Act 32 of 1998 (RSA, NPA Act, 1998) prescribes that 'there is a single national prosecuting authority established in terms of section 179 of the Constitution'. Secondly, section 4 of the NPA Act prescribes that the prosecuting authority comprises of: the National Director, Deputy National Directors, Directors, Deputy Directors, and prosecutors (RSA, NPA Act, 1998). Thirdly, section 20(1) vests the power to "institute and conduct criminal proceedings on behalf of the State" and to "carry out any necessary functions incidental" thereto, on the *prosecuting authority*. Fourthly, given that the prosecuting authority is made up of the various levels as prescribed in section 4, then it is evident that the SIU can refer any matter in which the commission of an offence is identified, to any of these levels which should have the delegations associated with their appointments, from the National Director, even if they were at a regional level. This would be both compliant on the basis of both the legislation and the constitutional imperatives.

### 3.3.7 Referrals to the Public Protector

The SIU during the course of its investigation, may come across matters which may in its opinion, best be dealt with by the Public Protector. In this case the SIU in terms of section 5(6)(b) of the SIU Act, *may* refer such matter to the Public Protector (RSA, SIU Act, 1996a). Similarly, the Public Protector *may* refer any matter which falls within the SIU's terms of reference, to the SIU as depicted in Figure 3.4 below. These prerogatives lie with both the Head of the SIU and the Public Protector respectively.

#### Figure 3.4: Referrals to the Public Protector



**Source: Personal Observation, 2014-2016, and Maharaj (2016)**

In this regard, it might be worth noting some of the investigations that are duplicated between the SIU and the Public Protector. In some cases, investigations even overlap with that of the DPCI e.g. the Nkandla matter which was investigated by the Public Protector, the DPCI and the SIU (Somiah, 2016). Some significant cases amongst others, according to an online article in the DailyVox (2014), on cases that put the Public Protector in the spotlight, an online eNCA article by Sello (2016), the Public Protector website (RSA, Public Protector, 2016), and SIU Annual Reports 2010/2011; 2011/2012; 2012/2013; 2013/2014 and 2014/2015 respectively, with reference to the respective proclamations; are set out in Table 3.1 hereunder.

**Table 3.1: Investigations dealt with by both the Public Protector and the SIU**

NO.	PUBLIC PROTECTOR	SPECIAL INVESTIGATING UNIT
1	Police Lease Procurement - Durban & Pretoria	South African Police Services (SAPS) - Procs. R42 of 10 August 2010 & R73 of 22 December 2011
2	The Midvaal Saga	Midvaal Local Municipality - Proc. R33 of 20 May 2011
3	Nkandla Debacle	Department of Public Works: Prestige Project - Nkandla – Proc. R59 of 20 December 2013
4	SA Post Office Lease (National Head Office - Eco Point)	South African Post Office (SOC) Limited (SAPO) - Procs. R5 of 06 February 2014 and R56 of 01 August 2014 (amendment)
5	South African Broadcasting Authority (SABC) - Hlaudi Motsoeneng	SABC - Proc. R58 of 29 October 2010



6	Department of Communications (DoC) - ICT Indaba -Dina Pule	Department of Communications - Proc. R 10 of 24 February 2014
7	Limpopo Dept of Roads & transport	Limpopo Province Intervention - Proc. R21 of 23 March 2012

**Source: Adapted from Sello (2016), RSA, Public Protector (2016), and SIU Annual Reports 2010/2011; 2011/2012; 2012/2013; 2013/2014 and 2014/2015**

What is evident is that efforts to investigate these matters which are generally quite complex in nature, are duplicated between the Public Protector and the SIU. This duplication of effort by virtue of the complexity of investigations generally unfold within the two Units and spreads over an extended period from anything between 1 and 5 or more years, and can be a rather expensive exercise. This is evident from the Nkandla investigation for which the Public Protector received the first complaint 2011 and only submitted her final report in 2014, 3 years later (RSA, Public Protector Report – Secure in Comfort, 2014). The SIU investigation took approximately 18 months from December 2013 to mid-2015 (Maharaj, 2016). This appears to suggest a duplication of costs, resources, efforts and sometimes unnecessary delays due to parallel investigations by two different agencies (Somiah, 2016). These types of situations emanate from organizational complexities, where, for example the Public Protector, which is a Constitutional body, may not want to relinquish its investigations to the SIU, which is a statutory body.

In this regard, while the Public Protector *may* at its discretion and only if he or she deems it appropriate, refer a matter falling within the ambit of an SIU Proclamation to the SIU, the SIU *may* only refer a matter which it comes across during the course of its investigation, which in its opinion may “best be dealt with by the Public Protector”, to the Public Protector (RSA, SIU Act, 1996a). In essence, while this section of the SIU Act provides both the agencies with a discretion to refer, the SIU is still bound to comply with its terms of reference which is a directive by the Presidency in the form of a Proclamation. In contrast, the Public Protector has its own discretion in terms of its Act to investigate and refer, any matter falling within the SIU’s terms of reference, to the SIU (RSA, Public Protector Act, 1994). The argument here is that the Public Protector is not directed by the Presidency, and therefore has more flexibility in referring a matter, than the SIU.

There is a close similarity of the wording relating to the Public Protector’s discretion to refer a matter to the SIU and/or a public body or authority, both in the SIU Act (RSA, SIU Act, 1996a)

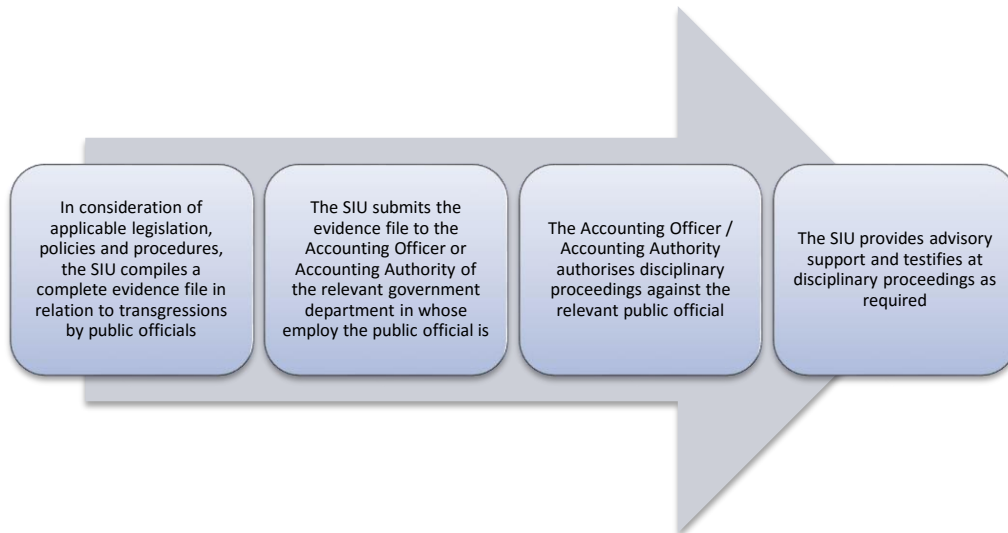
section 5(6)(b) “if he or she deems it appropriate” and, in the Public Protector Act (RSA, Public Protector Act, 1994) section 6(4)(c) “at any time prior to, during or after an investigation ... (ii) if he or she deems it advisable”. The similarity in the words ‘appropriate’ and ‘advisable’ provide the Public Protector with a wide discretion and where complexities may be at play, this can lead to the unnecessary duplication of effort, costs, time and resources. In addition, the fact that the Public Protector may even refer a matter ‘after’ its investigation, would further compound this duplication. A review of these two pieces of legislation is therefore essential in resolving this impasse. Alternatively, a clear set of guidelines pertaining to referrals between the two agencies should be set out in a Memorandum of Understanding entered into between the Heads of the two agencies (Personal Observation, 2016).

### **3.3.8 Referrals for and/or the Institution of Civil Proceedings**

One of the significant advantages that the SIU has over other Law Enforcement Agencies is that in addition to the power to investigate, it can litigate too. The Unit has the power through civil proceedings, to obtain court orders against individuals suspected of wrongdoing compelling them to repay an unlawfully acquired benefit. The Unit can also institute civil proceedings to cancel unlawful contracts (SIU Annual Report 2010-2011, 2011:7).

The SIU may in terms of section 5(5) of the SIU Act, take ‘civil proceedings in its own name or on behalf of a State institution in a Special Tribunal or any court of law (RSA, SIU Act 1996a). In addition, in terms of section 5(7) of the SIU Act, the Head of the SIU may bring any matter which in his or her opinion, justifies the institution of civil proceedings by a State institution against any person (including employees), to the attention of the state attorney or the State institution concerned. Matters referred directly to the State Institution may include recommendations for disciplinary action against employees as reflected in figure 3.5 below.

#### **Figure 3.5: Referrals to State Institutions for the institution of Disciplinary proceedings**

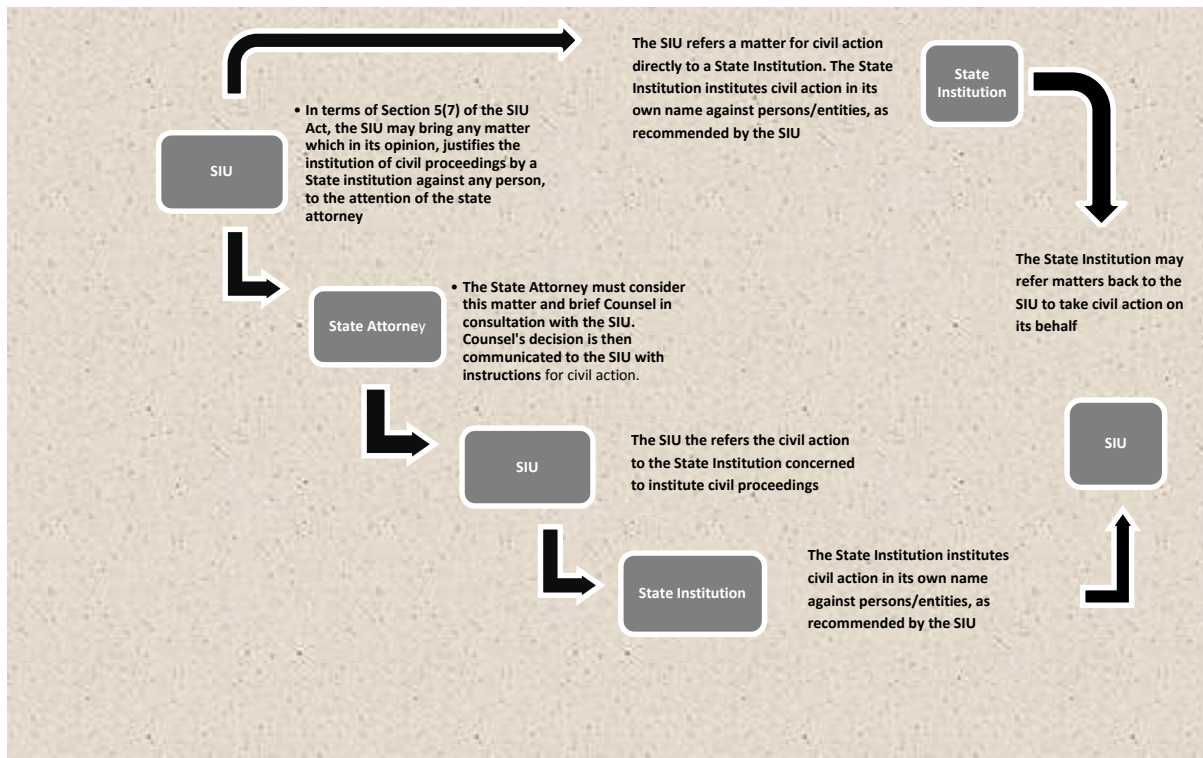


**Source: Adapted from Personal Observation 2005-2016**

According to Maharaj (2016), in terms of the current process, the SIU may either refer the evidence to the State institution concerned or the State Attorney, or institute proceedings in its own name or on behalf of the state institution concerned. In the former case, it is for the State institution or State Attorney to deal with the matter. The SIU assists in developing the matter for the institution of civil proceedings, if requested to do so. It is not inconceivable that the State institution may refer the matter back to the SIU in order for the SIU to institute proceedings. In the latter case, the SIU instructs the state attorney to brief counsel in order to institute proceedings in the SIU's name or on behalf of a state institution.

The SIU collaborates with the state attorney and counsel in order to develop the matter for the institution of the necessary proceedings. The SIU consults with the affected state institution only if and when necessary. The SIU, acting in terms of section 5(5) has instituted proceedings *against* state institutions. In these matters no relief was sought against the affected state institutions. They were merely cited as interested parties given that they had an interest in the matter. For example, the state institution was a party to a contract that the SIU sought to set aside. Maharaj (2016) presents the following as the current case flow or process relating to referrals for civil proceedings as set out in Figure 3.6 below:

**Figure 3.6: Referrals for institution of civil proceedings**

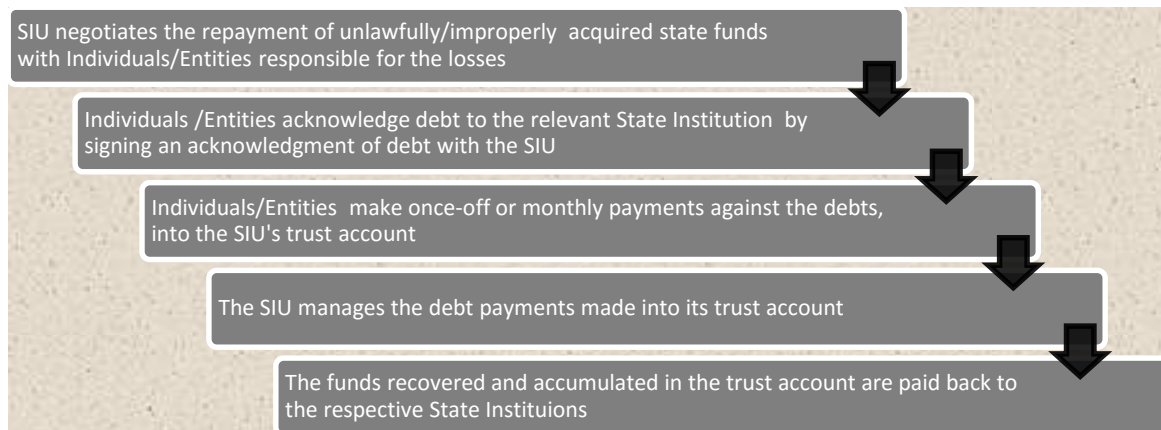


Source: Adapted from Personal Observation 2013-2016, and Maharaj (2016)

### 3.3.9 Civil Recoveries/Proceedings undertaken by the SIU

The SIU also initiates proceedings or takes appropriate civil action on behalf of state institutions against individuals (including state employees) and entities (including private companies), to recover unlawfully/improperly acquired state funds. This is done by way of the SIU negotiating the signing of acknowledgement of debts with the individuals/entities concerned to repay the unlawfully/ improperly acquired state funds. The SIU also serves letters of demands, whilst administering the debts on behalf of the State Institution concerned. The SIU operates a trust account into which the funds recovered are managed and controlled after which the funds are returned to the respective State Institutions as reflected in Figure 3.7 below.

**Figure 3.7: Civil recoveries/proceedings undertaken by the SIU**



**Source: Adapted from Personal Observation 2013-2016, and Maharaj (2016)**

### **3.8 The Impact of the SIU's work as an anti-corruption agency**

The SIU has over the years, had a huge impact on the investigation of fraud, corruption and malfeasance in the public sector as is depicted in the annual performance report of the SIU's Annual Report 2011-2012 ((2012:8-9). It has been assigned with a large number of Presidential Proclamations and has consistently produced significant outcomes relevant to its investigations. The SIU Annual Report 2010-2011 (2011:10) presented the performance successes of the SIU from the period 2004/2005 to 2010/2011. As far as its results of investigations, the SIU over the said period signed 45 377 acknowledgement of debts which were prepared for use in civil litigation (SIU Annual Report, 2011:10). It also prepared evidence for 24 299 matters for criminal prosecution and evidence for 28 485 matters for disciplinary proceedings. In addition, the Unit prepared evidence for other remedial action totalling 563 536, which included recommendations for driver's license cancellations and removals from the Social Pension System (SIU Annual Report, 2011:10). In this way the SIU assisted in cleaning up department's systems, of fraudsters and in so doing improved the integrity of the respective department's governance systems and processes.

The SIU also in relation to savings, preventions and cash recoveries, effected an actual saving which included all social grants removed from the Socpen system for the financial year, of R 1 147m. In addition it effected future savings of R 16 435m, considering all social grants recommended for removal from the Socpen system annualized over a 10 year period at an agreed rate. Lastly, the actual value of acknowledgement of debts or civil litigation as well as non-acknowledgement of debt recoveries, for example, admission of guilt was R332m (SIU

Annual Report 2010-2011, 2011, 10). All amounts recovered by the SIU is administered by the Unit in a trust account, and paid back to the respective government departments who suffered such losses. Coupled with the savings effected by the SIU to the respective departments, this enhances the financial ability of the departments to deliver services to the public.

These figures reflect the impact of the SIU's work. In fact the Unit further highlights significant results in its Annual Report 2010-2011 (2011:24-27) on some older proclamations which were its flagship projects. Firstly, in its Department of Housing project, the Unit signed 1291 acknowledgement of debts to the value of R 16 275 157.00, prepared 625 matters for criminal action and 490 matters for disciplinary action. Secondly, in its Department of Transport Driver's Licence investigation, the Unit identified and referred 37 625 invalidly issued and 8241 invalidly converted licences for cancellation, it registered 620 criminal cases against government officials, municipal officials and private individuals, and referred 168 matters to the Department of Transport for disciplinary action against officials. On the Department of Transport stolen vehicles investigation, the Unit registered 125 criminal cases and 61 disciplinary matters were referred to the Department of Transport. Finally on the Unit's Department of Social Development investigation; it verified 26 609 social grant beneficiaries, prepared 2809 matters for criminal action of which 2477 convictions were achieved, 2095 disciplinary matters were referred against public officials, 6326 acknowledgement of debts were signed to the value of R 56 269 044, and 6 326 unlawful beneficiaries were removed from the system (SIU Annual Report 2010-2011, 2011).

During the 2011-2012 financial year, some of the highlights on the Department of Public Works investigation, through a collaborative effort between the SIU and the Anti-Corruption Task Team, a contractor was arrested and charged with 148 counts of fraud and corruption to the value of R 123m, assets to the value of R80m was seized from the contractor, 4 Kwazulu Natal Department of Public Works officials were arrested for fraud and corruption. In addition, the SIU registered a further 5 criminal cases relating to fraud and corruption amounting to R 211m (SIU Annual Report 2011-2012, 2012:18). In the same report, on the South African Broadcasting Authority (SABC) investigation; the Unit registered a total of 29 criminal cases, identified irregular expenditure amounting to R 428m and fruitless and wasteful expenditure to the value of R 36m, a total of 464 disciplinary matters were referred to the SABC, R 207 000 worth of recoveries was identified and R 35m in potentially untaxed benefits were referred to the South African Revenue Service (SIU Annual Report 2011-2012, 2012:30).

In the foreword to the SIU's 2013-2014 Annual Report (2014: iii), Soni, presented some high level outcomes for the SIU between 2009 and 2014 as follows:

- R799m in potential cash recoverables;
- R113.8m in actual value of cash/assets recovered;
- R111m in actual savings;
- R27.5m in value of contracts set aside;
- R1.3b in value of expenditure in procurement matters where financial misconduct was identified;
- 13 298 matters referred for criminal prosecution; and
- 10 591 matters referred for disciplinary action.

What is clearly evident from the above examples, is that the SIU with both its investigation and litigation powers is a formidable force in the anti-corruption domain and ranks right up at the forefront amongst South Africa's law enforcement agencies and anti-corruption efforts to curb the scourge of corruption in the country.

### **3.9 A Comparative review of the SIU and the Hong Kong's Independent Commission against Corruption**

The Hong Kong's Independent Commission Against Corruption (ICAC) is regarded, according to Quah (2009:177), as a universal model as it is characterized by its "trinity of purpose" with the ability to investigate, prevent, and communicate/educate society on corruption (Heilbrunn, 2006:136). In this regard, the SIU is primarily a law enforcement type, investigative model with some evidence of prevention in its systemic recommendations to departments to close systemic gaps that create the opportunity for corruption to occur. The SIU however, does not embark on full-blown prevention or even public education exercises (Somiah, 2016). In fact, the SIU Act is fairly silent on this.

The ICAC is according to the OECD (2008:31), one of two agencies that had a popular image of a successful, independent multi-purpose anti-corruption agency, and is as Chene (2012:2) points out, well known for its resounding success in combating corruption, and many countries have tried to adopt this universal prototype, with little success. If the question arises as to why the ICAC should be selected for the comparison? Then the answer is simple. Any comparison or benchmarking, which incidentally according to Quah (2009:172), originated amongst

Japanese business firms back in the 1950's to benchmark the best organisations in other countries in order to transfer technology and practices to themselves; should take place against the best in the market or the world for that matter, and according to Chene (2012:2), the ICAC is a successful example of an anti-corruption agency and is often regarded as best practice and the “ultimate institutional response to fight corruption”. This view is further supported by De Sousa (2008:4) who also echoes the sentiment that the ICAC model is internationally acclaimed as a successful, best-practice model of anti-corruption agencies.

Quah (2010) further points out that one of the first steps taken to ensure the ICAC's credibility, was to revise existing legislation and to pass to new laws to establish an agency with an anti-corruption mandate to investigate and refer matters for prosecution, and to ensure that it had a strong and supportive legislative framework which criminalized corruption and associated offences. In this regard, South African appears to be on par with Hong Kong if what Pillay (2014: 56) says is correct in that “South Africa has some of the most comprehensive anti-corruption legislation in the world”. Some of these Acts have already been referred to in the preceding chapter and is seen to be strongly supportive and complementary towards both South Africa's anti-corruption agencies; in this case the SIU, as well as its efforts to combat corruption.

The laws enacted to empower the ICAC gave it far-reaching powers to act against corruption which included to search and seize, examine bank accounts, subpoena witnesses, audit private assets, arrest and detention and to seize passports and property (Quah, 2010). In the South African context, the SIU has its own enabling legislation, the SIU Act, which empowers it with all but the powers of arrest and detention, and for that matter, the powers of prosecution. It is important to note that the ICAC also lacks the power of prosecution. While the SIU does not seize property *per se*, it is also empowered in terms of its act to litigate and take civil action to get court orders compelling the repayment of unlawfully acquired benefits, or the surrendering of property to the sheriff of the courts *in lieu* of payment, by perpetrators. The Unit, also through close collaboration, works cooperatively with the DPCI and the Asset Forfeiture Unit to complement its lack of powers to arrest, seize and forfeit property.

Unfortunately, the SIU does not share the same experience as the ICAC, in terms of solid budgetary support or financing. In 2001, the ICAC according to Heilbrunn (2006:137) received about \$90 million, which equates to R1.249 billion, at a current rand equivalent of R13.88 (as at 29 November 2016) to the dollar. The SIU, with just over 600 staff, is approximately half



the size of the ICAC, who according to De Sousa (2008:9), had a staffing of 1350 contracted officers. While the SIU does not have prevention and community relations departments, but rather Business Management and Business Support, like the ICAC, its biggest department is the Business Operations which conducts its investigations. The ICAC's Corruption Prevention Department funds corruption-related studies, conducts seminars and assists both public and businesses to find corruption-prevention strategies. Its Community Relations Department "builds awareness on the societal costs of corruption" with business and the community (Heilbrunn, 2006:137).

The SIU has no such focus and has not endeavoured into awareness building programs (Personal Observation, 2005-2016). The United Nations body, UNCAC's (2004:10), on the other hand, is guided by article 6 of their Act, where State Parties are required to "ensure the existence of a *body or bodies*" that *prevent* corruption by implementing anti-corruption policies; and "increasing and disseminating knowledge about the prevention of corruption". There is thus a gap in the role of the South African SIU, which in line with UNCAC's guidelines and provisions, suggests that the SIU should reconsider its roles and responsibilities in this regard. This will ensure that South Africa is in line with its international obligations in terms of its UNCAC ratification.

Whereas the ICAC's reporting hierarchy according to Heilbrunn (2006:137,) constituted the "Special Administrator", the ICAC Director" and three oversight committees including: the "Operations Review Committee", the "Corruption Prevention Advisory Committee" and the "Citizen Advisory Committee on Community Relations"; the SIU only has the Head of the Unit and an 'Operations Review Committee' which was only recently established (Personal Observation, 2014-2016). Like the ICAC, the SIU too has to submit regular reports and follow guidelines as set out in its project plan. The SIU's project plans however, which is investigation or project specific, may not be the type of "clear procedural guidelines" as envisaged by the ICAC. This is especially in regards to uniformity in investigations, property seizures (civil litigation in the case of the SIU), and the duration of investigations (Somiah, 2016). In the case of the SIU, the duration and activities is set out in its project plan which is generally adhered to quite strictly. While it should be noted that the SIU lacks a Standard Operating Procedure for investigations, it is worth noting that this is currently being developed for the Unit (Personal Observation, 2014-2016).

The SIU like the ICAC, maintains a strong degree of integrity with its members and operations, so much so that it has its own Internal Integrity Unit (IIU) set up within the confines of its Business Management division (Somiah, 2016). This division ensures that the SIU recruits and maintains staff of the highest calibre by subjecting them to stringent annual vetting processes. In relation to reporting of corruption to the ICAC by citizens, while the ICAC according to Heilbrunn (2004:3), is able to freely investigate any allegations of corruption with specific police powers to investigate and prevent corruption, the SIU cannot investigate as freely as its mandate or terms of reference emanates only from Presidential Proclamations, without which the Unit may not exercise its powers (Personal Observation, 2016; Maharaj, 2016).

While the ICAC appears to have generated a reputation for combating corruption, the SIU too has thus far been very successful in the execution of its mandate with minimum criticism and maximum praise as reflected in a parliamentary statement issued by Khubayi (2016) where the Parliamentary Committee on Telecommunications and Postal Services welcomed the SIU's progress made on the investigation into tender irregularities, irregular appointments, theft, fraud and corruption. Parliament felt reassured that investigations were progressing swiftly and that matters had been referred to the National Prosecuting Authority, while the Asset Forfeiture Unit and civil processes were underway. In fact what is significant in this regard, is Parliament's support of the set-up of a Special Tribunal which can be set up to deal with any civil litigation matter brought before it by a Special Investigating Unit, thereby enhancing the Unit's ability promptly deal and with, and dispose of its matters through a dedicated court.

From the above it is evident that while the SIU has many similarities to the Hong Kong ICAC in terms of success, work still has to be done for it to become as formidable as its counterpart in Hong Kong. Even in its own multi-agency approach and this, significantly by virtue of South Africa's population size in contrast with Hong Kong, the SIU has potential to become as resilient as the ICAC, especially if it were to benchmark itself against the ICAC and implement processes to overcome at least some of its shortfalls, whilst working within the ambit of international guidelines for anti-corruption agencies.

## **Chapter 4: Presentation and Discussion of Results**

### **4.1 Introduction**

The gathering of primary data for this research entailed the utilization of the purposive sampling technique. The main rationale here was to seek out the responses of a target population who potentially bore sufficient knowledge of the subject matter. The SIU comprises of 32 Managers in the Business Operations management component, comprising: Programme, Project and, Assistant Managers (Personal Observation, 2014). A semi-structured questionnaire was administered via email to all 32 managers in random order subsequent to which only 12 managers responded making up 37% of managers, which effectively constitutes one third of the total population of operational managers in the Unit.

The questionnaire was made up of a range of questions that sought to gain information that would assist in responding to the research questions. As a result, the questionnaire was divided into three essential categories namely: organisational independence, functional independence and financial independence (See Appendix 1). The data retrieved from these questionnaires was tabulated onto excel and the results was collated using pivot tables and charts. The results of this exercise provided primary data on the real-life challenges affecting the SIU's independence. This Chapter provides a presentation of these findings according to the three essential categories, namely; organisational independence, functional independence and financial independence.

### **4.2 Organisational Independence**

The point of departure for the discussion on the SIU's organisational independence is essentially sections 2 and 3 of the SIU Act which speaks to the establishment of the SIU and its composition, including its appointment procedures. Section 2(1) by virtue of the wording 'whenever he or she deems it necessary', places the establishment of the SIU by way of a proclamation, at the sole discretion of the President. So too does the President have the sole discretion in terms of section 2(4) to amend the proclamation establishing the SIU. In simple terms, this suggests that the President has the prerogative to either establish, or disestablish an SIU.

A number of questions were posed under this section to the respondents to illicit real-life responses. Due to the nature of the questions being a combination of open-ended and closed ended, responses to open-ended questions will be presented as narrative discussions while closed questions will be presented as tables or graphs.

#### **4.2.1 Understanding of the term “Independence”**

The first question related to their understanding of the term independent. All 12 respondents were unanimous in their response that “independence” referred to instances where:

- there was no interference;
- there was autonomy;
- one could act without fear, favour or prejudice,
- there was freedom to exercise a mandate; and
- one could act within the ambit of one’s terms of reference without fear of reprisal.

#### **4.2.2 Other independent anti-corruption agencies**

On the question of which other anti-corruption agencies existed in South Africa; 7 of the 12 respondents pointed out the Public Protector. Of these 7, one respondent also cited the SIU, whilst two also cited the SAPS/DPCI. The remaining 5 respondents cited the DPCI, SIU, and Corruption Watch. In general however, it is clear that the majority of the managers interviewed acknowledged that the Public Protector was recognised as one of the other independent anti-corruption agencies, by virtue of its constitutional establishment.

#### **4.2.3 The independence of other anti-corruption agencies**

Question 3 presented a follow-up question to the above, and sought to determine why these agencies were seen to be independent. 7 of the 12 respondents cited the Public Protector, by virtue of:

- it being able to investigate immediately on receipt of a compliant;

- the fact that no permission was needed to initiate an investigation; and
- its accountability to Parliament and not to the executive (Head of State/President).

However some of the 7 respondents also cited the DPCI as being able to investigate immediately once a complaint was received; and the SIU as not being dictated to by political formations. The remaining 5 respondents cited both the DPCI and SIU as not being politically dictated to; and the SIU for investigating without fear or favour when carrying out their duties. Again, the responses by a majority of the managers place the Public Protector in a dominant position over the SIU and DPCI as an independent agency and critically due to its ability to initiate an investigation and its reporting line to Parliament.

#### **4.2.4 The implication of Chapter 9 of the Constitution on the office of Public Protector**

In terms of the respondents understanding of the Public Protector as being an institution established in terms of Chapter 9 of the Constitution, all 12 respondents were unanimous in their responses that by implication, the role of this institution was to support and strengthen Constitutional democracy. Further, that it was independent from executive, that it was regarded as a watchdog of the Constitution, and that its primary duty was to protect public interests.

#### **4.2.5 The degree of independence between the Public Protector and the SIU**

The respondents were additionally, asked to draw a comparison on the degree of independence between the Public Protector as a Chapter 9, Constitutional body; and the SIU as a statutory body. In essence, the question posed was: Which of the two bodies enjoyed a higher degree of independence? The response was unanimous from all 12 respondents that the Public Protector enjoyed a higher degree of independence due to its establishment as a Constitutional body. This is a clear indication that the Public Protector's degree of independence far outweighs that of the SIU due to its constitutional status. This is an indication that the lower degree of independence of the SIU may be a cause for concern and compromise the Unit in the execution of its anti-corruption mandate.

#### **4.2.6 The independence of the SIU as an anti-corruption agency in terms of the SIU Act**

On a general level, as to whether the SIU was considered to be an independent anti-corruption agency in South Africa and, if this was by virtue of its founding legislation the SIU Act, 5 of the 12 respondents responded in the affirmative that it was indeed independent, whilst 7 disagreed that it was independent. Consequently, 5 respondents felt that the SIU's independence could be attributed to the SIU Act, while 7 felt that the SIU Act was in fact an inhibitor to its independence. The majority response indicated that the SIU was not independent and that this was attributed to the SIU Act which did not provide sufficient independence to the Unit.

#### **4.2.7 Respondents' personal view of the independence of the SIU**

On an individual level, when asked whether they personally considered the SIU to be an independent anti-corruption agency considering South Africa's Constitutional dispensation and legislative prescripts; 3 agreed that the SIU was indeed independent while 9 disagreed citing:

- the SIU's dependency on the President for permission (in the form of a proclamation), to investigate;
- the limitations to what the Proclamation specified it could investigate; and
- the feeling that political pressure influenced certain matters.

These responses are first-hand and can be considered a measure of the managers' personal experience of independence within the organisation. The aspects presented justifying their view of a lack of independence are arguably, dependencies and outside pressures that is bound to have a material effect on the Unit's independence.

#### **4.2.8 The independence requirements of the SIU as an anti-corruption agency**

On whether the SIU as an anti-corruption agency was required to be independent; while one respondent disagreed that it had to be independent, 11 respondents agreed citing that independence was necessary:

- in order to fulfil its mandate;
- due to the controversial nature of its work;
- to be able to act without fear, favour or prejudice;
- to be in line with the Glenister judgement; and
- in order for the outcomes and recommendations of the SIU to be implemented without fear.

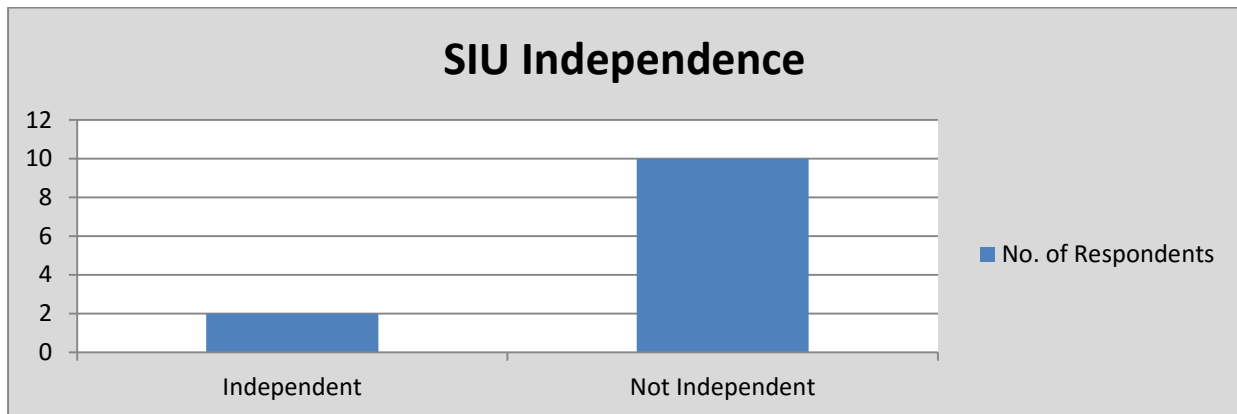
The responses in support of the SIU's need for independence are overwhelming and the reasons advanced seems compelling enough to justify the need for the Unit's independence.

#### **4.2.9 Public perception of the SIU's independence**

The respondents, as members of the Unit, were asked for their view as to whether those interviewed by the Unit actually saw the SIU as being independent. Whilst 3 respondents agreed that people interviewed by the Unit perceived it to be independent; 9 respondents indicated that people interviewed by the Unit did not perceived it to be independent, as it was seen merely as a puppet of the Executive (President), an organ of state, or a government department. These responses reflect the views of the managers while interacting with public and private sector individuals during the execution of their duties as they indicate that it is often easy to assess the public perception of the Units' standing within the anti-corruption environment and amongst other anti-corruption agencies. Typically, with the political scandals surrounding the Presidency, just by virtue of them knowing that the Unit reports to the President creates the perception that the Unit lacks independence.

#### **4.2.10 Factors that make the SIU independent / not-independent**

In response to the question of what factors made the SIU independent or not-independent, the responses received is set out in figure 4.1 hereunder, whilst the motivations for the responses were collated in tabular form and presented thereafter in table 4.1.

**Figure 4.1: SIU independence**

**Source: Research data from questionnaires administered to SIU managers**

10 of the 12 managers felt that the Unit was not independent while 2 felt that it was independent. In their responses, the managers presented factors associated with their respective responses. The motivations for the above responses are set out in tabular format in Table 4.1 hereunder.

**Table 4.1: Motivation for SIU Independence of Non-Independence**

No. of Respondents	Category	Motivation
2	Independent	<ul style="list-style-type: none"> <li>➤ The SIU can prepare a motivation for a proclamation without permission from the subjects to be investigated;</li> <li>➤ It has its own budget which it can utilize as it deems fit.</li> </ul>
10	Not Independent	<ul style="list-style-type: none"> <li>➤ It is dependent on the President for a proclamation/mandate;</li> <li>➤ Its finances is controlled by government;</li> <li>➤ The appointment of the HoU is made by the President;</li> <li>➤ Appointment of staff can be influenced by government;</li> <li>➤ Financial limitations in relation the charging of fees for its services;</li> <li>➤ Presidential oversight of the Unit and its reporting obligations to the President;</li> </ul>



		<ul style="list-style-type: none"> <li>➤ Budget approval by the Justice Ministry;</li> <li>➤ Its establishment by the President which can be changed by the executive or influenced by the legislature;</li> <li>➤ The SIU cannot initiate an investigation on receipt of a complaint.</li> </ul>
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**Source: Adapted from Research data from questionnaires administered to SIU managers, 2016**

In reviewing the responses from managers who felt that the Unit was in fact “independent”, it is easy to detect the contradictions with the responses from those that felt the Unit was “not independent”. Typically, while those that felt the Unit was independent by virtue of the Unit not requiring permission to motivate for a proclamation from persons to be investigated, the very fact that the Unit could neither investigate on receipt of a complaint nor without a proclamation was a more pressing issue that seem to affect the Unit’s independence than motivating for a proclamation. The issue of finances is also contradictory with 3 of the 10 responses motivating for “not independent” highlighting government’s control of finances, financial limitations in relation to charging of fees; as well as the Unit’s budgetary approval by the Justice Ministry. This may well diminish the financial autonomy of the Unit.

What is evident from these responses is that the majority of responses indicate reasons or limitations to the independence which are synonymous with what is prescribed in the SIU Act. This therefore could add some weight to their arguments.

#### **4.2.11 Challenges in the SIU Act that affect the Unit’s independence**

In response to the question that required the Respondents to identify those challenges in the SIU Act (RSA, SIU Act, 1996a) which they felt, affected the Unit’s independence, their responses, in no particular order, included:

- Section 2(1) - The SIU can only investigate once a proclamation is signed by the President, and in this regard the SIU in many cases, experiences significant delays in the authorization of proclamations;
- Section 2(1) and (4) - The SIU is established by the President and the proclamation establishing the SIU can be amended at any time, by the President;

- Section 3(1) - The appointment of the Head of the Unit by the President;
- Section 3(5)(b) - Payment of allowances to members may be determined by the Ministers of Justice and Finance;
- Section 4(f) and (g) - The SIU is obliged to report to President on its investigations;
- Section 4(1)(d) - As an anti-corruption agency, its primary function is civil litigation, while criminality must be referred to the prosecuting authority as it has no prosecutorial powers;
- Section 5(1) - Financial limitations in relation to the recovery of fees from state institutions for services rendered; and
- Section 5 - The SIU does not have arresting powers.

Most of these challenges are synonymous with issues that many authors as well as international legal instruments highlight as being inhibiting factors towards the independence of anti-corruption agencies.

#### **4.2.12 The SIU's accountability and the associated challenges**

On the SIU's accountability, 10 of the respondents agreed that the SIU was accountable to both the President and to Parliament, while 2 respondents indicated that the SIU was only accountable to the President. As a follow-up question in relation to challenges relating to the SIU's accountability, while 3 respondents saw no challenges, the other 9 presented the following challenges:

- The SIU is directly accountable to the President and not to Parliament;
- This may have an impact on investigations in which either the President or the ruling Party may be the focus of investigations;
- The SIU's accountability to the Minister of Justice in respect of finances/expenditure;
- Political interference due to its reporting obligations to the Presidency; and
- The accountability in relation to the submission of final reports to the President may provide the opportunity for reports to be tampered with.

It is clear from the responses that the majority of the managers agree that the Unit reports to both the President and to Parliament, however, 2 managers were of the view that the Unit only reported to the President. The responses are in line with the SIU Act in that while the

Unit's direct reporting line is in fact to the President, the Act also makes provision for the Unit's reporting twice annually to Parliament. Clearly, the major challenge to the Unit's accountability is highlighted as its reporting obligations to the Executive.

#### **4.2.13 The SIU's appointment procedures**

All 12 respondents agreed that the Head of the SIU is appointed by the President. This is in fact in line with prescripts in the SIU Act. In this regard the respondents identified the following challenges:

- The President may appoint someone he can manipulate;
- He may appoint someone toothless to Head up the Unit thereby compromising the efficiency of the Unit and as a result, inhibit anti-corruption efforts;
- Due to the appointment of the Head of the Unit by the Presidency, his/her loyalty will lie with the President;
- The Head of the Unit may show bias and not execute tasks without fear or favour; and
- By virtue of the President being the Head of the ruling party, his appointment of the Head of the Unit may be subject to political influence.

While the argument that the Executive appointment of the Head of the Unit can compromise the Unit, there are some arguments as explained later in this chapter in the international context, that are both for and against this practice. It however, remains a challenge in the anti-corruption context.

#### **4.2.14 Permanency of the SIU as a State Institution**

On the permanency of the SIU as a government institution, all 12 respondents agreed that the SIU was neither a permanent national government department, nor was it perceived as a "*permanent*" entity, agency or other institutional form. Eight of the 12 respondents indicated that the SIU was fostered by the Department of Justice & Constitutional Development (DoJ&CD) which was its parent department, while 3 respondents indicated that the SIU Act in fact gave the Unit mandatory "temporary" existence. One respondent indicated that the SIU

was a creature of statute. This type of set-up for an anti-corruption agency is devoid of security of tenure and can weaken an anti-corruption agency.

#### **4.2.15 Establishment of the SIU by the President**

On whether the SIU could be disbanded/disestablished by the President without consulting Parliament; 11 of the 12 respondents agreed that this was in fact possible by virtue of s.2(4) of the SIU Act, which makes no provision for the President to consult with Parliament in respect of either the establishment or disestablishment/closure of the SIU. One respondent disagreed. The overwhelming majority point out a critical compromise to the Unit's independence as there appears to be no security of tenure for the organisation.

#### **4.2.16 Political Interference in the SIU**

In response to the question probing whether the SIU was free from political influence, whilst two agreed that it was, 10 disagreed that the Unit was free from political influence citing amongst other things the following:

- The Head of the Unit is appointed by the President who himself is the head of the ruling party;
- The President himself decides on what the SIU investigates by virtue of the issuance of a proclamation setting out the terms of reference for the SIU;
- Political influence is possible by the ruling party via the President; and
- The SIU, as it is structured to operate within the ambit of its Act, will never be free from political interference.

This is a rather sensitive question and can compromise an anti-corruption agency's independence quite severely. Political influence is possibly the greatest risk for such a body.

#### **4.2.17 Political pressure on investigations**

The last question under organisational independence was by far the most sensitive one. The respondents were asked to indicate whether they had ever felt political pressure on any of their investigations. Seven of the 12 respondents indicated that they did feel some form of political pressure at some time or the other, whilst 4 indicated that they did not feel any political pressure. One respondent indicated that although political pressure was experienced, it was not direct. No elaboration was sought in this regard, due to the sensitivity of the Unit's work. It is a given that once an anti-corruption agency is politically captured, it compromises the Unit and reduces public faith in an organisation. The issue of political influence and interference is an issue that requires serious attention by lawmakers in order to preserve the integrity of anti-corruption agencies.

### **4.3 Discussion and interpretation of results on organisational independence**

There is no doubt that the SIU, as an anti-corruption agency, must be afforded the associated organisational independence as prescribed in Articles 6 and 36 of the UNCAC (2004). As one of the fundamental international legal instruments to which South Africa is party to, both Articles 6 and 36 of the UNCAC (2004:10), aptly compels State Parties to grant the body or bodies tasked with the prevention of corruption the "...necessary independence ... to enable the body or bodies to carry out its or their functions effectively and free from any undue influence". In other words, they ought to be allowed to function without fear or favour.

Despite the fact that the DPCI is established as South Africa's key anti-corruption agency, the SIU is also expected to be independent by the public. This is based upon the rationale that it is one of the bodies which derives an anti-corruption mandate through section 2 of the SIU Act, which makes provision for the President to refer any matter on the grounds of any alleged "offences referred to in Part 1 to 4, or section 17, 20 or 21 of Chapter 2 of the PACOCA Act, 2004; ... which was committed in connection with the affairs of any State institution"; to an existing SIU (RSA, SIU Act, 1996a). In the absence of the provisions of the PACOCA Act, an argument for the SIU's independence would have been a modest one. Its PACOCA mandate therefore triggers the requirement for appropriate independence.

The SIU therefore, in the execution of its anti-corruption mandate of "investigating serious malpractices or maladministration in connection with the administration of State institutions, State assets and public money as well as any conduct which may seriously harm the interests

of the public”; must have the necessary independence to investigate without undue influence (RSA, SIU Act, 1996a). In this regard, individuals responsible for oversight in state institutions or agencies at both national and local government level may become the focus of an SIU investigation. To this extent, the independence of the SIU’s investigation, by virtue of its reporting obligation to the President as the head of the ruling party, might be seen as a risk to the Unit’s independence. The SIU must maintain its integrity and guard itself against compromising its independence. This may entail a steadfast, no-nonsense approach to its investigations with some evasive manoeuvres to avoid political capture or manipulation.

The independence necessary would in this sense apply to the SIU’s establishment, the appointment procedures of the Head of the Unit and the composition of the Unit.

#### **4.3.1 Establishment of the SIU, Appointment procedures and Permanency, in relation to the SIU Act**

According to Section 2 of the SIU Act (RSA, SIU Act, 1996a), only the President can establish a Special Investigating Unit; and, only he or she can disestablish such Unit. Whilst there was a unanimous agreement by all the respondents in this regard, in the preceding section that the establishment of the SIU is at the sole discretion of the President, one of the concerns raised was that the SIU Act did not make the SIU a permanent state institution. Neither does the Act provide any guarantee as to the permanency of the Unit, nor that of its Head. These concerns are reiterated in the responses provided by the respondents on challenges in the SIU Act.

In comparison, Heilbrunn (2004:6) points out that despite the Singapore’s CPIB’s progressive accountability to four different ministries over a period of 15 years, its positioning directly in the executive and being directly accountable and reporting to the Presidency, afforded it with a significant degree of influence. Similarly, one could argue that by virtue of the SIU’s establishment by the Presidency, the Unit may well enjoy similar benefits to that of the CPIB. In contrast however, Heilbrunn (2004:6) further presents the argument by some observers that, while the placement of the “CPIB directly in the Executive branch” may indicate a high level of political commitment, “its reporting obligations reinforces the executive’s influence while reducing the CPIB’s independence”.

The respondents’ arguments among other things in the preceding section, were that as a result of the appointment of the Head of the Unit by the President, he or she would be beholden to

the executive and this would affect his or her partiality on investigations focused on the executive or the ruling party, which, as a result, would affect the credibility and independence of the Unit. This is supported by the Public Affairs Research Institute's view (PARI, 2012:106), in its Diagnostic Report on Corruption, Non-Compliance and Weak Organisations compiled for the Technical Assistance Unit of the National Treasury; that "apart from the technical (policing and legal) skills required, anti-corruption agencies tend to stand and fall on the basis of their perceived fairness". This is evidenced by the dissolution of the Scorpions because of its perceived impartiality in relation to groups within the African National Congress.

In tracking the establishment and existence of the SIU as far back as 1996, one needs to consider several key factors. The Heath Commission by virtue of Proclamation R72 of 1997, and the President's amendments to the said Proclamation by virtue of Proclamation R.24 of 14 March 1997, as amended by Proclamation R.72 of 11 November 1997 and subsequent establishment of the SIU vide Proclamation R118 of 2001. What is evident from these is that in this space of approximately 20 years, amidst these Proclamations and amendments, neither the Heath Commission nor SIU has been dissolved by the President. In fact this is eloquently pointed out in the Constitutional Court judgement by Yacoob J (2008) in *Chagi and Others v Special Investigating Unit* where in paragraph 24, he found that the 2001 Proclamation did not shut down or close the first Unit, it rather repealed the 1997 proclamation that created it and created the second Unit giving it the power to continue with investigations assigned to the first Unit.

The effect of this proclamation was that the Head of the Unit, Judge Willem Heath, had to step down as a result of the ruling that a sitting Judge could not be the Head of the SIU. Hofmeyr was appointed by the President as a replacement for Heath in 2001, and remained in this position until his removal in 2011 (Underhill, 20 August 2015). Since 2001 essentially, there have been no proclamations establishing an SIU or other SIU's. The Unit was therefore never shut down nor disestablished. Rather, the numerous proclamations authorized by the Presidency to date, served to, in terms of s. 2 of the SIU Act, refer such matters to the existing SIU.

In response to the respondents' concern relating to permanency of the SIU, in a pertinent Supreme Court of Appeal (SCA) judgement in *Special Investigating Unit v Nadasen (5/2001) [2001] ZASCA 117; [2001] 2 All SA 170 (A)* (28 September, 2001), Marais RM points out that s. 2(1) of the SIU Act:

“envisages the appointment of any number of units but does not entitle the President to appoint a roving unit or substitute police force with an unbounded mandate to investigate possible corruption wherever it may exist...”.

The identifiable challenges in this interpretation include the fact that the President cannot “appoint a roving Unit or a substitute police force” (*Special Investigating Unit v Nadasen*) whose mandate has no boundaries, and that it is the President’s prerogative to “appoint or establish a unit” (RSA, SIU Act, 1996a). Considering that the SIU has been in existence for more than 20 years now, may be tantamount to it being perceived as a “roving unit”, however, the fact is that it does not have an “unbounded mandate” (RSA, SIU Act, 1996a). It still operates within the strict and specific terms of reference of the SIU Act and applicable proclamations. This approach appears consistent with Meagher’s (2002:3) finding that one of the lessons learnt in his review of the experiences of anti-corruption agencies, was that “no agency could cope with an unlimited mandate” and that choices had to be made. Perhaps the consideration here therefore, should be for permanency of the Unit as an institution, the operations of which could still be subject to the terms of reference as contained in relevant Proclamations.

Despite this interpretation and specificity by the SCA, in relation to the establishment of the SIU by the President, in paragraph 43 of his Constitutional Court judgement in the *South African Association of Personal Injury Lawyers v Heath and Others*, Judge Chaskalson P, makes an interesting point that the SIU Act does not make provision for the appointment of the SIU Head for a specific period as the scope and nature of work. The judgement also highlighted that the effective functioning of the Unit may be adversely affected if the SIU Head was appointed temporarily as this would potentially minimize the “continuity and control” that is evident in a “permanent appointment or at least an appointment for an indefinite but long term” (*South African Association of Personal Injury Lawyers v Heath and Others*).

In as much as the above interpretation supports a lengthy indefinite appointment of the Head of the SIU, the idea of security of tenure is not protected within the prescripts of the SIU Act, and may be subject to interpretation. Being open to interpretation may positively or negatively impact on the Unit functionality. Perhaps the value of this interpretation may be the building block to an argument for an amendment to the prescripts to afford the position of the Head of the Unit more security of tenure by prescribing the periods or tenure of service like that of the Public Protector.



In the same judgement of *South African Association of Personal Injury Lawyers v Heath and Others*, Judge Chaskalson in paragraph 38, further contends that the SIU Head should be a person with a high degree of integrity especially as the functions he has to perform are executive functions. In this vein, the President irrespective of his own personal agenda is compelled to appoint such a person to the office of the Head of the SIU, that is, someone that is “fit and proper” (RSA, SIU Act, 1996b). Thus, any appointment contrary to this would be unconstitutional and invalid and may be the subject of legal challenges. The greater challenge would be the actual performance of these executive functions by the appointed SIU Head towards acting with integrity, and without fear, favour or prejudice.

The contention that the SIU was never dissolved in over 20 years does not however absolve the SIU Act from catering for a prescriptive permanency of the Unit. Neither is it absolved from the perceived partisan presidential appointment of the Head of the Unit. The responses highlighted in the preceding section, by the respondents, raise alarm-bells over these critical issues. The gist of the above-mentioned legal interpretations may however, add some value on any future arguments relating to a revision of the SIU Act. Perhaps what also needs to be highlighted, is that Judge Chaskalson, aptly pointed out in paragraph 67 of his same Constitutional Court judgement, in *South African Association of Personal Injury Lawyers v Heath and Others*, as early as 2001, that there was a need for the State to consider the constitutionality of issues related to the structure of the SIU Act and its provisions.

Based upon the concerns raised by the respondents in relation to the discretionary powers towards the establishment and disestablishment of the SIU by the President, the uncertainty of the Unit’s permanency; and, the appointment of the Head of the Unit by the Presidency the State need some attention in considering the future of the Unit. Perhaps a review the prescripts of the Act needs to be undertaken in order to bring it in line with its international obligations in terms of the UNCAC (2004), to ensure that the SIU Act does not inhibit the independence requirements of an anti-corruption body as envisaged by the UNCAC.

Given these concerns over powers and permanency, consideration within the SIU Act needs to be given to the SIU as an institution tasked with an anti-corruption mandate, even if it has to still rely on proclamations, as its terms of reference to investigate. Proclamations would then serve the purpose of setting the boundaries for an SIU investigation so as not to overlap with the mandate of other agencies. Permanency in this regard is seen as essential for an agency

tasked with an anti-corruption mandate to ensure and preserve the continuity of highly sensitive investigations.

#### **4.3.2 Is the SIU Independent or seen to be Independent?**

According to Gould (2012:1), in the March edition of the SA Crime Quarterly, in order for South Africa to meet with Constitutional and international obligations, an agency tasked with combating corruption must be independent, and must be seen as independent. These sentiments were echoed by Soni (2015) when putting aspects for consideration during this research. On this note, the most critical source of determining whether the Unit is indeed independent or seen to be independent would be those that are employed by the Unit as they would have the most practical exposure to instances where the Unit's independence may be inhibited, or to perceptions by persons interviewed in the course of the execution of their mandates. In this regard and in line with the Constitutional imperative as set out by Gould (2012), the majority of the respondents interviewed are in agreement with Gould's proposal of the Constitutional imperative that an anti-corruption agency was required to be independent; and as such, the SIU was required to be independent; and, seen to be independent.

It is important to note that the majority of the respondents felt that people interviewed by the SIU did not see the SIU as being independent, but more as a 'puppet' of the Executive citing the Unit's dependency on the Executive and on Proclamations by the President. In light of this, as an agency or organisation charged with an anti-corruption mandate, the emerging picture to a large extent, is that the SIU lacks the degree of independence required of it as an anti-corruption agency. Further, it is not viewed to be independent by the majority it interacts with. In this regard, the SIU appears to fail to comply with the Constitutional imperative of being an independent anti-corruption agency.

To this end, both sections 2 and 3 of the SIU Act need to be reviewed to determine the extent to which the current prescriptive requirements of the SIU conform to South Africa's regional and international obligations, as well as its legislative guidelines. Particularly the Glenister I judgement of *Glenister v President of the Republic of South Africa and Others [2008] ZACC 19* needs to be considered in relation to the establishment of an appointment procedures within its anti-corruption bodies. The Constitution should serve as the supreme guide for the

establishment of an anti-corruption agency such as the SIU and for the appointment of its Head. This is critical to preserve the integrity of the Unit's work.

Like the Office of the Public Protector, the Head of the SIU ought to be subject to the same intricate and transparent parliamentary selection processes to eliminate bias and subjectivity. The champions of this initiative, ideally, should be the political parties of the day, private sector businesses, non-profit organisations and civil society. Government, in this regard, in response to efforts by the Unit to motivate for, and secure this type of review and/or amendments to its Act, may be limited to the extent that it is accountable to the executive and further, that the amendment of legislation remains at the authority of the National Legislature. This is a political process whose objectivity may be affected by party politicking.

#### **4.4 Functional Independence**

The next section that the respondents were subjected to was that of the SIU's functional independence. The focus of the questions was to illicit responses which could clarify the degree to which the SIU enjoyed functional independence in the execution of its mandate and functions.

##### **4.4.1 Powers of the SIU in terms of the SIU Act**

The first question related to whether the SIU Act made provision for sufficient powers for the Unit to execute its mandate. Nine of the 12 respondents agreed that it did indeed, citing the powers to:

- Investigate;
- litigate (civilly) to recover losses suffered by the state;
- search and seize;
- compel witness testimony even if it incriminated such witness (provided such testimony would be inadmissible in subsequent criminal proceedings against such witness); and
- engage other Law Enforcement Agencies (LEA's) e.g. National Prosecuting Authority.

The remaining 3 respondents disagreed that the SIU Act made provision for sufficient powers, citing such reasons such as the Special Tribunal not being operational for civil litigation.

#### **4.4.2 Other agencies with more powers than the SIU**

Coupled with the above, four follow-up questions were administered to the respondents. The first being whether there were other agencies with more powers to investigate corruption than the SIU. While 2 of the respondents indicated there were none, 10 respondents agreed that there were indeed agencies with more powers than the SIU. These included the SAPS, the DPCI, the Public Protector, and the National Prosecuting Authority.

#### **4.4.3 Why do these agencies have more powers?**

The second question sought the reason for the respondents concluding that these agencies had more powers. The following reasoning was presented by the respondents:

- They did not need a proclamation to investigate;
- They may initiate an investigation on receipt of a complaint; and
- Agencies like the SAPS and DPCI have the powers of arrest, & to charge suspects and bring them before court.

#### **4.4.4 Powers that the SIU lack**

The third question sought to illicit responses in relation to powers that the SIU did not have. The responses were as follows:

- The powers of arrest;
- The powers of prosecution; and
- The power to report to persons other than the President.

#### **4.4.5 SIU powers that other agencies lack**

In contrast, the fourth question sought to determine whether the SIU had powers which other agencies did not have. In response, while two of the respondents disagreed that the SIU had powers that the other agencies did not have, 10 of the respondents indicated that some of the powers that the SIU had over and above the powers that other agencies had, were the power to:

- Conduct civil litigation in its own name or on behalf of a state institution;
- Hold hearings and question witnesses and/or compel witnesses to answer questions even if it incriminated them (without using such evidence in subsequent criminal proceedings); and
- Litigate to recover misappropriated state funds.

#### **4.4.6 The SIU's reliance on other agencies to investigate corruption**

On whether the SIU relied on the assistance of other agencies to investigate corruption, 5 respondents indicated that the SIU did not rely on the assistance of other agencies, while 7 indicated that the SIU did in fact rely on other agencies as follows:

- The National Prosecuting Authority for Prosecutions;
- The SAPS/DPCI for arrests; and
- The Asset Forfeiture Unit for asset forfeiture.

#### **4.4.7 Can the SIU initiate a prosecution?**

On whether the SIU could initiate a prosecution on matters investigated by the Unit, 6 respondents replied in the affirmative by virtue of a referral to the National Prosecuting Authority. On the other hand, 6 replied in the negative, citing that the decision to prosecute still lay with the National Prosecuting Authority. Notwithstanding the conflicting responses in the affirmative and negative by the respondents, by virtue of the National Prosecuting Authority being the common agency in all 12 responses to whom referrals for prosecution are made by the SIU, and with whom the decision to prosecute lay, the foregone conclusion in this regard

is that the SIU cannot prosecute, period. This is supported by the fact that prosecution is the sole mandate of the National Prosecuting Authority in terms section 2 of Chapter 2 of the National Prosecuting Authority Act 32 of 1998 (RSA, NPA Act, 1998) which prescribes that “there is a single national prosecuting authority established in terms of section 179 of the Constitution, as determined in this Act”.

#### **4.4.8 The SIU's access to information**

On the question of whether the SIU has independent access to information required to investigate corruption, 4 replied in the affirmative citing that the SIU could utilize its powers in terms of section 5 of the SIU Act to request information from any person or entity. The other 8 respondents replied in the negative, citing that the SIU relied on other agencies for information including: the Financial Intelligence Centre (FIC), the Companies and Intellectual Properties Commission (CIPC), the South African Revenue Services (SARS), the South African Banking Risk Information Centre (SABRIC), and the SAPS.

#### **4.4.9 The adequacy of SIU resources**

The final question under functional independence was whether the SIU had sufficient skilled staff to conduct its investigations or whether it relied on external skills. While 7 of the respondents agreed that the SIU did in fact have sufficient skilled staff with one exception that the SIU relied on external professionals for technical skills e.g. engineering or architecture, 5 of the respondents disagreed citing that the SIU had a shortage of skilled staff in the fields of auditing and accounting.

### **4.5 Discussion and interpretation of results on functional independence**

The SIU unfortunately does not have the power to initiate its own investigations nor does it have a choice in respect of what to investigate. The scope of its mandate is derived wholly from a Presidential Proclamation which is at the sole discretion of the President. Only on the issue

of a Proclamation can the SIU exercise its statutory powers. The question that then arises is, what does this imply? Is this seen as a weakness or strength?

#### 4.5.1 The Powers and Functions of the SIU

What is evident from the responses obtained from the respondents in the preceding section in relation to the SIU's ability to initiate an investigation of its own volition, is that this is seen as a weakness and an impediment to the Unit's functional independence. The respondents views are that the prerogative to investigate, and what to investigate should lie with the SIU, and not the executive. In contrast however, an interesting argument pointed out in the PARI's Diagnostic Report (2012) is that one of the *vulnerabilities* of anti-corruption agencies is that they can choose what to investigate and what not to. This could imply partisan behaviour on their part. The report therefore recommends that a critical requirement be that anti-corruption agencies select cases objectively.

In considering this argument, perhaps the fact that in the current context of a presidentially proclaimed mandate and terms of reference where the SIU cannot play a role in case selection, is to its advantage. This is based on the rationale that partisan behaviour on the part of the Unit in case selection, would then be eliminated. But then, one may question the role of the President in the case selection and assignment to the SIU? The major argument raised by the respondents in this regard was that the President as the executive may be biased in case selection as he 'may' assign cases at his discretion and not necessarily in the interests of the state or society.

This appeared to be evident in the United Democratic Movement's (2001:4) report entitled "Comrades in Corruption 2" in reaction to the Arms Deal Joint Investigation Report where they point out that although Parliament's Standing Committee on Public Accounts (SCOPA) recommended that the investigation be conducted by the SIU, the Director of Public Prosecutions, the Public Protector and the Auditor General. This resulted in what could be considered panic in the ruling party. SCOPA's decision was subsequently over-ruled by the Speaker of Parliament and no Proclamation was issued by the President for the SIU to investigate the Arms Deal (United Democratic Movement, 2001:4). Subsequent to this the SIU at the time known as the Heath Commission, was dissolved or the proclamation establishing it was repealed, and the Arms Deal investigation was assigned to the remaining three agencies. The situation intensified when the Deputy President at the time and his Cabinet, as indicated

in the United Democratic Movement Report (2001:5) publicly chastised SCOPA and in the process, “undermined Parliament’s decision”. Critically, the United Democratic Movement Report (2001:5) concluded that a number of incidents emanated from the Executive interference which “undermined the credibility of any investigation”. This included, SCOPA’s independence being compromised; the SIU with more powers (civil) than other agencies, was withdrawn from the investigation and dissolved; and the investigation had no public legitimacy.

An interesting consideration should be what the international practice in relation to anti-corruption agencies functional independence is. Heilbrunn (2004:6), in reference to Singapore, suggests that the President is also at the top of Singapore’s CPIB and that he receives all reports from the agency and can therefore make the final decision as to whether CPIB acts against alleged corruption. He also points out that the CPIB director is accountable to the President. The critical factor despite this perceived functional impediment with accountability to the executive though, is that the CPIB still had the reputation of high levels of successful investigations and that since its establishment, public sector corruption had decreased annually.

The respondents, in the current study, identified several challenges in the SIU Act. These included, the SIU’s reporting obligations to the President; the reliance on the prosecuting authority to prosecute offenders it might have identified as criminal perpetrators; its reliance on other law enforcement agencies to investigate criminality *it* had identified in the first place; the lack of the power to initiate an investigation without a Proclamation; and the lack of arresting powers by the SIU.

As an investigative type model of an anti-corruption agency, these are somewhat concerning issues that may warrant further analysis and interventions. On the reporting obligation to the Presidency, however, what is evident from the SIU Act and, on a closer analysis of s.4(1) (f), (g) and (h) of the Act, is the reality that it not only makes provision for the SIU to report to the Presidency, but the Unit is also required to report twice annually to Parliament on its investigations and “activities, composition and expenditure of the Unit” (RSA, SIU Act, 1996a). It must be noted that, while s.4 (1)(f) makes provision for reporting on progress on investigations “from time to time as directed by the President”, s.4(1)(g) requires that upon the conclusion of an investigation, the Unit is compelled to submit a final report to the President.

Additionally, s.4(1)(h) of the SIU Act (RSA, SIU Act, 1996a) makes provision for Parliamentary reporting twice annually. This confirms that besides the executive oversight during and upon conclusion of an investigation, there is a regular and ongoing reporting



obligation and oversight role played by the National Legislature. This oversight role could potentially serve to limit any form of manipulation by the executive of the SIU's investigations without being detected by the Legislature. This provides the degree of independence required of the SIU as an anti-corruption agency and is consistent with international practice and recommendations as both executive and parliamentary oversight provide for the independence necessary of an anti-corruption agency.

Whilst the powers of arrest might be not be easily achievable for the sole reason of not duplicating the powers and mandates of the SAPS, it should be an important consideration in the context of the anti-corruption mandate of the SIU. Perhaps this needs to also be considered in light of the lack of certain constraints in agencies like the Independent Complaints Directorate (ICD), now the Independent Police Investigative Directorate (IPID). Indeed Faull (2011a:5) raises doubt as to whether the ICD would be able to do justice to its mandate in light of budgetary and capacity constraints, or merely be compelled to pass complaints on to agencies like the SIU. Faull (2011a:5) goes on to argue that since it may be impossible for the IPID to "hire more investigators and provide them with specialised training required to investigate corruption"; it would have to "re-negotiate its relationships with ... other agencies to ensure that complaints are investigated". In this regard, the handling of investigations without full policing powers specifically that of arrest, may be problematic for agencies like the SIU.

Perhaps in this context one should consider these other agencies in South Africa that currently retain powers of arrest including the SAPS/DPCI and the IPID. This could potentially give rise to the argument that the powers of arrest are not necessarily limited to the police, but extend to other agencies as well like Singapore's CPIB which is independent from Singapore's Police Force, but retain police powers of arrest as set out in section 15 of Part IV of the Republic of Singapore's Prevention of Corruption Act (Republic of Singapore, Prevention of Corruption Act Chapter 241 of 1993, 1993:17). Faull (2011b:2) presents a worrying view of the police's susceptibility to corruption by virtue of their "state-sanctioned discretionary powers" which include the use of force and arrest and the fact that these powers may be subject to abuse. The fact that the police and potentially the DPCI within the police, may be easily susceptible to corrupt acts by virtue of the power they wield may warrant some consideration of assigning the powers of arrest to a statutorily independent body like the SIU especially in light of their

reputation for maintaining high levels of integrity whilst combating corruption. The emerging question then, is why the SIU, as an anti-corruption agency, does not possess policing powers of arrest, similar to Singapore's CPIB. Interestingly, De Sousa (2010:7) suggests that specialized bodies should be studied for various reasons which include amongst other things, that:

- their sole mission is to combat corruption;
- they are an attempt by governments to overcome the insufficiency and/or inadequacy of conventional law enforcement agencies in coping with the growing sophistication of corrupt mechanisms and transactions and detecting and/or preparing complex corruption cases;
- in contrast to law enforcement agencies, Anti-Corruption Agencies have also been designed to develop a preventive capacity and generate a knowledge-based approach to corruption through research; and
- these bodies are provided with a team of experts (... drawing on the knowledge and experience of several other monitoring and regulatory units and giving their own in exchange), an ample mandate, investigative powers, statutory autonomy and adequate funding to ensure that effective preventive steps are identified and put in place.

How then would a government hope to overcome the insufficiency or inadequacy of the conventional police force by granting less power to its anti-corruption agency or agencies than its police force? In this regard, an interesting observation is made by Quah (2010), where he points out that Singapore's success in combating corruption can be attributed to its reliance on the CPIB for this purpose instead of the police due to the rampant corruption in its police force. In concurrence, Quah (2010) makes it abundantly clear that the British colonial government's grave policy mistake of initially assigning the anti-corruption mandate to its police force was only realised and rectified 15 years after the legislative enactment of the Prevention of Corruption Ordinance in December 1937; by which time in October 1952, the CPIB was established as an agency separate from the Singapore Police Force. Implicitly, in the South African context, Faull (2011a:1) highlights the number of "high-profile police scandals" involving some of SAPS' top management and the fact that these incidents have a ripple effect on the organisation's ability to effectively combat widespread corruption. Considering the

effects of corruption on society and its Constitutional imperatives, it would bode well for South Africa to not wait 15 years, but rather remedy this situation sooner than later.

With the increase in corruption in South Africa, combined with media and public outcry of deliberate manipulation of investigations under the control of the police and National Prosecuting Authority, perhaps both Quah (2010) and De Sousa's (2010) observations must be given some consideration. They suggest moving from a reliance on conventional law enforcement authorities and the colonial way of relying on the police to curb corruption. This is an interesting and critical viewpoint for consideration in relation to the South African context, where the anti-corruption reliance is more on the DPCI which falls under the SAPS, rather than the SIU. Typically, a tendency to shift this reliance to the SIU may be more conducive in the South African context, especially in the current situation, where a manipulation through poor leadership appointments by the executive, to agencies within the criminal justice system and organisations tasked with combating corruption according to Tamukamoyo & Mofana (2013), is becoming increasingly evident.

This however, would require some review and amendments to legislation and protocols between the SIU, DPCI and the National Prosecuting Authority. The researcher suggests that this is a possibility if current processes are revised accordingly. This is based upon the rationale that current practice with the SIU's process flow, is that the SIU Act prescribes that once criminality is identified, the matter must be referred to the National Prosecuting Authority, which then decides on prosecution and returns the matter to the SIU with a directive that the matter be handed over by the SIU, to the SAPS or the DPCI. Once in the hands of the police, the SIU has no control over the investigation or outcomes. Considering the overwhelming arguments in the Constitutional Court relating to the independence of the DPCI; the risk of executive and political interference on the Unit's investigations and functioning, within the confines of the SAPS (Pereira *et.al.*, 2012:40-41); it would auger well for South Africa's law-makers to reconsider the requirement that the SIU hand over matters to the SAPS or DPCI after it is returned by the National Prosecuting Authority.

It is important to note the proposal that after a referral by the SIU and once a decision to prosecute is made by the National Prosecuting Authority, the matter should be returned to the SIU to finalize the criminal investigations, during which time, the SAPS or DPCI must be compelled to provide the necessary support in terms of policing powers, to the SIU. The aim here is to allow the matter to be brought to a successful conclusion under the watchful and

competent eye of the SIU which sentiments are echoed by Democratic Alliance Member of Parliament (MP) Dene Smuts in Hartley (2011) where she suggests that the Hawks remain in the police while the SIU should form the basis of South Africa's independent anti-corruption Unit, to work closely with the National Prosecuting Authority and the police to bring a criminal matter through a successful prosecution. With the extensive multi-disciplinary forensic expertise and capabilities it possesses, it is neither inconceivable nor baseless for the SIU to lead an investigation; provided it is supported with policing powers of the DPCI. This approach is supported by a provision in the NPA Act, section 24(4)(c)(ii)(aa) which caters for a Director of Public Prosecutions to give written directions or furnish guidelines not only to the Provincial Commissioner of the police, but also to "any other person who within his or her area of jurisdiction, conducts investigations in relation to offences" (RSA, NPA Act, 1998).

In any event, should the matter be referred to the Provincial Commissioner of police with a request for assistance with investigations in terms of section 24(7) of the NPA Act, the Director may still give directions or guidelines in terms of section 24(4)(c)(ii), to such Provincial Commissioner to cooperate with the SIU in investigating a matter.

#### **4.5.2 The power to initiate or conduct preliminary investigations**

Another major inhibiting factor for the SIU, as identified by the respondents, is its inability or lack thereof to initiate an investigation on the receipt of a complaint or of its own volition, if it becomes aware of incidents of malfeasance in the public sector (Maharaj, 2016). Any investigation by the SIU in the absence of a Proclamation would be considered *ultra vires* (outside the terms of reference) to the SIU Act and therefore unlawful. Based on its current legislative model, even if the SIU receives a complaint, it cannot conduct any preliminary investigations in order to either firm up the allegations or establish, at a *prima facie* level (at first sight), the veracity of the allegations as the Act precludes any preliminary investigation. To this extent, the SIU would have to rely on 'evidence' voluntarily handed in by a whistleblower or other interested party in order to motivate for a Proclamation (Maharaj, 2016).

This suggests that on receipt of a valid complaint but in the absence of information, documents or other material evidence, the SIU would have no course to apply for a Proclamation from the Presidency. This is particularly worrying and compromises the value and contribution of the SIU as an anti-corruption agency. This has the potential to diminish confidence in the SIU as

a recognized anti-corruption agency in South Africa. In this vein, consideration must be given to empowering the SIU to initiate investigations or at least preliminary investigations on the receipt of a complaint or even of its own volition depending on the merit of such complaint which may purport to fall within the ambit of s.2 of the SIU Act, in order to justify an application for a proclamation to the Presidency.

In order for this to be possible, an amendment to the SIU Act, in relation to its powers, is necessary and this should be similarly worded to s.6 (4)(a) of the Public Protector Act and read: “The Head of the Special Investigating Unit or duly delegated members of the SIU should be competent to investigate allegations falling within the ambit of s.2 of the SIU Act, on his or her own initiative or on receipt of a complaint, any alleged...maladministration...”. The wording could even be drafted to limit the SIU’s preliminary investigation at inception to gathering sufficient information supporting the allegations, to apply for a Proclamation to the President. This will in essence set the boundaries for investigations after a first complaint is received by the SIU.

In this way, despite initiating preliminary investigations at its discretion, the mandate for a full investigation can still be subject to an application for a Proclamation from the President. This application will be first subject to scrutiny by the DoJ&CD and then by the Presidency before it is signed and authorized by the President. This would eliminate perceptions of ‘partisan’ behaviour on the part of the SIU in its case selection. This has the potential to serve as a safeguard on the part of the SIU as case selection will not be solely at the discretion of the SIU but subject to ministerial as well as executive oversight and consideration.

Perhaps an essential observation on the part of the SIU obtaining its mandate from the Presidency, by virtue of a Proclamation authorized by the President, is that it is not entirely true that the types of cases assigned to the SIU is at the sole discretion of the President as this is still subject to the scrutiny of Parliament. This occurs by way of the SIU’s reporting to the National Legislature when questions may be raised in relation to applications for Proclamations that are still pending between the DoJ&CD and the Presidency. In this way, the National Legislature exercises Parliamentary oversight on Proclamations pending authorization by the Presidency (Maharaj, 2016).

### **4.5.3 Reporting obligations**

The reporting structure was identified by the respondents as an issue of concern. However in the context of the SIU Act, what is prescribed therein in relation to its reporting obligations to Parliament and the oversight role played by Parliament, appears to be in line with what is suggested by Stapenhurst, Ulrich and Strohal (2006:5) in the first chapter on ‘Parliamentarians Fighting Corruption’. Stapenhurst *et. al.* (2006:5) notes that “to work successfully, anti-corruption commissions must be independent, part of a broader anti-corruption strategy, embedded in a reporting hierarchy encompassing the legislative and executive, and have the government enact its recommendations”. The SIU operates within this context of reporting to the Executive as well as to Parliament and therefore derives a degree of independence by virtue its reporting obligations to Parliament and hence parliamentary oversight on its activities.

In addition, in consideration of Quah’s (2009) observations as well as the current turmoil between the DPCI and the National Prosecuting Authority over the Finance Minister, Pravin Gordhan, perhaps the SIU should be allowed to proceed with its criminal investigations throughout the prosecutorial process to bring its matters to finality in court. This is suggested as an alternative to the matter being referred or reported to the SAPS or DPCI, who in turn must rely on the support of the SIU (this is of course at the discretion of the SAPS or DPCI, should they decide to consult with the SIU). Rather, the suggestion is that, the SIU should retain the matter and the SAPS/DPCI should be compelled to provide support in relation to policing powers, to the SIU, to enable it to bring the criminal investigations to a conclusion.

## **4.6 Financial Independence**

The final section of the questionnaire focused on issues related to financial independence. The questions sought to determine the extent to which the SIU enjoyed financial independence and as an anti-corruption agency and, the challenges it faced in this regard, if any.

### **4.6.1 The SIU’s budget allocation**

The first question examined the extent to which the SIU had its own budget allocated by Parliament. Five respondents indicated that the SIU has its own budget. Of these 5 affirmative

responses, one respondent cited partial funding from Parliament. The remaining 7 respondents denied that the SIU had its own budget allocated by Parliament, with 2 of the 7 citing that the SIU received its budget from the National Treasury through the DoJ, and one citing that the SIU received its budget directly from the DoJ.

#### **4.6.2 Sources of the SIU funding**

The follow up question to the above was how, or where does the SIU receive its funding. The respondents submitted as follows:

- From the National Treasury;
- From the National Treasury through the DoJ;
- From the DoJ; and
- From departments (fees recovered for forensic investigative services rendered).

#### **4.6.3 The SIU Act on its funding**

On the question of whether the SIU Act made provision for the Unit's funding, 9 respondents indicated that it did indeed, whilst also citing the recovery of fees from departments for forensic services rendered. The other 3 disagreed.

#### **4.6.4 Adequacy of the SIU budget**

On whether the SIU's budget was adequate for its operations, 6 respondents thought it was adequate, citing that the baseline budget from National Treasury and fees recovered from departments were sufficient. Whilst 2 replied in the negative, citing that the National Treasury baseline budget catered for salaries, while operations were reliant on fees recovered from departments. In essence, this implies that if departments failed to effect payment on the SIU invoices, this would pose a financial constraint as operational funds may become depleted. Four respondents however, indicated that they were uncertain if the SIU's budget was in fact sufficient.

#### **4.6.5 SIU's historical experience of a depletion of funds**

The next question sought to determine whether the SIU had run out of funds to perform operations in any prior financial year. Four respondents replied in the affirmative, indicating that indeed the SIU had to approach National Treasury for financial assistance at some stage during its existence, while eight replied in the negative, citing that they were unaware of instances where the SIU had in fact run out of funds.

#### **4.6.6 Discretion on budget utilization**

On whether the SIU had its own discretion in the utilization of its funds, 5 respondents replied in the affirmative, citing that the SIU managed its own budget, whilst 3 replied in the negative with no substantiation. One replied that the SIU did not have sole discretion while three indicated that they were uncertain.

#### **4.6.7 Does the SIU enjoy financial autonomy?**

The final conclusive question in this section was whether the SIU enjoyed financial autonomy. Three respondents agreed that the SIU did enjoy financial autonomy, as it could recruit, hire services and utilize its budget as required. Seven respondents disagreed that the Unit had financial autonomy, citing its dependence on National Treasury, the Ministries of Justice and Finance, and its regulation in terms of the PFMA. Two respondents indicated that they were uncertain.

### **4.7 Discussion and interpretation of results on financial independence**

The results of this section of the questionnaire, presents a view by the respondents that the SIU lacks financial independence. It is however not a unanimous view. Respondents appeared to be somewhat divided in terms of the SIU's financial independence and this could be attributed to the fact that being operational managers, some of them had some uncertainty in relation to the origin & distribution of some of the SIU's finances. Although about forty one percent of respondents interviewed believe that the SIU did indeed receive its funding from Parliament, fifty eight percent disagreed saying that it was appropriated through the DOJ&CD from



National Treasury as well as from departments for forensic services rendered to them, while thirty three percent of the respondents felt that the SIU did indeed run out of funds at some stage and had to approach National Treasury for additional funding.

#### **4.7.1 The SIU Budget**

A general indication by a majority of the respondents was that the SIU's budget was indeed adequate for its operations and that the Unit had its own discretion in relation to the utilization of its finances. On the main question, however, of whether they felt that the SIU enjoyed financial autonomy, fifty eight percent felt that the SIU lacked financial autonomy while twenty five percent felt that it enjoyed financial autonomy. The remaining sixteen percent of respondents were uncertain.

Perhaps the most overwhelmingly positive response from the respondents related to whether the SIU Act made provision for its budget or funding. To this question, seventy five percent of the respondents agreed that the SIU Act did indeed make adequate and appropriate provision for the budget and funding of the Unit. In fact this is qualified and reiterated in the provisions of s.13A(1) of the SIU Act (RSA, SIU Act, 1996a) which provides that the funds of an SIU consists of:

- (a) "money appropriated by Parliament;
- (b) money lawfully accruing from any other source, including fees and expenses recoverable for services rendered;
- (c) donations or contributions; ... and
- (d) money otherwise becoming available to a Special Investigating Unit".

#### **4.7.2 A comparison of the funding model of the SIU and the Auditor General**

The Act clearly makes provision for a number of ways, in which the SIU can appropriate funds but predominantly, from Parliament. Interestingly it seems the fees and expenses recovered for services rendered replicates the funding model of the Auditor General of South Africa which affords the institution financial independence. The relevance of this funding model to financial independence, is aptly presented by Woolman & Schutte (2008:24B-5) in a chapter on the Auditor General in "*Constitutional Law of South Africa*". Here the authors point out that fiscal

independence is one of the unique features of the Auditor General of South Africa which affords it the ability to generate revenue from “fees charged for audit services”, thereby ensuring that it has “money necessary to discharge its constitutional duties” (Woolman & Schutte 2008:24B-5).

Pointedly, these financial resources is said to immunize the Auditor General of South Africa from budgetary constraints that have undermined the independence of other Chapter 9 institutions. The authors maintain that the Auditor General of South Africa’s ability to recoup fees charged for auditing services in essence, enhances its political independence. This they emphasised is prevalent in a landscape where other Chapter 9 institutions, like that of the Public Protector, “constantly complain that they are under-funded and under-resourced and therefore incapable of discharging their constitutional duties” (Woolman & Schutte 2008:24B-5). The conclusion in light of the above in the authors view, is that the Auditor General of South Africa is the only Chapter 9 institution to be truly both financially and administratively independent of national government.

Given the above statements and arguments, the ability to recoup or recover fees for forensic services rendered by the SIU, once a unique feature of the Auditor General of South Africa - a Constitutional Chapter 9 institution, certainly provides the Unit with the same or similar degree of financial independence. This development, a result of an amendment, proposed by the Unit, to its Act, and subsequently enacted in 2012 by the National Legislature, is a phenomenal achievement towards enhancing the Unit’s financial independence. Certainly, the respondents’ views coupled with the above argument; reinforces the SIU’s financial autonomy and suggests that the SIU may be sufficiently financially independent.

As is evident from the above discussion, there seems to be little fault with the SIU’s funding model or its financial independence as it is quite similar to that of the Auditor General of South Africa. However, perhaps still, a recommendation could be that consideration ought to be given, by parliament, to ensure that a sufficiently adequate budgetary allocation of funds is granted to the SIU at the onset. This is especially due to the fact that in some instances, departments or public bodies requiring the services of the SIU, cannot afford such services or do not have adequate budgets to reimburse the SIU for its services. Where this is the case, and the SIU’s baseline funding allocation from Parliament is insufficient, this could pose a serious threat to the SIU being able to execute its mandate in relation to allegations of fraud, corruption or maladministration pertaining to a specific department or public institution.

## 4.8 Conclusion

This Chapter provided an account of the responses by managers within the SIU who are directly confronted with many of the issues posed to them in the research questionnaire. The main aim was to comment on the responses received in relation to the extent to which the SIU enjoys independence in regard to organisational, functional and financial levels. The Chapter revealed that in all three areas of independence reviewed, there are material shortfalls in the SIU's independence. This however does not suggest that the SIU by virtue of these challenges cannot function or is compromised to the extent that it cannot execute its mandate. It does however point out some material deficiencies that warrant intervention by lawmakers in order to further enable the SIU's efficiency and effectiveness in the execution of its anti-corruption mandate. In addition, a review of the legislative hindrances and other material operational or functional obstacles will further serve to bolster the Units efforts to tackle corruption in a more confident and independent manner in keeping with both constitutional imperatives as well as international obligations relating to anti-corruption.

In the following Chapter, conclusions are drawn and recommendations made on the basis of the interpretations and discussions in this chapter, of the information and data sourced through this research. The discussion and interpretation of results provides evidence of legislative problems with the organisational, functional and financial independence of the SIU which should be attended to as a matter of urgency to preserve the SIU's integrity as an anti-corruption agency, as well as to maintain South Africa's integrity in the ratification of the UNCAC as well as other international obligations.

## Chapter 5: Recommendations and Conclusion

### 5.1 Introduction

The World Bank, in 2002, coined the term '*State Capture*' as "the illicit provision of private gains to public officials, via informal, non-transparent, and highly preferential channels of access" (Karklins 2002:27). Fourteen years on, South Africa is now experiencing its own '*State Capture*' which was recently revealed in the report of the Public Protector of South Africa (2016), entitled "State of Capture", where evidence of systematic high-level maladministration and possible corruption relating to cabinet appointments and tenders was alleged. The evidence in the Report implicates the Presidency, Ministries, State-Owned Entities and, the controversial Gupta family.

Emphasis on anti-corruption, has reached an elevated status on the international agenda. Countries are constantly seeking new ways of dealing effectively with corruption. Rutkowski & Ociecek (2016), officials from the Central Anti-Corruption Bureau in Poland, note that some of the critical basis upon which these efforts towards dealing with corruption are based upon the Transparency International Corruption Perception Index, as well as conventions against corruption, which include that of UNCAC and the Council of Europe. Rutkowski & Ociecek (2016) note that consideration of the Transparency International's corruption perception index and the UNCAC requirements led to the creation of the Polish Central Anti-Corruption Bureau which has full policing powers and report to the Prime Minister.

Research into finding new ways of dealing with corruption are useful as they offer mechanisms by which governments can find practical solutions in dealing with the scourge of corruption. These efforts are critical towards improving political and social perceptions, as mentioned earlier in this dissertation. The overall aim of this study was to determine the level of independence of anti-corruption agencies, through a case investigation of the SIU. Further, the study sought to carry out this investigation through several research objectives that guided the inquiry. These are:

- To assess the nature and the level of independence of the SIU and the challenges thereof;
- To compare the SIU's level of independence in relation to other anti-corruption agencies in South Africa;

- To determine what the international standards and practices are in terms of the establishment and mandates of anti-corruption agencies;
- To establish the level of compliance by South Africa in terms of its international multi-lateral anti-corruption obligations; and
- To make recommendations based on the research findings on the degree of independence which is incumbent of an anti-corruption agency in South Africa.

This Chapter seeks to respond to these research objectives and offers recommendations in light of the findings. The sections that follow, hence, provide insight thereof.

## **5.2 Parliament's Role in securing independence for its anti-corruption agency/agencies**

Within South Africa, the focus on corruption has gained significance over the last few years. This has resulted in media attention combined with societal and political outcries in response to these reports of corruption and maladministration. The SIU's level of influence in the prosecutorial process of any of its matters by the National Prosecuting Authority and further criminal investigation by the Hawks, is limited and this has the potential to compromise the impact of the Unit's work. The relevance of this argument is presented in the current context of the recent Hawks/NPA/SARS-Gordhan saga that recently played itself out. Here, the Hawks investigated the Finance Minister, Pravin Gordhan, where after the National Prosecuting Authority initiated a prosecution but shortly thereafter, withdrew its decision to prosecute. The general perception was clearly that both the National Prosecuting Authority and the Hawks were being utilised as pawns by the executive, to fight political battles as evidenced in a Democratic Alliance (2015:1) argument, that institutions of our democracy were "increasingly being undermined" and that the executive had "presided over a systematic project of state capture" where key institutions were eroded by "cadre deployment and ANC majoritarianism". This type of situation raises issues over the status of these two pivotal agencies in the investigation and prosecution of corruption matters.

When anti-corruption agencies become compromised in this way, it warrants a review of its status and role in the anti-corruption arena, as well as the relevant prescripts governing institutional operation. An important consideration therefore would be that perhaps a review of how the dependencies of agencies like the SIU on other agencies for support in the execution

of its anti-corruption mandates, is affected when the integrity and independence of these agencies are compromised. The rationale here would be to determine whether these dependencies compromise the effective functioning of agencies like the SIU as in the case of the Hawks where Quintal (2016) cites DA Member of Parliament Zakhele Mbhele as suggesting that the Hawks have been compromised by political interference where positions are given to individuals to settle political scores. In this regard, Pope (2006:51-53) points out Parliament's crucial role in enacting laws relevant to the fight against corruption including the following questions that Parliament should consider when enacting laws:

- “What was the capacity of agencies required to enforce the law? And if they lack capacity, whether there was a need for other institutions to be involved?”
- Are the police, prosecutors and enforcement agencies staffed with honest and technical professionals?
- whether the enforcers were independent from the executive both in theory and in practice? and
- To whom and in what ways, were the enforcers accountable?” (Pope 2006:51-53).

Essentially, Pope (2006:53) emphasizes the need during this strengthening process, for Parliament to consider “the weaknesses of the agencies that will be responsible for enforcing the laws they prepare”. Once institutional weaknesses are identified in agencies that are charged with an anti-corruption mandate, it is Parliament's duty to review laws that compound these weaknesses, with a view to enhancing such agencies ability to execute its mandate more effectively. Within South Africa's constitutional dispensation, this is an imperative that simply cannot be ignored especially in light of the peaking levels of corruption and the deeply compromised elite networks within government which appear “to be shaping and destabilising current anti-corruption efforts (Van Vuuren, 2014:1). It is particularly worrying to note as suggested by Van Vuuren (2014:1), the presence of elements of the political elite with anti-democratic tendencies in South Africa's functioning democracy; that seek to undermine democratic institutions “by ensuring that the rule of law is applied inconsistently”. The South African legislature is therefore bound to ensure that they duly comply with the constitutional imperative of reviewing laws with a view to strengthening and adequately enabling anti-corruption agencies; through legislative amendments, to prevent the compromised political elite, from undermining these agencies.

Matiangi (2006:69,74) in a case study examination in the role of the Kenyan Parliament in the war against corruption, points out a significant contribution by Parliament in a bold initiative, where it introduced an Anti-Corruption Select Committee (ACSC) to among other things, “study and investigate the causes, nature, extent, and impact of corruption...; identify the key perpetrators and beneficiaries of corruption; recommend effective and immediate measures to be taken against such individuals...; and recover public property appropriated by them”. The Committee made a number of recommendations including the introduction of new anti-corruption legislation outlawing certain practices within the public sphere, as well as other major judicial reforms. While South Africa does have a Parliamentary Anti-Corruption Inter-Ministerial Committee (ACIMC), its terms of reference is “to coordinate and oversee the work of state organs aimed at fighting and combating the scourge of corruption in the public and private sectors” (RSA, Department of Public Service and Administration, Parliamentary Question 3977, 2015). Primarily however, , the ACIMC’s role is to oversee and monitor the work of the Anti-Corruption Task Team (ACTT) which is expected to work in a collaborative environment with various agencies to achieve targets of prosecution of 100 corruption cases, each to the value of R5 million or more. In comparison however, the ACIMC’s role, barely covers what the Kenyan ACSC was mandated with.

Parliament’s role in curbing corruption cannot be over-emphasized. Further, the South African Parliament, have an opportunity to learn from the case of Kenya. This would require assertions in regards to anti-corruption endeavours within the context of its own constitutional framework, as this has the potential to contribute to an increased perception of trust by society in Parliament’s integrity (Matiangi, 2006:76). In turn, this will serve to enhance Parliament’s legitimacy in the current South African context where corruption is seen to be rife and particularly amongst senior officials of the ruling political party.

### **5.3 Summary of Chapters**

The research chapters were structured in order to provide a chronological view of the research problem. While chapter one introduced the problem of the independence of the SIU and set out the methodology that would be used to examine the SIU’s independence, chapter two covered the conceptual framework of anti-corruption agencies in both the national and international contexts and included a discussion of how South Africa’s legislative framework supported its

anti-corruption obligations and agencies. The chapter also introduced South Africa's key agencies entrusted with the challenging mandate of fighting corruption. In addition, a comparative presentation was provided of South Africa's dedicated anti-corruption agency to some international anti-comparative agencies. The chapter also provides an overview of South Africa's multi-agency approach towards anti-corruption.

Chapter three elaborated on the SIU as a case study, its legislative mandate, how it operates, the impact of its work and a comparative review of the Unit with Hong Kong's ICAC, considered to be one of the best anti-corruption agencies in the world. Chapter four presented the results and an interpretation and discussion of the research in relation to the SIU's organisational, functional and financial independence. The last chapter concludes with a summary of chapters, an highlight of Parliament's role in affording adequate independence to the country's anti-corruption agencies, and finally some recommendations are presented to enhance the independence of the SIU as determined by the research.

## **5.4 Recommendations to Enhance the Independence of the SIU**

There can be no doubt that certain considerations must be afforded by the Legislature as to the adequacy of independence that the SIU enjoys. The importance of independence to the success of anti-corruption agencies is highlighted by Meagher (2002:2), where he points out that this is precisely what enables them to operate in a consistent and professional manner, with little partisan intrusion. He goes on to aptly imply that where agencies are not structurally independent, then it is "no more powerful than its bureaucratic and political patrons" (Meagher 2002:2). The results and interpretation of results of this research as presented in the previous chapter therefore propose that several legislative amendments that could potentially enhance the independence factor of the SIU, must be considered in relation to the following:

### **5.4.1 Organisational independence**

- Parliament should review the provisions of section 8 of the SIU Act relating to the "powers and functions of a Special Tribunal, and make it equally applicable to the SIU through an amendment to section 5 so that the SIU too, is empowered to be "independent and impartial



and perform its functions without fear, favour or prejudice and subject only to the Constitution and the law” (RSA, SIU Act, 1996a);

- Parliament must assert itself by reinforcing its constitutional obligations to society by reviewing and enhancing the independence of South Africa’s anti-corruption agencies and further, by way of setting up an Anti-Corruption Select Committee, similar to the Kenyan experience, to effectively:
  - coordinate anti-corruption efforts with all its anti-corruption agencies;
  - consider and implement in collaboration with responsible agencies a centralised and coordinated record keeping of all corruption matters reported or under investigation by all agencies;
  - in collaboration - study and research the causes, nature, extent, and impact of corruption on society;
  - in collaboration with all responsible agencies, conduct regular trend and pattern analyses on anti-corruption efforts and corruption tendencies;
  - in a concerted effort in a regular dialogue with key law enforcement and anti-corruption agencies - facilitate the identification of key perpetrators and beneficiaries of corruption; and
  - recommend effective and immediate measures to be taken against such individuals to recover public funds/property appropriated by them.
- In this regard and by virtue of section 7(2) of the Constitution (RSA, the Constitution, 1996b) which compels the State to “respect, protect, promote and fulfil the rights in the Bill of Rights”, Parliament’s intervention is seen as a constitutional imperative with a legal obligation to act appropriately, to arrest, and suppress the prevalence of corruption in society which has damning effects on rights protected by the Constitution;
- Parliament must review and consider the adequacy of its Chapter 9 institutions considering the prevalence of corruption in the country as its last review of Chapter 9 and associated institutions was conducted in 2007, 10 years after the advent of Democracy (RSA, Parliament, Report of the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions, 2015). Interestingly, the SIU was not reviewed during this process. It is now 22 years after the advent of Democracy and still we suffer the pain of corruption. There is therefore an urgent need to review their effectiveness, efficiency, relevance, adequacy, scope etc. in keeping with constitutional principles so as to determine whether there is a need to consider whether the establishment of an additional independent Chapter 9

institution may be warranted considering the impact of corruption on society's fundamental constitutional rights; or, the re-constituting or rationalisation of existing institutions to wield constitutional authority;

- The SIU must be established as a *permanent* state institution charged with an anti-corruption mandate, by the Presidency in consultation with Parliament. Legislative amendments is warranted in this regard to cater for permanency of the Unit, and security of tenure for the Head and staff;
- The Head of the SIU must be subject to a transparent Parliamentary appointment process like that of the Public Protector. Existing legislation must be reviewed and amended in this regard;
- The Head of the Unit must be appointed for a fixed period similar to the Public Protector. For example, a 7 year non-renewable term. The appointment period must not be aligned to electoral terms. For this purpose, *cadre deployment* should not be a consideration. Existing legislation must be reviewed and amended in this regard;
- Regulations should be promulgated by the Minister of Justice in terms of section 11 of the SIU Act as amended compelling all State institutions (national and local government), State entities, municipalities, parastatals etc. to use the SIU as the first port of call to report all matters falling within the ambit of section 2(2) of the Act to eliminate the need for lengthy processes of motivations for proclamations to the Presidency, by the SIU; as well as to reduce cost implications for the state in procuring expensive forensic services at exorbitant costs from the private sector, while the SIU provides the exact same service. .

#### 5.4.2 Functional independence

- It is recommended that Parliament ought to implement a separate central anti-corruption coordinating mechanism, or alternatively, build such responsibility into the authority of an existing institution like the SIU, similar to Poland's experience. This responsibility, according to Rutkowski & Ociczek (2016), lies with the Head of the Central Anti-Corruption Bureau to accurately record all cases of corruption dealt with by the various agencies, and to prevent a duplication of effort, resourcing and costs associated therewith across various agencies. This is similar to the UNODC's (2015:34) proposal for affiliate countries to put a single high-level entity, preferably one that reports to the executive; in charge of coordination and implementation of its anti-corruption strategy's policies and

objectives. This central mechanism needs to be effectively managed in order to provide Parliament with accurate statistics related to the prevalence of corruption nationally. In this regard the UNODC (2015:36) further highlights the power of reputation of the coordinating Unit could be harnessed to potentially propel or motivate other implementing agencies to act effectively through regular reports on progress made by various the various agencies, judiciary and prosecuting authority in the fight against corruption e.g. success rates in prosecuting corruption cases. This has the potential to further enhance; through trend and pattern analyses, the country's ability to correctly assess and address the levels of corruption, and progressively enable the institution of applicable reforms. As an alternative, this could be facilitated by way of regulations which may be promulgated by the Minister of Justice in terms of section 11 of the SIU Act as amended.

- Parliament and/or the SIU, ought to consider legislative amendments or regulations that compel anti-corruption agencies to implement functions relevant to the prevention, education and awareness of corruption, as part of their core functions as required by article 6(1) of the UNCAC (2004:10).
- The SIU ought to have the power to, at the least, initiate a preliminary investigation on receipt of a complaint or of its own volition, should information of transgressions falling within its mandate come to its attention, and whether the Proclamation remains its primary terms of reference or not. This preliminary investigation may serve as a solid basis for the motivation for a Proclamation to the Presidency. This has the potential to encourage public reporting and whistleblowing, and enhance public confidence in the SIU as an anti-corruption agency.
- Consideration should be given to removing the requirement for a proclamation authorizing the SIU's investigation, due to its perceived subjectivity by virtue of its authorization by the executive and, the associated delays therewith.
- It is recommended that consideration be given to providing the SIU with the powers of arrest or, at the least, a feasibility study be undertaken to determine whether this power would be appropriate given that the mandate of the SIU includes the investigation of corrupt offences or practices as prohibited by the PACOCA Act. It is important to highlight that other agencies with similar mandates, like the SAPS/DPCI, and IPID, retain the powers of arrest. This would be in line with international practices where most international anti-corruption agencies like Hong Kong's ICAC, Singapore's CPIB, Poland's Central Anti-Corruption Bureau, France's *Agence Francaise Anti-corruption* (AFA), Lithuania's

Special Investigative Services (SIS), Botswana's Directorate on Corruption and Economic Crime (DCEC), to name but a few, are all endowed with full policing powers.

- Alternatively, consideration should be given to amend either section 4 of the SIU Act (enhance the functions of the SIU to include the investigation of criminality after the National Prosecuting Authority has pronounced its decision to prosecute), or section 5 of the SIU Act (empower the SIU to request or compel the assistance/support of the SAPS/DPCI to provide the necessary support in relation to policing powers and functions required in an SIU investigation); to enable the SIU to retain custodial authority of an investigation and to facilitate it through the prosecutorial and judicial processes. This in effect suggests an amendment to cater for prescripts that would compel that the SIU be provided with investigative support relating to policing powers, from the SAPS/DPCI (or other relevant agencies).

### **5.4.3 Financial independence**

- It is recommended that Parliament ought to independently allocate a sufficiently adequate budget to the SIU without relying on baseline funding via the Department of Justice; nor, funding that the SIU may appropriate through the recovery of fees from departments. This type of funding reliance has the potential to compromise the Unit's ability to promptly deal with allegations once received, as some departments delay payment against SIU invoices which could result in financial shortfalls in the SIU's operational budget.
- Alternatively, Parliament should, in consultation with the Finance Minister and the National Treasury; determine the most appropriate manner of retrieving or retaining funding from all national and/or provincial departments, State-Owned Entities etc. into a central fund managed by Treasury to facilitate the SIU's direct access to funding for SIU investigations, thereby removing the SIU's reliance on departments honouring SIU invoices with payment for forensic services rendered.

## **5.5 Legislative amendments drafted by the SIU**

It must be noted that at the very conclusion of this research, it was established that the SIU had begun a process of drafting legislative amendments. As advised, some of these amendments

proposed by the Unit are of significance to this research and bears relevance to some of the above-mentioned recommendations. The significant amendments proposed include the Unit being empowered to amongst other things; conduct preliminary investigations on the receipt of a complaint; to report to specified persons or entities; to publish its final report as directed by the President; have funds set aside by the National Treasury from money appropriated to a State institution in order to fund an SIU proclaimed investigation; for Special Tribunals to make an order that a High Court would be competent to make; and, for a Special Tribunal to impose a financial penalty where impropriety has been established (Maharaj, 2016).

## 5.6 Conclusion

While the PSC (2001b: 74), as early as 2001, in its *'review of South Africa's national anti-corruption agencies'* suggested that the SIU was *'not independent but a mechanism which the Executive can use to recover public monies'*, this does not explicitly appear to be the case with the SIU as is suggested in the results of this research. The SIU has since its inception, evolved and developed significantly, with some associated legislative amendments in 2012, which enhanced its civil litigation capabilities, as well as providing it with additional powers to recover fees for services rendered by it to departments. While the SIU does enjoy some degree of independence, there is work to be done in relation to enhancing this critical requirement to align with the Unit's organisational, functional and financial independence. The rationale is to adequately empower the Unit to deal more effectively with the scourge of corruption.

What was required at the onset of this research was an intricate and rigorous dissection and interpretation of the prescripts of the SIU Act coupled with the requirements of international agreements and established best practices on anti-corruption agencies, aligned to the South African context. The analysis has shown that by way of *some* legislative amendments, the SIU has progressed in terms of enhancing its independence. There is no doubt that there are some inhibiting factors which are yet to be resolved through further legislative review and amendments. These have the potential to propel the SIU into an anti-corruption agency that would be seen to be on par with what is required in terms of both local and international standards.

The current South African temperament on corruption is extremely sensitive and volatile and what is emerging, is a "precipitating crisis" which Heilbrunn (2006:145) suggests is the very

type of situation that “forces political leaders to undertake significant reforms”. This he says is evidenced from the Hong Kong, New South Wales and Singapore experience where certain scandals forced policy-makers to establish commissions with broad powers, which were independent of the police. Heilbrunn (2006:146) impresses the fact the some of the prerequisites for the success of anti-corruption agencies is its ‘independence’; its reporting hierarchy comprising the executive, parliament and public oversight committees; and, government’s commitment to enact reforms that may be politically difficult.

This investigation has shown that the tasks of anti-corruption agencies are of a rather complex nature as pointed out by Johnson, Hechler, De Sousa & Mathisen (2011:2) where the expectations are that they combat corruption independently and skilfully by “developing specialized enforcement competencies along with preventative and educational/research capacity.” In addition, they are expected to “overcome the inadequacy” of traditional law enforcement authorities and, take a leading role in the implementation of “national anti-corruption strategies.”

In the current South African context, in order for the ruling party to enhance its legislative and political reputation as well as for it to maintain political support; it is necessary for anti-corruption reforms that further entrench and support constitutional democracy to be part of our immediate landscape. This will have the potential to improve investor and societal confidence. The Legislature’s interventions therefore, with a strong support from the ruling party; should be significantly focused on identifying anti-corruption agency deficiencies and implementing effective reforms in strengthening and enhancing its institutional capacity to fight corruption. The critical focus of such enhancement should be that of the independence of its anti-corruption agencies, like the SIU.

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