

Considering a Single Anti-corruption Agency for South Africa

**Submitted in partial fulfilment of the requirements of the LLM degree
Criminal Justice
University of the Western Cape**

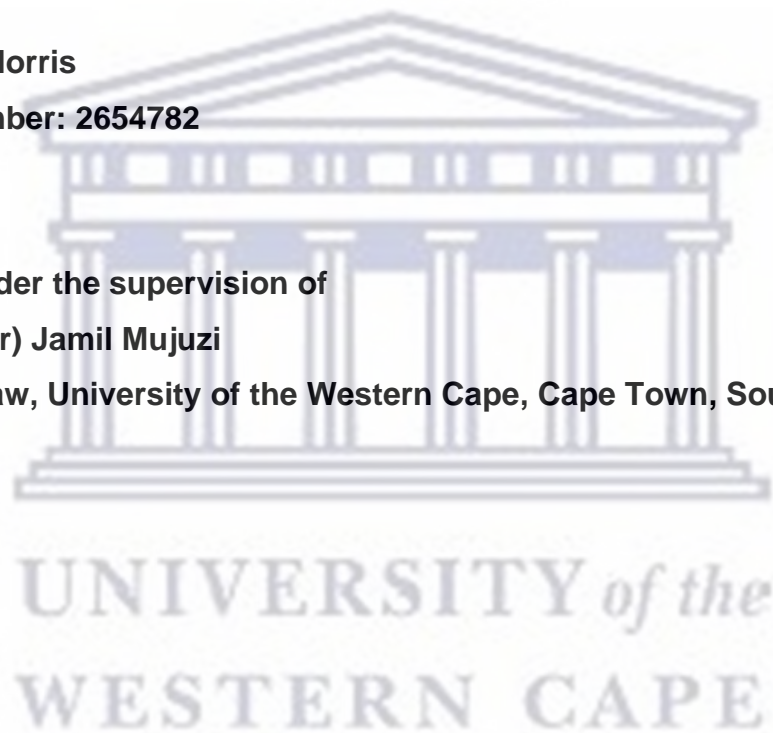
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DECLARATION

I, Liesl E. Morris, hereby declare that this dissertation is original. It has never been presented to any other university or institution. Where other people's ideas have been used, proper references have been provided. Where other people's words have been used, they have been quoted and duly acknowledged.

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Table of Contents

DECLARATION.....	i
ACKNOWLEDGEMENTS	ii
ABSTRACT.....	v
LIST OF ABBREVIATIONS.....	vi
KEY WORDS	vi
CHAPTER 1: INTRODUCTION AND OVERVIEW	1
1.1 Introduction	1
1.2 Problem statement	6
1.3 Research questions	7
1.4 Research methodology	7
1.5 Literature review.....	7
1.6 Chapter outline	11
CHAPTER 2: INTERNATIONAL LAW OBLIGATIONS	13
2.1 UNCAC.....	13
2.2 Regional Instrument: The African Union Convention on Preventing and Combating Corruption.....	18
2.3 Subregional Instrument: SADC protocol against corruption	22
2.4 Constitutional approach to international law.....	24
2.5 Domestication of the UNCAC.....	27
2.5 Conclusion.....	29
CHAPTER 3: THE MANDATE(S) OF SAPS, DPCI, IPID, SIU AND THE NPA ...	30
3.1 SAPS.....	30
3.2 Directorate for Priority Crime Investigation	33
3.2.1 The Directorate for Special Operations (DSO)	34
3.2.2 The DPCI.....	35
3.3 The Independent Police Investigative Directorate (IPID).....	40
3.3.1 Independent Complaints Directorate (ICD)	40
3.3.2 IPID	42
3.4 The special investigating unit (SIU)	45
3.4.1 The Heath Special Investigating Unit	45
3.4.2 The Current SIU	47
3.5 National Prosecuting Authority (NPA)	50
3.6 Conclusion.....	54

CHAPTER 4: DISCUSSION ON SINGLE AGENCIES AND HOW THEY WORK.	56
4.1 Introduction and Mandate.....	56
4.2 History of the establishment of the ACAs.....	56
4.3 Mandate.....	58
4.4 Independence	64
4.4.1 Organisational Independence.....	64
4.4.2 Functional Independence	68
4.4.3 Financial Independence	69
4.5 Conclusion.....	70
CHAPTER 5: CONCLUSION	75
5.1 Introduction	75
5.2 Conclusion of the study.....	75
BIBLIOGRAPHY	82

ABSTRACT

In recent years, concerns about corruption have increased in South Africa. Although corruption is widely discussed, less focus is placed on the anti-corruption agencies and their efficiency in countering corruption. These agencies are established in terms of legislation to prevent, combat, investigate and prosecute corruption in line with international and regional instruments and domestic legislation. Though the approach is a multiple-agency approach, over the years, some agencies were established, re-designed and others done away with. The question is whether the current anti-corruption agencies are still efficient in fighting corruption in line with international standards. The proposed standard is that ACAs should be independent, specialised, staffed, and have sufficient resources to meet their roles and responsibilities.

The focus of this dissertation is to assess the efficiency of specific anti-corruption agencies in South Africa. This dissertation hopes to contribute to a better understanding of what a model anti-corruption agency is and how the agencies in South Africa measure against that model. The analysis looks at the mandate and discusses the strengths and weaknesses of the agencies. The strengths include the legal framework that provides the ACA with its mandate and powers and its independence and public collaboration. The weaknesses include political interference, insufficient legal framework and resources as well a lack of public trust. It is recommended that a single agency should be used in South Africa.

LIST OF ABBREVIATIONS

ACAs	Anti-corruption agencies
SAPS	South African Police Service
SIU	Special Investigating Unit
DPCI	Directorate of Priority Crime Investigation
IPID	Independent Police Investigative Directorate
NPA	National Prosecuting Authority
UNCAC	United Nations Convention Against Corruption
PRECCA	Prevention and Combatting of the Corrupt Activities Act

KEY WORDS

Corruption

Executive and political interference

Independence

Dedicated agency

Impartiality

Effectiveness

South Africa

Credibility

Multi-agency approach

CHAPTER 1: INTRODUCTION AND OVERVIEW

1.1 Introduction

South Africans are well acquainted with corruption. Corruption is defined as giving or accepting or offering to give or accepting any gratification by acting or not acting in an unauthorised or improperly induced manner.¹ With a corruption score of 43 out of 100 by Transparency International in 2022, it is a societal issue that needs to be addressed². Corruption is not only a criminal offence, but it threatens constitutional governance and negatively impacts our economy. It results in the resources not being distributed fairly and the most vulnerable members of the society suffer.³ Corruption is not a crime that began in South Africa with the dawn of constitutional democracy. Our country inherited a corrupt history from the previous dispensation.⁴ Combating corruption can take place in the private or public sector, but for obvious reasons, public sector corruption has a huge impact. South Africa, over the years, had to formulate policies and establish anti-corruption agencies (ACA) to combat corruption. South Africa's anti-corruption architecture follows the multi-agency model approach and there are about 19 statutory and non-statutory entities. Several agencies each with a specific mandate established to combat or prevent corruption as prescribed by legislation⁵. However, the mere existence of ACAs in a country do not signify that the agencies are functioning efficiently and that the fight against corruption is effective.

The obligation to combat corruption and establish ACAs in South Africa emanates from several international and regional conventions.⁶ The United Nations Convention Against Corruption (UNCAC)⁷ in Article 6 states that state parties shall

¹ S 3 Prevention and Combating of Corrupt Activities Act 12 of 2004.

² Transparency International, 'Corruption Perceptions Index: South Africa 2022' available at <https://www.transparency.org/en/cpi/2021> [Accessed 4 March 2025].

³ Safara L and Odeku KO 'Critical Legal Perspective of International Anti-Corruption Laws for Tackling Corruption in South Africa' (2021) 10 (1) *Perspectives of Law and Public Administration* 205.

⁴ Leggantsi C 'Corruption in South Africa: myths, history and the crisis of capitalism' (2022) 57 (3) *Journal of Public Administration* 466.

⁵ Dassah M 'Single-and Multi-Agency Approaches to Fighting Corruption: Lessons for South Africa Lessons for South Africa' (2014) 28 (2) *Loyola Journal of Social Sciences* 269.

⁶ National Anti-corruption Strategy 2020-2030 18
https://www.gov.za/sites/default/files/gcis_document/202105/national-anti-corruption-strategy-2020-2030.pdf [Accessed on 4 March 2025].

⁷ United Nations General Assembly Resolution 58/4 (2003).

establish dedicated anti-corruption agencies to prevent corruption. South Africa ratified the UNCAC in 2004, and as informed by the Constitution of the Republic of South Africa, in 1996⁸ it undertook the process to domesticate the UNCAC through national anti-corruption legislation and established anti-corruption agencies. Our constitution requires that, in addition to ratification of international agreements, we need to enact national legislation to incorporate the international agreement into our municipal law. ⁹The principles under Article 6 are that each state is mandated to establish an agency with a preventative mandate in terms of its legal system. The agency should be granted the necessary institutional and functional independence, and the principle of subsidiarity should apply.¹⁰ Similar but more concise provisions are found in Article 5 of the AU Convention on Preventing and Combating Corruption¹¹ and in Article 4(g) of the SADC Protocol against corruption.¹² South Africa has enacted several anti-corruption pieces of legislation that domesticate its duty to establish ACAs in terms of international and regional instruments. The primary legislation that criminalises corruption is the Prevention and Combating of Corrupt Activities Act,¹³ which aims to strengthen measures to prevent and combat corruption, but there are several other pieces of anti-corruption legislation as well.¹⁴

As mentioned previously, South Africa has multiple ACAs and, in a bid to discuss the effectiveness of the anti-corruption agencies, the writer will look at the mandate of the five anti-corruption agencies mentioned below. Corruption is primarily investigated by the South African Police Service (SAPS) in collaboration with other investigative agencies, namely, the Directorate for Priority Crime (DPCI), the Independent Police Investigative Directorate (IPID), the Special Investigative Unit

⁸. S 231(4) The South African constitution: 'Any international agreement becomes law in the Republic when it is enacted into law by national legislation, but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.'

⁹. Dugard J, Du Plessis M & Maluwa, T, et al *Dugard's International Law: A South African Perspective* 5ed (2019) 73.

¹⁰. Camerer M 'What makes for effective anti-corruption systems' (2008) 10 SAIIA Occasional Paper 6.

¹¹. African Union Convention on Preventing and Combating Corruption (2003) 43 ILM 5.

¹². The Southern African Community Protocol Against Corruption 2001.

¹³. Prevention and Combatting of Corrupt Activities Act 12 of 2004.

¹⁴. Public Finance Management Act 1 of 1999, Municipal Finance Management Act 56 of 2003, Public Audit Act No. 25 of 2004, the Financial Intelligence Centre Act 38 of 2001, the Prevention of Organised Crime Act 121 of 1998.

(SIU) and prosecuted by the National Prosecuting Authority (NPA).¹⁵ The effectiveness and efficiency will be discussed by looking at the shortcomings of their mandates as well as how major events impact how ACAs need to improve to be effective.

Recently, the Judicial Commission of Inquiry into allegations of State Capture exposed how corruption had infiltrated the public sector and SOEs.¹⁶ The extent of the financial or investment loss, as well as the lack of service delivery as a result of corruption became public, but more so, it became public just how broken-down ACAs were in South Africa.¹⁷ Reports about unstable leadership in the SAPS and the NPA came to light and reports of breaching public trust by appointing unethical and incompetent leaders were made. The strong political interference in the affairs of ACAs resulted in the chairperson of the commission recommending a single independent ACA.¹⁸

Another major event that influenced ACAs in South Africa was the COVID-19 pandemic which came with unprecedented challenges. The urgency to which the government had to respond to the pandemic soon became a vehicle for corruption.¹⁹ In response to the high-level corruption, the president announced the establishment of a collaborative and co-ordinating fusion centre to deal with Covid 19 related corruption and other financial investigations. The centre is made up in a multidisciplinary fashion, consisting of nine state law enforcement agencies to strengthen efforts to prevent, detect, investigate and prosecute COVID-related corruption.²⁰ Each institution and authority operates within its own legal framework and combines its expertise and skill to fight crime.²¹ The focus of the fusion centre²²

¹⁵ Budhram T and Geldenhuys N 'Combating corruption in South Africa: assessing the performance of investigating and prosecuting agencies' 2018 31(2) *Acta Criminologica: Southern African Journal of Criminology* 23.

¹⁶ Momokhere J 'Understanding the Phenomenon of State Capture and its Manifestation in South Africa' (2018) 16 (2) *Commonwealth Youth and Development* 2.

¹⁷ Storm A 'The development of an independent anti-corruption agency to combat corruption in South Africa' (2020) 1 *Just Africa* 54.

¹⁸ Storm A *Just Africa* (2020) 55.

¹⁹ Mlambo V Masuku M 'Governance, Corruption and COVID-19: The Final Nail in the Coffin for South Africa's Dwindling Public Finances' (2020) 55(3) *Journal of Public Administration* 551.

²⁰ Fighting corruption during COVID-19 <https://www.gov.za/anti-corruption/fighting-corruption-during-covid-19> [Accessed 4 March 2025]

²¹ Briefing Statement on the achievements and accomplishments of the Fusion Centre <https://www.fic.gov.za/Documents/Media%20release%20-%20Fusion%20Centre%20-%20final.pdf> [Accessed 4 March 2025].

²² This multi-disciplinary initiative, created by the Anti-Corruption Task Team (ACTT), located at the

is not exclusively focused on corruption. Criticism toward the compilation of the group is that it lacks the required specialisation. Each institution has its primary mandate and, although anti-corruption measures are part thereof, it is not dedicated to anti-corruption only.²³ All the institutions involved are proportionally responsible for anti-corruption, but it is not their dedicated function. The independence of the fusion centre is also challenged, since each agency participant has a respective leader to take instruction from and report to.

Of the five ACAs this paper will focus on, four are investigative in nature and only one is a prosecuting agency. Their mandate is not exclusively focused on anti-corruption, it is but one of the responsibilities they have. The challenge with a multi-agency approach in South Africa is that agencies have similar yet different priorities²⁴ and, with inadequate coordination, the functions may be duplicated. Another weakness of multiple agencies is that the resources and expertise are fragmented. SAPS and the DPCI are related in work. They are established in terms of the same legislation and report to the same executive member in parliament. The DPCI which was established in 2009 is responsible for priority crime investigation and currently functions as a unit within the SAPS.²⁵ The most contentious issue around the establishment of the DPCI was that, at the time, they were introduced as the successors of the Directorate for Special Operations (DSO), better known as the Scorpions.²⁶ However, unlike the Scorpions, which was a prosecution-led unit located in the NPA, the DPCI is located as a division of SAPS. Interference with SAPS commissioners or the minister would also mean interference with the stability of the DPCI.

IPID is the watchdog over the SAPS, and metro police members also report to the minister of police. With a list of other crimes to investigate, the IPID is also mandated

Financial Intelligence Centre (FIC), brings together South African law enforcement agencies, the intelligence community, and other competent authorities.

<https://www.fic.gov.za/Documents/Media%20release%20-%20Fusion%20Centre%20-%20final.pdf> [Accessed 4 March 2025].

²³ Hoffman P Mr President, your new anti-corruption Hub won't work

<https://www.dailymaverick.co.za/opinionista/2020-07-27-mr-president-your-new-anti-corruption-hub-wont-work/> [Accessed 4 March 2025].

²⁴ Pillay P 'Anti-Corruption Agencies in South Africa and Brazil Trends and Challenges' (2017) 9(8) *African Journal of Public Affairs* 4.

²⁵ Kinnes I Newham G 'Freeing the Hawks' 2021 SA Crime Quarterly no 39 *Institute for Security Studies* 34.

²⁶ Faull A and Mtsolongo T 'From stings to wings' 2009 SA Crime Quarterly no 29 *Institute for Security Studies* 17.

to investigate corruption.²⁷ Though the IPID is separate from the SAPS, it is still dependent on their resources, like technical, forensic, and ballistic investigative support which have a bearing on its independence.²⁸ Based on that, there is a risk of influence from the political leadership.²⁹

Kinnes and Newham discuss the political interference in the SAPS and how the appointment of leadership is often a result of political affiliation and not skill and expertise.³⁰ Therefore, by virtue of the fact that the DPCI is established by the same legislation and subject to the same policy, and regulations and is subordinate to the same executive leadership, the risk of political interference exists for the DPCI.³¹

The SIU functions differently from the above-mentioned agencies. The SIU does not conduct criminal investigations,³² and investigations by the SIU commence after a presidential proclamation. The President is responsible for the appointment and removal of the head of the agency. It was intended to be a temporary agency but since continued its work.³³ If the SIU discovers, during their investigation, that there is a possibility that criminal prosecution should take place, they will usually refer the criminal prosecuting aspect of cases to the NPA to prosecute. The NPA, in turn, refers the case back to a unit in SAPS or the DPCI.³⁴ The civil recovery done by the SIU is similar to the recovery done by the Assets Forfeiture Unit (AFU), a unit in the NPA.³⁵ The final agency for discussion and the only prosecuting authority is the NPA, which consists of several business units. In terms of S179 of the Constitution of the Republic of South Africa, this single prosecuting authority must exercise its functions without fear, favour, or prejudice.³⁶ Unfortunately, the independence of the

²⁷ S 28 (1) (g) of the Independent Police Investigative Directorate Act 1 of 2011.

²⁸ Lekgau K, Maluleke W and Roelofse C 'Analysis of Misconduct and Crime by Police Officers Investigated by the Independent Police Investigative Directorate' (2021) 56 (1) *Journal of Public Administration* 33.

²⁹ Vawda Y Mtshali M 'Who is watching the watchers? A critical assessment of the Independent Police Investigative Directorate's prospects of investigating misconduct in the South African Police Service' (2013) 17 *Law, Democracy & Development* 144.

³⁰ Kinnes I Newham G (2021).

³¹ Kinnes I Newham G (2021) 35.

³² Bruce D 'Accountability for corruption the role of the Special Investigating Unit' 2019 Southern Africa Report 28 *Institute for Security Studies* 9.

³³ Bruce D (2019) 10.

³⁴ Montesh M 'An analysis of the role of the South African asset forfeiture unit and the Special Investigating Unit' (2009) 22 (2) *Acta Criminologica* 38.

³⁵ Montesh M (2009) 39.

³⁶ Constitution of the Republic of South Africa, 1996.

agency has been questioned due to controversies that are often political in nature.³⁷ Since its inception, no National Director of Public Prosecutions (NDPP) of the NPA has ever completed their 10-year office term and the court also had to remove occupants of that position at some point,³⁸ which caused uncertainty in the institution.³⁹ Although the NPA is not of equal standing to a Chapter 9 institution, the institution has the duty to perform its duties independently.⁴⁰

The above indicates the vulnerability of the ACAs in their structure, leadership and independence. It might be time for South Africa to consider whether the multi-agency approach to combating corruption is still the most efficient and effective way. As time goes by and weaknesses are exposed, it is wise to look at our counter-corruption institutions. We need to look as well at aspects and instances that influence their status as a compliant ACA.

The study will conclude by explaining why South Africa needs to consider establishing a single dedicated agency in combating corruption and how that agency should be constituted considering the existing approach and other factors that influence such change.

1.2 Problem statement

This paper is inspired by the old debate between a single and multi-agency approach in South Africa.⁴¹ Whether a single comprehensive ACA should be established or multiple specialised agencies. This debate raises critical questions about the implications of each model, and this study aims to explore both approaches. The first question is how effectively the five agencies prevent and combat corruption. How do the political dynamics, institutional frameworks and capacity of the ACAs shape the anti-corruption efforts? Secondly, what challenges do these agencies face? Thirdly, would South Africa benefit from a single-agency

³⁷ Camerer M 'Challenges in integrity management: The case of the National Prosecuting Authority (NPA)' (2020) 10 Occasional Working Paper Nelson Mandela School of Public Governance, University of Cape Town 9.

³⁸ The appointment and dismissal of the NDPP Instability since 1998'2018 ACJR <https://acjr.org.za/resource-centre/appoint-and-dismiss-of-ndpp-fs-7-fin.pdf> [Accessed 4 March 2025].

³⁹ Dyani-Mhango N 'Reflections on Prosecutorial Independence and Impartiality in South Africa: The Recent Jurisprudence of the Courts' (2020) 35(2) *Southern African Public Law* 1.

⁴⁰ Kohn L 'The National Prosecuting Authority as Part of South Africa's Integrity and Accountability branch and the related case for an Anti-Corruption Redress System' 2022(12) *Constitutional Court Review* 36.

⁴¹ Naidoo V 'The politics of anti-corruption enforcement in South Africa' (2013)31(4) *Journal of Contemporary African Studies* 532.

approach? This will be done through lessons learned from two countries that implement the single agency approach. Given the problem outlined, the study aims to highlight why South Africa should consider a single anti-corruption agency.

1.3 Research questions

The aim of the study is to provide a detailed discussion by evaluating the effectiveness of existing ACAs. We will compare strengths and weaknesses of those ACAs and gauge public perception by looking at perception surveys and data. We will analyse the legal framework and cases from countries that implement the single agency approach.

Based on these objectives, the study seeks to address the following research questions:

- a. Are the institutions sufficiently independent as anti-corruption agencies?
- b. Does South Africa need to consider a single anti-corruption agency?

1.4 Research methodology

This is a desktop-based research study that focuses on the analysis of existing sources of primary and secondary literature. The primary sources are the relevant pieces of legislation and the Constitution. The secondary sources referred to include journal articles, books, as well as informal sources like media articles and press statements. This research method has been chosen based on its suitability to provide a comprehensive overview of the study.

1.5 Literature review

The UNCAC is crucial for this paper as a guide on what characteristics anti-corruption agencies should reflect. Several authors⁴² have highlighted how different countries benefit from either a single or from a multiple anti-corruption agency

⁴². Dassah M 'Single-and Multi-Agency Approaches to Fighting Corruption: Lessons for South Africa' (2014) 28 (2) (2014) *Loyola Journal of Social Sciences* 265-287, Pillay P 'Anti-Corruption Agencies in South. Africa and Brazil Trends and Challenges' (2017) 9(8) *African Journal of Public Affairs* 1-14, Lekubu BK 'Improving the effectiveness of the South African anti-corruption agencies and strategies: lessons from Botswana, Hong Kong and Singapore' 2019 *Acta Criminologica: African Journal of Criminology & Victimology* 74-90.

approach. Their opinions are influenced by comparison and politics, law, administrative and organisational factors. The literature considered below focuses on the weaknesses of ACAs as well as factors for consideration of a single-agency approach.

In his article discussing single and multiple approaches to fighting corruption, Dassah highlights the internal and external factors that contribute to the success of an ACA. These factors are relevant to either single or multiple agencies. The article goes on to discuss the background and workings of both Hong Kong's Independent Commission Against Corruption and Singapore's Corrupt Practices Investigation Bureau, both which are single agencies. He mentions that multiple agencies in other developing countries proved to be less effective due to duplication of tasks and rivalry that can lead to the dilution of resources.

He discusses the South African framework and shortcomings when it comes to enforcement and lack of political will. In the article, he mentions that no corruption situation is irreversible and, when choosing an agency approach, it is not wise to copy and paste a successful agency without considering one's own institutional and cultural context.⁴³

Likewise in their article, Lekgau, Maluleke and Roelofse discuss the challenges faced with IPID. There were efforts made to empower the IPID, but the demand still seems to outweigh their capacity. The IPID relies on SAPS resources and this conflicts with the IPID Act and the independence of the directorate.⁴⁴

The SIU doesn't meet the criteria for an independent anti-corruption agency. Its investigations may be initiated only on the basis of presidential proclamations. Bruce states that the SIU needs to be empowered. The president initiates investigations and determines the outcome of the investigation reports by actioning the recommendations of the report or by doing nothing with the report. There is no security of tenure for the head of the SIU, and measures to appoint the best candidate must be enhanced. Although there is no evidence to suggest it, the media published that there is a risk that the proclamation of the SIU is seen as a political

⁴³. Dassah M (2014) 28.

⁴⁴. Lekgau K, Maluleke W and Roelofse C (2021) 56.

tool.⁴⁵ The SIU investigates matters with the view of instituting civil litigation or matters where perpetrators are signing an acknowledgment of debt. Frequently, investigations by the SIU uncover the need for disciplinary action and rely on other role players like SAPS and NPA to investigate.⁴⁶

Camerer explained the legacy of cadre deployment and the political interference it has in state departments, especially the NPA. The NPA experienced a period of unstable management with questionable ethics. The NPA was consciously targeted to be controlled during “State Capture”. Though they have received a significant budget and can address the organisational challenges, a cleaning-up process can only occur if everyone employed in the prosecuting authority is given the resources and support to live up to the constitutional expectation.⁴⁷

Kohn’s article gives another perspective on how the NPA (also referred to as the ‘fourth branch of the state’) can fulfil its constitutional obligations. This fourth branch of state will enhance and protect the institutions that fall within that category because, as an institution, the NPA ought not to fall within the executive branch of government. This would ensure that a member of any other branch does not interfere with another branch of government, ensuring individual liberty and a system of checks and balances⁴⁸. As a country, we need a proactive approach to fighting corruption and a change in policy might be essential to restore the confidence of the people in the institution of the NPA, especially after the state capture phenomenon.⁴⁹ Dyani-Mhango in their article⁵⁰ discusses how jurisprudence contributed to defining terms like prosecutorial independence and impartiality. Prosecutorial independence refers to the relation the NDPP has with the executive and the factors that influence that independence, for instance, security of tenure and unconstitutional dismissal. Whereas, prosecutorial impartiality refers to how prosecutors exercise their daily duties, both prosecutorial independence and impartiality are vital to the legal process. The responsibility that the Minister of Justice exercises over the head of the NPA does not extend to prosecutorial

⁴⁵. Makwakwa T ‘SIU probe in KwaZulu-Natal ‘dirty politics’ <https://www.iol.co.za/dailynews/news/siu-probe-in-kwazulu-natal-dirty-politics-15c6a99f-d49c-442d-bd18-d15f10d51213> [Accessed 4 March 2025]

⁴⁶. Bruce D 2019.

⁴⁷. Camerer M 2020.

⁴⁸. Kohn L (2022)25.

⁴⁹. Kohn L (2022)26.

⁵⁰.Dyani-Mhango N (2020) 35.

decisions and the oversight of the Minister is important to guard against institutional abuse and misuse by prosecutors. Court cases have shaped the jurisprudence and highlighted the importance of prosecutorial independence and impartiality, and one can hope that the guidance is considered in policy and in the execution of duty.⁵¹ The writer concludes that since the appointment of the current NDPP, there has not been a high-profile political criminal investigation, and it remains to be seen how those with political power will behave when they are being investigated.⁵²

This paper discusses the weaknesses of the existing ACAs weaknesses in detail in a bid to show that though there are multiple agencies, they are handicapped in a certain way. The executive maintains a degree of control over all the ACAs and, as indicated, political inference to weak leadership. Most of the ACAs mentioned suffer from organisational challenges that include a shortage of human and physical resources. The weaknesses were exposed during the Zondo Commission inquiry⁵³ into state capture and subsequently with the COVID-19 pandemic.⁵⁴ Corruption has increased, and the public doesn't have confidence in ACAs. Despite the growing body of research on ACAs, and the need for specialised agencies to combat corruption, there remains a gap concerning the transition from a multi-agency to a single agency and how variables like socio-economic conditions, governance structures and community needs impact the success of single agencies. Research addressing these gaps could be valuable to policy makers when considering the feasibility of a transition.

⁵¹ *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* 2018 (10) BCLR 1179 (CC).

The case revolves around the removal of Mr. Nxasana from his position as National Director of Public Prosecutions (NDPP) and the subsequent appointment of Adv S Abrahams. The case highlights the danger of a prosecuting authority being manipulated to advance political agendas, which undermines the rule of law. *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) This case deals with the appointment of Mr. Menzi Simelane as the NDPP. The DA challenged the appointment, arguing that it was irrational and invalid. The court highlighted the requirement that the NDPP needs to be a fit and proper person the court seeks to safeguard the NPA from undue political influence.

⁵² Bernstein A 'Reforming the NPA – The urgent need to restore faith in SA's justice system' <https://cde.org.za/reforming-the-npa-the-urgent-need-to-restore-faith-in-sas-justice-system/> [Accessed 4 March 2024]

⁵³ Momokhere J (2018)16.

⁵⁴ Mlambo V Masuku M (2020) 55.

1.6 Chapter outline

This study is divided into five chapters, and each chapter is purposed to address a key phase in this research study. Chapter One introduce the topic and outlines the background of the study. It identifies the problem statement, outlines the research question and states what methodology will be used to answer the research question. It gives an overview of what corruption is and the ways the government is responding to it through policy and ACAs. Lastly, it outlines the structure of the study.

Chapter Two discusses the international law obligations to combat corruption while looking at how international law is incorporated in South African law. It looks into the global, regional and subregional instruments that impact the South African legal framework by giving an overview of the international framework in combating corruption under the respective instruments. An exploration is made of the similarities and differences of the provisions of the respective instruments. Chapter Three analyses the mandate of SAPS, DPCI, IPID, SIU and the NPA respectively. We discuss the enabling legislation of each agency and give an overview of the structure of the agency and their mandate in combating corruption. Further to this, we analyse how their workings influence each other and the instances of collaboration or dependence in implementing their mandates. In this chapter, there is a discussion on significant events or cases that exposed weaknesses or challenged how the agencies execute their mandates. This chapter explores the multi-agency approach of South Africa.

Chapter Four of the study focuses on single agencies and discusses their legal framework. When discussing the ICAC of Hong Kong and the CPIB in Singapore, attention is given to the historical context of the agencies. Furthermore, their strengths and weaknesses are assessed by looking at an overview of the structure and functionality of the ACAs as well as the accountability and oversight mechanisms. The study further discusses public perception of the effectiveness of the ACAs.

Chapter Five is the concluding chapter and draws together the weaknesses of a multi-agency and highlights the strengths of a single agency. It explores aspects

about Hong Kong and Singapore that are different to South Africa's landscape but points out why it is necessary to consider a single-agency approach.

CHAPTER 2: INTERNATIONAL LAW OBLIGATIONS

This chapter will highlight the international and regional obligation to combat corruption and specifically to establish an anti-corruption agency by member states. Then the discussion will continue and focus on how international law is domesticated in South Africa as well as the piece of legislation that criminalises corruption.

2.1 UNCAC

Corruption has been around for centuries, and no state has ever been indemnified from it. With globalisation, the need for global regulatory frameworks became more evident. International organisations like the Organisation for Economic Co-operation and Development (OECD), the Council of Europe (CoE), and the United Nations (UN) have been instrumental in developing legal instruments to combat corruption.⁵⁵ The UNCAC is the first binding global instrument on corruption and more states signed the instrument as awareness of transnational corruption grew.⁵⁶ The existence of other multilateral conventions, like the Inter-American Convention⁵⁷ on Corruption, highlighted areas of concern and indicated that an international instrument to address more comprehensive aspects of corruption is needed.⁵⁸ The UNCAC is detailed and focuses on almost all anti-corruption aspects, including prevention, criminalisation and enforcement.⁵⁹ Chapter Two of the convention deals with prevention and includes provisions on the creation of model preventative policies. The policies relate to the establishment of anticorruption bodies and enhanced transparency in the financing of election campaigns and political parties. The efficiency and transparency in the public sector in particularly critical areas of the public sector, such as the judiciary, public procurement and public finance are needed. Member states are also required to create preventative measures for the

⁵⁵ Bryane M' Drafting Implementing Regulations for International Anti-Corruption Conventions' (2007)36 (2) *Journal of Legislation* 2.

⁵⁶ Webb P 'The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity' (2005) 8(1) *Journal of International Economic Law* (JIEL) 192.

⁵⁷ Inter-American Convention Against Corruption, March 29, 1996, S. Treaty Doc. No. 105-39, 35 I.L.M 724, Civil Law Convention on Corruption, Nov. 4, 1999, Eur. T.S. No. 174, Criminal Law Convention on Corruption, January 27, 1999, Eur. T.S. No. 173, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Webb P (2005)8(1) 193.

⁵⁸ Webb P (2005)8(1) 192.

⁵⁹ Snider T, Thomas R. & Won K 'Combating Corruption through International Law in Africa: A Comparative Analysis' (2007)40(3) *Cornell International Law Journal* 707.

private sector and to promote the participation of social society and non-governmental organisations. These mandatory and non-mandatory clauses relate to prevention that member states need to give effect to by domesticating the relevant provisions.⁶⁰

Among its key provisions, Article 5 and Article 6 stands out as crucial components of the anti-corruption framework. Insofar as the establishment of ACAs, the relevant clauses are Article 5 and Article 6 of the UNCAC.

Article 5. Preventive anti-corruption policies and practices

1. Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, co-ordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.
2. Each State Party shall endeavour to establish and promote effective practices aimed at the prevention of corruption.
3. Each State Party shall endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption.
4. States Parties shall, as appropriate and in accordance with the fundamental principles of their legal system, collaborate with each other and with relevant international and regional organisations in promoting and developing the measures referred to in this article. That collaboration may include participation in international programmes and projects aimed at the prevention of corruption.

Article 5 sets out the strategic planning that member states must have in place to combat corruption in different forms and sectors. Article 5 guides member states to craft sound policies to combat corruption. The accurate identification and assessment of all problems and challenges that a country faces in combating corruption was reported to influence the effectiveness of anti-corruption strategies or policies.⁶¹ The development of anti-corruption policies should involve multiple stakeholders to ensure that corruption risks from the public and private sectors are prevented. The development of the policies is one part of the requirements. Member states must co-ordinate the implementation of the anti-corruption policy to

⁶⁰ Article 5(1) United Nations Convention against Corruption

⁶¹ Conference of the States Parties to the United Nations Convention against Corruption: Open-ended Intergovernmental Working Group on the Prevention of Corruption
<https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup4/2019-September-4-6/V1904637e.pdf> page 3 [Accessed 4 March 2025].

ensure the goals and objectives of the policy are achieved.⁶² The preventative policies must provide for a mechanism for monitoring, evaluation and reporting to strengthen transparency and accountability.⁶³ Article 5 provides for the legal and policy framework relevant to anti-corruption. Article 6 provides for the institutional framework to ensure that the policies in Article 5 are realised.⁶⁴ State Parties are reminded of the importance of the preventative measures in Article 5 and 6 and advised of the ongoing process of anti-corruption.⁶⁵

The guidelines for the creation of these bodies are provided for in Art 6 of UNCAC. Article 6(1) states that:

Member states are encouraged to establish independent body/ bodies to prevent corruption. This body/ bodies should have the required authority and functions to operate effectively and implement anti-corruption policies without interference. This body /bodies must have initiatives aimed at public awareness.

These bodies are required to implement, co-ordinate, supervise and disseminate knowledge and awareness of the policies anti-corruption policies require in terms of Article 5. Both Articles 5 and 6 are mandatory provisions and should be read together to understand how effective preventative anti-corruption policy impacts the efficiency of anti-corruption institutions. Article 36 also relates to Article 6 in that it provides for the establishment of specialised law enforcement bodies to combat corruption. Some of the ACAs in SA have a dual approach to combating corruption, hence the writer is referring to Article 36.⁶⁶

⁶². Open-ended Intergovernmental Working Group on the Prevention of Corruption <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup4/2019-September-4-6/V1904637e.pdf> Lessons learned on the development, evaluation and impact of anti-corruption strategies (Article 5 of the United Nations Convention against Corruption) page 5 [Accessed 4 March 2025].

⁶³. Conference of the States Parties to the United Nations Convention against Corruption Open-ended Intergovernmental Working Group on the Prevention of Corruption <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup4/2019-September-4-6/V1904637e.pdf> page 7 [Accessed 4 March 2025].

⁶⁴. Conference of the States Parties to the United Nations Convention against Corruption, Mandates of anti-corruption body or bodies in respect of prevention (Article 6 of the United Nations Convention against Corruption <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup4/2014-September-8-10/V1404318e.pdf>) [Accessed 4 March 2025].

⁶⁵. Conference of the States Parties to the United Nations Convention against Corruption (Doha, Qatar, 9-13 November 2009) <https://www.unodc.org/corruption/en/cosp/conference/session3-resolutions.html> [Accessed 4 March 2025].

⁶⁶ Article 36 United Nations Convention Against Corruption.

These ACAs should be given sufficient resources which include material resources as well as specialised staff, and the staff should also be trained to perform their function. Importantly, these ACAs need to be independent. The concept of independence of ACAs is anchored in the UNCAC but is left open to interpretation, and no consensus could be reached at the negotiation of the UNCAC on what that independence entails.⁶⁷ Independence referred to in the UNCAC does not mean total autonomy with no oversight. Reasonable checks and balances do not make the ACAs an illegitimate agency. However, the anti-corruption bodies must be financially, institutionally and functionally independent, have the necessary resources and specialised staff, and receive the relevant training. Financial independence refers to the inability of the government to interfere by restricting the finances of the ACA. Institutional independence refers to the ability to appoint the staff and implement its role and responsibility and its decision-making with limited interference from the government.⁶⁸ Functional independence is the least possible degree to which an ACA can function without the undue interference of any third party or the political executive.

Another important aspect of the UNCAC is the establishment of the Conference of State Parties (COSP) which assists state parties in the implementation and also reviews the implementation of the convention. The Conference of the States Parties (COSP) is established in terms of Art 63 of the UNCAC and meets biennially.⁶⁹ The conference has subsidiary bodies to advise the conference and make recommendations. There is an implementation review group, the working group on prevention, the working group on Asset recovery, and an Expert meeting on International Cooperation. At its eighth session, held from 16 to 20 December 2019, the COSP to the UNCAC adopted the resolution 8/7 that gives guidance on enhancing the effectiveness of anti-corruption bodies. States were called upon to give adequate consideration and resources to anti-corruption bodies in order to

⁶⁷. Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Corruption

https://www.unodc.org/documents/treaties/UNCAC/Publications/Travaux/Travaux_Preparatoires_-_UNCAC_E.pdf#page=111.26 [Accessed 4 March 2025].

⁶⁸United Nations Development Programme Applying the Capacity Assessment Methodology to anti-corruption agencies <https://anti-corruption.org/Learning/ACA/49.htm> [Accessed 4 March 2025]

⁶⁹. Conference of the States Parties to the United Nations Convention against Corruption <https://www.unodc.org/unodc/en/corruption/COSP/conference-of-the-states-parties.html> [Accessed 4 March 2025].

meet emerging challenges. The goal was for states to reflect on the outcome of their country reviews to enhance anti-corruption framework and share best practices among member states.⁷⁰ South Africa was reviewed in the 2016-2021 cycle, and the Country Review Report of South Africa reviewed the implementation by South Africa of articles 5-14 and 51-59 of the UNCAC.⁷¹ The observation on the implementation of Article 6 is that South Africa needs to adopt measures to strengthen ACAs, invest in training and ensure that ACAs are sufficiently staffed.⁷² The review process has added a more measurable manner to determine and sharing best practices for implementing the UNCAC.⁷³

With the dawn of the new democracy, South Africa re-applied to become a member of the UN and that membership meant to abide by the policy and norms of the UN.⁷⁴ The constitution further dictates the process of how a convention becomes binding on the republic.⁷⁵ The UNCAC is one of the international agreements of the UN and was ratified by South Africa on 22 November 2004. South Africa follows the multi-agency approach to fighting corruption, with a combination of older existing agencies and specialised units that get established as the need arises. In that sense, South Africa does comply with the UNCAC, although this paper aims to look at the effectiveness of multiple agencies.

⁷⁰ Conference of the States Parties to the United Nations Convention against Corruption (Abu Dhabi, United Arab Emirates, 16-20 December 2019)

<https://www.unodc.org/unodc/en/corruption/COSP/session8-resolutions.html> [Accessed 4 March 2025].

⁷¹ Country Review Report of South Africa Review by Niger and the Cook Islands of the implementation by South Africa of articles 514 and 5159 of the United Nations Convention against Corruption for the review cycle 2016-2021

https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2020_12_23_Final_Country_Review_Report_of_South_Africa.pdf [Accessed 4 March 2025].

⁷² Country Review Report of South Africa Review by Niger and the Cook Islands of the implementation by South Africa of Articles 514 and 5159 of the United Nations Convention against Corruption for the review cycle 2016-2021

https://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2020_12_23_Final_Country_Review_Report_of_South_Africa.pdf [Accessed 4 March 2025].

⁷³ Deegan J 'Corrupting perceptions: the impact of the United Nations convention against corruption, on corruption perceptions index scores' 3(2) 2019 *JACL* 176.

⁷⁴ South Africa becomes a charter member of the United Nations <https://www.sahistory.org.za/dated-event/south-africa-becomes-charter-member-united-nations> [Accessed 4 March 2025].

⁷⁵ S 231(4) of the Constitution.

2.2 Regional Instrument: The African Union Convention on Preventing and Combating Corruption

Under this heading, the writer will focus on the AU Convention on Preventing and Combating Corruption (AUCPCC). The AUCPCC is an important legal instrument to address issues of corruption across the African continent.

The roots of corruption on the African continent have their origins in the European slave trade and the Industrial Revolution, where self-enrichment became the order of the day as each person in the bureaucratic progression wanted to benefit from the colonial administrative process.⁷⁶

The African Union Convention on Preventing and Combating Corruption (AUCPCC) is geographically limited and uniquely emphasises aspects of corruption that affect Africa.⁷⁷ To ensure good governance, post-colonialism required African leaders to fight corruption⁷⁸ and required the African Union (AU) to enact the AUCPCC in 2003 and it became operational in 2006.⁷⁹ The Convention is unique among anti-corruption instruments in that it contains mandatory provisions regarding private-to-private corruption⁸⁰ and transparency in political party funding.⁸¹ Through surveys on the prevalence of corruption, Africa is believed to be the highest prevalent region in the world.⁸² Corruption increases poverty and hinders social and economic growth, consequently, many Africans are deprived of receiving basic needs.⁸³ See below for the CPI scores for Sub-Saharan countries, with most countries scoring below 50.⁸⁴ AU countries form part of the CPI for Sub-Saharan Africa, and the following image provides a visual representation of the top and bottom scores as

⁷⁶ Imiera P (2020) 'Corruption race in Africa: Nigeria versus South Africa, who cleans the mess first?' *De Jure Law Journal* 73.

⁷⁷ Snider T, Thomas R. and Won K (2007) 743.

⁷⁸ Mangu AB 'Good governance and democratic leadership for an African Renaissance: A reflection on AU member states' compliance with the AUCPCC 2012 7 (2) *International Journal of African Renaissance Studies* 19.

⁷⁹ Imiera PP' The corruption race in Africa: Nigeria versus South Africa, who cleans the mess first?' 2020 *De Jure Law Journal* 75.

⁸⁰ Article 11.

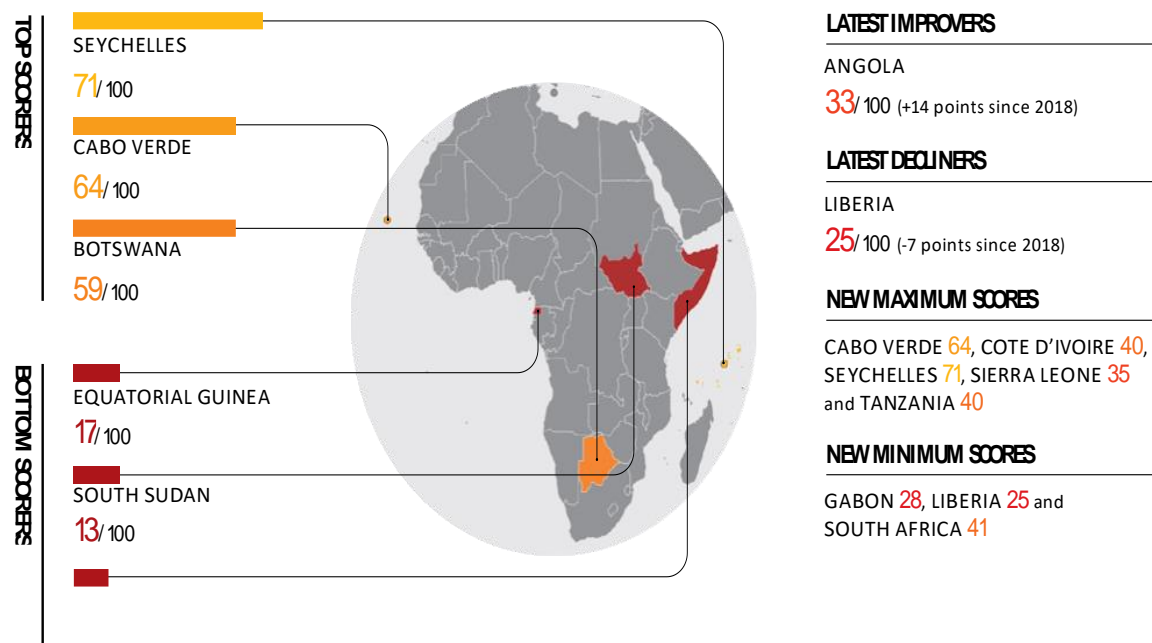
⁸¹ Article 10.

⁸² Ayodeji GI et al. 'African Union, Promotion of Democracy and Anti-Corruption Initiatives in Africa' (2023)4(1) *ABUAD Journal of Social and Management Sciences (AJSMS)* 2.

⁸³ Ayodeji GI et al (2023) 7.

⁸⁴ Corruption Perception Index 2023 <https://images.transparencycdn.org/images/CPI-2023-Report.pdf#page=9.10> [Accessed 4 March 2025].

well as the latest improvements and declines. South Africa was identified as one of the countries with a new minimum score.



The CPI shows mixed results in Africa, with noteworthy improvements in a few countries. However, most African countries saw stagnation, maintaining the region's consistently poor performance. Combating corruption in the region remains a priority.

South Africa ratified the AUCPCC in 2005, and it looks at essential aspects of transnational corruption.⁸⁵ The objectives of the Convention are to promote and strengthen the development in Africa of anti-corruption mechanisms⁸⁶; secondly to promote, facilitate and regulate co-operation among state parties⁸⁷; thirdly, to remove obstacles to the enjoyment of human rights⁸⁸, including economic, social and cultural rights; and fourthly, to establish conditions necessary to foster transparency and accountability in the management of public affairs.⁸⁹ The AU Convention criminalises corruption in the public and private sectors, obligating state

⁸⁵. African Union, 2003, Article. 7.1; Snider T, Thomas R & Won K (2007) 711.

⁸⁶. Article 2(1).

⁸⁷. Article 2(2).

⁸⁸. Article 2(4).

⁸⁹. Article 2(5).

parties to adopt legislative, administrative and other measures to combat corruption.⁹⁰ The AU corruption convention focuses on three aspects of combating corruption which are prevention, criminalisation, and international cooperation.⁹¹ Art 1 of the Convention defines corruption as 'acts and practices including related offences proscribed in this Convention'. Art 4 set out the offences considered corruption acts of corruption and related offences. The text outlines various forms of corruption, including the soliciting or accepting of goods or benefits in exchange for public functions for personal benefit. Other forms include offering undue advantages in the private sector, illicit enrichment and participation as principal, co-principal, agent, instigator, accomplice, or accessory after the fact in corrupt acts.

The Convention addresses both the demand and supply sides of corruption and requires state parties to criminalise both solicitation and acceptance of corrupt activities. Art 5(3) of the AU Convention calls for the establishment of ACAs. Unlike the UNCAC preventative measures contained in one article, Art 5 contains the legislative and other measures of combating corruption. On the other hand, the UNCAC has a heading for preventative policies and the establishment of an ACA respectively. The AU convention provisions are straight to the point on the establishing, maintaining and strengthening of ACAs. In that sense, it is similar to the provisions in the UNCAC. However, unlike the UNCAC, there is no mention of the type of independence and support that should be provided to the established ACA. The weakness of the AU Convention is that it does not give guidance on the establishment of ACAs as the success of an ACA depends on different elements that must be better defined in the UNCAC. In the 20 years since the AU convention, there has been notable improvement, and progress in enhancing anti-corruption efforts has been made by member states.⁹² Efforts to ensure that there is no political instability in the form of coup d'état and interference with elections would enhance the region's efforts to combat corruption.⁹³ The political will to combat corruption can never be underestimated and meticulously drafted laws and regulations cannot compensate for the lack of political commitment to eradicate corruption in the

⁹⁰ Olaniyan K 'The African Union Convention on Preventing and Combating Corruption: A critical appraisal' (2004)4 *African Human Rights Law Journal* 75.

⁹¹ Snider T, Thomas R & Won K (2007) 712.

⁹² Ayodeji GI et al 10.

⁹³ Ayodeji GI et al 13.

region.⁹⁴ African leaders have generally shown a keen interest in signing international or regional instruments because of the foreign sponsorships it may gain. However, the compliance is poor.⁹⁵ Corruption is far from being eradicated on the continent and it even increased after the AUCPCC.⁹⁶ In order for the AUCPCC to remain a relevant and effective instrument, the provisions of the AUCPCC need to be amended.⁹⁷ The AU through the Pan-African Parliament do resolve on matters relating to anti-corruption from time to time.⁹⁸ These resolutions are not binding on the members states but are consultative and advisory in nature and considered vital to combating corruption.⁹⁹

The AUCPCC established the Advisory Board on Corruption (ABC)¹⁰⁰ as its follow-up mechanism that must embark on programmes of prevention and combating corruption.¹⁰¹ This autonomous organ plays a significant role in combating corruption within the AU. The purpose of the ABC is to provide guidance on the application of anti-corruption measures in the region. The board plays an advisory role on best practices and facilitating training in anti-corruption practices. The ABC also monitors the implementation and progress on anti-corruption efforts made by member states. The establishment of the ABC enhances the capacity of the AU to combat corruption.¹⁰²

However, the work of the ABC is criticised for not delivering on its mandate to raise awareness, visit governments and develop and promote harmonised codes of conduct for Africa. The ABC suffers financial and human resource challenges that contribute greatly to the shortcomings of the board. At this moment, the mandate of the ABC is not to enforce but to monitor and promote compliance with the AUCPCC. Perhaps the ABC should be given more power in enforcement of the

⁹⁴. Imiera P (2020) 76.

⁹⁵. Mangu AMB (2012) 27.

⁹⁶. Mangu AMB (2012) 29.

⁹⁷. Mangu AMB (2012) 32.

⁹⁸. Resolution on the dialogue on combatting corruption: sharing knowledge, deepening understanding and transforming policy to practice, Published on 18 October 2016 <https://africanlii.org/akn/aa-au/statement/resolution/pap/2016/4-3-2/eng@2016-10-18> [Accessed 4 March 2025] Resolution on managing debt and fighting corruption in Africa Published on 17 October 2019 <https://africanlii.org/akn/aa-au/statement/resolution/pap/2019/5-3-5/eng@2019-10-17> [Accessed 4 March 2025].

⁹⁹. PAP plays a prominent role in combating corruption: AUABC <https://pap.au.int/en/news/press-releases/2023-03-09/pap-plays-prominent-role-combating-corruption-auabc> [Accessed 4 March 2025].

¹⁰⁰. Article 22.

¹⁰¹. Mangu AMB (2012) 23.

¹⁰² Article 22(5)

AUCPCC.¹⁰³ There is limited information about state parties' self-evaluation processes and assessments made publicly available. The unavailability of reports and assessments on the review process makes it difficult to evaluate the effectiveness of ABC in promoting the convention's implementation across member states.¹⁰⁴

2.3 Subregional Instrument: SADC protocol against corruption

The SADC is one of the economic sub-regional communities recognised by the AU comprising 16 member states from the Southern region of Africa.¹⁰⁵ The region is faced with challenges that create a conducive breeding ground for corruption, like integration of trade which makes the region more vulnerable.¹⁰⁶ Sub-Saharan Africa has an average score of 33 out of 100 CPI score, and though there has been improvement in some countries, the poor performance overshadows the gains.¹⁰⁷ The sixteen member states of the SADC form part of the CPI, and their individual scores contribute to the low score of the region. Regional integration was expected to bring benefits to member states supported by the idea that regional integration has the potential to transform the economies of SADC countries.¹⁰⁸ Common forms of corruption in Southern Africa include, but are not limited to, bribery, extortion, embezzlement, theft and fraud, abuse of office, influence peddling, illicit enrichment, and nepotism.¹⁰⁹ The purposes of the protocol are to create a unified approach to addressing shared challenges and corruption as a shared challenge, the provisions of states in Article 2 are as follow:

¹⁰³. AU-ABC Strengths, Weaknesses, Opportunities and Threats (SWOT) analysis <https://anticorruption.au.int/sites/default/files/files/2021-06/en-auabc2018-2022strategicplan.pdf#page=21.04> [Accessed 4 March 2025 2024].

¹⁰⁴. Comparative analysis of the UNCAC and the AU Convention https://knowledgehub.transparency.org/assets/uploads/helpdesk/Comparative_analysis_of_the UNCAC_and_the_AU_Convention_2014.pdf [Accessed 4 March 2025] African Union Advisory Board Against Corruption, Resources <https://anticorruption.au.int/en> [Accessed 4 March 2025].

¹⁰⁵. Bonga WG 'Corruption Prevalence in SADC Regional Bloc' (2021)9(2) *Journal of Research in Humanities and Social Science* 8.

¹⁰⁶. Bonga WG (2021)9.

¹⁰⁷. Transparency International Global Highlights <https://images.transparencycdn.org/images/CPI-2023-Report.pdf> [Accessed 4 March 2025].

¹⁰⁸. Bonga WG (2021) 8.

¹⁰⁹. Musila JW 'Anticorruption Strategies in Sub-Saharan Africa: Lessons from Experience and Ingredients of a Successful Strategy' (2019) 20(2) *Journal of African Business* 181

The purpose of this Protocol are:

- a) to promote and strengthen the development, by each of the State Parties, of mechanisms needed to prevent, detect, punish and eradicate corruption in the public and private sector,
- b) to promote, facilitate and regulate co-operation among the State Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the public and private sectors.
- c) to foster the development and harmonisation of policies and domestic legislation of the State Parties relating to the prevention, detection, punishment and eradication of corruption in the public and private sectors.

The key purpose of the protocol, as deduced from the above quote, is to promote good governance, facilitate co-operation and enhance the legal framework to combat corruption. Further to that, the protocol emphasises the development of preventative measures and the need to strengthen those bodies. The SADC region had a protocol against corruption two years before the UNCAC. The SADC Protocol against Corruption came into force in August 2003 to further promote and strengthen anti-corruption efforts in the public and private sectors.¹¹⁰ The SADC Protocol set an important precedent in regional anti-corruption efforts. The SADC Protocol was ratified by South Africa in 2001 and provides for five categories of obligations, preventative measures and mechanisms, criminalisation, confiscation and seizure, international co-operation, and implementation mechanisms.¹¹¹ The SADC protocol defines corruption as an offense that is the abuse of power by an official in the public or private sector.¹¹² In so far as criminalisation is concerned, Art 3 of the protocol criminalises acts of corruption and lists the specific acts of corruption and covers more or less the same ground that other regional and international conventions do. The protocol also provides for the establishment of anti-corruption institutions other than the police or national prosecuting authority.¹¹³ Art 4 (1)(g) encourages the establishment, maintenance and strengthening of

¹¹⁰. Bonga WG (2021) 9.

¹¹¹. Anti-corruption conventions in Africa: what civil society can do to make them work <https://www.transparency.org/en/publications/anti-corruption-conventions-in-africa-what-civil-society-can-do-to-make-the> [Accessed 4 March 2025] Gillian Dell, Anti-corruption convention in Africa: what civil society can do to make them work, Transparency International, 2005 32.

¹¹². Nsereko DDN and Kebonang Z' The SADC Protocol Against Corruption: Example of the region's response to an international scourge' (2005)1 *University of Botswana Law Journal* 88.

¹¹³. Article 4(g) also see Nsereko DDN & Kebonang Z 2005 101.

institutions responsible for prevention, detection, punishing and eradicating corruption.¹¹⁴ Art 4 deals with preventative measures that each member state undertakes in order to achieve the purposes set out in Art 2 of the Protocol. The preventative measures are crafted to create an environment that discourages corruption and promotes ethical behaviour in the public and private sector. These measures aims to enhance accountability and transparency and equitable systems to deter against corruption.

Similar to the AU Convention, the provisions on preventative measures are under one article. The Protocol provision does not mention the independence or maintenance of the ACA. The Protocol also specifically mentions that the ACA should be responsible for punishing corruption, while neither of the other instruments refer to punishment. The Protocol states that the ACA must eradicate corruption. The word choice is much more ambitious than the UNCAC. The AU convention does not even state in that much detail what the ACA should do. Each instrument, though similar, focuses on a different aspect of the ACA that member states should establish.

All SADC members have an agency or several agencies to tackle corruption but the independence of those agencies has always remained a concern.¹¹⁵ The lack of political will is also a challenge that is evident in the SADC region and effective leadership in that regard will tremendously benefit efforts to combat corruption.¹¹⁶ Just like the AUCPCC, the SADC Protocol does not provide for sanctions for non-compliance by member states, and the oversight body of the protocol has a reactive task as opposed to being proactive.

2.4 Constitutional approach to international law

South Africa's history of the concept of international law started with the arrival of European settlers.¹¹⁷ The UN was established in 1945, and South Africa played a prominent role in shaping our anti-corruption legal framework. However, due to racial discrimination before democracy, government policies were defensive on

¹¹⁴. SADC Protocol Against Corruption 2001.

¹¹⁵. De Sousa C 'Combatting corruption in the SADC' 2015 *De Rebus* 12.

¹¹⁶. De Sousa C (2015) 13.

¹¹⁷. Dugard J et al. *Dugard's International Law: A South African Perspective* 5ed (2019) 18.

aspects of international law that were against Apartheid.¹¹⁸ The violation of human rights in South Africa at the time contributed significantly to the international legal framework and led to treaties promoting human rights and racial equality.¹¹⁹ In 1994, recognition of international law became a pillar of the democracy of South Africa and no longer selectively applied as the case was during Apartheid.¹²⁰ South Africa's identification with international law became evident, by signing important human rights treaties, and the country is a leader on the African continent when it comes to participation in international structures.¹²¹

To discuss how South Africa recognises and applies international law in the constitutional dispensation, I will have to deal with the three theories of interaction between municipal law and international law.¹²² The monist theory maintains that international law and municipal law are one concept of law and that international law should apply directly in a country without the need to be domesticated into municipal law.¹²³ The dualist theory maintains that international law and municipal law are completely separate systems and often set out how international law will be adopted and then domesticated into their legal system.¹²⁴ The Monist-Dualist theory focuses on the practicality of the relationship between international law and domestic law and dictates that, in the event of a conflict between international law and domestic law, the country's own jurisdictional rules apply.¹²⁵

The process of adoption of international law is dealt with in terms of section 231 of the Constitution, whilst section 232 addresses the application of customary international law, and section 233 deals with the application of international law.¹²⁶

^{118.} Dugard J (2019) 5ed 22.

^{119.} Dugard J (2019) 5ed 23.

^{120.} Dugard J (2019) 5ed 24.

^{121.} Dugard J (2019) 5ed 25.

^{122.} Mutubwa W 'Monism or Dualism: The Dilemma in The Application of International Agreements Under the South African Constitution' (2019) 3(1) *Journal of Conflict Management and Sustainable Development* 27.

^{123.} Dugard J (2019) 5ed 57.

^{124.} Dugard J (2019) 5ed 57.

^{125.} Dugard J 92019) 5ed 58.

^{126.} Constitution of the Republic of South Africa, 1996.

Section 231 of the constitution states:

The President has the responsibility to negotiate and sign international agreements. This must be approved by Parliament before ratification, and this ensures that there is democratic oversight and legislation of the agreement by the government. Section 231 differentiates between two different types of international agreements: An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, which binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time. Once the international agreement is ratified, it becomes binding on South Africa and may require the enactment of domestic legislation to give effect to the provisions of the agreement.

Knowing the provisions of section 231 is important to understand how South Africa engages the international community and its international commitments. The adoption process in section 231 sets out that international law does not apply automatically in South Africa but must be approved by the National Assembly(NA) and the National Council of Provinces(NCOP), with the exception of agreements of technical, administrative, or executive nature that only need to be tabled before the NA and NCOP.¹²⁷ The approval of international law must be accompanied by domestication to be law in South Africa. However, a self-executing treaty only finds application as law if it is not inconsistent with the Constitution or any act of parliament.¹²⁸ The meaning of self-executing has not been defined in the South African context, and the courts are reluctant to determine what it exactly means.¹²⁹The Constitution is the highest law in the country. International legal status will be determined by an act of incorporation, either by an act of parliament or by subordinate legislation.¹³⁰

The South African courts are willing to apply international law when interpreting and applying South African law. The inclination is provided for in the constitution that states that any reasonable interpretation consistent with international law must be preferred over any other interpretation that is inconsistent with international law.¹³¹ Since the democratic dispensation, there has been some land mark cases where

^{127.} Mutubwa W (2019) 29.

^{128.} S 231(4) Constitution of the Republic of South Africa, 1996.

^{129.} Dugard J (2019) 5ed 87.

^{130.} Dugard J (2019) 5ed 99.

^{131.} S 233 Constitution of the Republic of South Africa, 1996.

the court interpreted international law, like the case that abolished the death penalty, *S v Makwanyane*¹³². More related to the topic of this paper, the *Glenister*¹³³ case examined the role of interpreting international law in domestic courts.

2.5 Domestication of the UNCAC

As a point of departure, the writer will discuss the anticorruption framework as set out in the National Anti-Corruption Strategy (NACS) that was developed and enhanced in response to the review process of the Conference of State Parties (COSP).¹³⁴ As per the NACS, the primary anti-corruption legislation in the country is the Prevention and Combating of Corrupt Activities Act (PRECCA).¹³⁵ PRECCA is the country's primary attempt to meet its obligation in terms of the UNCAC.¹³⁶ PRECCA aims to provide a comprehensive legal framework for combating corruption in both private and public sectors. The long title of PRECCA states:

To provide for the strengthening of measures to prevent and combat corruption and corrupt activities; to provide for the offence of corruption and offences relating to corrupt activities; to provide for investigative measures in respect of corruption and related corrupt activities; to provide for the establishment and endorsement of a Register in order to place certain restrictions on persons and enterprises convicted of corrupt activities relating to tenders and contracts; to place a duty on certain persons holding a position of authority to report certain corrupt transactions; to provide for extra-territorial jurisdiction in respect of the offence of corruption and offences relating to corrupt activities; and to provide for matters connected therewith.

The long title contains the core mission to prevent and combat corruption in all forms. The legislation creates the general offence of corruption,¹³⁷ offences of corruption by specified people,¹³⁸ specific and miscellaneous offenses of corruption and the duty to report corrupt transactions.¹³⁹ PRECCA is not the only anti-corruption legislation in South Africa. There are several other pieces of legislation calling for transparency of government and companies, protection for whistle-

^{132.} *S v Makwanyane and Another* 1995(3) SA391 (CC).

^{133.} *Glenister v President of the Republic of South Africa and Others* 2015 (1) BCLR 1 (CC).

^{134.} National Anti-Corruption Strategy 2020 - 2030

https://www.gov.za/sites/default/files/gcis_document/202105/national-anti-corruption-strategy-2020-2030.pdf [Accessed 4 March 2025] page 13.

^{135.} Act No. 12 of 2004.

^{136.} Pragal O 'Assessing South Africa's Prevention and Combating of Corrupt Activities Act' (2006)19(2) *Acta Criminologica* 19.

^{137.} S 3 of Prevention and Combating of Corrupt Activities Act 12 of 2004.

^{138.} S 4-S9 of Prevention and Combating of Corrupt Activities Act 12 of 2004.

^{139.} S 34 of the Prevention and Combating of Corrupt Activities Act 12 of 2004.

blowers and a duty to investigate corruption.¹⁴⁰ PRECCA creates the general crime of corruption, the provision is broad and aims to cover a range of offences that can be considered corruption.¹⁴¹

In addition to creating the general crime of corruption, the Act also criminalises specific corrupt activities.¹⁴² The Act also creates a duty to report corruption in section 34 and requires all people in positions of authority in both public and private sectors to report corruption to the police if it involves more than R100 000. Section 25 of the act sets out the penalties upon conviction and hefty prison sentences can be imposed, as well as fines. The Act criminalises a wide range of corrupt activities, suggesting an inclusive approach to tackling corruption and seeks to foster a culture of integrity in South Africa.

Another relevant anti-corruption statute in South Africa is the Prevention of Organised Crime Act 121 of 1998, which provides for measures to combat organised crimes, money laundering and criminal gang activities. The Act provides a mechanism for the state to apply for the seizure of property through civil proceedings if reasonable grounds to believe that the property concerned is an instrumentality of an offence, the proceeds of unlawful activities, or is associated with terrorist and related activities.¹⁴³ Assets can only be seized once a High Court order has been obtained.

Apart from legislation that expressly criminalise corruption, there are other legislation that are in place for combating corruption.¹⁴⁴ These include the Protected Disclosures Act 26 of 2004, which places a duty on employers to have a system for whistleblowers to report irregular conduct and to inform employees about this system, the Promotion Access to Information Act¹⁴⁵, the Promotion of Administrative

¹⁴⁰ The Protected Disclosures Act 26 of 2000, the Promotion of Access to Information Act 2 of 2000, the Promotion of Administrative Justice Act 3 of 2000, the Public Finance Management Act 1 of 1999 and Regulations, the Municipal Finance Management Act 56 of 2003 and Regulations, Companies Act 71 of 2008, the Public Service Act 103 of 1994, the Witness Protection Act 112 of 1998.

¹⁴¹ S 3 of Act 12 of 2004.

¹⁴² Ss 4-21 of Act 12 of 2004.

¹⁴³ S 38 and s 48 of Act 121 of 1998.

¹⁴⁴ National Anti-Corruption Strategy

https://www.gov.za/sites/default/files/gcis_document/202105/national-anti-corruption-strategy-2020-2030.pdf [Accessed 4 March 2025].

¹⁴⁵ Act No. 2 of 2000.

Justice Act (PAJA)¹⁴⁶, the Protected Disclosures Act (PDA)¹⁴⁷, the Public Finance Management Act (PFMA)¹⁴⁸, Municipal Finance Management Act (MFMA)¹⁴⁹, Public Audit Act¹⁵⁰, the Financial Intelligence Centre Act (FICA) Act.¹⁵¹

2.5 Conclusion

South Africa acknowledges its duty under international conventions and its domestic legal framework. The Constitution provides for the interpretation of international law¹⁵² and the courts have continued to do so since democracy. With endemic corruption levels, the government of South Africa expressed its commitment to fight corruption further with the process of the development, implementation and monitoring of a National Anti-Corruption Strategy (NACS). The NACS was developed using United Nations Guidelines, and the process entailed reviewing international best practices and multi-sector engagement with the vision of achieving a corruption-free South Africa.¹⁵³

¹⁴⁶. Act No. 3 of 2000.

¹⁴⁷. Act No 26 of 2004.

¹⁴⁸. Act No. 1 of 1999.

¹⁴⁹. Act 56 of 2003.

¹⁵⁰. Act 25 of 2004.

¹⁵¹. Act 38 of 2001.

¹⁵². S 233 of the Constitution.

¹⁵³. National Anti-Corruption Strategy

https://www.gov.za/sites/default/files/gcis_document/202105/national-anti-corruption-strategy-2020-2030.pdf [Accessed 4 March 2025]

CHAPTER 3: THE MANDATE(S) OF SAPS, DPCI, IPID, SIU AND THE NPA

In this chapter, the writer would like to discuss the mandate of the above ACAs and the aspects that influence their effectiveness e.g., leadership and political interference. Further, the writer will discuss cases where the court had to apply international and domestic law that necessitated the amendment of establishing legislation of ACAs to make the ACA more effective.

3.1 SAPS

The SAPS is one of the law enforcement agencies and has a very important role in the country's criminal justice system. It is a large organisation established in terms of section 205 of the Constitution and is mandated to prevent, combat and investigate crime. The duties and objects of SAPS are regulated in the Constitution and the South African Police Service Act (the Act). section 205 (3) of the Constitution states¹⁵⁴

The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

As the primary crime agency in South Africa, SAPS plays a crucial role in maintaining order and public safety. Since the SAPS has such a broad function in fighting crime and, as far as corruption, corruption cases of a less serious nature are reported and investigated by local police detectives and serious cases of corruption are investigated by specialised units of the SAPS.¹⁵⁵ The Minister of Police is the political executive member that is responsible for the SAPS and must, in consultation with the provincial government, determine national policy for policing.¹⁵⁶ The funding for the service comes from the national budget of the minister.¹⁵⁷ The head of the police service is the National Police Commissioner (NCP) and he is appointed by the President of the Republic for a term of 5 years.¹⁵⁸ There have been conflicting views on the professional experience and qualification

^{154.} S 205(3) Constitution.

^{155.} Budhram T & Geldenhuys N 'Corruption in South Africa: The demise of a nation? New and improved strategies to combat corruption' (2018)31(1) *South African Journal of Criminal Justice* 32.

^{156.} S 206 Constitution; Mabasa HM & Olutola AA 'The structure of South African police: Towards a single police service' (2021)7(1) *Cogent Social Sciences* 2.

^{157.} Mabasa HM & Olutola AA (2021) 3.

^{158.} S 7 of the South African Police Service Act 68 of 1995.

that a National Commissioner must hold. Some believe that they should have policing experience and others believe that policing experience should not be a determining factor.¹⁵⁹ However, the leadership of any organisation is extremely important, as the performance and effectiveness of the organisation heavily depend on it hence, it is of utmost importance to ensure the selection of competent and capable leaders. NPC is to manage and control the SAPS policing service toward the objective of preventing, combating and investigating crime, maintaining public order, upholding the law, and protecting the citizens of South Africa.¹⁶⁰

To better understand the challenges within SAPS, the following are NCPs and acting NCPs of SAPS who had allegations and convictions of corruption that led to their early termination from office. The first NCP post-1994, and the only commissioner that completed his term, was John George Fivaz who was a career policeman with experience in various fields and various units of the SAPS.¹⁶¹ He was succeeded by Jackie Selebi, who was an ANC member with no police experience. He resigned when corruption charges were brought against him.¹⁶² Mr Selebi was found guilty of corruption after the court found that he had established a corrupt relationship with someone. He used his position as a public officer to give a third-party sensitive and secret information regarding criminal investigations against him for gratification.¹⁶³ Bheki Cele replaced him in that position. He was suspended pending investigations of allegations relating to unlawful involvement with the procurement of property, and, in June 2012, he was dismissed from the position. Mr Cele was also not a career policeman.¹⁶⁴ The President then appointed Riah Phiyega. Her work experience was not in policing, and she was alleged to have been doing business with the SAPS. Her lack of policing experience is believed to have resulted in the mass shooting of striking miners.¹⁶⁵ Ms Phiyega completed her five-year term, while suspended on full pay. During her suspension, the acting commissioner, Khomotso Phahlane was dismissed due to allegations of corruption relating to procurement

¹⁵⁹ Montesh M 'A proposed model for the appointment and dismissal of the national commissioner of the South African Police Service: a comparative study' (2014) 1(1) *Journal of Law, Society and Development* 71; Masiloane D 'Compromised policing: An evaluation of the criteria used to appoint police commissioners in South Africa' (2023)32(2) *African Security Review* 200-214.

¹⁶⁰ S 207 Constitution of the Republic of South Africa, S11 South African Police Service Act 68 of 1995.

¹⁶¹ Montesh M (2014) 72.

¹⁶² Montesh M (2014) 73.

¹⁶³ *S v Selebi* (25/09) [2010] ZAGPJHC 53.

¹⁶⁴ Montesh M (2014) 74.

¹⁶⁵ Montesh M (2014) 77.

processes and being complicit in criminality within SAPS Crime Intelligence. Khehla Sitole, who was appointed in 2017.¹⁶⁶ His employment was terminated by mutual agreement¹⁶⁷. The High Court held that he breached his duty when he insisted that certain documents that were requested were classified and failed to assist IPID by providing information. This resulted in him being deemed politically compromised.¹⁶⁸ From the above, it is evident that top leadership has been unstable in SAPS, and often this is attributable to corruption or political vulnerability. Quality leadership is a governance issue, and the South African government supports the culture of good governance.¹⁶⁹ Those charged with governance are expected to set the tone at the top about the importance of accountability, to demonstrate integrity and lead by example. The current national commissioner is Sehlahle Masemola who has extensive police experience and only time will tell if he finalises his term without controversies and scandals.¹⁷⁰

As an anti-corruption agency, the public needs to have confidence, trust and respect for the authority of the institution.¹⁷¹ During the period 2002-2012, there was mass recruitment in the service, admittedly, the then National Commissioner stated that the quality of the recruitment and standard of training was compromised to accommodate the mass recruitment drive.¹⁷² Another ill that compromises the SAPS is allegations of police corruption. Research on this topic indicates significant participation by members at all levels of the institution.¹⁷³ The organisational and managerial dysfunctionality has been identified as a risk factor indicator for high-level corruption in the service.¹⁷⁴ For the SAPS to be effective, the public must trust that it has the capacity to assist with the problem of corruption and not fear that engaging the police would result in them being victims of corruption.

¹⁶⁶. SAPS History <https://www.saps.gov.za/about/history.php> [Accessed 4 March 2025].

¹⁶⁷. Statement on departure of SAPS National Commissioner <https://www.thepresidency.gov.za/statement-departure-saps-national-commissioner> [Accessed 4 March 2025].

¹⁶⁸. *Vuma and Others v Executive Director: Independent Police Investigative Directorate and Another* 2021 (1) SACR 621 (GP).

¹⁶⁹. S 195 of the Constitution of the Republic of South Africa, 1996.

¹⁷⁰. SAPS Media Statement Ministry of Police <https://www.saps.gov.za/newsroom/msspeechdetail.php?nid=39041> [Accessed 4 March 2025].

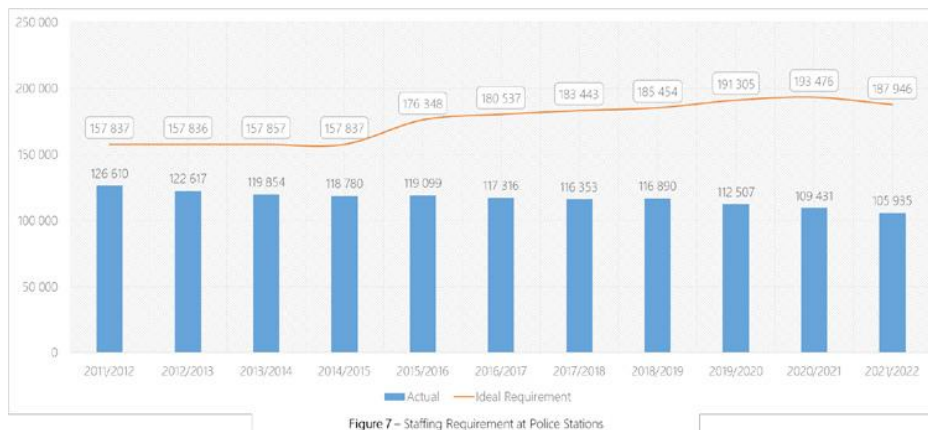
¹⁷¹. Lamb G 'Safeguarding the Republic? The South African Police Service, Legitimacy and the Tribulations of Policing a Violent Democracy' (2021) 56(1) *Journal of Asian and African Studies* 93.

¹⁷². Lamb G (2021) 95.

¹⁷³. Lamb G (2021) 101.

¹⁷⁴. Lamb G (2021) 101.

The below graph indicates the desired staff complement of SAPS in comparison to the actual staff at police stations. The shortcoming is glaring:¹⁷⁵



With limited personnel, there are fewer opportunities for training and development and this can hinder the growth of skills necessary for quality policing. In order to be effective, an ACA needs to have sufficient qualified staff and, as seen above, the SAPS are falling short. The ratio between policemen, detectives and specialists in the SAPS shows that they do not have the opportunity to attend to and give every case the attention it deserves. Officers face overwhelming workloads leading to burn out and poor job satisfaction and potentially higher instances of misconduct and corruption.¹⁷⁶ An institution is just as strong as the capacity of its employees and considering that SAPS is not exclusively responsible for combating corruption, it is undesirable to have such a big staff shortage.

3.2 Directorate for Priority Crime Investigation

The DPCI was established in 2009 and is colloquially known as the Hawks, established as an independent directorate within the South African Police Service.¹⁷⁷ The brief discussion on the Scorpions will give background information and set a foundation for the discussion on the effectiveness of the Hawks. The

¹⁷⁵ Annual Performance Plan SAPS https://static.pmg.org.za/SAPS_2023-24_APP_Final_20_March_2023.pdf [Accessed 4 March 2025] page 22.

¹⁷⁶ Justice and Violence Prevention Programme, Institute for Security Studies ‘Strengthening the SAPS for a safer South Africa: Recommendations for police reform’ 2024 <https://issafrica.s3.amazonaws.com/uploads/pages/1719390413742-SAPS-Report.pdf> [Accessed 12 March 2025]

¹⁷⁷ S 17C South African Police Service Act, 1995 as amended by the South African Police Service Amendment Act, 2008 (Act 57 of 2008).

discussion will highlight the rationale behind the enabling legislation of the Hawks as well as its relationship with SAPS.

3.2.1 The Directorate for Special Operations (DSO)

The DSO was launched in 1999 and, in 2001, legislation¹⁷⁸ was promulgated that placed this elite investigative unit under the auspices of the National Prosecuting Authority (NPA), falling under the authority of the National Director of Public Prosecutions.¹⁷⁹ The establishment of the Scorpions came at a time when there was an indication that normal law enforcement was no longer effective against increased degrees of criminal activity in the country.¹⁸⁰ The Scorpions was a multidisciplinary agency that investigated and prosecuted organised crime and corruption. The Scorpions mandate was to ensure that the SAPS still retained their investigative powers and ensured that the Scorpions did not get overloaded with trivial matters.¹⁸¹ The operational mandate was narrow and soon after the change in management in SAPS, there was conflict between the two institutions.¹⁸² The establishment of the Scorpions under the NPA raised constitutionality concerns. Since the NPA has a quasi-judicial function, its proximity to investigation would give the National Director of Public Prosecution too much power and that might be a breach of the separation of powers.¹⁸³

Another contention that impacted the work of the Scorpions was its vulnerability to political manipulation. The unit enjoyed much popularity in the country for investigating high-ranking politicians¹⁸⁴. The Scorpions experienced intense political pressure and in 2007, the African National Congress resolved that the Scorpions should be incorporated into the South African Police.¹⁸⁵ The reason for the resolution was that the constitution provides for a single police service and that the members of the Scorpions performing police functions must fall under the SAPS.¹⁸⁶

^{178.} S 7(1) of the NPA Act 32 of 1998.

^{179.} Redpath J 'Weathering the storm Tough questions for the Scorpions' 2004 8(31) *SA Crime Quarterly* 31.

^{180.} Berning J & Montesh M 'Countering corruption in South Africa The rise and fall of the Scorpions and Hawks' (2012)39 *SA Crime Quarterly* 4

^{181.} Redpath J 2004 32.

^{182.} Berning J & Montesh M (2012) 5.

^{183.} Redpath J (2004) 33.

^{184.} Berning J & Montesh M (2012) 3.

^{185.} Berning J & Montes M (2012) 7.

^{186.} ANC 52nd National General Council Resolutions 20 December 2007
<https://www.anc1912.org.za/resolutions-2/> [Accessed 4 March 2025].

During their tenure, the DSO had many achievements, ranging from seizing large amounts of contraband and securing prison sentences. The DSO performance over the years can be viewed in the table below. Their conviction rate has been consistently high:¹⁸⁷

Directorate of Special Operations							
Indicator	2004/05	2005/06	2006/07	2007/08	2008/09	Change over prev yr	Change over period
Investigations finalised (no. of cases)	325	318	267	178	78	-56.2%	-76.0%
Investigations new (no. of cases)	334	380	368	111	55	-50.5%	-83.5%
Arrests (no of persons)	471	447	617	144	126	-12.5%	-73.2%
Prosecutions finalised (no. of cases)	234	243	214	182	64	-64.8%	-72.6%
Conviction rate	88%	82%	85%	94%	98%	+4.3%	+11.4%
Restraint orders with AFU (R'000)	R 180,000	R 236,000	R 550,000	R 45,425	R 17,021	-62.5%	-90.5%
Contraband seized (R'000)	R 2,460,000	R 445,000	R 956,580	R 4,084,775	R 35,571	-99.1%	-98.6%

3.2.2 The DPCI

After scepticism and disapproval by opposition political parties, the Hawks were launched as an agency that would take over where the popular Scorpions left off.¹⁸⁸ The transition from DSO to DPCI wasn't smooth. In 2008, a businessman, Mr Glenister, approached the court to declare the legislation that led to the establishment of the Hawks unconstitutional and invalid and declared that the decision taken to initiate legislation disestablishing the DSO was unconstitutional and invalid.¹⁸⁹ Glenister applied for direct access to the Constitutional Court for an order compelling the government to withdraw the relevant bills from Parliament¹⁹⁰. Effectively, the Court was asked to determine the validity of the legislation before it even came into effect. Glenister argued that the decision to dissolve the DSO caused mass resignations within the institution, and that gave the court the court power to intervene in order to prevent irreparable harm in the form

¹⁸⁷. NPA annual report https://www.gov.za/sites/default/files/gcis_document/201409/npa-annual-rpt0809.pdf page 35-37 [Accessed 4 March 2025].

¹⁸⁸. Faull A and Mtsolong T (2009) 17.

¹⁸⁹. *Glenister v President of Republic of South Africa and Others* 2009 (1) SA 287 (CC) (*Glenister I*).

¹⁹⁰. *Glenister v President of the Republic of South Africa and Others* 2009 (1) SA 287 (CC) (*Glenister I*), *Glenister v. The President of the Republic of South Africa Case* 2011 (3) SA 347 (CC) (*Glenister II*), *Glenister v President of the Republic of South Africa and Others* 2015 (1) BCLR 1 (CC) (*Glenister III*).

of depriving South Africa of an effective crime-fighting unit. The court discussed the separation of power¹⁹¹ of the executive to initiate legislation and found that the applicant failed to prove material and irreversible harm that would justify judicial intervention at this stage of the legislative process.¹⁹² The application for direct access was dismissed. In October 2008, Parliament voted, effectively dissolving the Scorpions and creating the DPCI¹⁹³. On 27 January 2009, they were assented to and signed in by the President. In *Glenister II*,¹⁹⁴ the court was presented with the same set of facts as three years previously, but with the exception of the impugned legislation that was then duly passed by Parliament. The applicant argued that, in enacting the laws, the legislature violated several of its constitutional obligations. The obligations were to act reasonably and accountably; to cultivate good human resource management; to respect international treaty obligations; to maintain an independent anti-corruption unit; to allow public participation in the legislative development process; to allow the NPA to exercise its actions; to allow the NPA properly to exercise its functions; and to respect values enshrined in the Bill of Rights.¹⁹⁵ The amicus argued for the establishment of an independent anti-corruption agency based on an international obligation.¹⁹⁶ The respondents maintained that amended legislation is supported by the provisions of sections 179 and 205 of the Constitution that define the role of the NPA and SAPS, respectively.¹⁹⁷ Ngcobo CJ, in his minority opinion, accepts that the constitution obliges the state to take effective measures to fight corruption but not as contended by the applicant and the amicus.¹⁹⁸ He notes the following:

It is in this context that the role of international law, in particular the Convention, must be understood. The Convention may be used as an

¹⁹¹. *Glenister v President of Republic of South Africa and Others 2009 (1) SA 287 (CC)* (*Glenister I*) ad para 28-40.

¹⁹². *Glenister v President of Republic of South Africa and Others 2009 (1) SA 287 (CC)* (*Glenister I*) ad par 47-55.

¹⁹³. National Prosecuting Authority Amendment Act 56 of 2008 and the South African Police Service Amendment Act 57 of 2008.

¹⁹⁴. S 7(2) of the Constitution; *Glenister v. The President of the Republic of South Africa Case 2011 (3) SA 347 (CC)* (*Glenister II*).

¹⁹⁵. *Glenister v. The President of the Republic of South Africa Case 2011 (3) SA 347 (CC)* (*Glenister II*) ad para 17.

¹⁹⁶. *Glenister v. The President of the Republic of South Africa Case 2011 (3) SA 347 (CC)* (*Glenister II*) ad para 18.

¹⁹⁷. *Glenister v. The President of the Republic of South Africa Case 2011 (3) SA 347 (CC)* (*Glenister II*) ad para 19-20.

¹⁹⁸. *Glenister v. The President of the Republic of South Africa Case 2011 (3) SA 347 (CC)* (*Glenister II*) ad para 113.

interpretive aid in understanding the nature and scope of the constitutional obligation to effectively combat corruption and organised crime, but such obligation is not a matter that is governed directly by the Convention. As the Convention explicitly states, an anti-corruption unit must be established—in accordance with the fundamental principles of [our] legal system¹⁹⁹. As an interpretive tool, therefore, the Convention is at all times subject to the requirements of the Constitution, in particular those provisions of the Constitution that specifically deal with the powers of the legislature to establish a police service in order to prevent, combat and investigate crime.¹⁹⁹

In framing their judgment, the majority noted that, although corruption does not appear in the Constitution, there is an obligation to be accountable, transparent, responsive and open in government.²⁰⁰ These values and obligations of public administration and the provisions of s7(2) of the constitution create a duty to combat corruption.²⁰¹ The majority noted that the obligations in the international conventions²⁰² create a duty on the Republic to create an independent anti-corruption unit.²⁰³ The majority considered the requirements of independence through political oversight, the perception of independence from the public, adequate security of tenure of the Head and remuneration for DCPI members. Aspects of the legislative framework enacted by the Hawks were found to be inconsistent with the Constitution as they failed to ensure an adequate degree of independence.²⁰⁴ There were two reasons advanced for that decision. The first one was the security of tenure and institutional safeguards related to the appointment and dismissal of the head and other members of the agency as well as securing remuneration levels.²⁰⁵ The second was that the agency is vulnerable to political influence. The court discussed political interference and political accountability and held that the independence of an agency is guaranteed by political accountability.²⁰⁶ As it was, the case investigated by the Hawks would be decided based on policy guidelines created by the Ministerial Committee, who are composed of politicians

¹⁹⁹. Ad para 115.

²⁰⁰. S 195 of the Constitution.

²⁰¹. Ad para 117.

²⁰². UNCAC, The Southern African Development Community (SADC) Protocol on Combating Illicit Drugs and the African Union Convention on Combating Corruption.

²⁰³. Ad para 192.

²⁰⁴. Also see Bruce D (2019) 3.

²⁰⁵De Vos P 'The South African Police Service Amendment Bill: Possible Compliance with Glenister v President of the Republic of South Africa (2012) SSRN <https://ssrn.com/abstract=2050861> [Accessed 12 March 2025].

²⁰⁶. De Vos P (2012).

and the National Commissioner of Police could also refer cases.²⁰⁷ That posed a risk of political influence, since the appointment of the National Commissioner lacked the security of tenure and could result in excluding certain investigations due to political or other reasons.²⁰⁸ The court highlighted that it is not prescriptive of what structure the revised agency should take, as long as it functions with adequate independence.²⁰⁹

Both the minority and majority decisions had valuable points when considering the impact of international law and independence specifically. The writer is prone to align with the majority judgment, that in the absence of express mention of anti-corruption, this interpreted the constitution to create an imperative to combat corruption.

Two years after *Glenister II*, Mr Glenister initiated further litigation to challenge the attempt by parliament to remedy the defect mentioned in *Glenister II*. The Amendment Act,²¹⁰ which retains the DPCI within the SAPS structure, provisions made to Chapter 6A and established the unit as follows:

Establishment and composition of the Directorate for Priority Crime Investigation:

*The Directorate for Priority Crime Investigation is hereby established as a Directorate within the South African Police Service. The senior structure is composed of the Office of the National Head of the Directorate at national level and the Office of the Provincial Directorate in each province. National Head of the Directorate at national level is appointed by the Minister in concurrence with Cabinet. The rest of the appointments made by the Head shall be done based on the required level of experience, training, skills, competence and knowledge of candidates.*²¹¹

The amendments provide strict guidelines for integrity, recruitment and accountability that are an improved version of the legislation enacted by the Scorpions.²¹² The role of the National Commissioner is limited to consultation on issues of budget, staffing and joint operations.²¹³ The head of the unit and the deputy head are to be appointed by the Minister of Police. However, because the

²⁰⁷De Vos P (2012).

²⁰⁸De Vos P (2012).

²⁰⁹ Cameron E 'Constitutionalism, rights, and international law: the Glenister decision' (2013)23 *Duke Journal of Comparative & International Law* 406.

²¹⁰ Act 10 of 2012.

²¹¹ S 17C Act 68 of 1995

²¹² S 17C Act 68 of 1995 also see Faull A and Mtsolongong T (2009) 18.

²¹³Burger J 'No-man's-land: the uncertain existence of SAPS specialised investigative units' (2015) ISS PAPER 283 12.

unit is located under the SAPS, it cannot escape the effect of unstable management and the low perception that the public has of the SAPS.²¹⁴ The form and structure of an ACA have a direct impact on the effectiveness of the agency and being located within SAPS is not desirable.²¹⁵ Notwithstanding the attempt to secure the tenure of the head of the DPCI, the amendments fall short of the security of tenure for all members discussed in the judgment.²¹⁶ Ordinary members of the Hawks would, therefore, remain subject to the hierarchical structure, discipline regulations and ordinary remuneration regime of SAPS. This could leave members vulnerable to threats and undue influence. The amendment also attempted to minimise political interference by changing the offences referrals to the policy guidelines issued by the Minister.²¹⁷

Another challenge experienced by the DPCI that impacts effectiveness is the decline in workforce, the DPCI functions at a workforce far less than it should and the recruitment and retaining of staff is a challenge.²¹⁸

Notwithstanding the challenges the DPCI might face as a dedicated ACA, the directorate does perform well in terms of its mandate.²¹⁹ In the 2024/2025 annual plan of the SAPS, the contribution of the DPCI in dismantling the drug supply chain was mentioned and the DPCI, with other role players, created an action plan to action the recommendations of the Financial Action Task Force in so far as anti-money laundering and counter terror financing is concerned.²²⁰

^{214.} Kinnes I & Newham G (2012) 36.

^{215.} Reeves C 'After Glenister The case for a new dedicated agency' (2012) 39 SA Crime Quarterly 24.

^{216.} S 17G and S 24 Act 68 of 1995, also see *Glenister II* at 155 at para 222:

'In short, the members of the new Directorate enjoy no specially entrenched employment security. They, like other members of the SAPS, have employment rights under the SAPS Act and under other labour and employment law statutes, but no special provisions secure their employment. While it is not to be assumed, and we do not assume, that powers under the SAPS Act will be abused, at the very least the lack of specially entrenched employment security is not calculated to instil confidence in the members of the DPCI that they can carry out their investigations vigorously and fearlessly. In our view, adequate independence requires special measures entrenching their employment security to enable them to carry out their duties vigorously.'

^{217.} S 17D(1)(b) Act 68 of 1995.

^{218.} SAPS Annual Performance Plan [South African Police Service 2022-23 Annual Performance Plan 11 March 2022.pdf \(pmg.org.za\)](#) page 21 [Accessed 4 March 2025].

^{219.} Public update by the national head: Directorate for Priority Crime Investigation, lieutenant general (Dr/Adv) Godfrey Lebeya (SOEG): fourth quarter of 2022/2023 financial year date: 15 June 2023 <https://www.saps.gov.za/newsroom/msspeechdetail.php?nid=46698> [Accessed 4 March 2025].

²²⁰South African Police Service | Annual Performance Plan 2024/2025 https://www.saps.gov.za/about/stratframework/strategic_plan/2024_2025/SAPS-2024-25-Annual-Performance-Plan-02-April-2024-Final.pdf [Accessed the 4 March 2025].

3.3 The Independent Police Investigative Directorate (IPID)

3.3.1 Independent Complaints Directorate (ICD)

After the dawn of democracy in the country, the ICD was established in 1997 as a police complaints body in terms of the Police Service Act.²²¹ As the forerunner of IPID, the discussion on the ICD will explain why as a country we initially needed police oversight and how the institution has developed, specifically, how the directorate developed and grew as an ACA.

Post-Apartheid, the public needed to regain trust in the police and the ICD as an oversight body could facilitate that system of accountability. The sole mandate of the unit was to investigate deaths of people in police custody or as a result of police action, but it also received complaints from police members involved in crime.²²² Section 53 (2) of the South African Police Service Act stipulates that the Independent Complaints Directorate:

- (a) May mero motu or upon receipt of a complaint, investigate any misconduct or offence allegedly committed by a member, and may, where appropriate, refer such investigation to the Commissioner concerned;
- (b) Shall mero motu or upon receipt of a complaint, investigate any death in police custody or as a result of police action; and
- (c) May investigate any matter referred to the Directorate by the Minister or Member of the Executive Council.

The investigative power of the ICD members was identical to the powers given to a police member and it was an offence to interfere with ICD duties.²²³ The unit was created independently from SAPS but reported to the Minister of Police.²²⁴ The reporting to the Minister of Police was problematic, in the sense that the overseeing body is reporting to the executive that they are overseeing. Section 51 of the Act sets out the appointment process for the Executive Director of the ICD as follows:²²⁵

^{221.} S 50 of Act 68 of 1995; also see Faull A 'Oversight agencies in South Africa and the challenge of police corruption' (2011) 227 *ISS* 3.

^{222.} Faull A (2011) 3.

^{223.} Berg J' Civilian oversight of police in South Africa: from the ICD to the IPID' (2013)14(2) *Police Practice and Research: An International Journal* 146.

^{224.} Faull A (2011) 3.

^{225.} S 51 of Act 68 of 1995.

Appointment of Executive Director

The Minister shall nominate a suitably qualified person for appointment to head the directorate in consultation with the Parliamentary Committees. The appointment shall be for a period not exceeding five years, provided that the head be eligible for consecutive appointments. The Executive Director may be removed from his or her office under the circumstances and in the manner prescribed by the Minister in consultation with the Parliamentary Committees.

The head enjoyed a degree of job security. The role was designed to be independent but the relationship with the Minister meant that accountability could sometimes conflict with independence. There was also no duty or sanction on the police to co-operate with the ICD, and the ICD would refer findings to police management for action.²²⁶ The lack of resources hampered the effectiveness of the ICD, and even when the personnel and resources were increased, the demand grew faster.²²⁷

During 2005, after the closing of the SAPS anti-corruption unit, the Anti-Corruption Command (ACC) was established within the ICD to investigate serious corruption cases and high-profile cases.²²⁸ It was aimed at the investigation of allegations of corruption perpetrated by the SAPS and Municipal Police Service members. The directorate was highly under-resourced financially and did not have sufficient staff. It was in existence for five years but essentially failed to launch. Right after Apartheid, the country was in a nation-building phase and ensuring that the police respected human rights and are accountable, hence, an oversight body like the ICD. However, as the democracy grew with time, and crime increased, the police expected to fight crime and be effective, and the ICD was considered useless as it outlived its purpose.²²⁹

^{226.} Berg J (2013) 146.

^{227.} Berg J (2013) 147.

^{228.} IPID Annual Performance Plan

<https://www.ipid.gov.za/sites/default/files/documents/annualreport05.pdf> page 43 [Accessed 4 March 2025] also see Faull A (2011) 4.

^{229.} Berg J (2013) 149.

3.3.2 IPID

The Independent Police Investigative Directorate was created to replace the ICD and as a departure point. Unlike its predecessor, the agency was created through its legislation and in that way was separate from its connection to the SAPS.²³⁰

The Independent Police Investigative Directorate was structured with an expanded mandate. The Directorate exercised its functions in accordance with the Constitution and its own Act and allocated a budget from money that was appropriated by Parliament. The head is still appointed by the Minister of Police but with greater emphasis on accountability and transparency. The Directorate functions are institutionally and operationally independent. The Directorate must be independent, impartial and must exercise its powers and perform its functions without fear, favour, prejudice, or undue influence and is required to report to Parliament.

The separate legislation for the IPID is in compliance with section 206(6) of the Constitution which requires an independent police complaints body to be established in terms of national legislation. The mandate of IPID was more extensive concerning the offenses it could investigate, and any matter was referred by the Minister or the Secretary of the Civilian Secretariat for Police.²³¹ Section 28 of the act sets out the type of matters IPID can investigate.²³²

(1) The Directorate must investigate—

Deaths in Custody or Resulting from Police Actions regardless of whether the police official was on or off duty; Rape by a member of the South African Police Service or a member of a municipal police service, whether the police officer or such member was on or off duty; Rape of any person while that person is in police custody; Torture by police officers, including allegations of assault with intent to cause grievous harm; Discharge of official firearms by police officers; Corruption within SAPS, initiated by the Executive Director of IPID or after the receipt of a complaint from a member of the public or referred by the Minister, an MEC, the National Commissioner, or the appropriate Provincial Commissioner, National Head, or the appropriate Provincial Head of the Directorate for Priority Crime Investigation, executive head of the relevant municipal police service, municipal manager or as the case may be; Attempted murder related to the use of weapons or discharge of fire arm by police officers; Collaborative offenses involving police officers and other agencies or civilians; As well as any other matter referred to as a result of a decision by the Executive Director, or a provincial head.

^{230.} S 206(6) of the Constitution of the Republic of South Africa and S 3 and S 4 of IPID Amendment Act 15 of 2024.

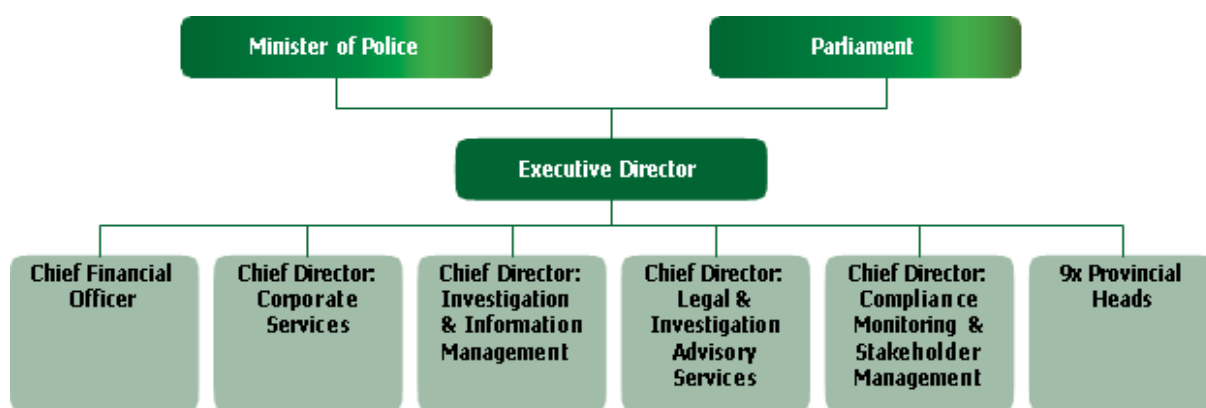
^{231.} Berg J (2013) 149.

^{232.} Independent Police Investigative Directorate Amendment Act 15 of 2024.

The IPID Act now expressly states that it is required to investigate corruption and may investigate systemic corruption.²³³ The directorate was also armed with more powers and the police must co-operate, and failure to comply could result in a conviction.²³⁴

The head of IPID, the Executive Director, is still appointed by the Minister of Police for a term of five years, renewable for one more term²³⁵ and the IPID is still housed within the same Ministry which has a bearing on its independence.²³⁶

The organisational organogram is set out below that enhances comprehension and effectively communicates the relationship between different divisions and the interaction within the Directorate.²³⁷



The IPID is responsible for investigating police organisations²³⁸ of significant size and has not received the desired financial support. The agency also heavily depends on the resources of other role players like the NPA and SAPS, meaning that shortcomings of other agencies detrimentally affects the performance of IPID.²³⁹ Statistics indicate that the agency has difficulty investigating basic cases, more so with complex financial crimes, which mostly is a factor in corruption

^{233.} S 28(1)(g) Act 15 of 2024.

^{234.} Berg J (2013) 150.

^{235.} S 6(3)(a) of Act 1 of 2011.

^{236.} Berg J (2013) 149.

^{237.} IPID Annual Performance Plan

<https://www.ipid.gov.za/sites/default/files/documents/IPID%20APP%202023-2024.pdf> page 16[Accessed 4 March 2025].

^{238.} The South African Police Service established in terms of s 214(1) of the Constitution and the Municipal Police Service established under s 64A of the South African Police Service Act.

^{239.} Bruce D 'Are South Africa's cops accountable?' 2020 (25) APCOF Research Paper 39.

cases.²⁴⁰ The conditions that IPID works under are unfavourable and it would be unrealistic to expect quality investigation from the agency.²⁴¹ The 2023/2024 Annual Report highlights the following challenges: increased workload with minimum resources, reliance on other organs of the State for technical reports, limited financial capacity and the demand to extend the geographical footprint of the institution.²⁴²

The IPID Act has been amended²⁴³ to give effect to the court's findings in *McBride v Minister of Police and Another*.²⁴⁴ The applicant in that case was the Executive Director of IPID since 3 March 2014. He is on precautionary suspension since pending a disciplinary inquiry to be initiated against him by the Minister of Police. Mr McBride became responsible for an IPID investigation into the alleged involvement of Lieutenant General Dramat, then the head of the Directorate for Priority Crimes. An initial report recommended that Mr Dramat and Mr Sibiya should be criminally charged with kidnapping and defeating the ends of justice. However, in a subsequent report, endorsed by Mr McBride, it was recommended that no charges be brought against them – citing lack of evidence as the reason. Mr McBride was accused of unlawfully tampering with the report. The High Court emphasised that the independence of IPID is expressly guaranteed under section 206(6) of the Constitution. It held that this independence was not adequately protected by the relevant legislative provisions. The appointment of the Executive Head is subject to the rules of the public service as set out in S6(3) of the Act and the removal of the Executive Head is the prerogative of the Minister of Police as per S6(6) of the Act. McBride said that these provisions did not provide the institution sufficient independence that effectively shields it from undue political interference. The court held that the power of the minister of police is incompatible with the independence required by the Constitution. The court confirmed the order of constitutional invalidity by the High Court.²⁴⁵ Parliament was directed to cure the defects in the legislation to provide for the Directorate's institutional and operational independence within 24

²⁴⁰. Bruce D (2020) 42.

²⁴¹. Bruce D (2020) 48.

²⁴². IPID Annual Performance Plan

<https://www.ipid.gov.za/sites/default/files/documents/IPID%20APP%202023-2024.pdf> Page 12-13 [Accessed 4 March 2025].

²⁴³. IPID Amendment Act 15 of 2024.

²⁴⁴. 2016 (2) SACR 585 (CC).

²⁴⁵. *McBride v Minister of Police and Another* 2016 (4) BCLR 539 (GP).

months from the date of the order. In terms of the amended provisions, the Executive Director may only be removed from office on the ground of misconduct, incapacity or incompetence on a finding to that effect by the National Assembly, thus providing for parliamentary oversight concerning the suspension, discipline or removal of the Executive Director.

As per the annual report, the Directorate received responses on 3139 cases where the National Prosecuting Authority (NPA) had made a decision, thereby exceeding the five-year target of 2500 by 639. A total of 1 329 disciplinary recommendations were initiated by the police service against a five-year target of 2500. The shortfall is 1171 to achieve the five-year target, running from 2022-2025. The disciplinary actions that were finalised by the end of the period under review were 1663. Notwithstanding challenges, the IPID is reducing levels of criminality and police misconduct.²⁴⁶

3.4 The special investigating unit (SIU)

3.4.1 The Heath Special Investigating Unit

The SIU is an independent agency established²⁴⁷ by the President who conducts investigations after a proclamation is issued, and the scope of the investigation is set out in that proclamation.²⁴⁸ Section 2 of the act states that the President may establish Special Investigating Units and Special Tribunals by proclamation in the Gazette. The President exercises the powers on the grounds of any alleged:

Serious maladministration with the affairs; improper or unlawful conduct by employees of any State institution; unlawful appropriation or expenditure of public money or property; unlawful, irregular or unapproved transaction, measure or practice including intentional or negligent loss of public money or damage to public property; Offence referred to in Part 1 to 4, or section 17, 20 or 21 of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004; Unlawful or improper conduct that has caused or may cause serious harm to the interests of the public or any category thereof.

²⁴⁶ Achievement of institutional impacts and outcomes

https://www.gov.za/sites/default/files/gcis_document/202310/ipid-annual-report.pdf [Accessed 4 March 2025].

²⁴⁷ S 2 Special Investigating Units and Special Tribunals Act, Act No. 74 of 1996.

²⁴⁸ Montesh M 'An analysis of the role of the South African asset forfeiture unit and the Special Investigating Unit' (2009)22(2) *Acta Criminologica* 36.

The mandate of the SIU is to investigate serious maladministration and corruption relating to state institutions, state assets, and public money any conduct that may seriously harm the interests of the public. It is mandated to establish a special tribunal to hear civil matters.²⁴⁹ The agency applies civil law in adjudicating cases and that is an advantage as the SIU only has to prove its cases on a balance of probabilities.²⁵⁰ Once the investigation is completed, a final report is submitted to the President and its findings, as well as the recommendations, are made. The SIU Act also established a Special Tribunal that came into operation in 2019 to adjudicate upon any civil proceedings and judgments of the Special Tribunal and which are equivalent to decisions of a single judge of the High Court.²⁵¹

Section 7 of the Act sets out the Composition of the Special Tribunal. Establishing the Special Tribunal has been instrumental in the outcomes of SIU civil litigation cases for ensuring that monies lost to the state are recovered. The jurisdiction of the Special Tribunal is limited to only those cases arising out of SIU investigations. The litigation process is faster, as the SIU doesn't have to queue with ordinary litigants in conventional civil courts for its matters to be heard. Special Tribunal adopts a more flexible and expeditious approach to legal actions, and its proceedings are inquisitorial.²⁵² The Tribunal does experience the following operational challenges to finalise cases.

1. Unavailability of presiding officers for matters in the Special Tribunal
2. Inadequate human resource capacity in the Civil Litigation Unit
3. Delays in provision of legal services by State Attorney's Office.
4. Unavailability of legal counsel due to schedule and diary constraints.²⁵³

The SIU was initially headed by Judge Heath until 2001, before the Constitutional Court judgment that a judge cannot head an investigating unit, given the principle of separation of powers. In *South African Association of Personal Injury Lawyers v Heath and Others*,²⁵⁴ this case involved the constitutionality of the functioning of the

²⁴⁹. The mandate of the SIU <https://www.siu.org.za/our-mandate/> [Accessed 4 March 2025].

²⁵⁰. Montesh M (2009) 36.

²⁵¹. MBA Incorporated: What is the SIU and its purpose <https://mbaincorporated.co.za/thought-leadership-articles/posts/what-is-the-siu-and-its-purpose/> [Accessed 4 March 2025].

²⁵². Department of Justice and Constitutional Development Special Tribunal <https://www.justice.gov.za/tribunal/index.html> [Accessed 4 March 2025].

²⁵³. SIU Annual Performance Plan <https://www.siu.org.za/wp-content/uploads/2022/05/Annual-Performance-Plan-2022-2023.pdf> page 42 (Accessed 4 March 2025).

²⁵⁴. 2001 (1) SA 883 (CC).

SIU. The SIU was tasked to investigate allegations that attorneys acting for road accident claimants had failed to pay over to their clients all the compensation due to them. The appellant appealed to the Constitutional Court against the dismissal of cases they raised in the High Court. They argued that the appointment of a judge to head the unit is unconstitutional as it violates the principle that the powers of the executive and judicial branches of state should be kept separate. They also argued that the investigation falls outside the scope of the SIU. The government argued the separation of state powers is flexible under our constitution and Judge Heath does not act as a judge when he performs his SIU functions. Section 3(1) of Act 74 of 1996 was declared to be inconsistent with the Constitution and invalid and led to the amendment of S3. The applicants in the case alleged that a judge as head of the unit undermined the independence of the judiciary that the Constitution requires. It was held that the functions that the head of the SIU has to perform are executive functions and inconsistent with judicial functions.²⁵⁵ Judge Heath made an application to resign as a judge, but the then-president refused to discharge him of his duties.²⁵⁶ The SIU essentially ceased to exist until it was re-established by proclamation in 2001, and a new unit was created.²⁵⁷

3.4.2 The Current SIU

Since the re-establishment of the SIU act was amended and set out, the composition of the unit is as follows:²⁵⁸

The President appoints a person who is a South African citizen and who, with due regard to his or her experience, conscientiousness and integrity, is a fit and proper person as the head of a Special Investigating Unit. The President may appoint any person meeting the requirements as the Acting Head of such Unit for the period determined by the President should the position becomes vacant. The Head of a Special Investigating Unit may appoint as many other fit and proper persons to the Special Investigating for the effective functioning thereof. A member of a Special Investigating Unit shall hold office for the duration of the existence of such Special Investigating Unit but a member may at any time resign or after a specified period or task. The Head of a Special Investigating Unit may at any time, remove any member from office if there are sound reasons for doing

²⁵⁵. *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) page 30 at para 38.

²⁵⁶. Bruce D (2019) 4.

²⁵⁷. Special Investigating Units and Special Tribunals Amendment Act, 2001 (No. 2 of 2001) and R118 issued on 31 July 2001.

²⁵⁸. S 3 of Act 74 of 1996 as amended by Act 2 of 2001.

so. The President may at any time remove the Head of a Special Investigating Unit from office if there are sound reasons for doing so.

While both versions of the SIU aim to curb corruption, the Heath SIU was an innovative but constitutionally challenged body, whereas the current SIU has been adapted to comply with constitutional requirements and operates with a broader mandate, enhanced powers, and a supporting judicial body in the form of the Special Tribunal that was not available to the previous version.

Considering the provisions establishing the SIU, the composition of the SIU and the functions²⁵⁹ of the SIU, the following aspects influence the independence and the efficiency of the unit. The unit is dependent on the President for a proclamation²⁶⁰ and the proclamation can be amended at any time by the President,²⁶¹ and the head of the unit is appointed at the sole discretion of the President.²⁶² The President is not the only executive member that plays an important role as payment of allowances to members may be determined by the Ministers of Justice and Finance.²⁶³ The SIU has a multi-disciplinary approach to implementing its mandate since the SIU does not have the power to make arrests, and it works closely with the SAPS and the NPA.²⁶⁴ However, the unit does have substantial law enforcement powers that include searching and seizing premises as well as forcing entry if the need exists.²⁶⁵ When the unit has built a solid civil case they also have the authority to sign an acknowledgment of debt and do away with litigation.²⁶⁶ In addition to civil litigation and recoveries done by the SIU, it also makes referrals for criminal and disciplinary actions.²⁶⁷ Unfortunately, the SIU doesn't receive feedback on the progress of the referrals.²⁶⁸ Notwithstanding shortcomings, the unit has made a huge impact on anti-corruption combating in its now 26 years of existence. Last year, the silver jubilee anniversary the South African Government looked back on

^{259.} S 4 of Act 74 of 1996.

^{260.} S 2(1) Act 74 of 1996.

^{261.} S 2(4) Act 74 of 1996.

^{262.} S 3(1) Act 74 of 1996.

^{263.} S 3(5)(a) and (b) Act 74 of 1996.

^{264.} S 4(1)(d) and S5(2)(b) Act 74 of 1996 also see Montesh M (2009) 37.

^{265.} S 6 of Act 74 of 1996.

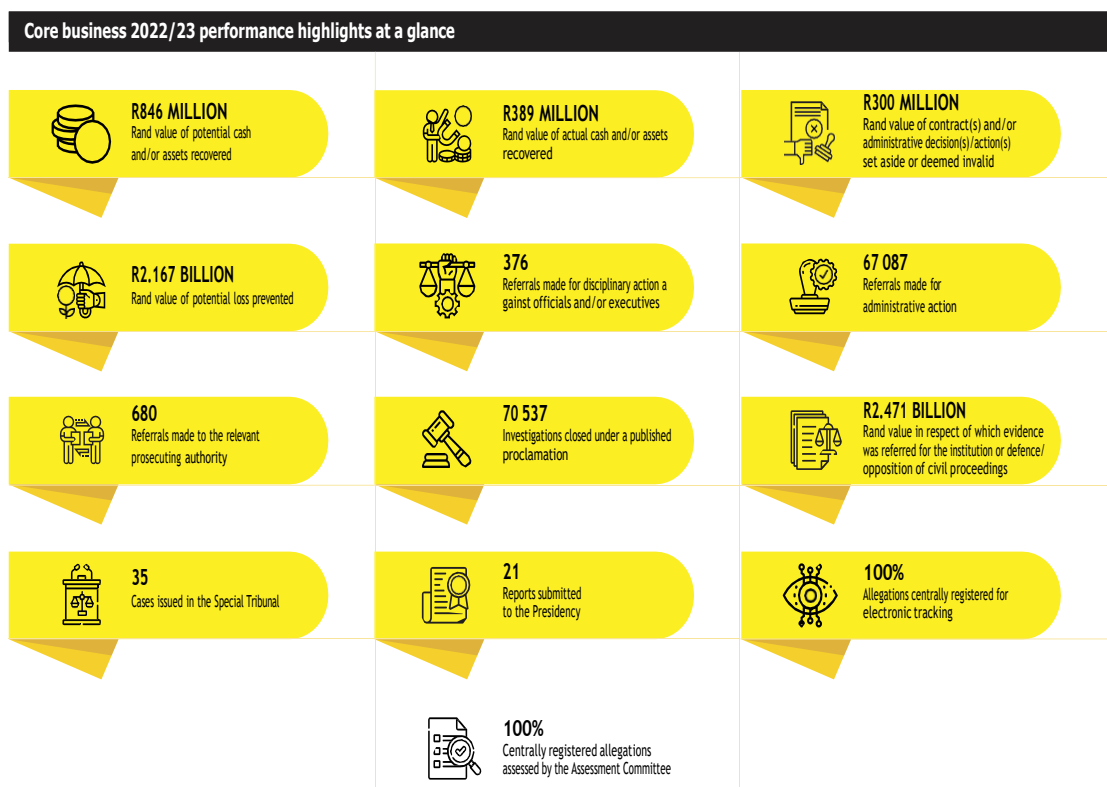
^{266.} Bruce D (2019) 6.

^{267.} Bruce D (2019) 14.

^{268.} Bruce D (2019) 17.

major cases and recoveries made, most of the cases amounting to millions of rands.²⁶⁹

The SIU has achieved success, and their 2023/2024 performance core business reports the following:²⁷⁰



the SIU's efforts saved the South African government approximately billions. This includes direct recoveries and prevented losses, with major investigations against state entities. The SIU closed 70,537 investigations in the 2022/23 financial year. This number significantly exceeded the planned target of 1,450. The SIU made 680 referrals to the relevant prosecuting authority for further action. This number exceeded the target of 250.

Despite these achievements, the SIU faces challenges, including legal setbacks particularly when its investigative authority is questioned. Courts have scrutinised

²⁶⁹ Article on the 25 years existence of the SIU <https://www.gov.za/speeches/special-investigating-unit-25-years-striking-against-corruption-13-jul-2022-0000> [Accessed 4 March 2025].

²⁷⁰ Core business 2022/23 performance highlights at a glance https://www.siu.org.za/wp-content/uploads/2023/10/SIU-Annual-Report-Final_11Oct.pdf [Accessed 4 March 2025].

and occasionally ruled against the constitutionality of its investigations. A notable case involves the Eastern Cape Premier and Fort Hare University, where the Premier applied to the court for an order interdicting SIU from investigating his master's degree registration at the University of Fort Hare. The case hinges on the interpretation of a Presidential Proclamation that authorised the SIU to investigate maladministration at the university, with the Premier arguing that the Proclamation does not extend to his master's degree registration.

The High Court ruling highlights the complexities in balancing robust anti-corruption efforts with adherence to legal processes.²⁷¹

3.5 National Prosecuting Authority (NPA)

The NPA was established in terms of section 179 of the Constitution,²⁷² and section 2 of the Act.²⁷³ There is a single national prosecuting authority in the Republic, structured in terms of legislation. The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings. In terms of legislation, the Directors of Public Prosecution must be appropriately qualified. Legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice

The President appoints the head, who is called the National Director of Public Prosecution (NDPP). He also has the power to suspend the NDPP and, after an enquiry, remove it.²⁷⁴ The role of the NDPP is vital in the criminal justice process and has been a contentious issue that has been the subject of multiple cases over the years. Unfortunately, none of the NDPPs appointed since 1998 ever finished their ten-year term in office. The NPA has been burdened with unstable and, at times, poor and unsuitable leadership²⁷⁵. The first appointed NDPP was as chief whip for the leading party and his resignation came after a decision was made not to prosecute the then deputy President in the arms deal case.²⁷⁶ At a press

²⁷¹. *Mabuyane v President of The Republic Of South Africa and Others* (330/2023) [2023] ZAECBHC 13.

²⁷². S 179 of the Constitution 1998.

²⁷³. S 2 of National Prosecuting Authority Act, No 32 of 1998.

²⁷⁴. S 10 and s 12 Act 32 of 1998.

²⁷⁵. ACJR factsheet: The appointment and dismissal of the NDPP Instability since 1998'2018 ACJR <https://acjr.org.za/resource-centre/appoint-and-dismiss-of-ndpp-fs-7-fin.pdf> [Accessed 4 March 2025].

²⁷⁶. *S v Shaik and Others* (Criminal Appeal) 2007 2 All SA 9 (SCA); also see Bruce D (2019) 6.

conference held in August 2003, the NDPP announced that, notwithstanding a prima facie case of corruption against the Deputy President, the NPA would not prosecute.²⁷⁷ There was a brief appointment of an acting NDPP, Silas Ramaite, in September 2004. The next permanent appointed NDPP was Vusi Pikoli who was in office for less than three years. Pikoli got dismissed after wanting to institute corruption cases against the then National Commissioner of the Police, Jackie Selebi, who held a political appointment by the governing party, and for filing rape charges against the then Deputy President.²⁷⁸ He was suspended based on an irretrievable breakdown between him and the Minister of Justice, and a commission of inquiry into his fitness to hold office was established.²⁷⁹ The commission found that most of the allegations against Pikoli were unfounded but that he should have informed the then President about proceedings against Selebi.²⁸⁰ Pikoli charged Zuma on charges associated with the conviction of Shaik in the arms deal case, but the case was dismissed because the prosecution was not ready. Pikoli challenged his dismissal but the case was not finalised, and he accepted a settlement before the case could be heard.²⁸¹ Mokotedi Mpshe became Acting NDPP during Pikoli's suspension and subsequent dismissal. The next permanently appointed NDPP, Mr Simelane, had his appointment challenged in the Constitutional Court where the court found that he was not fit and proper for the position with his allegiance to the governing party.²⁸² Simelane was involved in the dispute concerning the proper role of the then National Commissioner Pikoli and appeared at the commission of enquiry where the credibility of his evidence was questioned as well as his integrity.²⁸³ The court held that the decision by the Minister to advise the President not to consider indications of dishonesty in the commission of enquiry and to ignore recommendations of the Public Service Commission and to appoint Simelane as

²⁷⁷ Press Statement by: Bulelani Thandabantu Ngcuka, National Director of Public Prosecutions on the Decision on whether to prosecute after the completion of the investigation against Deputy President, Mr Jacob Zuma, Schabir Shaik and others 23 August 2003 https://www.armsdeal-vpo.co.za/special_items/statements/ngcuka_statemnt.htm [Accessed 4 March 2025].

²⁷⁸ *S v Zuma* [2006] 3 All SA 8 (W) also see Bruce D (2019) 6

²⁷⁹ Redpath J 'Failing to prosecute? Assessing the state of the National Prosecuting Authority in South Africa' (2012)189 *Institute for Security Studies* ISS 14.

²⁸⁰ Summary of report of the enquiry into the fitness of advocate VP Pikoli to hold the office of National Director of Public Prosecution: <https://static.pmg.org.za/docs/090120pikoli1.pdf> [Accessed 4 March 2025].

²⁸¹ *Pikoli v President and Others* 2010 (1) SA 400 (GNP); Redpath J (2012) 15.

²⁸² *Democratic Alliance v President of South Africa and Others* 2012 (12) BCLR 1297 (CC) Bruce D (2019) 8.

²⁸³ *Democratic Alliance v President of South Africa and Others* 2012 (12) BCLR 1297 (CC) ad para 4.

NDPP was irrational.²⁸⁴ The acting NDPP after Simelane, who was in office for 18 months, was Nomgcobo Jiba when Mxolisi Nxasana was appointed as NDPP.²⁸⁵ The President decided to institute a commission of inquiry into Mr Nxasana's fitness to hold office and to suspend him pending its outcome.²⁸⁶ The issue was about a previous conviction of murder against Nxasana. The commission was suspended after the settlement was reached. The termination of the appointment of Mr Nxasana as NDPP was constitutionally invalid and payment of the money was subsequently found to be irregular.²⁸⁷ The next NDPP was Shaun Abrahams.

The current NDPP inherited an institution that was highly politicised, and her performance and the President's commitment to the stability and integrity of the institution remains to be seen. The Constitution does not expressly state the need for the NPA to be independent, but states that the NPA must exercise its power fairly and without fear or prejudice.²⁸⁸ Different aspects have a bearing on the independence of the NPA. These include the security of tenure of the NDPP, the term of office, and grounds to protect them from unconstitutional dismissal.²⁸⁹ The NDPP must be able to make day-to-day decisions and make those prosecutorial decisions without fear of political interference.²⁹⁰ Prosecutorial independence should not be interpreted to mean the same as judicial independence, since the powers of the NPA are not judicial.²⁹¹ The NDPP and the Minister need to concur on policies of the NPA. Oversight of the President, the Minister and Parliament is essential to avoid the concentration of power.²⁹² The table below illustrates the performance of the NPA for four years and indicates an increase in the conviction rate in public sector:

^{284.} *Democratic Alliance v President of South Africa and Others* 2012 (12) BCLR 1297 (CC) 65-66 ad para 88-91.

^{285.} Muntingh L *et al.* 'An Assessment of the National Prosecuting Authority: A Controversial Past and Recommendations for the Future' 2017 *ACJR*
<https://uwcscholar.uwc.ac.za:8443/server/api/core/bitstreams/0266475f-bd37-4586-9efa-828b4bf89d41/content> [Accessed 12 March 2025]

^{286.} *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* 2018 (10) BCLR 1179 (CC).

^{287.} *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* 2018 (10) BCLR 1179 (CC). 50-51 ad para 113; also see Bruce D (2019) 8.

^{288.} Dyani-Mhango N (2020) 3

^{289.} Dyani-Mhango N (2020) 6.

^{290.} Dyani-Mhango N (2020) 7.

^{291.} Dyani-Mhango N (2020) 11.

^{292.} February J 'Protecting the public or politically compromised? South Africa's anti-corruption bodies' 2019 (31) *Southern Africa Report* 5.

Table 5: Corruption, complex tax and money laundering (2019 to 2023)

Indicator	2019/20 Actual performance (Numbers)	2020/21 Actual performance (Numbers)	2021/22 Actual performance (Numbers)	2022/23 Actual performance (Numbers)
Number of government officials convicted for offences related to corruption	184	86	130	134
Number of persons convicted of private sector corruption	233	147	209	204
Conviction rate in complex tax cases	93.3% 112/120	88.5% 69/78	98.3% 113/115	96.4% 133/138
Number of cases finalised with verdicts involving money laundering	72	62	86	85

Notwithstanding notable achievements by the NPA, the conviction rate related to corruption relatively is low as seen in Table 5 above²⁹³. Corruption conviction figures in both the government sector and private sector have been negatively affected by the low case influx, as well as the fact that these cases take a long time to be finalised due to their complexity.

The NPA is a large organisation with different business units, each with its own focus area. There are two units that particularly focus on anti-corruption. The first unit is the Asset Forfeiture Unit (AFU) which focuses its prosecutions on cases of organised crime and corruption in the private and public sectors and can seize assets or proceeds identified as being the rewards of criminal behaviour.²⁹⁴ With the AFU approach, the court applies to courts for the seizure and eventual confiscation of proceeds of crime. This is similar to the SIU that refers matters to the Special Tribunal for recovery. The second unit is the Investigating Directorate (ID) established by the President in terms of a proclamation by the government gazette on 4 April 2019, as an instrument in the fight against corruption.²⁹⁵ The ID was capacitated by re-assigning prosecutors and the secondment of investigators from the SAPS, IPID and duty arrangements of DPCI investigators as well as

²⁹³. NPA Annual Performance Plan <https://www.npa.gov.za/index.php/media/npa-annual-performance-plan-2022-23> page 33 [Accessed 4 March 2025].

²⁹⁴. NPA: Asset Forfeiture Unit <https://www.npa.gov.za/asset-forfeiture-unit> [Accessed 4 March 2025].

²⁹⁵. NPA Investigating Directorate <https://www.npa.gov.za/investigating-directorate> [Accessed 4 March 2025].

recruiting.²⁹⁶ ID's powers and function include the subpoena of witnesses to furnish documents or to answer questions, applying for and executing search and seizure warrants, prosecuting cases after consultation with the relevant DPP and bringing asset forfeiture applications.²⁹⁷ A challenge with the ID is that the NPA Act does not make provision for the appointment of investigators in the NPA on a permanent basis. The NPA made submission for the amendment of the legislation to allow for the permanence of the ID and the appointment of skilled investigators.²⁹⁸ The requirements to ensure the independence of a specialised unit within the NPA and the constitutional considerations have been decided on in the *Glenister* case, and it will be interesting to see if the ID will be an ACA as envisioned in the UNCAC.

3.6 Conclusion

As discussed above, it is clear that each ACA has a responsibility to combat and prevent corruption, with the determination of what level of corruption is subject to in the enacting legislation. Furthermore, each ACA is independent, as stated in the constitution, legislation or determined by case law. The proximity to executive interference has been a challenge to each ACA mentioned. Security of tenure of the heads, arbitrary removal and suspension and term of office have resulted in litigation. Amendment of legislation now provides better protection for heads of ACAs and ensures that a suitably skilled person is appointed. However, operationally, there are challenges that impact their effectiveness. ACAs often rely on one another or are required to refer cases to one another due to legislative constraints. Due to the reporting structure of each ACA executive leadership, the anti-corruption efforts are isolated and not co-ordinated effectively. Their mandates expose a duplication of functions. The SAPS, DPCI, IPID, SIU and the NPA have the mandate to investigate corruption, IPID to investigate the police and municipal police and SIU on proclamations by the President. The DPCI and IPID rely on SAPS for technical resources and that is particularly a challenge for IPID, which is the oversight body of the police. Most ACAs reports indicated a shortage of human and

²⁹⁶ NPA Presentation to SCOPA

https://www.npa.gov.za/sites/default/files/uploads/FINAL%20NPA%20Presentation%20to%20SCOPA_15%20FEBRUARY%202022.pdf [Accessed 4 March 2025].

²⁹⁷ Chapter 5 of Act 32 of 1998.

²⁹⁸ NPA Annual Performance Plans <https://www.npa.gov.za/index.php/media/npa-annual-performance-plan-2022-23> page 22 [Accessed 4 March 2025].

financial capital as a challenge. This results in long time lapses from investigation to prosecution and results in witnesses or evidence no longer being available and cases closed without prosecution.

CHAPTER 4: DISCUSSION ON SINGLE AGENCIES AND HOW THEY WORK.

4.1 Introduction and Mandate

In this chapter, the writer will discuss two single-approach ACAs, the Corrupt Practices Investigation Bureau (CPIB) and Hong Kong's Independent Commission Against Corruption (ICAC), respectively. The discussion will explore the level of political, financial and operational independence the agencies have in performing their mandates. The discussion will be comparative, highlighting each agency's similarities, differences, strengths and weaknesses. Factors like their mandate, design and leadership have an impact on the success of an ACA.

4.2 History of the establishment of the ACAs

The history of an agency is important as it indicates whether a government managed to establish a functional ACA from scratch, or if the success that is evident now was achieved through re-designing existing institutions and re-enforcing legislation.

Singapore's Corrupt Practices Investigation Bureau was established in 1952 as a new agency that succeeded an unsuccessful unit.²⁹⁹ Before 1952, a unit known as the Anti-Corruption Branch (ACB) under the Criminal Investigation Department of the Singapore Police Force headed by a special group of senior police officials was in charge of investigating corruption cases. The ACB proved to be relatively ineffective in curbing corruption because it was discovered that many cases involved police officers.³⁰⁰ In 1951, in a theft of opium scandal, it was revealed that senior police officials were perpetrators in the case. The government of the time decided to establish another special team that replaced the ABC, and that team later became what is known as Singapore's Corrupt Practices Investigation Bureau (CPIB). The CPIB, as an independent body, was separated from the Police, to investigate all corruption cases as provided for in the Prevention of Corruption Act (PCA) enacted in June 1960 that strengthened the CPIB's legal powers.³⁰¹ The PCA and the Penal Code³⁰² are the primary pieces of legislation defining corruption as a

²⁹⁹. Van der Wal Z 'Singapore's Corrupt Practices Investigations Bureau: Guardian of Public Integrity 'From Crooked Cops to a Valued Institution' (2021) *Guardians of Public Value* 64.

³⁰⁰. Van der Wal Z (2021) 64.

³⁰¹. Prevention of Corruption Act of 1960.

³⁰². Penal Code 1871.

substantial offense. Section 5 of the PCA defines corruption as an act where: Any individual who, acts alone or in collaboration with other people, corruptly solicits, receives, gives, promises, or offers gratification for personal gain or concerning any matter involving a member, officer of a public body, is deemed to have committed an offense. Upon conviction, the penalty may include a fine not exceeding \$10,000, a prison term of up to 5 years, or both.³⁰³ The court developed a broad definition of the word “gratification”, and it can be monetary and/or non-monetary. in *PP v Peter Benedict Lim Sin Pang*³⁰⁴ sexual favours are a gratification. Section 6 of the PCA criminalises the receiving or giving of bribes as a reward for performing or not performing by agents or those who act on behalf of others. In a recent case, *Goh Ngak Eng* case,³⁰⁵ the Singapore High Court developed a new sentencing framework for corruption cases and stated that a subordinate owes loyalty to their principal and should not use the business to advance their interest. The court stated that the sentencing framework does not apply to public sector corruption. The framework is only applicable to the private sector because of the public interest, to ensure that economic well-being is upheld while maintaining the smooth operation of the market.

The Independent Commission Against Corruption (ICAC) in Hong Kong was set up in 1974 to fight corruption through effective law enforcement, prevention and education through law enforcement. The aim was to keep Hong Kong fair, just, stable and prosperous and to keep relations with other anti-corruption agencies globally.³⁰⁶ Before the establishment of the ICAC, there were pieces of legislation that criminalised corruption, but they were not as effective as the legislation that enacted the ICAC.³⁰⁷ The legislation was enforced by the anti-corruption unit in the police force. The police chief superintendent was under investigation for the anti-corruption unit and a commission of inquiry and the public recommended that there was a need for an independent anti-corruption agency.³⁰⁸ The Independent

³⁰³. S 5 Penal Code 1871.

³⁰⁴. *PP v Peter Benedict Lim Sin Pang* [2013] SGDC 192.

³⁰⁵. *Goh Ngak Eng v Public Prosecutor* [2022] SGHC 254.

³⁰⁶. Hong Kong: The facts <https://www.gov.hk/en/about/abouthk/factsheets/docs/icac.pdf> [Accessed 4 March 2025].

³⁰⁷. Huberts L ‘Anticorruption Strategies: The Hong Kong Model in International Context’ (2000)2(3) *Public Integrity* 212.

³⁰⁸. Hong Kong The facts ICAC <https://www.gov.hk/en/about/abouthk/factsheets/docs/icac.pdf> [Accessed 4 March 2025].

Commission Against Corruption Ordinance³⁰⁹ is the enacting legislation of the ICAC and establishes an independent body of the civil service to address corruption and incidental matters thereto. ³¹⁰From the brief history, it becomes evident that the CPIB is an institution that was developed from an existing structure and achieved the status to become the agency it is through enabling legislation. The ICAC, on the other hand, is the first type of agency of its kind created to be a single ACA.

4.3 Mandate

The CPIB mandate is mandated to investigate any act of corruption in the public and private sectors in Singapore. Its mandate is to receive and investigate complaints alleging corruption and prevent corruption through public education and community outreach. The CPIB is responsible for safeguarding the integrity of the public service and for encouraging corruption-free transactions in the private sector.³¹¹ The CPIB has the power to arrest anyone with or without a warrant if they have been or are reasonably suspected of having been so concerned in any offence under the Prevention of Corruption Act.³¹² The CPIB also has powers of investigation and special powers of investigation.³¹³ By instruction of the public prosecutor, the CPIB may exercise special powers of investigation in non-seizable offences in the case of any non-seizable offence, and all or any of the special powers concerning police investigations.³¹⁴ By order of the public prosecutor's power, they have inspection of banker's books and may take copies of any relevant entries in any such book.³¹⁵ They have the powers to search and enter a premise by force if necessary and to search, seize and detain documents, articles, or property that contain evidence.³¹⁶

The Prevention of Bribery Ordinance (POBO)³¹⁷, as amended, is the primary anti-bribery legislation in Hong Kong enforced by the ICAC. It contains provisions

³⁰⁹. Independent Commission Against Corruption Ordinance (Cap. 204).

³¹⁰. S 3 Independent Commission Against Corruption Ordinance Cap.204.

³¹¹. Roles and Function of the CPIB <https://www.cpiib.gov.sg/who-we-are/our-work/roles-functions/#:~:text=The%20Bureau's%20mandate%20is%20to,offences%20under%20any%20written%20law> [Accessed 4 March 2025].

³¹². S 15 Prevention of Corruption Act, 1960

³¹³. S 17 Prevention of Corruption Act, 1960.

³¹⁴. S 18 Prevention of Corruption Act, 1960.

³¹⁵. S 19 Prevention of Corruption Act 1960.

³¹⁶. S 21 Prevention of Corruption Act 1960.

³¹⁷. The Prevention of Bribery Ordinance Cap. 201.

prohibiting bribery in both the public and private sectors.³¹⁸ In Hong Kong, corruption and bribery constitute the same offense and are defined as:

(1) Any person who, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, offers any advantage to a public servant as an inducement to or reward for or otherwise on account of that public servant's— (Amended 28 of 1980 s. 3)

(a) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as a public servant;

(b) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act, whether by that public servant or by any other public servant in his or that other public servant's capacity as a public servant; or

(c) assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public body, shall be guilty of an offence.

The significance of the above extract from legislation is to highlight the comprehensive legal framework in comparison to the provisions in South African law. The Prevention of Bribery Ordinance (POBO) considers bribery to have occurred when any person offers an advantage to a public servant as a reward for favourable treatment.³¹⁹ The term "advantage" covers a broad range of monetary and non-monetary items.³²⁰ There is no minimum threshold for what constitutes an advantage. An advantage is considered a bribe when a corrupt purpose is associated with the offer.³²¹

(2) Any public servant who, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his— (Amended 28 of 1980 s. 3)

(a) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as a public servant;

(b) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act, whether by himself or by any other public servant in his or that other public servant's capacity as a public servant; or

(c) assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public body, shall be guilty of an offence.

³¹⁸. Part II Prevention of Bribery Ordinance Cap.201.

³¹⁹. S 4(1) Prevention of Bribery Ordinance Cap.201.

³²⁰. S 2 Prevention of Bribery Ordinance Cap.201.

³²¹. Hong Kong - Global bribery offenses guide

<https://www.dlapiper.com/en/insights/publications/2019/09/global-bribery-offenses-guide/hong-kong>

[Accessed 4 March 2025].

The offence of bribery when the perpetrator is a public servant includes offering, soliciting, or accepting an advantage as an incentive to, or reward for the public servant (not) performing or influencing the performance of any act in his or her capacity as a public servant. Public servants are subject to more stringent provisions

(2A) Any person who, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, offers any advantage to the Chief Executive as an inducement to or reward for or otherwise on account of the Chief Executive's—

(a) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as the Chief Executive;

(b) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act, whether by the Chief Executive in his capacity as the Chief Executive or by any public servant in his capacity as a public servant; or

(c) assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public body, shall be guilty of an offence. (Added 22 of 2008 s. 2)

Anyone, regardless of location, who offers any advantage to the Chief Executive without lawful authority, or a reasonable excuse, is guilty of an offence. This applies if the advantage is offered as an inducement or reward to the Chief Executive because of something the Chief Executive has done. The advantage should aim to influence their actions, decisions, or dealings with public bodies and people. The section makes it a crime to bribe the Chief Executive Officer in his professional capacity.

(2B) If the Chief Executive, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his—

(a) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as the Chief Executive;

(b) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act, whether by the Chief Executive in his capacity as the Chief Executive or by any public servant in his capacity as a public servant; or

(c) assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public body, he shall be guilty of an offence. (Added 22 of 2008 s. 2)

The offences relating to bribery of the Chief Executive, whether being offered an advantage or being the one accepting or soliciting an advantage are similar to the provision applicable to public servants.

The above section focuses on the actions of the Chief Executive Officer. Similar to section 2A, it is an offence if the Chief Executive Officer solicits or accepts an advantage in connection with their official duties that may influence them to act or take or fail to take decisions in favour the person or entity that offered the advantage.

(3) If a public servant other than a prescribed officer solicits or accepts an advantage with the permission of the public body of which he is an employee being permission which complies with subsection (4), neither he nor the person who offered the advantage shall be guilty of an offence under this section. (Added 28 of 1980 s. 3. Amended 14 of 2003 s. 15)

(4) For the purposes of subsection (3) permission shall be in writing and—

(a) be given before the advantage is offered, solicited or accepted; or

(b) in any case where an advantage has been offered or accepted without prior permission, be applied for and given as soon as reasonably possible after such offer or acceptance,

and for such permission to be effective for the purposes of subsection (3), the public body shall, before giving such permission, have regard to the circumstances in which it is sought. (Added 28 of 1980 s. 3)

Section 3 and 4 set out the exception to bribery, when a public servant other than a prescribed officer has permission to accept an advantage. This can only be done if the requirements are followed. The request to offer or accept an advantage must be done in writing and the permission must be granted before the advantage is offered or accepted, or as soon as is reasonably possible afterward. As much as permission to the provisions of the act is a defence, the ICAC has indicated that customary trade practice is not to be a defence for purposes of this section. Whether the purpose of the bribery was incomplete or impossible to complete because of other factors is irrelevant to determining guilt. Public bodies are also encouraged to regulate that the extent entertainment is accepted in the organisation.³²²

The ICAC also investigates offences under the Elections (Corrupt and Illegal Conduct) Ordinance.³²³ Corruption complaints are sourced through proactive detection strategies in high-risk sectors as well as complaints received directly from members of the public, and it is an offence to make a false report.³²⁴ The ICAC has the power to arrest and detain a person without a warrant if it reasonably suspects

³²². ICAC resources definition of bribery <https://www.icac.org.hk/icac/pb/en/bribe.html> [Accessed 4 March 2025].

³²³. Elections (Corrupt and Illegal Conduct) Ordinance Cap. 554.

³²⁴. S 13 B Independent Commission Against Corruption Ordinance Cap.204.

that person of committing an offence.³²⁵ The ICAC also has the authority to search any person, premises, or places, and seize or detain anything that it has reason to believe contains evidence of any of the POBO offences.³²⁶ The ICAC may require the production of documents if it is reasonable to believe that an offence under the POBO has been committed by any person and that there are relevant documents. Furthermore, the ICAC can take fingerprints and other forensic evidence identifying particulars³²⁷ subject to the limitations.³²⁸ The ICAC is responsible for forwarding evidence to the Department of Justice (DoJ) for prosecution consideration.

The mandate of both ACAs is similar, but the tasks of the agencies differ in a significant way. Due to the political history and the fact that the same political party has been in power since the establishment of the CPIB, political will underpins the mandate and enforcement and investigation of big and small corruption cases, irrespective of the status of the person.³²⁹ Investigation of corruption and malpractices, and the review of administrative weaknesses in the public sector and reviewing government departments in accessing their risk exposure to corruption. The agency also does regular training for public servants to sensitise them about the risk of corruption, and awareness is even made in school³³⁰. Singapore's corruption control framework emphasises political will as the foundation and shows zero tolerance as the cornerstone. An illustration thereof is included as follows:

^{325.} S 10 and s 10 A Independent Commission Against Corruption Ordinance Cap.204.

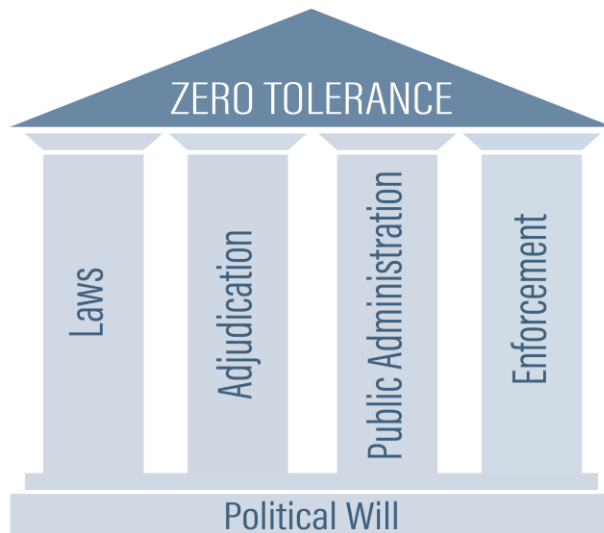
^{326.} S 10 C Independent Commission Against Corruption Ordinance Cap.204.

^{327.} S 10 D and 10 E Independent Commission Against Corruption Ordinance Cap.204.

^{328.} S 10 F and 10 G Independent Commission Against Corruption Ordinance Cap.204.

^{329.} Van der Wal Z (2021) 71.

^{330.} Van der Wal Z (2021) 70.



331

The CPIB is under the enforcement pillar of this framework that through its enacting legislation and design, attained a reputable reputation.

The ICAC has a three-pronged strategy that puts equal weight on law enforcement and systematic prevention and public education.³³² The ICAC cannot impose legal sanctions on suspects but refers the matter to the prosecution. Their task is to provide sufficient evidence that corruption has occurred.³³³ The ICAC places strong value on cultivating social support to ensure that the community shares the same values regarding combating corruption.³³⁴ Public values must reflect a low tolerance for corruption and trust in the capabilities of the ACA, and the ICAC seems to meet both criteria³³⁵. Positive perceptions of the public sustain anti-corruption efforts and the contrast will result in negativity and distrust.³³⁶ The approach of the ICAC is to restore public confidence in the government and offers a socially embedded style to combating corruption by broadcasting, naming and shaming of

³³¹ Singapore's Corruption Control Framework <https://www.cpiib.gov.sg/about-corruption/prevention-and-corruption/singapores-corruption-control-framework/> [Accessed 4 March 2025].

³³² ICAC Institutional Strength <https://www.icac.org.hk/en/intl-persp/control/institutional-strength/index.html> [Accessed 4 March 2025].

³³³ Setiawan A et al. 'Comparison of Corruption Eradication Institutions in Various Countries (Indonesia, Hong Kong, Japan, Australia, New Zealand)' (2024)6(2) *JIHAD: Jurnal Ilmu Hukum dan Administrasi* 131.

³³⁴ Johnston M 'It takes a whole society: why Hong Kong's ICAC cannot succeed alone' (2022) 25(2) *Public Administration and Polic* 110.

³³⁵ Johnston M (2022) 116.

³³⁶ Gonga T, Scott I and Xiao H 'Unpacking Public Perceptions of Effectiveness in Anti-Corruption Agencies: The Case of Hong Kong' (2023)25(6) *Public Integrity* 567.

corruption.³³⁷ Critics refer to the CPIB approach as an authoritarian democracy,³³⁸ and one can wonder if the ACA will still be as successful if the political landscape should change.

4.4 Independence

Independence is an important feature that contributes to the success of an ACA. The agency must be granted organisational, functional and financial independence. There must be no external interference with the operations and policies of an ACA. The resources must be sufficient to execute its function.

4.4.1 Organisational Independence

Organisational independence with regards to ACAs refers to the least possible political interference in the appointment of authorities, security of tenure, implementation of functions and decision-making of the ACA.

The CPIB is directly subordinated to the Prime Minister's Office. The CPIB is headed by a director whom the President of Singapore appoints,³³⁹ The director is directly responsible and reports to the Prime Minister. The Act establishing the CPIB does not specifically spell out the independence of the CPIB, but the appointment process of the Director indicates that the Director is not like other heads of government departments who are all subject to the direction of the Prime Minister. According to the Constitution, the Director can continue to investigate other ministers and senior civil servants even where the Prime Minister does not approve, provided he has the concurrence of the President.³⁴⁰ The President can appoint deputy directors, assistant directors, and special investigators and create different grades for them as he deems fit.³⁴¹ Section 3 of the Prevention of Corruption Act³⁴² states

The President may appoint the Director of the Corrupt Practices Investigation Bureau, as well as refuse to appoint or revoke the appointment of the Director. The President may also appoint deputy directors, assistant directors, and special investigators as he deems fit. The Director's powers

³³⁷. Singh D 'Anticorruption, Cultural Norms, and Implications for the APUNCAC' (2021)10(2) *Laws* 9.

³³⁸. van der Wal Z (2021) 77.

³³⁹. S 3(1) Prevention of Corruption Act 1960.

³⁴⁰. S22G Constitution of the Republic of Singapore.

³⁴¹. S 3(2) and s 3(5) of the Prevention of Corruption Act 1960.

³⁴². Act 1960.

and duties can be performed by delegated deputy directors or assistant directors, and the President can create different grades for these positions.

In the event that the director becomes the subject of an investigation, the agency is empowered by its constitution to approach the president's office directly.³⁴³ The CPIB consists of three main departments: Corporate Affairs, Investigations and Operations. The Corporate Affairs Department consists of five divisions: People Management & Development, Finance & Administration, Planning, Research & Corporate Relations, Information Technology, and Digital Transformation Office. The Investigation Department is the core function of the CPIB and consists of three divisions: Investigations Operations, Training Development & Policy, and Training Operations. The Operations Department is divided into three divisions: Intelligence Operations, Intelligence Analysis & International Affairs, and Science & Tech/Special Projects.³⁴⁴

The position of the ICAC in the Hong Kong government is also unique. The commissioner is the head of the ICAC and is directly accountable to and only takes direction from the Chief Executive of the Hong Kong Special Administrative Region subject to the terms and conditions of the Chief Executive.³⁴⁵ The four departments of the ICAC address the duties of the Commissioner.³⁴⁶ The Operations Department³⁴⁷ receives, considers and investigates alleged corruption offences. The Corruption Prevention Department³⁴⁸ examines practices and procedures of government departments and public bodies to reduce corruption opportunities and offers free and confidential corruption prevention advice to private organisations upon request. The Community Relations Department³⁴⁹ educates the public against the evils of corruption and enlists public support in combating corruption. The International Cooperation and Corporate Services Department undertakes international and mainland liaison and capacity-building programmes, the Secretariat of the International Association of Anti-Corruption Authorities and

³⁴³. Article 22G of the Constitution.

³⁴⁴. CPIB Organisational structure <https://www.cpi.gov.sg/who-we-are/our-work/organisational-structure/> [Accessed 4 March 2025].

³⁴⁵. S 5 Independent Commission Against Corruption Ordinance Cap. 204.

³⁴⁶. S 12 Independent Commission Against Corruption Ordinance Cap.204.

³⁴⁷. S 12 (a) to (c) Independent Commission Against Corruption Ordinance Cap.204.

³⁴⁸. S 12 (d) to (f) Independent Commission Against Corruption Ordinance Cap.204.

³⁴⁹. S 12 (g) and (h) Independent Commission Against Corruption Ordinance Cap.204.

provides comprehensive corporate services support to the Commission as a whole.³⁵⁰

The recruitment process and appointment of the officers are done per the prescripts of the Civil Service Bureau. Their conduct and discipline are also governed by respective disciplined services legislation.³⁵¹ The commissioner of the ICAC can also make orders regarding the discipline of officers, known as commissioner standing orders.³⁵² Section 8 of the ICAC Ordinance governs the appointment and termination of ICAC members and states:

The Commissioner may appoint officers to support the execution of duties under this Ordinance. After consulting the Advisory Committee on Corruption, the commissioner may terminate an officer's appointment by providing written notice of the reasons. The officer has 7 days to make representations. Where an appointment is terminated, the officer may appeal to the Chief Executive within 21 days against the termination. The Chief Executive has the authority to approve and modify the terms and conditions of employment for officers. The Commissioner and officers shall be employed under the Public Service (Administration) Order, Government regulations, and administrative rules applicable to public officers, unless modified by standing orders made under section 11(2). modified by standing orders made under section 11(2).

The above indicates the Commissioner's power to appoint officers, the additional layer of oversight and possibly guidance in the decision regarding the termination of an officer. This sets out the employment terms and termination process as well as the appeal mechanism. Job security is secured through due process and a clear employment framework.

The Operational Department is the largest department of ICAC. It is responsible for investigating corruption and related offenses in both the public and private sectors, and it operates under the command of the Head of Operations. The Head of Operations, who also serves as the Deputy Commissioner, reports directly to the Commissioner. The department is made up of four investigation branches, each of which is overseen by an Assistant Director.³⁵³ The Corruption Prevention Department (CPD) consists of a management group and six assignment groups.

³⁵⁰ About ICAC, ICAC Organisational Chart <https://www.icac.org.hk/en/about/struct/index.html> [Accessed 4 March 2025].

³⁵¹ Civil Service Bureau, Government of the Hong Kong Special Administrative Region, Administration of the Civil Service <https://www.csb.gov.hk/english/admin/overview/22.html> [Accessed 4 March 2025].

³⁵² S 11(b) Independent Commission Against Corruption Ordinance Cap.204.

³⁵³ ICAC Organisational Chart <https://www.icac.org.hk/en/about/struct/index.html> [Accessed 4 March 2025].

Each assignment group is responsible for preventing corruption within various government departments, public bodies, and functional areas such as procurement, law enforcement, civil service integrity, and public works. One of the assignment groups oversees the Corruption Prevention Advisory Service (CPAS), which assists private organisations in preventing corruption by fulfilling their requests for the service.³⁵⁴ The Community Relations Department (CRD) is led by a director and functions through two divisions. Division One aims to disseminate anti-corruption messages through mass and new media. They aim to publicise the ICAC's latest anti-corruption work, promote business ethics and preventive education in various professions, trades, and industries, and encourage integrity and positive values among young people. They also devise long-term strategies based on research and surveys. Division Two provides face-to-face preventive education to different community segments, including the government, public bodies, business sector, educational institutions, districts, and non-profit organisations. They also reach out to the public to enlist their support for ICAC's work and receive corruption complaints and enquiries.³⁵⁵ The CRD provides anti-corruption education through promoting positive values to the young generation, aligning educational levels with moral growth as well as promoting a clean civil service through leadership and ownership of integrity management and business ethics for the private sector.³⁵⁶ There are four advisory committees comprising prominent citizens appointed by the Chief Executive to oversee the work of the ICAC. All four advisory committees are independent from the ICAC and are chaired by non-official members.³⁵⁷

A significant organisational difference between the two ACAs is their reporting hierarchy. The CPIB, on their website, states the ACA is under the Prime Minister's office and gives no clear flow of the reporting structure while the ICAC website gives a clear flow of reporting including a section on their checks and balances.³⁵⁸ Due to

³⁵⁴. 2022 Annual Report Independent Commission Against Corruption Hong Kong Special Administrative Region of the People's Republic of China.

³⁵⁵. 2022 Annual Report Independent Commission Against Corruption Hong Kong Special Administrative Region of the People's Republic of China.

³⁵⁶. Wong C Effective practices of anti-corruption education: Hong Kong's experience 2018 [Conference presentation abstract]. 21st Scientific Conference "UNAFEI UNCAC Training.

³⁵⁷. ICAC Advisory committee on corruption

<https://www.icac.org.hk/en/about/power/check/advisory/acoc/index.html> [Accessed 4 March 2025].

³⁵⁸. Organisation Structure: ICAC's Institutional Strength

<https://www.icac.org.hk/en/about/struct/index.html#:~:text=The%20ICAC%20comprises%20the%20office,International%20cooperation%20and%20administrative%20support> [accessed 4 March 2025].

the lack of transparency of how the reporting work for the CPIB works, the organisational independence as reflected by the ICAC is the better option.

4.4.2 Functional Independence

There should be no interference of a third party/parties or the executive. An ACA should discharge their mandate impartially free from undue influence.³⁵⁹ Political will and support do not guarantee functional independence but are a strong contributing factor. Agencies need to have accountability mechanisms in place to limit the opportunity for third parties, senior officials of the agency as well as the executive, to interfere with its operation.

The CPIB has political support from its government through its leading party which has been in power since its independence in 1959.³⁶⁰ The first prime minister of the new administration in 1959 took the first stand by not taking gifts from well-wishers and set an example for his administration and Singaporeans even though giving gifts is an accepted part of their culture.³⁶¹ The political leadership took a zero-tolerance approach to corruption and that led to the enactment of the PCA.³⁶² The ministers and public service were re-trained to be aware of the anti-corruption approach. An essential part of this anti-corruption approach was punishing all corruption offenders, regardless of social or political standing.³⁶³

An important element of functional independence is how accountable and transparent the ICAC is and the oversight bodies that the ACA reports to. The ICAC Commissioner reports to the Executive Council on major policy issues and four oversight committees. The four committees are the Advisory Committee on Corruption, the Operations Review Committee, the Corruption Prevention Advisory Committee, and the Citizen Advisory Committee on Community Relations.³⁶⁴ The

³⁵⁹. Article 6 United Nations Against Corruption Convention 2003.

³⁶⁰. V Lim An overview of Singapore's anti-corruption strategy and the role of the CPIB in fighting corruption https://www.unafei.or.jp/publications/pdf/RS_No104/No104_18_VE_Lim_1.pdf [Accessed 4 March 2025].

³⁶¹. Quah J 'Lee Kuan Yew's role in minimising corruption in Singapore' (2022) 25(2) *Public Administration and Policy* 168.

³⁶². Quah J (2022) 169.

³⁶³. Quah J (2022) 169.

³⁶⁴. About ICAC: Checks and balances <https://www.icac.org.hk/en/about/power/check/index.html> [Accessed 4 March 2025].

Advisory Committee on Corruption oversees the general work direction of the ICAC and advises on policy matters.³⁶⁵ The Operations Review Committee oversees the work of the Operations Department of the ICAC.³⁶⁶ The Corruption Prevention Advisory Committee advises on the priority of assignment studies and examines all assignment reports.³⁶⁷ The Citizen Advisory Committee on Community Relations advises on the strategies of public education and enlisting public support against corruption.³⁶⁸ The composition of the committees gives the ICAC a great amount of credibility as each department is subjected to oversight.

Oversight mechanisms of the CPIB are less clearly defined than is the case with the ICAC.

4.4.3 Financial Independence

This refers to the impossibility of the government to restrict the agency's activities by reducing its budget. The success or failure of ACAs depends on the quantity and quality of resources available. Staff should be hired based on merit, be well compensated, be subject to integrity reviews and quick removal, and have a strong professional ethic.

The political leadership intentionally enhanced CPIB's budget and personnel. The population per year of the country impacts the CPIB's annual budget and number of staff for the same year.³⁶⁹ The recruitment in the public service also changed and only the best candidate was appointed, based on merit and not on age. The change was constantly improving their salaries and working conditions to reduce the incentive to commit fraud.³⁷⁰ Though the government inherited a budget deficit and a culture of corruption from the previous dispensation, Singapore transformed from a Third World to a First World nation by 2000.³⁷¹ As a result of the political will, the CPIB is internally supported to function and externally protected against

³⁶⁵. The Advisory Committee on Corruption

<https://www.icac.org.hk/en/about/power/check/advisory/acoc/index.html> [Accessed 4 March 2025].

³⁶⁶. About ICAC: The Operations Review Committee

<https://www.icac.org.hk/en/about/power/check/advisory/orc/index.html> [Accessed 4 March 2025].

³⁶⁷. About ICAC: The Corruption Prevention Advisory Committee

<https://www.icac.org.hk/en/about/power/check/advisory/cpac/index.html> [Accessed 4 March 2025].

³⁶⁸. About ICAC: The Citizen Advisory Committee on Community Relations

<https://www.icac.org.hk/en/about/power/check/advisory/caccr/index.html> [Accessed 4 March 2025].

³⁶⁹. Quah J (2022) 170.

³⁷⁰. Quah J (2022) 171.

³⁷¹. Quah J (2022) 173.

interference which contributes to the success the CPIB achieved. The dedication and impact of political leadership on anti-corruption cannot be underestimated.

The ICAC derives its financial budget from the general revenue.³⁷² Its annual expenditure estimates are considered by the Advisory before submission to the Chief Executive for approval.³⁷³ The ICAC's accounts are managed in accordance with government regulations and procedures and are subject to auditing by the Director of Audit, similar to other government departments.³⁷⁴

Singapore and Hong Kong are Asian countries, and are the exception when it comes to successfully combating corruption on the continent.³⁷⁵ The significance of mentioning this is that although they, nor their reform strategies are the same, they do share cultural practices. One such practice relevant to corruption is the culture of gift giving.³⁷⁶ Distinguishing between a gift and a bribe could be difficult in certain circumstances.³⁷⁷ The political stance prohibiting gifting in Singapore is stronger than that in Hong Kong. In Singapore, members of the civil service are prohibited by law³⁷⁸ from accepting any gifts or entertainment from the public.³⁷⁹ In Hong Kong, gift gifting is not a criminal offence. The approach is to focus on educating why certain cultural practices are wrong and could create favourable conditions for corruption to take place and its adverse effects.³⁸⁰

4.5 Conclusion

The success of the ICAC and the CPIB can be attributed to several shared components. The indispensable component is political will. The politician of the day has showed commitment to change the tone at the top.³⁸¹ Both institutions are located at a level of government that provides it with the necessary operational

³⁷². S 4 Independent Commission Against Corruption Ordinance Cap.204.

³⁷³. S 14 Independent Commission Against Corruption Ordinance Cap.204.

³⁷⁴. ICAC Annual Report 2023 <https://www.icac.org.hk/icac/annual-report/2023/> [Accessed 4 March 2025].

³⁷⁵. Quah J 'Breaking the cycle of failure in combating corruption in Asian countries' (2021) 24(2) *Public Administration and Policy* 125.

³⁷⁶. Quah J 'Leadership and culture in combating corruption: a comparative analysis' (2022) 25(2) *Public Administration and Policy* 201.

³⁷⁷. Singh D 'Anticorruption, Cultural Norms, and Implications for the APUNCAC' (2021)10(2) *Laws* 4.

³⁷⁸. S 2 of the Prevention of Corruption Act 1960.

³⁷⁹. Quah J (2002) 202.

³⁸⁰. Quah J (2002) 203.

³⁸¹. Quah J 'Combating Corruption in Asian Countries: Learning from Success & Failure' (2018)147 (3) *Daedalus, the Journal of the American Academy of Arts & Sciences* 204.

autonomy and political interference. In Singapore, the qualities of the leaders are sought after. A leader should have high qualifications, relevant experience, vision, determination and exemplary character to occupy office in building an incorruptible state.³⁸² The legal framework and anti-corruption legislation provide sufficient powers to the ACAs. Not only are they empowered to investigate corruption offenses, both in the Government and private sectors, and they can investigate all crimes that are incidental to the corruption. The CPIB and ICAC have a total approach to anti-corruption, meaning all sectors and both parties involved in the bribery or corrupt act are guilty of an offence.³⁸³ They have to express their commitment to enforce the legislation that is reflected in the number and calibre of personnel employed, the budget allocated and ensuring a good staff-to-population ratio at the ACAs.

The impartial enforcement of the anticorruption laws in Singapore and Hong Kong, respectively also contributes to their success and positively influences the perception and trust the public have in them. The website of the CPIB publishes corruption-related cases on its website and, recently, a Minister of Transport was charged with several charges.³⁸⁴ Similarly, the ICAC regularly posts and keeps the public up to date on recent cases.³⁸⁵ The CPIB and ICAC have shown that the agency is not a political instrument to attack opponents, because even the political allies of the government are prosecuted.³⁸⁶ Concentrating resources and expertise seems to have yielded the required results. The reliance on one agency to combat corruption eliminates the duplication of functions, layering and possible turf wars between agencies.³⁸⁷ Both agencies have shown that an anti-corruption body needs to be separated from the police, especially when the latter is perceived to be corrupt. In Singapore, the prosecutorial powers reside with the Attorney-General and the Department of Justice is the prosecutorial authority in Hong Kong. The courts serve a crucial role in carrying out adjudication, which is essential, and they work closely

³⁸² Van Truong MA & Anh T 'Anti-corruption – an important factor in building a state ruled by law in Singapore and prompting Vietnam' (2023) 6(1) *International Journal of Education Humanities and Social Science* 242.

³⁸³ Quah J (2018) 204.

³⁸⁴ CPIB: Press releases <https://www.cpiib.gov.sg/press-room/press-releases/> [Accessed 4 March 2025].

³⁸⁵ Recent ICAC cases https://hkbedc.icac.hk/en/integrity_focus/recent_icac_cases [Accessed 4 March 2025].

³⁸⁶ Quah J (2021) 132.

³⁸⁷ Quah J (2021) 131.

with the ACAs in the process of eradicating corruption.³⁸⁸ A country must have legislation that ensures political independence not only of the ACA but also of the judiciary and the prosecuting authority if they want to succeed in combating corruption. The success of an ACA depends on the interaction and effectiveness of other criminal justice institutions.

The ICAC has a clear review mechanism and indicates how the commission is monitored. The CPIB website just states “under the Prime Minister’s Office”. Oversight mechanisms appear to be far less defined in the CPIB.³⁸⁹ It may restrict the CPIB autonomy. It might be seen as part of the structure of semi-authoritarian rule.³⁹⁰ Five key functions can be assigned to a special anti-corruption body: investigation, prosecution, education and awareness-raising, prevention and coordination. The two agencies differ in function model. The ICAC represents the universal model with three fundamental functions: investigative, preventative and communicative, as opposed to the CPIB’s investigative model.³⁹¹ Unlike the ICAC, the CPIB does not have a Community Relations Department whose legal duty is to educate the public on the negative consequences of corruption.³⁹² The ICAC has an inclusive education programme that starts at a kindergarten level, continuing to youths and adults.³⁹³ Hong Kong’s ICAC is renowned for its unique outreach programme.³⁹⁴ The Bureau strategy also includes public education and community outreach efforts to spread the anti-corruption message but perhaps not on the same scale as the ICAC.³⁹⁵

The public's trust in an institution gives legitimacy to it and can indicate that the institution has earned respect based on its performance. The public is also more

³⁸⁸. The International Association of Prosecutors: Anti-corruption models <https://www.iap-association.org/NACP/Anti-Corruption-Models> [Accessed 4 March 2025].

³⁸⁹. CPIB roles and functions <https://www.cpiib.gov.sg/who-we-are/our-work/roles-functions/> [Accessed 4 March 2025].

³⁹⁰. Johnston M (2022) 110.

³⁹¹. Krambia-Kapardis M ‘Disentangling anti-corruption agencies and accounting for their ineffectiveness’ (2019)26(1) *Journal of Financial Crime* 25.

³⁹². About ICAC Statutory Duty <https://www.icac.org.hk/en/about/struct/crd/duty/index.html> [Accessed 4 March 2025].

³⁹³. 2023 Annual Report Independent Commission Against Corruption Hong Kong Special Administrative Region <https://www.icac.org.hk/en/about/report/annual/index.html> [Accessed 4 March 2025] of the People’s Republic of China.

³⁹⁴. The International Association of Prosecutors: Anti-Corruption Models <https://www.iap-association.org/NACP/Anti-Corruption-Models> [Accessed 4 March 2025].

³⁹⁵. CPIB Roles and functions <https://www.cpiib.gov.sg/who-we-are/our-work/roles-functions/> [Accessed 4 March 2025].

likely to co-operate and comply with the institution's policies and regulations if they trust the institution.³⁹⁶ An institution like an ACA will become redundant if the public does not perceive it to be effective.³⁹⁷ Perceptions of corruption, whether they are wrong or not have an impact on aid, trade, investment, and lending decisions and can have significant geopolitical implications.³⁹⁸ ACAs must, therefore, have credible means to determine the perception the public has of them to work on shortcomings, alternatively, they must continue with practices that work. The writer will discuss what factors may impact public perception as well as the efforts and shortcomings the CPIB and ICAC have in place that impact the effectiveness of the ACAs.

According to data from Transparency International on the Corruption Perception Index (CPI), Singapore is ranked 5th and Hong Kong is ranked 14th least corrupt countries.³⁹⁹ Transparency International uses three different data sources to calculate how a country is perceived to be and annually compiles a global list.⁴⁰⁰ Irrespective of the criticism that might exist about the method of the compilation of the CPI, it is considered an expert tool and keeps corruption on the global agenda.⁴⁰¹ The organisation aims to promote transparency, accountability and integrity and currently reports on 180 countries and gives each country a score out of 100.⁴⁰² Inherently, there will be reluctance to do business or even visit countries that are reported to be highly corrupt and the contrary will be true for countries that are least corrupt, like Singapore and Hong Kong.

In his paper, Bautista-Beauchesne considers the four main reputational dimensions in which he considers ACAs to remain credible and to enjoy a good public perception.⁴⁰³ He states that an ACA must show that it delivers on the mission and goals of the institution. He refers to that as the performative dimension. The second

³⁹⁶. Xiao H, Gong T & Tu W 'Why Trust Weighs More? Investigating the Endogenous Relationship Between Trust and Perceived Institutional Effectiveness' (2024) 56(5) *Administration & Society* 603.

³⁹⁷. Xiao H, Gong T & Tu W (2024) 606.

³⁹⁸. Johnston M (2022) 133.

³⁹⁹. Corruption Perception Index <https://www.transparency.org/en/cpi/2023> [Accessed 4 March 2025].

⁴⁰⁰. The ABCs of the CPI: How the corruption perception index is calculated <https://www.transparency.org/en/news/how-cpi-scores-are-calculated> [Accessed 4 March 2025].

⁴⁰¹. Johnston M (2022) 133.

⁴⁰². What we do at Transparency International <https://www.transparency.org/en/about> [Accessed 4 March 2025].

⁴⁰³. Bautista-Beauchesne N 'Building anti-corruption agency collaboration and reputation: Hanging together or separately hanged' (2002) *Regulation & Governance* 16.

dimension is moral, and the ACA must indicate its commitment to transparency, accountability and integrity. The institution must be committed to its professed values. Thirdly, the ACA must employ competent, qualified and professional staff that are capable of dealing with complex matters without fear and bias. He calls this the technical and professional dimension. Lastly, an ACA should act procedurally correct and show regard to the law and not act above the prescripts of the law and collaborate with other institutions.⁴⁰⁴ In their paper, Gongga, Scott, and Xiao state two dimensions that affect public perception.⁴⁰⁵ The organisational dimension, that focuses on how effectively the constitution can deliver results, is closely related to the performative dimension as discussed by Bautista-Beauchesne. The second dimension is the environmental dimension, referring to an ACA's ability to adapt to the ever-changing social environment.⁴⁰⁶ The writers added trust as a moderating factor, indicating that trust boosts or substitutes the effectiveness impact of an ACA.⁴⁰⁷

The CPIB procures the services of an independent service provider to report on the public perception biannually.⁴⁰⁸ Their 2022 survey reflected that 96% percent of the participants perceive their corruption efforts to be good, very good, or excellent in a steady increase from previous years.⁴⁰⁹ In their 2023 annual survey, the ICAC reported numbers that indicate that most of the public still rejects corruption, and 98,9% of the participants have not encountered any corruption in the year.⁴¹⁰ Both ACAs enjoy a positive perception of effectiveness on a local and global front.

^{404.} Bautista-Beauchesne N (2022) 1402.

^{405.} Gongga T, Scott I & H Xiao (2023) 568

^{406.} Gongga T, Scott I & Xiao H (2023) 569.

^{407.} Gongga T, Scott I & Xiao H (2023) 571.

^{408.} CPIB Press releases <https://www.cpi.gov.sg/press-room/press-releases/280423-public-vigilance-critical-in-fighting-corruption/> [Accessed 4 March 2025].

^{409.} CPIB Press releases <https://www.cpi.gov.sg/press-room/press-releases/280423-public-vigilance-critical-in-fighting-corruption/> [Accessed 4 March 2025].

^{410.} ICAC Press releases <https://www.icac.org.hk/en/p/press/index.html> [Accessed 4 March 2025].

CHAPTER 5: CONCLUSION

5.1 Introduction

This study compares the multi-agency ACA approach in South Africa and the single-agency approach of the ICAC in Hong Kong and the CIPB in Singapore. It highlights the international obligation to combat corruption, particularly establishing and maintaining independent ACAs. It examined the legislative framework that empowers the identified ACAs and their mandate. It identified factors that affect the effectiveness of the ACAs. The South African analysis indicated that, notwithstanding some success, most ACAs have been tainted with scandals of poor leadership, often due to political interference and political alliances. Institutionally, most agencies are too close to political leadership, compromising their independence. The overall lack of financial and other resources also contributes to the inefficiency of ACAs. Despite efforts, the community generally does not perceive the ACAs to be combating corruption effectively and, based on the corruption index, South Africa still has a serious corruption problem. The ICAC and the CPIB presented a much higher perceived success in combating corruption by using a single ACA approach. Based on that, the writer concludes that South Africa should consider a suitable single-agency approach to combat corruption.

5.2 Conclusion of the study

South Africa will not succeed in combating corruption if the anti-corruption framework for implementing the anti-corruption legislation is not revised. Legislation has been enacted and amended to address corruption in the country. Case law reinforces the international obligation to establish and maintain effective ACAs. Domestication of international instruments has also taken place, yet somehow, the fight against corruption is not being won. The effectiveness of the ACAs in South Africa is multifaceted; they present both strengths and weaknesses.

The study has indicated that some agencies share a mandate concerning the investigation of corruption and that efforts to combat corruption are duplicated among ACAs. There exists professional competitiveness and, in some cases, agencies do not acknowledge the support they receive from other agencies. Cases

investigated by SAPS would be allocated to the DPCI almost at completion, and the success of the case would be attributed to the latter agency. The collaborative ideal often creates delays in the process. The referral process between the SIU, NPA and the DPCI is a practical example of how cumbersome their working relationship can be. Collaboration due to shortages of resources also contributes to the inefficiency of one agency, as could be seen between the SAPS and IPID as it relates to forensic evidence analysed at SAPS laboratories. The executive branch has significant influence over the appointment of heads of anti-corruption institutions which makes the process vulnerable to political interference. There is instability and weak leadership in agencies and the success of an ACA is dependent on who manages it. Generally, there is also an insufficient focus on the prevention of corruption in South Africa.

The single ACAs of Hong Kong and Singapore, by their design, do not have the challenges of duplication of functions because the effort to combat corruption is coordinated in one place. They are specialised agencies responsible for criminal investigation in the private and public sectors and also responsible for education, prevention and awareness raising. The finances, resources and expertise are centralised. Interestingly, both Hong Kong and Singapore come from a history of high levels of corruption. To achieve success in combating corruption, they had to enact legislation, and ACAs and social culture that resulted in success. The success of the ACAs indicates that change is possible. Both agencies are supported by strong political will, sufficient resources, staff and the mandate to investigate corruption regardless of social or political level. The agencies also focus on community participation that includes awareness, as well as their participation in review committees.

The comparison between the ACAs of South Africa against the single agencies cannot be done in isolation from other external factors. South Africa is significantly bigger than both Hong Kong and Singapore. The socio-economic context of South Africa and the origin of corruption is also very different. In no way can the exact model of Hong Kong and Singapore be emulated in South Africa's anti-corruption framework. More needs to be done to understand the reasons for corruption in South Africa, to know where the opportunity to commit corruption is created and to create laws to prevent it. It is necessary to review the weaknesses of the current

agencies before venturing into a single-agency approach. Fortunately, there are no clear indications of which model is the most effective for combating corruption. The South African approach should borrow the preventative and educational open approach from the ICAC in Hong Kong and zero tolerance of corruption from the CIPB. The migration from multiple agencies to a single agency should be gradual and structured. The strong political support of the studied single ACAs cannot be underestimated. It is unnecessary to have several agencies working towards the same goal. In a developing country, such as South Africa, available resources would be better utilised optimally in one specialised agency.

The ideal single agency for South Africa should be a multi-purpose agency with law enforcement powers. This should be an agency that is supported by political will through a genuine commitment to combating corruption, not merely establishing an agency as a compliance tool or a response to external pressure. The political will results in the impartial enforcement of legislation with the effect of the ACA investigating and prosecuting high-level corruption cases, even those involving political allies and influential people in the community. The agency should be mandated to investigate corruption and should have the power to search premises and seize different kinds of evidence. The agency should lead with the prevention of corruption and a big part should include community participation. The mandate should apply to both the public and the private sector. Much focus is generally placed on combatting corruption in the public sector but, because of our procurement system, the service providers in the public sector are mostly from the private sector. The Public Procurement Act, which is yet to become effective, empowers the Public Procurement Office (PPO) to investigate instances of non-compliance with procurement laws and regulations. If violations, such as fraud, extortion, or corruption are suspected, the Act mandates that these cases be referred to SAPS⁴¹¹. The Act also provides for a debarment mechanism, which bars companies or individuals involved in fraudulent activities, collusion, or providing false information from participating in future public procurement bids. Therefore, the mandate of the ACA should include measures to combat corruption in the private sector. The mandate of the ACA should include avenues for self-reporting of corporate offences, investigation of the offences and referral to the prosecuting

⁴¹¹. S 26 (3) of the Public Procurement Act 28 of 2024.

authority. The National Prosecuting Authority (NPA) enacted a policy in April 2024 that offers companies involved in corrupt activities an alternative path to resolution.⁴¹² The process is referred to as corporate alternative dispute resolution (C-ADR) and, even before publication of the policy, the NPA has had success in using C-ADR. There was a high-profile ABB Ltd case⁴¹³ that involved a multijurisdictional settlement for corruption relating to the Kusile power plant project with the US Department of Justice, US Securities Exchange Commission, the attorney general of Switzerland, and the national director of public prosecutions of South Africa. The NPA secured a settlement agreement where ABB was to pay over R2,5 billion in punitive reparations to South Africa.⁴¹⁴ The case was complex, and the settlement was an innovative step by the negotiating parties to hold the company accountable.

A vital requirement is for the ACA to have adequate and sustainable funding that is used transparently and accountably. The ACA should be allocated a dedicated budget that is not politically manipulated. An ACA that is adequately funded has the potential to operate effectively. Financial independence impacts human resources and material resources. In a country like South Africa, there are pressing national priorities like education and health, but high corruption is putting more pressure on these sectors. The ACA should enjoy financial independence as envisioned by Chapter 9 institutions in the *Independent Electoral Commission Langeberg Municipality*⁴¹⁵ case. In this case, the Langeberg Municipality Court reasoned that the IEC was an organ of state. The Court noted that Chapter Nine makes a distinction between the state and the government, and that section 181 of the Constitution emphasises the independence of Chapter 9 Institutions. Similarly, with the proposed single agency, Parliament ensures financial independence by evaluating what is reasonably required by the ACA and rationally addresses funding requests, considering other national priorities. Parliament should allocate sufficient

⁴¹² Corporate Alternative Dispute Resolution

<https://www.npa.gov.za/sites/default/files/uploads/Annexure%20A%20PART%2051%20Corporate%20ADR%20M.pdf> [Accessed 4 March 2025].

⁴¹³ *The Securities and Exchange Commission vs ABB Ltd*

<https://www.sec.gov/files/litigation/admin/2022/34-96444.pdf> [Accessed 4 March 2025].

⁴¹⁴ A Step Towards Accountability For State Capture Corruption At Eskom: ABB To Pay Over R2.5 Billion In Punitive Reparations To South Africa <https://www.npa.gov.za/media/step-towards-accountability-state-capture-corruption-eskom-abb-pay-over-r25-billion-punitive> [Accessed 4 March 2025].

⁴¹⁵ 2001 (9) BCLR 883 (CC).

funding for the ACA to fulfill its mandate. The ACA should be allowed to justify its budget needs before Parliament or its committees.

The leader of the ACA should be strong, ethical and appointed on merit and the process of appointment should be clear. The head of the agency should be appointed and removed by a parliamentary committee and report to parliament directly. The parliamentary committee responsible for appointing or removing the head of the ACA should include members from each representative political party holding seats in Parliament. That would ensure that the selection and removal process is not controlled by one party and reduces political influence in the process. The term of the head must be determined, and security of tenure must be provided for by legislation. The reporting structure of the ACA must be clear and it's advisable that the reporting should not be done to a minister but rather to parliament. Parliamentary oversight should be transparent, and the community should be able to have access to information and be able to monitor the activities and the outcomes. The ACA should be subjected to regular audits by independent bodies that assess the performance of the agency.

The staff of the ACA must be recruited based on the skills and expertise they can bring to the agency to sustain a high standard of competence.⁴¹⁶ The professional development of the staff should remain a priority, and the training received should be relevant to the changing environment of combating corruption. The employee conditions should afford the staff protection from political interference and victimisation. The calibre of staff employed at the ACA should be people with high ethical values and integrity, and they should be subjected to pre-employment screening.⁴¹⁷ The agency should have strong internal controls that would be used to address misconduct or unbecoming behavior from their staff. Community engagement should be an important aspect of the ideal single ACA in South Africa. The effectiveness of an ACA partly depends on how the community perceives it to be. When the community trusts an agency, there are better chances of support and it will deter them from participating in corrupt acts. South Africans should be educated on the effects of corruption and how corrupt acts in one sector that seems remote have a detrimental effect on the livelihoods of the general public. In a survey

^{416.} S 6 Independent Police Investigative Directorate Amendment Act 15 of 2024.

^{417.} S 8 (3) to s 8(8) Independent Police Investigative Directorate Amendment Act 15 of 2024.

of perceptions and surveys compiled by Corruption Watch, the majority of participants indicated that they have limited knowledge of anti-corruption laws.⁴¹⁸ The participants also strongly agree that whistle-blowers lives are not protected and they get victimised and even killed.⁴¹⁹ The Public Service Commission reported that the National Anti-Corruption Hotline (NACH) received a total of 2118 complaints for the 2022/23 financial year, showing an upward trajectory from previous years but relatively low considering the prevalence of corruption and the population of the country⁴²⁰. The feedback rate of the NACH is for the period 2004-2023. The report does not indicate the turnaround time per case, or how the cases were finalised, however, the report concluded that the feedback rate is higher. There must be working platforms e.g. websites and hotlines, for all citizens to report corruption and that would also require better efforts to protect whistle-blowers. The government is in the process of reviewing the Protected Disclosures Act and Witness Protection Act to, among other things, ensure whistle-blowers are better protected.⁴²¹ Similar to the ICAC in Hong Kong, social accountability should be encouraged through training and tools must be available for every age group in society. At primary, secondary and tertiary levels, students should get to learn about anti-corruption terms and measures. Technology allows more people to be reached through social media, and there is a need to be innovative with the campaign that the consumers of social media assist with in disseminating valuable information.

The current agencies in South Africa focus more on enforcement and have a responsive response. The ideal agency should have a holistic approach that creates a less tolerant approach to corruption, and prevention can contribute to that. The transition from multiple agencies to a single agency depends on policy considerations. Analysing the success of the ICAC and CIPB is crucial in this

⁴¹⁸. Corruption watch: The impact of corruption Insights from a Perceptions and Experiences Survey https://www.corruptionwatch.org.za/wp-content/uploads/2024/05/Corruption-Watch-Report-Experiences-and-Perceptions_FINAL.pdf [Accessed 4 March 2025].

⁴¹⁹. Corruption watch: The impact of corruption Insights from a Perceptions and Experiences Survey https://www.corruptionwatch.org.za/wp-content/uploads/2024/05/Corruption-Watch-Report-Experiences-and-Perceptions_FINAL.pdf [Accessed 4 March 2025].

⁴²⁰. Report on the performance of National Departments based on the principle of “people needs must be responded to” https://www.psc.gov.za/documents/reports/2023/Performance_of_National_Departments_on_Responsiveness_to_peoples_need_December_2023.pdf#page=13.70 [Accessed 4 March 2025].

⁴²¹. State Capture Commission Report Recommendations <https://www.stateofthenation.gov.za/state-capture-commission-recommendations/type/whistle-blower-protection> [Accessed 4 March 2025].

context. Therefore, the writer advances that South Africa should consider a single agency approach.

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