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EXECUTIVE SUMMARY

The South African legal system has, in recent years, proposed court specialisation as one solution to a number of problems confronting justice provision. Specialised courts have been proposed, and some set up, to hear labour, land, family and immigration matters. They have either been established or mooted for the hearing of hijacking cases, allegations of rape or domestic violence, and commercial crimes. This monograph seeks to provide an initial assessment of the policies and practices underpinning these proposals and initiatives, in order to begin to grapple with the question of whether specialised courts are likely to improve service delivery in the justice system.

This monograph considers both the desirability and practicality of court specialisation, and assesses the functioning of an existing court dedicated to cases of commercial criminality.

Ironically, the research showed that in terms of effectiveness and efficiency, the most important innovation of the Specialised Commercial Crime Court was not that it heard only one type of case. Rather, it was the improved integration of the work of the prosecutors and investigators whose cases came to these courts that made the difference. This suggests, of course, that more such gains can be made in the rest of the system. Some aspects of this innovation may however not be wholly replicable, and the results should not simply be assumed if rolled out elsewhere.

The case for and against court specialisation

There are, in essence, two sorts of cases that are made to justify the creation of a specialised court in South Africa. The first emphasises the transitional nature of South African law and asserts that particular areas of law associated with particular aspects of social transformation (such as land claims for example) necessitate the creation of courts dedicated to upholding the relevant legislation. The second is that specialisation allows skills to be developed in a particular area (for example hijacking) which in turn means cases can be

processed more efficiently. Moreover, the fact that court time is specifically dedicated to such crimes means that, once in court, they can be processed more speedily than may have been the case on an open court roll.

In reviewing these two alternative models of court specialisation, the monograph distinguishes between court specialisation proper and what is denoted court dedication or reservation. The former relates to the legislatively mandated creation of parallel courts designed to hear a narrow range of cases, while the latter relates to the mere 'dedication' of ordinary court resources—infrastructure as well as personnel in the magistracy and prosecution service—to the hearing of particular cases.

In relation to the two models of court specialisation the monograph suggests that, for a variety of reasons, specialisation is more difficult and problematic to implement than court dedication. Nevertheless, court dedication is not an entirely problem-free endeavour. The biggest risks associated with court dedication—risks that exist also in specialised courts—are that the creation of such courts will generate practices that work against the maintenance of professional objectivity among the judicial and prosecuting staff. Cases in such courts will, after all, tend to involve a rather limited number of professionals, and the resulting familiarity creates the potential for increased and unhealthy cosiness.

Despite these potential difficulties, the monograph argues that court dedication, if appropriately used, does offer rewards to deal with local and specific capacity constraints.

The Specialised Commercial Crime Court

In November 1999, the Specialised Commercial Crime Court in Pretoria opened its doors for business. With the assistance of Business Against Crime, the court was established in order to help rectify the perceived inability of the criminal justice system to cope with cases of commercial crime. Although these capacity-related problems were and are widely perceived to extend far beyond the relatively narrow range of cases of commercial crime, it was felt that they were compounded by the complexities of commercial crime cases.

The court itself is really just two ordinary regional courts set aside for the hearing of cases brought by the team of prosecutors housed in the Specialised Commercial Crime Unit (SCCU). And, given that most large regional courts

have magistrates and prosecutors dedicated to the hearing of commercial cases, there is, to all intents and purposes, nothing terribly innovative about the court itself. What is innovative, however, is the manner in which the work of the detectives of the SAPS Commercial Branch in Pretoria is integrated with the work of the prosecutors of the SCCU, as manifested in the completion of cases for presentation in the court. It is here that the innovative character of the court is evident.

The SCCU is composed of 20 prosecutors responsible for presenting the commercial crime cases investigated by Pretoria's Commercial Branch. However, unlike the practice in the rest of the criminal justice system, the prosecutor assigned to a particular case is involved in its investigation at a much earlier point in time. Indeed, shortly after the case first comes to the attention of an investigator at the Commercial Branch, she is required to present a draft investigation plan to the prosecutor. They will then be jointly responsible for ensuring that the docket from which a charge sheet is drawn, and which is eventually closed, is properly completed.

Assessing the impact of the dedicated court, and the integration of the investigative and prosecuting functions, is extremely difficult. Despite the complexities associated with proving a commercial crime case, as well as the fact that people charged with commercial crimes tend to have better legal representation, the Specialised Commercial Crime Court maintains a case completion rate similar to other regional courts: about nine cases closed per magistrate per month. This reflects well on the quality of the cases prepared by the responsible investigator/prosecutor teams. The conviction rate of nearly 90% of all closed cases also reflects this. As has already been suggested, however, these successes appear to have more to do with the integration of the investigation and prosecution functions than with the existence of the court itself.

Investigators, prosecutors and defence counsel interviewed in the course of this research suggested that the reasons for the relatively high level of success in the courts could be ascribed to three factors:

- In general, the involvement of prosecutors in the investigation phase meant that the investigation tended, on average, to be both more effectively and more efficiently completed, making it that much easier to complete the charge sheet and present an effective case.
- Prosecutors, having been involved in the investigation, were much more attuned to, and familiar with, the specific facts of the case, making their

presentation more effective. Moreover, this high level of preparedness made it that much more likely that defence counsel would advise their clients to plead guilty.

- The fact that particular magistrates were dedicated to commercial crimes meant that both defence and prosecution had a better sense of the needs of the court, making cases more efficient. In addition, the familiarity of the court with the nature of these cases meant that the cases could proceed more rapidly.

Although it is clear that these positive effects raise the effectiveness and efficiency of the court, it is also true that there are important features of this court that must qualify any assertion that this approach will necessarily succeed elsewhere.

- The first, and, probably most important advantage that this court enjoys is the quantity and quality of its prosecuting staff. Its endowment of resources, although justified by the nature of the cases brought, is obviously not replicable in every court, and it is impossible to be certain that dedicated courts without appropriate numbers of skilled staff will be a success.
- The co-location of investigators and prosecutors has also been a key factor pointed to by prosecutors in explaining the quality of the co-operation with the police. Again, this may not be achievable everywhere.
- The support of the private sector, facilitated by Business Against Crime, has helped to both facilitate the establishment of the organisational processes and to provide some additional resources to the SCCU, the Commercial Branch and the court.
- Finally, the inevitable tensions that arise whenever two distinct organisations begin to work together have been handled with grace, professionalism and competence by the management staff. This was not inevitable and reflects well on the decisions made and the people who made them. It is quite possible to imagine less successfully managed alternatives.

The evaluation of the Specialised Commercial Crime Court is, therefore, qualified. There is no doubt that the court itself is an effective and efficient institution. What is less certain is what accounts for that success, and whether it would be replicable in other jurisdictions or in relation to other categories of

crime. For this reason, it is unfortunately difficult to offer any clear-cut recommendations for rolling out the innovation. What is clear, however, is that specialisation by itself is no panacea.

In any event, the fact that specialisation in the case of commercial crime has been a success should not be used to justify any and all proposals for prosecuting or investigative specialisation. Such an approach, as has been argued in the case of some of the specialised units in the SAPS, often simply papers over the cracks in existing systems.

CHAPTER 1

INTRODUCTION

This monograph is born out of two distinct processes. On the one hand it has emerged from a series of interactions with role-players in the criminal justice policy development field, inside and outside of government, who consistently identified the Specialised Commercial Crime Court as one of the most successful innovations in the delivery and administration of justice since 1994. Generally, however, these role-players did not have all that much information on the nature and character of its success, nor the reasons for it. The general view seemed to be that ‘they’re getting really good conviction rates because they’ve integrated the police and the prosecutors’.

How this had happened, what this integration meant in practice, what its concrete results were, and what others might learn from all of this, were questions for which there were seemingly no adequate answers. It appeared, therefore, that, if nothing else, a monograph on this court would help policy-makers and practitioners think through the objectives of criminal justice transformation in a way that would help to identify various pointers to success.

There was a second motivation for this monograph. In the course of another project for the Department of Justice and Constitutional Development, it transpired that policy on the desirability and purpose of specialised or dedicated courts did not exist. It seemed that a monograph, setting out some of the issues that ought to be considered, would make a useful contribution to the process of reform. This motivation was only reinforced by the somewhat unedifying spectacle of Justice Portfolio Committee members having to object to some proposals in the Immigration Bill, which called for the creation of specialised immigration courts.

These two motivations for this monograph have meant that, broadly speaking, the document deals with two issues, hopefully brought together in a way that is both interesting and practical. The first half of the monograph looks in quite abstract terms at the arguments for and against court specialisation, while the second half looks more directly at the functioning and impact of the Specialised Commercial Crime Court.

While saying that these are the two broad themes of the monograph, it is important to add that what is unique and successful about the Specialised Commercial Crime Court is not, in fact, that it is a specialised court. More exactly, what sets this court apart from other regional courts—besides the fact that it hears a narrow range of cases—is that the work of the prosecutors who lead evidence on behalf of the state at this court, and the work of the investigators of the SAPS Commercial Branch in Pretoria, is so well integrated.¹ Thus, what started out as a report on the success of a specialised court, turns out to be a report on how the integration of investigation and prosecution can have important positive effects on the productivity of the criminal justice system.

Thus, throughout this monograph the aim has been to separate comments on the functioning and performance of the court, from comments on the functioning and performance of the investigation and prosecution teams. It is important to bear this in mind so that comments relating to the prosecution—the Specialised Commercial Crime Unit (SCCU)—are not confused with comments relating to the similarly-named Specialised Commercial Crime Court.

The Specialised Commercial Crime Court consists of two regional courts—courts 18 and 19—in Pretoria. It was set up at the end of 1999 with the assistance of Business Against Crime (BAC), which had taken a decision to assist the state in a number of areas in the development of criminal justice policy and the delivery of services. BAC has mainly played a facilitating role, helping the three parties central to this court (the SAPS, National Prosecuting Authority and Department of Justice and Constitutional Development), to develop appropriate working relationships in the face of this form of crime. In addition to this role, however, BAC has also provided some resources to the departments involved, including funds to secure skilled investigators and legal practitioners to mentor and assist the staff of these units.²

The main innovation of the Pretoria court is that investigators and prosecutors are put on project teams tasked with completing the investigation of crimes reported to the Commercial Branch. This integrated way of working, which might be alternatively described as prosecution-led investigation or prosecutor-serviced investigation (described in chapter four), means that case preparation and presentation in this court appears to be much more thorough than in other courts. The result is that cases are turned around faster, and more of them result in convictions. This improved efficiency and effectiveness, which is described much more fully in chapter five, can largely be accounted for by the fact that the joint investigations/prosecutions are so expertly and thoroughly executed.

Before discussing the functioning and performance of the Specialised Commercial Crime Court, however, the theoretical cases for and against court specialisation are considered. In doing so, some time is spent in chapter two reviewing what it is that courts are expected to achieve. It is argued that the objectives of a judicial process are neither unified nor free of contradiction. It is for this reason too that courts cannot be understood as unified organisations, but can be more fruitfully thought of as a 'informal workgroup'. This is somewhat of a paradox, given the formality of court practice, which comes together to process cases, but is shot through by conflicts over the goals of that process.

Chapter three examines the case for and against court specialisation, distinguishing between specialisation proper, in which a court is set up by statute, and court dedication, where an otherwise 'normal' court is dedicated to the hearing of cases of a specific nature. It is argued that the establishment of the latter is generally less difficult than the former.

Given the nature of this monograph, much of it emerges out of a combination of working through the existing literature and interviewing experts and practitioners in courts, court management and the criminal justice system generally. These interviews, with dozens of policy-makers, practitioners and users of the court, were unstructured. No attempt was made to ensure that those interviewed were somehow representative of the people working on these policies or in these courts, nor was any attempt made to use a survey instrument which would provide numerical measures of the attitudes of survey respondents. In addition to the interviews, a number of days were spent in court or with investigators and prosecutors, talking about their work and observing them in action.

Although there has been some attempt to assess the performance of this court quantitatively, the absence of adequately comparable data means that such an effort offers little real reward.

Given the rather unscientific nature of the methodology, this monograph is open to the criticism that the results were filtered through the pre-existing beliefs of the writer. That said, it is hoped that the views and opinions offered have been captured and conveyed as accurately as possible. Key individuals in the SCCU have reviewed a draft of this monograph in the hope that some errors may be eliminated; Antoinette Louw and Martin Schönteich of the ISS also reviewed early drafts. All the same, the writer takes full responsibility for any remaining faults.

CHAPTER 2

HOW TO MEASURE THE PERFORMANCE OF A COURT

The criminal trial overshadows all other ceremonies as a dramatisation of the values of our... government, representing the dignity of the State as an enforcer of law, and at the same time the dignity of the individual when he is an avowed opponent of the State, a dissenter, a radical, or even a criminal.³

What do courts do?

Most societies and certainly all modern societies recognise the fundamental importance of setting in place a system of impartial institutions, in which disputes can be heard by suitably qualified people who are both structurally autonomous and independent minded. Indeed, the case for such a system is so strong that it hardly bears repetition. Suffice it to say that such a system is the only basis upon which individuals can be persuaded to refrain from taking action themselves to enforce their rights, or to right wrongs (real or perceived) done to them. Simultaneously such a system reduces transaction costs by increasing the certainty that contractual commitments will be complied with or will be enforced, thereby promoting the development of more efficient economic production.⁴

The practical implications of how to give effect to the need for independent courts has been set out and interpreted in common law, statute and, more recently, in the South African constitution. The constitution states that “everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum” (section 34). Thus, South Africa’s courts can *hear any dispute* which can be settled by the application of law in hearings that must be *fair* and, to that end, such courts (or other tribunals) must be *independent* and *impartial*. This independence is further guaranteed by section 165, which provides that the courts are “subject only to the Constitution and the law” and that they must apply these “impartially and without fear, favour or prejudice”. Furthermore, all decisions of the courts are binding.

Thus, philosophically, socially and legally, courts have been set up as impartial arbiters in legal disputes and, to the extent that goals for South Africa's system of courts can be described, they should reflect this *raison d'être*. This definition of the role of courts emphasises that courts are a means to resolving disputes, but does not imply anything about the content of decisions made by the courts. However, it precludes a definition of the function of courts, even criminal courts, as having anything to do with the punishment or rehabilitation of criminals. Courts exist to hear criminal cases fairly and impartially, much as they do civil and administrative matters. They do not have a goal other than to process cases fairly and decide them impartially.

At the same time, however, the courts are also part of a system that does have a more outcome-oriented function. As anyone will tell you, the criminal justice system is supposed to do something about crime. Without question, this system—comprising police, prosecutors, magistrates, private defence counsel, public defenders, prison warders and support staff—is intended to result in some predetermined social goal. Unfortunately, it is not always clear that the goals of that system are easily defined or that they form a coherent unity.

The goals of criminal justice

For some, the objective of the criminal justice system is to *punish* those who violate the rights of others through their criminal deeds. To this, many would respond that the function of the system is to *prevent crime by rehabilitating and reintegrating* identified and convicted criminals, or by *detering* those who may not yet have committed a crime, but who may consider doing so. Others point to the preventative effects of *incapacitation*, arguing that the imprisoned offender cannot rape your daughter. Equally, democratic societies set other goals for the system. It should, for instance, *treat humanely* everyone from victim to convict. It must *uphold and defend the constitutional rights* of suspects and accused persons. Moreover, in pursuit of these goals, the criminal justice system must *retain public confidence*, and perform its functions *effectively and efficiently*.

While there are circumstances in which one can conceive of the system achieving all of these goals, it is also clear that these diverse ambitions can be both confusing and contradictory. Is it true, for instance, that policies that increase the deterring and incapacitating effects of prison will not affect its capacity to rehabilitate and re-integrate? Will policies that enhance the system's impact on crime in the short term, undermine its long-term legitimacy and, therefore, effectiveness? Can potential strategies achieve their aims while striking the appropriate balance between the costs of crime and the costs of fighting crime?

It has been established, therefore, that courts are institutions tasked primarily to hear cases impartially, but that, as components of the criminal justice system, they are also expected to contribute to the (somewhat uncertain) aims of that system with regard to the combating of crime. Nonetheless, even within that system, the function of the court is merely to hear cases brought against accused persons. More than this: precisely because they are impartial and are tasked with providing a fair hearing, they are expected to be a check on how the other agencies of the criminal justice system exercise their powers. In their function and their rules of procedure they are expected to ensure that any excesses committed in the pursuit of criminals go unrewarded so that, over time, such excesses are bred out of the methods used by the police and prosecution. Thus: courts hear cases, and are expected to do so fairly. But in doing so they are expected to act as a brake on other role-players in the system, to ensure that they fulfil their functions in ways that are consistent with the rules of due process defined in constitutional and common law.

The most important implication of this is that it is inappropriate to define or understand the role of courts as vehicles for the conviction of offenders, or to evaluate their performance on the basis of the number (or rate) of convictions achieved. This would be tantamount to evaluating the performance of civil courts on the basis of how many times they find in favour of the plaintiff. Rather, the performance of courts needs to be evaluated by reference to the number of cases completed and the extent to which the processes invoked in completing cases are fair and just.

It is clear, therefore, that there is some conflict of goals in courts. They are part of a system that is intended to manage levels of crime in a society by dealing with people who have offended against social rules. At the same time they are also expected to protect the rights of the accused person and to dismiss cases against the guilty when due process rights have been violated. Thus, following the South African Law Commission, the goals of a criminal trial might be stated as:

- determining the truth so that the guilty are convicted and the innocent are acquitted;
- establishing the truth using a procedure that is fair in respect of protecting the rights of the accused person and the interests of society; and
- achieving these two objectives in a manner that is effective and efficient.⁵

These (diverse and conflicting) objectives are given philosophical and procedural flesh in South Africa's adversarial system of justice, where the presiding

officer's task is to hear both sides of a case and to make a decision based on the facts and legal arguments presented to her. The process is driven by both the prosecution and the defence, and the presiding officer serves as an arbiter of both the admissibility of evidence and what weight to attach to it. In such systems it is the prosecution's duty to furnish evidence—accumulated in a manner that is consistent with the rules of criminal procedure and the Bill of Rights—and to persuade the judge or magistrate of the guilt of the accused beyond a reasonable doubt. In the meantime the defence seeks to show that the evidence led is factually untrue, inadmissible or insufficient to prove guilt beyond a reasonable doubt. The presiding officer is, therefore, similar to an umpire or referee: she has no interest in proving or disproving the charges, merely in ensuring that all admissible evidence is presented and given due weight when reaching a verdict.⁶ For her, unlike the prosecution (and police) or the defence (and accused person) the trial is an end in itself, not a means to an end.

One of the implications of the 'party-driven' nature of the adversarial model of criminal courts is that the court itself needs to be conceptualised as an organisation in which conflict over the goals of the processes it manages is institutionalised. Given what we have said about the goals of criminal justice, the 'goal conflict' of the role-players at court is not, of course, a bad thing. It is, rather, part of the nature of a system that seeks to prosecute the guilty but protect the rights of those accused of committing crimes. Nevertheless, it does mean that there is a need to understand the management of courts and the finalisation of cases in a way which does not reduce the objectives of the process to the goals of any one of the parties. In particular, it is important to distinguish the aims of the parties (defence and prosecution) who regard a trial as a means to an end (the proving of their cases) and the magistrate, and those who administer the institution, who regard the completed trial as an end in itself.

The recognition of the importance of institutionalised goal conflict in courts is, of course, hardly fresh. Indeed, it is both trite and obvious. Nevertheless, it is important to build this into any attempt to evaluate the performance of courts. Equally, it should form the foundation of any conceptualisation of the court as an organisation.

Are courts organisational units?

The fact that the justice system serves and pursues multiple and contradictory objectives is reflected in the conflict over the goals of the actors in the drama of the court. It is also reflected in the character of a court as an organisation.

This is of course, obvious in relation to the accused and his or her representative, neither of whom answer to any public authority. However, it is also the case for the presiding officer, prosecutor and investigating officer who may be members of different government departments, or who answer to different authorities within the same government department.

Thus, if one's understanding of an organisation is that it forms a definite and rational hierarchy, then a court is not an organisation. This is so simply because most of the key actors of the court are independent of one another, and are not accountable to each other nor to a supervising authority.

Despite this obvious difference between courts and other organisations, it is submitted that it would still not be incorrect to characterise courts as organisations. Despite the absence of a fixed hierarchy in which tasks are delegated and through which actors account to a single boss, the court does have other characteristics of organisations. Following Feeley, we need to recognise that courts, like other organisations, institutionalise the interaction of a large number of actors whose roles are highly defined and who are required to follow a specific set of rules.⁷

More than this, and despite the institutionalised conflict over goals, we can identify a core goal which all parties share: the processing of the accused from being charged to being either convicted or acquitted. It is true that the actors at court have different interests in the final disposition of each case and, indeed, that the personalities playing the different roles change. Nevertheless, courts and their actors share an interest in the process of getting the arrestee through the court procedure.

However, even in this most simple of common denominators, matters are not all that simple, for there may well be circumstances in which there is a trade-off between the speed at which cases are heard and the fairness with which they are decided. The added haste can sometimes be achieved at the expense of the rights of the accused person. Nevertheless, as a general point of departure, one could say that perhaps the only goal shared by more or less all the role-players in a court is the processing of cases and accused persons.⁸ This is so despite the diverse and contradictory objectives of the system of justice as a whole, and despite the contrasts between the objectives of different role-players regarding the manner in which the case against any particular accused person is finalised.

Given these complexities, Clync and Neubauer characterise courts as "informal workgroups" in which people work towards a common objective, interact with one another on a continuing basis, and perceive themselves to constitute

a group. At the same time they have different levels of commitment to the group and its work, along with differing levels of group solidarity. This model, they argue, accounts for the character of the division of labour and the nature of working relationships between actors in trial courts.⁹ In any event, as Clynych and Neubauer point out, in spite of the fact that courts are intended to function as adversarial contests, studies repeatedly find relatively high levels of informal and, sometimes, illicit co-operation between the adversaries.¹⁰

The diverse and contradictory goals of courts and the actors who play out trial court dramas, mean that any evaluation of the performance of courts needs to be suitably nuanced, giving voice and weight to the enormously complex role that these organisations play. So, before looking at the role court specialisation may play in improving the performance of South Africa's criminal justice system in general, and the courts in particular, we need to systematically set out the criteria against which one might evaluate the impact of reforms. In doing so, however, it is important to recognise that while players in a court include police, accused persons and defence counsel, it is the presiding officers, court administrators and prosecutors who are the most consistent members of the 'informal workgroup'. It is the work of these people that forms the basis for the participation of the others.

In looking at the ways in which one evaluates courts we will not focus unduly on the police, as evaluating them requires a far wider range of measures capturing activities in areas outside of the court. The defence, also, cannot be evaluated as an institution, because it is not. Our focus, therefore, will be on the functioning of the courts in the fair processing of cases. We will seek to register data on the rate at which convictions are obtained as a measure of the performance of the prosecution, as it is their task to identify and pursue those cases that have a reasonable likelihood of conviction.

The performance of courts and prosecutors

One of the clear objectives of courts and the justice system is the effective and efficient processing of cases. When we begin to look at court performance, we should therefore first consider the speed and cost-effectiveness of its processing of cases. But courts, as we have said, have other obligations to meet as well.¹¹

This is not to say that, when looking at a court's performance, its impact on the wider crime-related goals of the criminal justice system should be ignored. It is legitimate to ask what impact the court (or a particular innovation) is mak-

ing to society's efforts to manage crime levels and to deal with offenders. It is submitted, however, that, in order to preserve the integrity and impartiality of courts, such measures should really be related to the performance of the prosecution and, therefore, the investigation, of cases. Indeed, even the core measure of the performance of the court—the processing of cases—is arguably affected most by the effectiveness and efficiency of the investigation and prosecution of cases. Thus, while the time required by the legal representative of the accused may delay trials, generally most delays are thought to be primarily due to delays in the investigation of matters or delays arising from the poor management of the case, resulting in the non-attendance of witnesses or defendants at court.^{12, 13}

That said, Olstrom and Hanson, comparing the timeliness of case management in a variety of courts in the United States, found that the single biggest factor influencing the pace at which cases were finalised was the local legal culture, and the extent to which it created expectations and demands on court actors to complete cases quickly. This, they insist, is a 'cultural' norm emerging from the interaction of the judges, prosecutors and defence attorneys, and could not be ascribed purely to any one of them. At the same time it did appear that if expectations for meeting deadlines imposed by the judiciary were credible, this would strongly influence the local culture. Other actors in the legal process would realise the need to meet deadlines. The police in particular (through the prosecutor) and local attorneys would learn the limits of the courts' patience quite quickly, and moderate their own behaviour accordingly.¹⁴

How have South African courts performed?

Martin Schönteich, in looking at the performance of the prosecution service in South Africa over a number of decades, reviews a great deal of the data on South Africa's courts.¹⁵ While this is not the place to review all those data, it is worth reporting some of the key findings in relation to the processing of cases. In this regard, he reports that:

- The number of cases prosecuted peaked at the end of the 1960s, with nearly 620,000 cases prosecuted. This number fell to about 300,000 in 1995/96. Making the reasonable assumption that this decline was not accompanied by a proportional decline in the number of courts, this would suggest that the average efficiency of courts has declined dramatically.¹⁶

- Against this, as Schönteich points out, changes in the portfolio of cases brought to court—drunkenness made up nearly 15% of charges brought to court in 1969/70—must be considered when evaluating changes in court efficiency. In the absence of such large numbers of petty cases, the average case is more difficult to prosecute, which means that each will, on average, take longer to prosecute.
- The fall in the number of cases prosecuted to completion has, in recent years at least, been reflected by the rapid rise of both the number of prisoners in South Africa's prisons who have yet to be convicted of the crime for which they are accused, as well as the increase in the amount of time that each prisoner awaiting trial spends behind bars. Thus the number of awaiting trial prisoners rose from 19,571 in June 1994 to 55,558 in December 2000. Similarly, their length of stay rose from an average of 76 days in June 1996 to over 130 days in December 2000.¹⁷
- Schönteich also presents data on the processing of cases through the courts. Although these figures are available for a short period only, they suggest that the number of cases finalised in district courts and in regional courts every month, while somewhat variable, are 'stuck' around 23,000 and 3,000 respectively. These data suggest, therefore, that the average district court finalises 29 cases per month, while the average regional court finalises nine cases per month.¹⁸

Having reviewed the data on the performance of the prosecution service, Schönteich concludes that "the criminal justice is performing poorly".¹⁹ Moreover, he believes that its performance "can be substantially enhanced only if the effectiveness of the prosecution service is also improved".²⁰ In this regard, however, he identifies a number of reasons for the relatively poor—and deteriorating—quality and quantity of work delivered. These include:

- inadequate numbers of prosecutors relative to the (growing) workload;
- the loss of skilled personnel;
- poor training methodologies; and
- inadequate rewards, resulting in the service's inability to retain qualified staff.²¹

Apart from these issues, however, Schönteich points to changes in the legal environment since the transition to democracy, which have complicated the

prosecution of some kinds of cases, as so-called 'reverse onus' provisions have been overturned.²² In addition, new requirements governing the management of cases against juvenile accused persons also resulted in a slowing down of the processing of such cases. Moreover, he suggests that personnel and organisational problems in the police service have resulted in weaker investigations and, therefore, fewer prosecutions and convictions.

In addition to this list, it is also submitted that an under-researched factor explaining the decline in the number of cases completed every year is the increase in the proportion of accused persons who are now represented in court. This change, a result of the constitutional right to state-funded legal representation in serious cases, must, at a minimum, have lengthened the time taken to complete cases, while, in all probability, increasing the number of accused persons eventually acquitted of charges.

There can be little doubt that democracy and the transformation of both South African society and the institutions of the South African state have created enormous challenges to the functioning and performance of the criminal justice system as a whole. Courts are suffering deteriorating performance, as the workload of the system, measured by the number of crimes recorded by the police, has risen; personnel numbers have declined or, at best, average levels of experience have fallen; and the rules and procedures of criminal justice have changed. Add to this the high levels of insecurity generated by the restructuring and transformation of the departments concerned, as well as the rapidly rising level of public pressure on the system, and the only surprise is that the system has, for the most part, not crumbled under the weight of these combined factors. These points are, in general, well made by commentators like Schönteich.

The point of our preceding analysis, however, is that this one-sided evaluation of the performance of the criminal justice system is inadequate, for, as we have seen, its nature and structure embodies the pursuit of objectives other than the successful prosecution of offenders.

To be sure, the transition to democracy has also created some opportunities for improving the system. There is little doubt, for instance, that, measured against the criteria of fairness and justice, the rules and procedures of criminal justice are today much improved compared to those that existed under apartheid. The overturning of 'reverse onus' provisions, the constitutional protection of due process rights, and the greater independence of the magistracy all serve to ensure that the process of achieving convictions is substantially more conducive to judicial certainty than may have been the case in the past.

In addition, legal assistance is, for the most part, available to indigent people accused of serious crime. Juvenile accused persons are entitled to better treatment, while victims of crime, particularly those from the so-called vulnerable groups, are beginning to be better served by the system than they were in the past. While the legitimacy of the system in the past was undermined by the fact that the people who worked for it were not representative of the greater population, the present staff complement is likely to have begun to turn those issues around.

One must, therefore, reach a mixed judgement in relation to the performance of the criminal justice system, its individual agencies and the institution of the 'informal workgroup' that is the court at the heart of the process of administering justice in South Africa. On the one hand it is clear that there are severe problems in relation to the achievement of the system's crime control objectives. On the other, the system is substantially fairer and its decisions ought to enjoy far more credibility than was the case under apartheid.

How to evaluate the workings of South Africa's courts

In showing that the evaluation of the functioning of South Africa's courts is no easy matter, much ground has been covered. This paper has tried to show, for instance, that although one might say, from a social policy perspective, that the function of the criminal courts is to 'do something about crime', it is, in fact quite difficult to say what that 'something' is. Equally, whether an individual court achieves anything with respect to overall crime levels, or not, is, to some extent, immaterial. After all, it is not the court's job to think about crime or crime levels, but to process cases brought before it. Its micro-level objectives—the rapid but fair hearing of cases—may have something to do with the macro-goals of the criminal justice system, namely the control of crime levels, but its function is to simply process cases as rapidly and fairly as possible, all the while recognising the potential conflicts between these goals.

Courts are therefore peculiar organisational entities, for they embody conflicting and incompatible goals. Indeed, while courts facilitate the work of investigators and prosecutors, they also put brakes on the excesses to which these functions may be prone. For this reason, courts do not consist of stable, organisationally rigid hierarchies, but are better understood as more-or-less informal workgroups, coming together for the processing of cases in which the identities of the role-players differ and each belongs to a different organisation or is entirely independent.

Given these complexities, it is clear that defining a set of criteria against which to measure the performance of courts or, indeed, of the impact of innovations in the delivery of justice, is no easy matter. Furthermore, even if a set of criteria were developed to assess the performance of courts or the impact of innovations, it is possible that the impact may be positive in relation to one set of criteria and negative in relation to another, incommensurate set of indicators. In these circumstances it would be hard to determine whether a court or innovation were doing well or poorly overall, and reasonable people might differ on how to interpret the results.

Thus, when reviewing the nature and effect of court specialisation, one must ensure that account is taken of the effects not just on conviction rates and case processing speed, but on the fairness, accessibility and independence of the courts concerned.

CHAPTER 3

COURT SPECIALISATION IN THEORY

The structure of South Africa's court system

As long ago as September 1997, the Department of Justice (which has since become the Department of Justice and Constitutional Development) identified court specialisation as one of the key strategies for the provision of “an adequate network of accessible and service-oriented courts and other judicial and quasi-judicial institutions for all communities”.²³ At that time, the department's list of areas potentially in need of specialist courts included family law, sexual offences and juvenile justice. In addition (and these were not identified as forms of specialised courts) the department envisaged establishing, or at least regulating, community courts (including traditional courts) and institutions providing alternative dispute resolution services.

However, before looking at the merits or otherwise of specialisation, it is worth reviewing the current structure of South African courts, for any specialisation that occurs must take place within the parameters of this structure.²⁴

South Africa's superior courts are the Constitutional Court of Appeal, and high courts. The Constitutional Court hears constitutional matters, while the Supreme Court of Appeal hears all appeals from the high courts except those of a constitutional nature. Together with the Constitutional Court, it has the power to regulate and develop our common law. The high courts have original jurisdiction over all matters, whether they are civil, administrative, criminal or constitutional (unless the matter in question has been assigned by an act of parliament to another court), but will generally only hear particularly serious criminal cases if on appeal from the lower courts. There are currently ten geographically defined divisions of the high court.

South Africa's lower courts are made up predominantly of the district and regional courts, which hear the vast majority of cases in South Africa. They have jurisdiction over all but the most serious administrative, civil and criminal cases. In addition, they have jurisdiction over a number of matters, including all maintenance actions, the holding of inquests, and cases arising from

the Promotion of Equality and Prevention of Unfair Discrimination Act. All are also deemed children's courts.

Magistrate's courts are themselves divided into district courts (which hear matters that are less serious and which are likely to result in less serious penalties in the case of conviction) and regional courts, which hear more serious cases. Regional courts can now also hear certain divorces. There are currently 432 magistrate's courts and approximately 1,450 magistrates in South Africa.

It would be incorrect to describe the different components of the court system in South Africa as being 'specialised' except to the extent that the distinctiveness of the functions of each of these courts reflects a certain division of labour. Nevertheless, all of these courts, with the possible exception of the Constitutional Court, have a very generalised jurisdiction. The same cannot be said of a variety of courts set up in terms of various acts, each of which are deemed to operate at a level equivalent to one of the courts described above, but with a much more narrowly defined and, therefore, specialised mandate. These courts, the remit of which is defined in key statutes, include:

- the Labour Court (at the level of a high court) and the Labour Appeal Court (at the level of the Supreme Court of Appeals) which respectively hear matters and appeals arising out of the Labour Relations Act;
- the Land Claims Court at the level of a high court, which hears matters arising out of the application of the Restitution of Land Rights Act;
- the Special Income Tax Courts, at the level of high courts, which hear income tax appeals;
- the Competition Appeal Court, which considers appeals on decisions of the Competition Tribunal;
- the Electoral Court, in which matters relating to the conduct of elections and decisions of the Independent Electoral Commission are heard (it is also a superior court);
- the Small Claims Courts, lower courts, hear low-value (less than R3,000) civil matters; there are currently about 120 such courts, most of which hear cases after hours.

Given the tightly defined remit of these courts, it would not be stretching the term to describe these courts as 'specialised' in the sense that the focus of the

work conducted in those courts is limited to a pre-determined range of issues. This specialisation is, in the case of these courts, defined in law. Furthermore, it is the laws that create the courts that also create the source of legal dispute, be that criminal, civil or administrative, over which these courts have jurisdiction. In other words, these courts have been created by the legislature with the express purpose of providing a forum for the enforcement of rights and responsibilities created in specific legislation. Thus, in some senses their very existence is predicated on the laws that they are intended to enforce.

Moreover, the *raison d'être* for these courts is to ensure that people deemed to have the appropriate skills and, as importantly, attitudes, could be employed in courts that have definite social policy objectives, such as the transformation of labour relations and the redistribution of land. The appointment of such persons was seen as so important to the realisation of these goals that special courts with distinct procedures (including appointment procedures) were regarded as necessary. This motivation for the establishment of these courts is, as we shall see, somewhat controversial. At the same time, however, it should be noted that, given the novel content of the laws (and, hence, the courts tasked with enforcing them), the building up of expertise and institutional memory and capacity can be seen as an important effect of concentrating cases in a predetermined court.

Interviews with senior members of the Department of Justice and Constitutional Development suggest that the establishment of these specialised courts is not entirely straightforward. For one, a comprehensive policy on the criteria of, or process for, the establishment of such courts does not appear to exist. It was noted more than once, however, that the judiciary is generally quite reluctant to establish such courts.²⁵

This reluctance flows from a variety of sources, but revolves around the extent to which South Africa's system of courts is unified and forms a single coherent entity. In particular, concerns relate to the proliferation of separate courts 'equal in status to the high courts' but with different appointment and removal criteria and mechanisms, and different conditions of service. These conditions mean that judges appointed to one court of 'equal status to the high courts' may not meet the same criteria (or enjoy the same conditions of service) as judges in the high courts themselves. Apart from the potential for inter-court jealousies and prejudices, the more relevant concerns relate to whether judges in different courts are suitably inter-changeable and, therefore, suitably consistent in their decision-making. Moreover, given the intense competition for resources in the justice system, the creation of evermore specialised

courts, each with its own start-up and operating costs, can easily become a drain on existing resources if the establishment of those courts is not accompanied by additional funding.

Apart from these concerns, serious issues relating to the consistency and coherence of South Africa's jurisprudence arise when courts are established outside of the normal system. This is because no matter how narrowly their mandates are defined, there are bound to be legal disputes relating to jurisdiction over matters falling on or near the boundaries of that mandate.²⁶ Apart from this, however, there is the very real concern relating to the rules of precedence, which govern areas of law common to both the specialised and non-specialised court environments. How, for instance, are the rules of evidence in the Labour Court affected by decisions in other high courts? This issue can be difficult to manage when the law is subject to relatively frequent review as is currently the case while the courts are interpreting the constitution.

The establishment of specialised courts outside the normal court structure is therefore regarded as controversial by many within the justice system. However, this is not so much the case with specialised courts that have not been created by a specific piece of legislation and remain within the broad structure of South Africa's system of courts. The establishment of these courts, which we will later refer to as 'dedicated courts', is seen more as a specific strategy to assist with the more speedy or effective resolution of certain matters. Such matters, while handled by all courts (at the appropriate level), are handled exclusively by some courts in some jurisdictions where conditions warrant it. These courts include:

- Ordinary criminal courts specialising in certain crimes associated with the assessment, payment and collection of taxes.
- Sexual offences courts which are otherwise ordinary courts focusing on a specific set of offences in order to provide a more appropriate service to the victims of those crimes. In order to focus on the needs of the victim, the staff of these courts receive particular training. Many of these courts also have the physical infrastructure required to assist victims to provide evidence without having to confront the accused in person. Sexual offences courts exist in a number of jurisdictions, having initially been established in Wynberg in 1993. A ministerial task team has compiled a business plan for creating 20 more such courts.
- Family Court Centres concentrate a variety of legal matters associated with family life in one location, hearing divorces, maintenance hearings,

children's court matters and, in some instances, cases governed by legal and policy considerations relating to juvenile justice.

- The Specialised Commercial Crime Court in Pretoria, a replica of which is currently being established in Johannesburg, focuses on a variety of defined offences relating to commercial practices and fraudulent dealings.

The similarity between these courts and those set up in terms of particular pieces of legislation is that the rationale for both relates to the desire to address the complexities or sensitivities associated with particular legal matters. They offer an environment in which the skills of the personnel, the management systems in place, and the infrastructure available are better suited to these matters than would be the case in more generalised court environments. At the same time, however, these latter courts remain part of the standard court system. Organisationally, this means that the courts, and their personnel, are part of the standard court structure, and rules of selection, appointment, promotion and dismissal are the same as those for other courts. As a result, there is far more opportunity for interchange and career mobility for members of staff in these courts. Equally important, the standard rules of evidence and precedence apply, making the administration of justice more predictable and consistent.

These courts can, therefore, be seen as an extension of the reasonably common practice in large regional courts, of concentrating certain cases in the hands of certain prosecutors. Thus, in the Johannesburg regional court, a relatively small team of prosecutors is responsible for prosecuting all hijacking cases, while others are responsible for commercial crimes and yet others for sexual violence. These 'specialisations' are not fixed in organisational stone, but evolve as individual prosecutors develop a particular interest, as well as skills and experience in the prosecution of particular crimes. However, when there are insufficient cases of the kind a prosecutor specialises in, she is given other cases to prosecute.

Pros and cons of court specialisation

Having reviewed the existence of specialised courts, and some of the concerns raised, and at the risk of some repetition, it is worth considering the case for and against court specialisation in light of the set of objectives common to courts described in chapter two.²⁷

The most important motivations for the establishment of specialised courts relate to the possibility that these institutions might make the administration of justice more efficient. In this regard, the most important characteristics of such courts is their capacity to attract and utilise persons with appropriate expertise in the prosecution (in the case of criminal trials) and adjudication of matters in which such specialised knowledge is required for the most effective processing of cases. Indeed, even if these courts do not attract personnel with the requisite expertise, it seems plain that the experience of prosecuting and presiding over a range of similar cases will sharpen the skills of the people concerned. Thus both the prosecution and judiciary will become evermore familiar with complex factual issues, as well as with established law and procedure. This should lead to speedier and, therefore, less expensive proceedings for the state and litigants.

In addition, precisely because a court is specialised and hears a series of similar cases, consistency in decision-making (whether to prosecute, whether an accused person is guilty, what the appropriate sentence should be, etc.) will be encouraged. For obvious reasons, consistency and predictability is much valued in the administration of justice. Apart from the benefits to the quality of justice delivery, such consistency will also have the effect of encouraging the formation of a corps of specialist counsel familiar with the workings of the court and, therefore, better able to manage cases efficiently.²⁸

Similarly, as was pointed out above, some areas of our law associated with the transformation of social relations were considered so novel that it was thought necessary to create juridical institutions that would concentrate the deciding of relevant cases in one place. This would ensure the rapid and consistent development of the case law, and also ensure that a corps of specialists—on the bench and in the legal profession—would rapidly develop the appropriate skills and experience. This would allow them to deal more expertly with those matters.

In this regard, the fact that new legislation has been passed may also mean that there is a rapid increase in the number of matters directly related to that legislation. Under these circumstances, the existence of the specialist court in which these matters are concentrated means that a burden is lifted off the generalist courts.

These benefits notwithstanding, there are also a number of risks associated with the creation of specialist courts:

- Although specialisation on the part of practitioners may increase the efficiency with which they execute their functions, it may also tend to create a degree of over-familiarity. According to both Cazalet²⁹ and Du Randt,³⁰ this can conceivably lead to a loss of perspective, so that the prejudices and prior knowledge of the actors colour their objectivity. Moreover, as was pointed out above, the lack of a general overview and experience of the law as it evolves may have negative consequences on the career mobility and general competence of staff.
- It is also conceivable that a degree of ‘cosiness’ develops between presumed adversarial role-players in a court if they become over-familiar with each other and with the cases to which they are expected to apply their minds.
- Again, as mentioned above, there is a risk that the particular area of law to which the specialist court devotes its attention, may develop in ways that are out of step with the overall development of the law. Moreover, there may be problems with the degree of consistency between specialist and generalist courts, in areas of the law that overlap. In such cases it is far from obvious that the appropriate response of the system should be to ensure that the specialist court hear the matter. But in that case, how can the generalist court ensure that it approaches the issues associated with the specialist court appropriately? More pertinently, what is to stop a specialised court developing a somewhat eccentric interpretation of rules of a more general nature?
- Seemingly trivial matters, such as the relative status and importance of presiding officers in specialist courts, can also easily become sources of discontent and difficulty.
- To the extent that a court is established to hear a predetermined and limited range of cases, motivated by existing weaknesses in the performance of the justice system, it is vulnerable to the criticism that, in setting up that court, the root causes of those weaknesses are not addressed.
- A final set of problems associated with court specialisation, but covered by neither Cazalet or Du Randt, arise from the fact that it is quite likely that the people involved in a very high proportion of cases heard in that court are likely to be the same individuals. Obviously the magistrate and prosecutor are likely to be present in many of the cases. But those cases are also likely to involve the same members of the police (in the case of criminal

courts) as well as the same members of the legal profession. If one of the key checks on the development of corrupt and unethical practices, namely the circulation of personnel, breaks down, it may become increasingly difficult to ensure the integrity of the process. Thus, if a court is dedicated to the prosecution of people caught in possession of narcotics, and is serviced by the same prosecutors, defence attorneys and police officers, it is possible that the entire court might become corrupt. Indeed, rumours that certain attorneys can facilitate the losing of dockets in drug trials do circulate in the legal profession in South Africa's main cities.

That said, it is true that this is also a risk associated with all courts operating in smaller centres, where there are simply insufficient numbers of lawyers, police officers and magistrates to ensure the adequate circulation of personnel. This may, therefore, be a risk inherent in running a criminal justice system.

Given the potential benefits, as well as the potential risks, of court specialisation, it is important to begin to determine a set of criteria in terms of which specialist courts may be set up. In doing this, however, it is important to recognise that the different ways in which specialisation is organised, gives rise to different trade-offs of risk and reward. In particular, there is an enormous difference between the statutory establishment of specialised courts 'outside' of the normal structure and system of courts, and the organisational or managerial decision to use a particular courtroom within the jurisdiction of a particular court to exclusively hear a certain set of cases. In order to distinguish these two approaches, we will call the former court specialisation, while the latter will be deemed court dedication or court reservation, in the sense that an otherwise general court is dedicated to (or reserved for) the hearing of certain matters.

There is little doubt that of the two, the statutory creation of a court outside of the normal structure of South African courts creates far more difficulties than the mere reservation of a court for the hearing of certain predetermined matters. The latter approach avoids a number of the problems and potential pitfalls identified above. These (avoided) problems include the issue of precedence and authority (since a normal court reserved for certain matters will be bound by the decisions of other courts in just the way that generalist courts are). There will also be no problems relating to overlapping jurisdictions. Since no law binds the court to a particular mandate, it will be relatively easy to allow it to hear matters that fall outside its remit. Similarly, there is no likelihood that the court will be under-utilised, because it can continue to hear all other matters in those periods when it is not fully occupied with specialised

cases. This also means that there is much less scope for officers to become 'over-specialised' and losing perspective.

Although many of the other risks mentioned may be common to specialised and dedicated courts, it seems likely that many of them are far more applicable to specialised courts than dedicated courts. Thus, although there may be differences in the appointment, promotion and remuneration policies governing the staff of a dedicated court, relative to their generalist colleagues, this is much more easily managed, as are the more subtle questions of authority and status. The mere fact that the personnel in these institutions continue to be part of a common structure means that these factors can be managed, even if personnel in dedicated courts are chosen because of their seniority and experience, or, indeed, their lack of seniority and experience. In any event, problems of moving from a dedicated court to a general one are much less fraught than might be the case for judges in specialised high courts who wish to move to the normal high courts.

This is not to say, however, that it is absolutely clear that the creation of dedicated courts is always preferable to the creation of specialised courts. There are reasons to believe that some of the advantages of court specialisation or dedication described above may be more strongly felt in specialised courts than in dedicated courts. Among the benefits that may accrue more strongly to a specialised court than to a dedicated court, one may count the following:

- Perhaps the biggest potential benefit associated with the creation of a specialised court to deal with new legislative requirements is that, in concentrating all the cases that arise from that legislation in one place, the relevant law develops much more quickly, allowing practice and precedent to emerge. This is obviously a boon if the legislature attaches a great deal of urgency to the development of this particular area of the law.
- Creating specialised courts with their own recruitment and appointment criteria and processes can ensure that the required skills are brought into the justice system more quickly and, as important, that they are appropriately targeted and employed. Thus if labour courts are to be established to help implement and enforce a new labour relations regime, the system may well benefit from the direct recruitment of legal professionals skilled in existing labour law.

That said, there are those in the criminal justice system who insist that, in relation to criminal trials at least, bringing in skills from outside of the

prosecution system may often be less efficient because these recruits will be unfamiliar with the systems and approach of the prosecution service.

- Because dedicated courts have no legally defined mandate, it is inevitable that many, if not most, cases for which they are dedicated will, in fact, be heard in other courts. This may well mean that there is a lack of consistency in decision-making across courts—a problem that is, however, inherent in the nature of justice systems.
- Setting up dedicated or specialised courts needs to be accompanied by an assessment of the potential risks run by allowing role-players to become over-familiar with each other.

When should specialised courts be established?

Given the difficulties associated with assessing the pros and cons of establishing specialised and dedicated courts, it is unsurprising that the Department of Justice and Constitutional Development has not developed a set of consistent principles to use in assessing when and where to establish such courts. Despite this, senior officials readily acknowledge that there is a place for dedicated courts and, indeed, many are actively involved in setting up such courts. Finding support for specialised courts outside of the normal structure of courts was harder, although some saw the value of such courts in areas where the implementation of controversial social policies was at stake.

Although no policy document regarding the establishment of such courts is available, Advocate Pieter du Rand, a senior official in the court services division of the department set out a range of questions which had to be considered when the establishment of a specialised court was being contemplated.³¹ This paper, delivered at a seminar on the proposal by the Department of Home Affairs to establish specialised immigration courts, proposes that the following issues need to be considered:

- The problem that gives rise to the need for a specialised court must be considered to be relatively permanent, with other, managerial, solutions to be used in the case of more temporary problems. One indicator to be considered in this regard is the passage of new legislation giving rise, or expected to give rise, to a great deal of litigation.
- Specialised courts should only be established after appropriate studies of previous court practices, or after the running of a carefully assessed and

successful pilot project. Studies of past practices should, *inter alia*, look into the consistency of previous decision-making of the courts; the extent to which there may have been some reluctance to bring cases to court; whether existing courts have a backlog of these cases; whether such delays are actually harmful to the course of justice; and whether there have been complaints about the administration of justice in a particular area of the law.

- The areas of law to be administered by the court must lend themselves to clear and consistent definition, ensuring that the issues to be covered are sufficiently ‘free-standing’ and do not overlap with other areas of the law.
- The court will have to have appropriate volumes of work, and there must be available resources for establishing such a court.
- The benefits of concentrating and centralising cases of a particular type must be offset against the potential costs of reducing access to justice to litigants who are geographically distant from the court.
- In addition, it is submitted that the benefits also need to be offset against the possible risks of corruption setting in.

Adv. du Rand identified the above issues as key guidelines to the establishment of specialised courts. He concluded by arguing that, while there were often sound reasons for establishing specialised courts, there was also a need to rationalise South Africa’s courts in order to avoid placing too many demands on a system. The system does, after all, have a range of other priorities to deal with.

Conclusion

Using somewhat dubious grammar, South Africa’s constitution demands that “as soon as practical after the new Constitution took (sic) effect all courts, including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the requirements of the new Constitution” (Schedule 6, section 16 (6) (a)). This process has, at the time of writing, barely begun, with proposed legislation governing the nature, structure and functioning of South Africa’s courts largely still being conceptualised or researched.

It is clear that the department and its parliamentary watchdog have a clear preference for the establishment of a single, unified judiciary with clearly defined jurisdictions for the various levels in the South African court structure. In implementing this preference, it seems clear that the department and parliament will tend to steer away from proposals to set up specialised courts with mandates defined in terms of statute.

While there is plainly merit in the position adopted by the department with regard to specialised courts, there seems to be little doubt that what we have called dedicated courts are somewhat less problematic. They can deliver many of the perceived benefits of court specialisation while minimising many of the risks associated with the establishment of institutions outside of the normal court structures. That being the case, it is worth looking in some detail at a real dedicated court: the Specialised Commercial Crime Court based in Pretoria. In doing so, however, we will also see that this court has a number of further characteristics that distinguish it from other dedicated courts. In particular, the investigators of the police service and the prosecutors of the NPA have developed a very tight, integrated working methodology—a feature which other courts do not enjoy. While this is interesting in itself, it does mean that there are limits to the extent to which one might draw lessons about the functioning of such courts in general, from the functioning of this court in particular.

CHAPTER 4

THE SPECIALISED COMMERCIAL CRIME COURT

Emerging from a partnership between the SAPS, the National Prosecuting Authority, the Department of Justice and Business Against Crime (BAC), the Specialised Commercial Crime Court was established in November 1999. Situated in a drab, bureaucratic building in Pretoria, the court consists of two regional courts with a mandate to hear the cases brought to trial by the Specialised Commercial Crime Unit (SCCU).

The court itself can be understood primarily as institutionalised and dedicated court time reserved for the hearing of commercial crime cases brought by a dedicated group of around 20 prosecutors. However, as we shall see, the innovation associated with the SCCU is related not so much to the existence of this dedicated court. It lies in the nature of the working relationship and procedural integration between the prosecutors attached to this court, and the police officers investigating the matters brought before it. Before looking at this, however, it is important to understand the range of matters that the SCCU is responsible for prosecuting.

The SCCU is responsible for prosecuting all cases of commercial crime and fraud committed in the jurisdiction of the Pretoria magistrates' courts, but which are too serious to be prosecuted in the district courts. At the same time such cases should not be so serious that they require investigation and prosecution by the Scorpions, or the Directorate of Special Operations. Although these boundaries are somewhat unclear, in practice the SCCU takes:

- All fraud cases except for relatively small, straightforward frauds, apparently committed by a single individual—unless it is alleged that she has committed numerous such crimes. For instance, if a person pays with a cheque while the funds in her account are insufficient to cover the transaction, she will most probably not be prosecuted by the SCCU. However, if the amount in question is very large, or the suspect is believed either to be part of a syndicate committing this crime repeatedly or to have passed a series of these cheques, the likelihood increases. On the other hand, some of the most complex and high value frauds will also probably not be prosecuted

by this unit, being within the remit of the Scorpions, who cover all crimes committed by organised criminal groups.

- In addition to these frauds, some forms of theft (such as embezzling money from a company's pension fund) also qualify for prosecution by the SCCU. Again the decision whether or not a case should go to the district court may depend on to what extent it involves organised criminality.
- The prosecution of a wide variety of statutory offences associated with the establishment and running of businesses, will also be prosecuted by the unit. Such offences include those created by the Companies Act, the Closed Corporations Act, the Insolvency Act, the Banks Act, etc. In all about 60 pieces of legislation create statutory commercial crimes which might be prosecuted by the SCCU. Once again, however, particularly minor or particularly major infractions of the law may fall outside of the remit of the unit.

Given this brief, the SCCU is involved in the prosecution of a very wide range of cases. Moreover, within each of these categories of offence, there is a wide range of actual and potential *modus operandi*. Indeed, compared to the more limited range of methodologies deployed by those who have committed violent crimes or property crimes, where deception and misrepresentation are not core elements, prosecuting commercial crimes is, as one prosecutor said, "an endless lesson in the many ways people have invented to screw each other". Obviously this creates practical difficulties for the investigation and prosecution of offences, difficulties which we will explore more fully below. For the moment, however, let us look at the procedure followed by the SCCU.

Processing cases through the Specialised Commercial Crime Court

The most profound innovation associated with the Specialised Commercial Crime Court is not that such a court exists to hear such cases. In most large courts one is likely to find that the control prosecutor has assigned some of her staff to the more-or-less exclusive prosecution of commercial criminal matters, and that these cases will often be concentrated in the same court. Thus, the mere existence of a dedicated court is not the key innovation associated with this court. What is key, however, is the way in which the work of the investigating officer and the prosecutor is integrated. This process is documented in the official 'Procedural Guidelines for the Specialised Commercial Crime Unit' which might be summarised as follows:

- A complaint falling within the remit of the SCCU is laid at a police station by the complainant, or may be lodged directly at the SCCU or the Commercial Branch.
- The commander of the detectives at the police station identifies the case as 'belonging' to the Commercial Branch (see text box on page 38), and forwards the docket to the commanding officer of the Pretoria Commercial Branch.
- On receipt of the case by the Commercial Branch, it is booked out to an investigator for preliminary investigation, to be completed within 14 days. This investigation consists of making sure that the offence falls within the mandate of the Branch, and obtaining whatever evidence already exists, including the possible retaking of the complainant's statement. In addition, the investigator completes a draft investigation plan, setting out what evidence is to be collected, and the timeframes within which this will be done.
- Within 14 days the commanding officer reviews the docket and investigation plan with the investigator, and hands it on to the workflow administrator of the SCCU who will allocate the work to the appropriate prosecutor.
- Once the prosecutor has received the docket, she is required to meet with the investigator within 14 days in order to review the information already in hand and the draft investigation plan which sets out responsibilities and timeframes for accumulating evidence. This plan, once completed, is affixed to the docket, forming a point of reference and accountability.
- The investigator then completes the investigation, reporting to her commanding officer. In addition, where appropriate, the investigator and the prosecutor may meet to follow up progress in the investigation of the case, particularly in complex matters or where new information comes to light that necessitates a reformulation of either the charges or the investigation plan.
- Upon completion of the investigation the investigator will either arrest the suspect, or summons him to appear at court. Ordinary trial procedures follow. One final requirement of SCCU policy, however, is that prior to the trial, the investigation/prosecution team is required to meet defence counsel and other relevant role-players, in order to ensure that

there are no unnecessary delays during the trial. In particular, the meeting must ensure that the defence will be ready to proceed on the date on which the trial is scheduled to begin.

In an effort to enhance the management of cases and the work of members of the SCCU, work procedures have been designed in order to facilitate a rather more detailed monitoring of the flow of cases. Thus, at every stage of the process progress reports are completed and data are inputted into a management system. This system helps managers of the SCCU and the Commercial Branch to, individually and collectively, assess the performance of staff and the outputs of their units as a whole. While most prosecutors seemed to think that some of the reporting requirements were bureaucratic, in general they could all see the value in having these data, and the impact that they had made in identifying blockages and ensuring that these were overcome.

The (changing) mandate of the SAPS Commercial Branch

Prior to the restructuring of the Commercial Branch, it consisted of little more than national and provincial commanders of three distinct units: the Fraud Unit, the Syndicate Fraud Unit, and the Commercial Crimes Unit.

The Fraud Unit investigated simple frauds, usually committed by a single offender and often involving no suspicion of repeat offences, focusing primarily on the simpler cases of cheque and credit card fraud. The Syndicate Fraud Unit, on the other hand, was responsible for investigating more organised cheque and credit card frauds. These included the 'skimming' of credit card data from one card to another; the creation of forged cheques and credit cards; the use of a large batch of stolen cheques and credit cards; and cases where offenders used numerous cards or one card frequently. In addition, this unit was responsible for investigating more sophisticated frauds such as 'kite-flying' schemes; advance fee frauds including so-called West African 419 scams; and 'black dollar' cons. Finally, the Commercial Crime Units were responsible for investigating offences allegedly committed by businesses and, in particular, crimes committed by directors of companies in their official capacity. These units would have been responsible for investigating most of the statutory offences now prosecuted by the SCCU.

Following a decision in early 2002, the SAPS has restructured the commercial branches and redefined their mandate. From now, it seems, com-

mercial branches will exist in different centres. Made up of the vast majority of the detectives who worked in the three distinct units, they will be tasked with investigating all the matters that were previously investigated by the Syndicate Fraud and the Commercial Crimes Units. The simpler frauds, previously investigated by the Fraud Unit, have become the responsibility of the general detective units of police stations.

In addition to these commercial branches, which will have distinct geographical jurisdictions, the SAPS is setting up a small unit tasked with investigating serious economic offences with a nation-wide jurisdiction. This unit will be responsible for investigating only the most serious of cases, and is to have the resources to pursue extremely complicated matters.

Naturally, views on the desirability or otherwise of these changes differ depending on who it is offering their opinion. As a general rule, it seems that detectives at police station level are unhappy that their workload will increase without being given additional resources. Detectives in the Commercial Branch, however, are relieved to have rid themselves of the more petty cases—of which there is a high volume—because it will allow them to focus on more serious and difficult cases.

What is commercial crime?

Perhaps one of the most common opinions expressed in the course of this research was that the varied and complex nature of commercial crime necessitated the establishment of the SCCU. It was felt that the available skills, systems and resources in the non-specialised criminal justice environment were unable to ensure the successful investigation and prosecution of these cases. As we shall see, there is much merit in this argument. Indeed, the results of the unit suggest that its special procedures do, in fact, result in high levels of success (see the following chapter). But before we get there, it is important to understand why it is that commercial crime is believed to be harder to investigate and prosecute successfully than other forms of criminality. To do this, however, we need to develop a working definition of commercial crime.

As has already been pointed out, the SCCU prosecutes cases that fall into two broad categories: statutory offences defined in terms of the numerous pieces of legislation regulating the conducting of business activity, and various forms of fraud and theft. This suggests that, in practice at least, an operational definition

of commercial crime is being developed, and that it revolves around the commission of fraud and the violation of statutes regulating businesses and transactions. Naturally, in law and in practice, the character of the common law crime of fraud (as well as its baby brother, forgery and uttering) is very different to the numerous statutory offences.

Although there are a very large number of statutory offences, each with its own elements, in general the core difference between these crimes and the crime of fraud is that they establish a set of responsibilities which it is criminal to fail to perform. Thus, the Companies Act creates numerous offences in terms of which directors of companies can be prosecuted if they fail to provide oversight, even if they do not necessarily have the intention to defraud, or do not steal/misuse company funds themselves.

In addition, some statutory offences—usually relatively minor and technical in character—have been created. These can be proved almost exclusively on the basis of irrefutable facts, requiring little evidence relating to the person's intention. For example, in terms of the Closed Corporations Act, it is an offence to conduct business under the name of a closed corporation unless such a corporation has been duly registered and the person concerned is a member of that cc.

In general, however, the common thread linking these crimes is the need to ensure that accountability for shady business practices is vested in an identifiable person against whom the state can proceed for acts and omissions that prejudiced, or may have prejudiced, others.

Thus, despite the fact that there are numerous potential crimes which members of the SCCU might investigate and prosecute, most detectives and prosecutors insist that it is the shady business practices that are almost equivalent to, or associated with, acts of fraud which form the core of their mandate. For that reason, they say, almost every case brought to the Specialised Commercial Crime Court alleges fraud in the first instance. Many, however, also deal with alternative statutory offences, including violations of the tax code.³²

It appears, therefore, that the SCCU has adopted an offence-based definition of a commercial crime. This puts the emphasis on the non-violent character of the deeds committed by the offender, and her targeting of financial gain through acts of deception. Alternatively, however, the SCCU will prosecute offenders under the relevant statutory offences, where proving the intent of the offender and her use of a misrepresentation is difficult.³³

Given the emphasis on illegal acts of this nature, it is inevitable that the work of the SCCU is extremely varied and that this variety can make the investigation and prosecution of these crimes very difficult.

Consider, for instance, the difference between crimes of deception and crimes of violence. Prosecuting the latter generally involves proving a relatively simple set of causally connected elements. Murder, for instance, requires showing that the victim died as a result of the intentional actions of another person. Although there are any number of reasons why such cases are not successfully investigated—generally because there is no way to identify the murderer—the elements required to prove a case are reasonably easy to list. You need evidence that the victim died, that her death was because of the actions of another (e.g. she was shot or stabbed or pushed under a bus), and that the person arrested was the person who committed the act which led to the victim's death.

Compared to this, the nature of many crimes of deception, as well as the fact that many of the methods used are very similar to legitimate business transactions, means that it is often much more difficult to determine whether a crime has, in fact, been committed, and by whom. It is not always easy to establish, for instance, whether an investor who loses money in a business deal has been consciously and deliberately defrauded, or whether it was simply a risky venture that went wrong.

In any event, the defrauding of investors—lucrative as it may be and consisting of as many strategies as it does—is only one of the very large number of potential commercial frauds. Think about insurance-related frauds committed by policyholders against insurance companies, or by dishonest brokers against policyholders. Consider medical aid fraud and pension fund fraud, cheque, credit card and tax fraud. Consider the many ways in which employees defraud the organisations for which they work, and the equally numerous ways in which a company's clients or suppliers may defraud it. Commercial crime is, it seems, a form of crime of almost infinite breadth.

Typical forms of fraud

South Africa's common law defines the crime of fraud as the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.³⁴ This definition of the elements of fraud immediately suggests that the core components of the crime of fraud

are (i) the making of misrepresentations that (ii) can or do cause prejudice to the recipient of the misrepresentation, or to a third party.

Given this definition of the crime, it is immediately obvious that there is any number of potential forms of fraud, since any misrepresentation that causes any actual or even potential prejudice to any person qualifies. Nevertheless, from the point of view of practical policing and law enforcement, the most important forms of fraud are all variations on a rather smaller number of themes. These include:

- Cheque frauds, which involve the theft and/or alteration of otherwise legitimate cheques, the theft of blank cheque forms and their fraudulent use, the forging of cheques, or the recycling of already used cheques back through the banking system. Perhaps the most common type of fraud committed is the signing of a cheque in the knowledge that the drawer does not have sufficient funds available.
- Credit card frauds include the use of stolen/lost credit cards, the 'skimming' of the electronic data stored on a card's magnetic strip and copying it onto another card, or the use of the number of the card belonging to another person in the electronic or telephonic purchase of goods.
- Advance fee frauds, including the so-called Nigerian Letters (or 419 scams), are premised on offering the victim a role in a legitimate or illegitimate business deal. All that the victim need do is provide some start-up capital or to contribute to the initial costs of the venture. Of course, nothing ever comes of the deal and the victim loses her contribution.
- Kite-flying frauds, in which a series of transactions are entered into with a bank or banks in order to induce the bank to believe that real funds have been deposited into an account and to have the balance cleared prior to the validation of the original deposits. The funds are then removed from the account before the bank realises that no real deposit was made.
- Other very typical frauds include a variety of frauds committed by individuals against their employers (e.g. by massaging expense accounts, embezzling funds or colluding with the organisation's suppliers) or by individuals against medical aids and insurance companies by over-claiming, sometimes colluding with service providers to do so.

The investigation of these inter-personal frauds differs depending on the specific facts of the case. In general, the greatest challenge is to show that at the

time that representations were made to the victim, the fraudster intended to mislead the victim, with the notion of 'intention' interpreted very widely. This is obviously fairly easy in the case of many forms of cheque and credit card frauds: anyone who signs a cheque form or credit card slip in the name of another person knows very well that she is misrepresenting her identity. Similarly, when false or exaggerated claims are submitted to an insurance company or into one's employer's payment system, a magistrate will generally assume that the offender knew that what she was signing did not accurately reflect the true extent of her rights. In the same way, in kite-flying scams, the courts will accept that the offender knew that funds she withdrew on the basis of a fictitious deposit did not exist, and that she had no rights to them.

On the other hand, in cases where the initial representations to the victim seemed to suggest an honest business venture, it can be quite difficult to show that the offender intended to defraud the victim. In these cases, however, if the offender fails to use the funds in pursuit of the presumed business deal, the courts will infer that she had intended to defraud the victim.

Thus, in some of these cases it is often much easier to identify the offender than it is to prove that she had formed the necessary intention to defraud. This is not to say that fraudsters are always easy to identify. Indeed, misrepresentations regarding one's identity are very common, and include various cheque and credit card frauds. However, having identified and caught the offender in these cases, proving guilt can be quite simple, particularly if there is signed documentary evidence.

Identifying a serial credit card fraudster

In early May 2002 an investigator for one of the large banks arrested a woman in a liquor store in Pretoria after watching her sign a credit card slip after tendering a stolen credit card. He had been following her for most of the day and had seen her sign a number of slips in a number of stores. It later transpired that the card she had been using, which had been stolen only a few weeks before, had been used in over R95,000 worth of fraudulent transactions after its rightful owner had reported its loss.

The investigator—a former detective—had begun to tail the woman he subsequently arrested, following her being photographed at a petrol station while signing a slip for a credit card that turned out to have been stolen. Using the photograph, investigators at the bank were able to put a name to

the photograph of the woman because she was already on trial in a separate matter in Johannesburg and her identifying characteristics were stored in the bank's database of known fraudsters. Knowing that she was still committing these crimes, it was a simple matter to find her home address and follow her until an arrest could be effected. Because he was a private investigator, such an arrest could only take place if a crime was committed in his presence—hence his following her into the liquor store.

Clearly there were many links in the chain that led to the identification and arrest of the suspect, many of which were somewhat fortuitous. She obviously knew many of the security procedures used by the bank and their limits, allowing her to avoid arrest when presenting stolen cards. Had there been no photograph, nor her name and description on file, she may never have been arrested.

Typical commercial crime matters

In general, the fraudulent crimes described above are committed by individuals against other individuals, or by individuals against businesses. Commercial crimes, on the other hand, are generally committed by businesses, or by their directors. In many of these cases fraud overlaps with theft, because there may not have been any misrepresentations made. The variety of potential scams include:

- 'Investment' schemes in which individual investors are persuaded to have a company invest funds on their behalf. These funds are then stolen by the staff or directors of the investment company. Another version of this crime is when insurance brokers fail to pay the insurance premiums of their clients/victims over to the underwriter. Some investment frauds evoke shades of pyramid schemes.
- Ponzi or pyramid schemes offer high returns to investors by transferring funds from new recruits to existing recruits. The new recruits then have to go out and recruit more 'investors' to recover their original payment and make a return. These schemes are illegal because they inevitably run out of recruits, bringing the scheme to a grinding and traumatic close.
- Trading schemes involve at least two colluding 'investment companies'. Here, instead of running off with the clients' capital, the two companies transact unnecessarily, each earning unnecessary commissions.

- Companies sometimes obtain loans or attract investors on the basis of misleading or false financial statements, or on the basis of non-existent or valueless collateral, or raise multiple loans using the same collateral. Indeed, in some cases, forged letters of credit are used to secure funds.
- Again, companies are often involved in numerous other kinds of fraud including insurance fraud, making fraudulent deductions from employees' salaries, as well as tax and tax rebate frauds.
- The non-payment of suppliers is also a common source of commercial crime, and, while there have been instances in which the business was established in order to profit from unpaid supplier credits, generally these cases begin when businesses begin to go under and the directors try to postpone the inevitable.
- Various cross-border frauds are also a growing problem. These include transfer pricing and exchange control violations, the misstatement of the value of imports to avoid customs taxes, and money laundering.

According to senior detectives, most matters that come to their attention emerge when a company either begins to fail to pay its accounts, or after liquidation has taken place and the liquidators uncover suspicious transactions. The creditors—be they investors or suppliers—lay charges of fraud or theft against the directors, alleging that they misused the company's funds for their own benefit to the prejudice of creditors. Using the Companies and Insolvency Acts, together with the common law crimes of fraud and theft, investigators then pursue evidence that the directors or staff of the company concerned enriched themselves at the ultimate expense of the company and its creditors.

To do this, the investigators obtain the financial records of the company as well as the personal financial records of the directors, and look for transactions that imply wrongdoing or a failure to exercise the fiduciary duties of a director. Detectives say that generally it is reasonably straightforward to identify such transactions from bank records. However, if much of the business is conducted using cash, it can be much more difficult to show how funds were used and where they went.

Statutory commercial crimes, many of which may be committed in the course of any of these frauds, also include a variety of more technical violations, some of which can be particularly difficult to investigate and prosecute. One

example of these are the offences created by the Counterfeit Goods Act—offences, it should be noted, that fall squarely into our definition of commercial crimes since they involve no violence but do seek to profit from misrepresentations of fact.

The basic import and intention of the Counterfeit Goods Act, passed in 1997, is fairly clear: it criminalises the importing, exporting, manufacture, trading, distributing or displaying of ‘counterfeit goods’. These goods are defined as goods, manufactured in South Africa or elsewhere, which closely imitate goods to which intellectual property rights are attached or which have a registered trademark.³⁵

Detectives and prosecutors alike regard this act as somewhat ‘over-engineered’ because it provides a very elaborate and highly regulated series of steps to be completed in the course of an investigation. Some of these requirements have meant that cases have been very difficult to bring to court. For instance, the act provides that confiscated goods are to be kept in specific depots designated for the task. No depots were so designated until December 2000, three full years after the law was passed. This meant that there was no legal way to store suspect goods in order to use them as evidence.

The technical nature of the legislation is also borne out by the fact that it sets precise timeframes for prosecutors and investigating officers to inform suspects and other interested parties about their intention to pursue a prosecution after the goods have been seized. Indeed, given that these requirements are unique to cases brought under this act, there have been instances where cases have fallen apart because the prosecutor concerned has been unsure of what was required of her. One prosecutor in Johannesburg, for instance, apparently refused to issue notices to suspects in terms of section 7 of the act, claiming that he required the authority of the Director of Public Prosecutions to do so.

These procedural technicalities complicate the bringing of charges and necessitate having reasonably well trained officials. They are compounded by the technical and legal difficulties associated with determining if a particular item is a counterfeit copy of a protected original. In one case, for instance, the imitation of a very common cheap pen was so close that only scientific tests on the ink carried out at the French manufacturer’s laboratories proved them to be counterfeit. The refusal of the scientists to come to South Africa to testify meant that the case could not proceed.

Conclusion

This chapter has sought to explain the unique functioning of the Specialised Commercial Crime Court, but it has done so with barely any reference to the court itself. While the reason for this was not initially self-evident, it has become clear in the course of this research that what is truly unique about the manner in which this court works is almost unrelated to the court itself. In point of fact, the court is identical to other regional courts, but its time and personnel have been dedicated to hearing cases investigated by Pretoria's Commercial Branch and prosecuted by the SCCU. This is what is novel about the court, and should be considered when any assessment is made of the impact of the innovation that is the Specialised Commercial Crime Court.

Because the key to understanding this court lies in the integration of the investigative and prosecutorial functions in Pretoria, we have spent a fair amount of time reviewing the nature of that integration and the character of the cases confronted by the joint investigation-prosecution teams. Here we have seen that commercial crime is, by its nature, somewhat more complex and variable than are other forms of criminality. It is this characteristic that is often used to justify the existence of this dedicated court and the peculiar relationship of investigators and prosecutors. It is now time to turn to an assessment of the impact that these innovations have had on the administration of justice in commercial crime cases in Pretoria. The next chapter attempts to do exactly this.

CHAPTER 5

ASSESSING THE SPECIALISED COMMERCIAL CRIME COURT

This chapter seeks to provide an assessment of the impact that the innovative approach to the investigation and prosecution of commercial crime has had on the achievement of the varying goals of criminal justice. Naturally enough, the focus is on whether these innovations have contributed to increased efficiencies in the courts and better performances from prosecutors and investigators, and, to a much lesser extent, the impact that these processes have had on the quality of justice. In seeking to provide the assessment, however, it became clear that it is no simple matter to determine the standards against which the performance of this court is to be measured. This is in part a function of the poor quality data collected throughout the criminal justice system. This oft-mentioned problem means that determining a 'par' value for investigative and prosecutorial performance and court efficiency is next to impossible.

A second reason why it is difficult to work out an appropriate comparison is the nature of this court's portfolio of cases: it is simply impossible to find a court with a portfolio of cases that is similar in terms of numbers and complexity. The effect of this is that even if similar data were available for other courts, it is unlikely that they would be directly comparable. For these reasons, the bulk of this assessment of the investigative/prosecutorial process in this court consists of the views and opinions of people working in the 'informal workgroup' that is the court.

Assessment by the numbers

Before looking at the performance and impact of the Specialised Commercial Crime Court in as much detail as the constraints of the available data allow, it is worth looking at the evidence we have regarding the incidence and impact of commercial crime and fraud in South Africa as a whole. In doing this, however, it is important to bear in mind all the usual qualifications associated with crime statistics. In particular, we need to consider that, as with all other forms of criminality, the reporting and recording of fraud and commercial crime is known to be below its actual incidence. Many of the reasons for this are iden-

tical to those associated with the under-reporting and under-recording of other crimes: for a crime to appear in police statistics three things must happen, it must be noticed, reported and accurately recorded. There are, however, further reasons to believe that fraud and commercial crime numbers do not reflect the real incidence of these cases; reasons that are peculiar to the character of these crimes. These include:

- It is standard operating procedure for many cases of fraudulent misuse of credit cards and cheques to be recorded by the banks, but only to be reported to the police after investigation and, usually, after the identification of the suspect. This means that many thousands of individual incidents only come to the notice of the police if and when an arrest is made.
- There is a widely held belief that many frauds committed against businesses are not reported to the police, particularly when committed by insiders, for fear that the failure of the organisation's systems reflects poorly on its management. This was confirmed by a recent survey, which found that, having identified a fraud, companies reported only 60% of incidents to the police or a government body.³⁶

In addition to these problems there is the fact that even the reported figures on the incidence of fraud and commercial crime are, in many ways, inadequate for analysis because of the diversity of the underlying acts of criminality. The difference in the seriousness and value of the cases involved is also an issue: as far as police crime statistics are concerned, a R200 returned to drawer cheque fraud is identical to a case of corporate fraud amounting to R200 million.³⁷

While these factors are important to consider for any application of police commercial crime statistics, for our present purposes there is a final matter to be aware of. Police crime statistics do not indicate whether a recorded case is petty, and will therefore go to a district court, or whether it is so serious as to require the attention of a high court. This means that using the rates of success achieved across the board may bias any comparison with the Specialised Commercial Crime Court, which, as we have seen, has the status of a regional court.

Police crime statistics

From police crime statistics we know that the incidents of fraud recorded by the police were broadly stable between 61,000 and 63,500 between 1994 and 1998, but that they rose to about 67,000 in 1999 and 2000. In other

words, over the seven years for which we have comparable data, the incidence of fraud rose by about 1,4% a year, with most of that growth concentrated at the end of the period. We also know that the average value of cases reported to the police rose from about R54,700 in 1995 to about R112,500 in the first quarter of 1999.³⁸ In addition, the number of cases outstanding on the 30th of June each year rose from 29,700 in 1996 to 38,400 in 1999, having been about 25,300 on the 31st of December 1995.³⁹

The number of cases that the police have referred to court has been very stable at around 13,000 per year between 1995 and 2000, but this has meant that the proportion of recorded cases referred to court fell from nearly 22% to about 19% in that time. Of recorded fraud cases, about 6,6% resulted in convictions in 1995, with an increased 7,6% resulting in a conviction in 2000. As a proportion of cases taken to court, convictions have risen from about 30% to just over 40% in that time.

Overall, therefore, it appears as if the investigation and prosecution of commercial crime in South Africa has been improving steadily off a low base. As has been pointed out before, however, it is impossible to know whether and to what extent these changes are explained by changes in the nature of the cases that get to court. It is possible, for instance, that the improved rate of conviction for these cases reflects underlying changes in the nature of the reported cases which are eventually prosecuted. More relevantly, from the perspective of this monograph, the overall effectiveness of the police and prosecution service in enforcing these matters may not be a relevant comparison, since most minor and simple cases will go through the district courts. Nevertheless, the comparison is revealing.

In 2001, two magistrates in the Specialised Commercial Crime Court, one having started only in July, handed down judgement in 171 (completed) cases, with 88% resulting in a conviction. Each case was finalised in an average of about two days of actual court time. It is impressive that two magistrates, one operating for only six months, cleared so many cases. It may seem that this statistic is not too different from the nine cases per court per month reported by Schönsteich. However, the fact that the newly-appointed magistrate was still hearing matters that he had begun in the regional court, as well as the fact that these cases are much more complicated than other criminal matters, suggests that this court was, in fact, handling its cases efficiently. This fact is borne out by the high number of hours sat during court days, and the reduced number of unnecessary delays, according to the management of the court.

That said, as will be explained below, there are reasons to believe that, relative to other courts, this court is less under-resourced than are most other courts. Because of the nature of the cases it has to deal with, it has been allocated a large number of prosecutors per court. Inevitably, this means that there is increased throughput.

Another factor accounting for this relatively high level of productivity is that there are often good reasons for persons accused of fraud to plead guilty, particularly where cases are investigated well—largely because of the documentary nature of the evidence that will be brought. This too will tend to increase the speed at which cases are finalised relative to other crimes (which make up the bulk of the workload in other courts). Against this, however, leading evidence in the sentencing procedure is often extremely complex and time-consuming in fraud cases when there is more than one accused person, since it is very hard to determine the precise levels of culpability of each without hearing evidence.

Despite these qualifications, it does seem clear that the specialised court is showing the way in ensuring that cases are finalised more promptly than is the case elsewhere.

Qualitative assessment of the process

It is clear from the summary described above that the management and practice of integrated prosecutions and investigations is much more developed in the procedures of the Commercial Branch and SCCU, than is the case in the work of the rest of the criminal justice system. So close is this integration that it can be understood in two contrasting, but equally plausible ways. On the one hand it seems that the structure and management of these investigations represent the acme of ‘prosecution-led investigations’. This is a methodology highly prized in much of the policy documentation on criminal justice, and presumes a relationship in which the needs of prosecutors dominate and drive the investigation.

On the other hand, however, it is equally plausible to argue that the dedicated prosecutors (and, indeed, the dedicated court) exist primarily to service the needs of the investigators. They are there to give them advice and assistance in the completion of their investigations, ensure that these are completed in a manner consistent with the constitution, and complete applications to the courts on their behalf—even before they prosecute the cases.

One way to choose between these alternative conceptions of the relationship between the prosecutors and detectives working in the Specialised Commercial Crime Court might be based on one's organisational perspective: prosecutors might choose to see the investigators as being led by them, detectives might choose to see the prosecutors as providing a dedicated service exclusively for them. In fact, the choice is a false one because the nature of the business of criminal justice means that prosecutors and investigators are complementary inputs: neither functions without the services of the other.

The prevailing view among the staff of the Commercial Branch and the SCCU is that the relationship is complementary. This is not to say that there is no professional jealousy or conflict over turf and authority, but it does reflect the fact that both prosecutors and investigators are conscious that the successful conclusion of cases requires both their efforts. The real question is why the Commercial Branch and the SCCU feel the need to adopt a joint investigation/prosecution approach when the sequential, production line approach dominates the rest of the system.

One answer to this question is that, both investigation and prosecution are integral parts of the same process, producing the same result—a criminal trial against an offender. It follows that the separation of functions in the rest of the system is perverse, while the work of the Commercial Branch/SCCU is much more rational. Against this view, however, stands the concern that there are good reasons for investigators and prosecutors to work separately, since it is the institutionalised conflict over goals that protects important values in the criminal justice system (see chapter two above). Among the most important reasons for separation is that a prosecutor's independence from the investigation protects her capacity to assess the case objectively when exercising her discretion at all the critical decision-points before and during the trial. These decisions, over which she has exclusive decision-making authority, include:⁴⁰

- the decision to institute proceedings or to refuse to prosecute;
- the decision over what charges to put to the accused;
- the decision to oppose bail or not to do so;
- the decision to accept or reject a guilty plea;
- the decision about what evidence to lead in court;
- the decision whether or not to withdraw charges;
- determining what sentence to request and what evidence to lead; and
- the decision about appealing to higher courts in appropriate circumstances.

Given all these decisions which a prosecutor will be called on to make in the course of a trial, there is a potential cost to her being too close to the investigation and the investigating officer, since this fact may cloud her judgement. More generally, given that the prosecutor's primary function is to assist the court in arriving at a just verdict, the fact that she may also have a stake, even if only an emotional one, in the outcome of the investigation, may cost the system one of its goals—its fairness.

Against this potential cost of this approach, there is the overwhelmingly positive evaluation of the system by the actual prosecutors and investigators involved. Neither believe that this level of cosiness, which they have, after all, been trained to avoid, is likely to develop. In any event, the rotational system in terms of which investigators are assigned to cases militates against this possibility.

Prosecutors and investigators share an apparently universal sense that, working properly, this approach ensures that cases are properly and speedily investigated. It also ensures that the prosecution is much more prepared for trial than is the case in other parts of the criminal justice system where there is greater distinction between the investigation and prosecution functions. In this regard, three key areas of organisational improvement stand out in the evaluation of the system offered by the participants: improved investigations, better prepared prosecutions, and the enhanced expertise of the dedicated magistrates.

Improved investigations

In conducting this research, one of the views most commonly expressed by current and former investigators, senior police officers, private investigators, defence counsel and prosecutors, was that the overall quality of investigations into alleged cases of fraud or commercial crime was of a low and falling standard. This was attributed to many causes, but by far the most important theme was the difficulty that the police service appeared to have in attracting, training and retaining skilled investigators to investigate commercial criminality.

Experienced investigators attributed this problem to the nature of commercial crime and the investigation thereof. This is not, they argued, a form of crime to which every investigator is suited. Its investigation requires patience; the ability and willingness to sit with piles of documents and rows of figures trying to trace transactions; and, above all, a very delicate understanding of the various pieces of legislation that might be used in the prosecution of these

crimes. Finding staff with these characteristics has always been difficult, because the features of a police officer's life that attract people to the profession in the first place, are seldom these.

However, matters have been made even more difficult in the past decade as the restructuring of the police service has led to the perceived decline in the status of the detective services in general, and the specialised units in particular. This decline has been the result of a variety of factors:

- the rise of the doctrine of community policing (which emphasises both crime prevention and, in the case of investigators, local accountability);
- the politically vulnerable position of the detective service and, in particular, the specialised units, which were perceived to have a problematic history; and
- the organisation's training emphasis on general skills rather than specialisation.⁴¹

The perceived drop in the status of the Commercial Branch has made attracting new recruits more difficult. Moreover, the haemorrhaging of experienced investigators to the banks, insurance companies and forensic accounting firms has weakened the capacity to investigate in the here and now, as well as the ability of the branch to reproduce the skills needed in younger generations of investigators.

This perceived decline in skills and the real decline in personnel numbers has meant that the Commercial Branch has become less effective. At the same time, however, detectives believe that the incidence of commercial crime has risen while simultaneously becoming more difficult to solve. Given the difficulties arising from the under-reporting of crime and the inherent difficulties of attempting to compare the complexity of the various incidents of commercial crime between cases and across time, it is extremely difficult to assess whether this last opinion is borne out by the facts. At the same time, however, detectives, prosecutors and private commercial crime investigators point to a number of factors that might serve to reinforce such an argument. These include:

- One of the most documented features of South Africa's reintegration into the world has been the interest that it has attracted from international criminal organisations. Many of these organisations—particularly those originating in West Africa, Eastern Europe and Pakistan—appear to specialise in various forms of fraud. To the extent that this is the case, they

may have driven up the incidence of these crimes and, because of the organised and skilled character of these crimes, may have made them, on average, more difficult to solve.

- The advent of electronic communications has created a whole new range of methods by which frauds may be committed against both individuals and organisations. These methodologies have also exposed gaps in standard criminal procedure, police powers, investigative techniques and rules of evidence alike, making it more difficult to investigate and prosecute these crimes.⁴²
- South Africa's increased integration into global banking and trading relationships has also resulted in an increase in the number of commercial crimes with a cross-border element. Obviously this complicates investigation and prosecution.
- Just about everyone involved in the prevention, investigation or prosecution of commercial crime felt that standards of honesty in South Africa had fallen over the past decade and that, as a result, the propensity to take advantage of opportunities to commit fraud had increased. This, most felt, was linked to the transition to democracy and was one of the effects of the contesting cultures of entitlement which have emerged in the course of that process, and was also manifest in a 'general culture of lawlessness', as one person put it. This process was thought to be reinforced by the perceived weakness of the criminal justice system and the consequent belief that offenders would get away with their crimes—a factor which was also raised by many of the respondents in the KPMG survey referred to earlier.

Thus, although there can be no absolute endorsement of the proposition that there is more commercial crime committed today than there was in the past, and that such crimes are more subtle and complex, there are plausible arguments that suggest that it may well be the case. It seems, therefore, that, together with the declining numbers of detectives, and dropping skills and experience levels, there is a likelihood that workloads have increased both in terms of quantity and complexity. Moreover, at precisely the same time as skill levels were falling in the Commercial Branch, the prosecution service has also had to confront an exodus of skills and experience, as documented by Schönreich.⁴³

Given these trends, one of the most profound contributions of the integration of the work of the investigator and prosecutor has been the pooling of skills

and experience, with each able to assist the other in conceptualising and executing the steps required to convince a court to convict the suspect. In the case of the SCCU and Pretoria's Commercial Branch, this process is augmented by BAC's provision of additional expertise—in the form of former investigators contracted to assist investigators, and private counsel contracted to assist prosecutions.

Case study: Justice delayed?

The fact that integration appears to improve the quality of investigations does not necessarily mean that it overcomes all the obstacles—the lack of personnel, logistical difficulties in obtaining evidence, etc.—that give rise to delays in completing these dockets. Consider the amount of time budgeted for the investigation of an apparently trivial crime.

Late in April 2002, a complainant opened a docket at a police station in Pretoria alleging that a competitor had fraudulently misused the complainant's closed corporation (CK) number on a tender to the Department of Environmental Affairs and Tourism (DEAT). As a result of that department's policy of sharing low value work between different service providers, the misuse of the CK number resulted in the complainant not receiving his fair share of work, allegedly losing a job worth R7,500. A fraud docket, with an alternative charge of violating section 22 of the Closed Corporation Act, was opened.

Over the course of the first half of May, the docket wound its way through the bureaucracy of the police service and eventually emerged on the desk of Inspector M at the Commercial Branch. Inspector M filled in a draft case investigation and prosecution plan, which he submitted to a prosecutor in the SCCU. She evaluated the plan and, around the middle of June, she and the inspector finalised a plan for the accumulation of all essential evidence, and set time frames for its collection. This was done under the watchful eye of a retired investigator who, at the expense of Business Against Crime, is attached to the Commercial Branch in order to mentor investigators and to help guide them through their cases.

In order to plan the matter, the investigating officer and the prosecutor set out the basic elements of the crimes which are alleged to have been committed, each of which has to be proven in court before a magistrate can convict. At the time of the meeting, the only evidence available was the complainant's complaint itself.

After considering the potential charges—fraud and the misuse of the name of a cc—it was decided to concentrate efforts on the fraud charge, since the latter offence carried a maximum sentence of a fine of only R500.

The key elements of fraud which the inspector and prosecutor needed to prove were (i) that the accused made a misrepresentation (ii) to a person, and (iii) that that misrepresentation resulted in either actual or potential prejudice to someone.

In order to establish that the suspect made a misrepresentation, it was deemed essential that the officer establish that an official form signed by the suspect contained information that was untrue, and that that information was provided to DEAT. This required obtaining certified copies of the original documentation furnished by the suspect, as well as a sworn statement from the appropriate official at DEAT (who had to be found by the detective). The statement would have to pronounce that the suspect provided the information on the form, and that the form was a true reflection of the information received. It was estimated that it would take about three weeks to complete this task, assuming that the appropriate people at DEAT were not on leave.

Then, in order to show that the information furnished by the suspect to DEAT was untrue, the detective would have to obtain a sworn statement from the Registrar of Closed Corporations. This would have to state that (a) a cc exists with the number used by the suspect, but that (b) the suspect is not a member of that cc. The detective would also have to provide evidence that the CK number of the complainant's cc was not duplicated and was not being used by another. Finally, he would also have to attest that the suspect was not a member of a cc with a CK number very close to that of the complainant's. The detective estimated that, given his commitments to other investigations and to a case that was currently before the court, it would take eight days to complete the request to the Registrar. Based on previous experience with the Registrar, and because documentation is kept off-site, the investigator estimated it would take at least a month to get the information.

In terms of showing that there was actual or potential prejudice caused to the complainant or to any other party, the investigating officer and the prosecutor came up with two potential sources of prejudice:

- The complainant might have missed out on some work from DEAT already, or may do so in the future because DEAT's database would reflect his having recently received work.

- The South African Revenue Service may have lost out on potential tax receipts if DEAT taxed the service provider as a cc when he should have been taxed as an ordinary individual. In order to do this, DEAT would have to supply information on the manner in which the work done was taxed. This might also lead to a charge of tax fraud.

In either case, appropriate evidence would have to be obtained from the complainant, DEAT or, if possible, the SARS. The former investigator, however, suggested that SARS was not likely to provide the sort of statement that they would need unless there was clear evidence that the suspect had evaded paying his taxes.

The meeting felt that it was extremely unlikely that this would have been the first offence committed by the suspect if the allegations were proved to be true. It is, after all, extremely unlikely that he would have been caught at the first attempt. The odds were that he had committed the crime previously and it was important, therefore, to pursue an investigation into any similar crime committed previously. To this end, the mentor proposed that the detective obtain a subpoena from a magistrate instructing the suspect's bank to make available details of transactions from the suspect's account. These would hopefully lead to previous transactions which, if investigated, would prove to have taken place on the basis of false CK numbers. In order to identify the appropriate bank, the returned cheque would have to be obtained from DEAT.

At this point a possible hitch was identified: the suspect lived in Johannesburg, which could mean that his bank would also be located in Johannesburg. This, in turn, would have meant that a magistrate in Johannesburg would have to issue the subpoena, necessitating the detective's travelling to Johannesburg to request the subpoena and, once it was issued, to serve it on the suspect's bank. A provisional court date would also have to be booked in case the bank failed to comply with the subpoena. It was estimated that obtaining, serving and getting the bank to comply with the subpoena would take ten to twelve weeks. Thereafter, the detective and the prosecutor would review the bank statement to assess the likelihood of pursuing further inquiries into other transactions.

After compiling all the evidence, the detective would obtain a statement from the suspect in which he would be afforded the opportunity to offer his side of the story.

All things being equal, and because the detective was going to be involved in a separate case for the whole of September, the prosecutor and detective agreed to meet to review progress on the case in early October, with a view to serving a summons on the suspect for a first appearance in court in the middle or end of October—roughly six months after the complainant first laid the apparently trivial charge.

Prepared prosecutors

The augmentation of skills in the investigative process is, of course, crucial. However, there is an even more important effect of the integration of the work of investigator and prosecutor. In the nature of things, a prosecutor who has participated in an investigation and who knows the ins and outs of a case before it comes to court, is going to be much more prepared for trial than one who has not had that privilege. Moreover, given the fact that the prosecutors of the SCCU specialise in the prosecution of commercial crimes and fraud, those that have prosecuted these matters for some time are much more attuned to the evidentiary needs of these cases. They also have a much more developed grasp of the intricacies of both the *modus operandi* of offenders and the laws against which they offend. This advantage is manifested in a number of areas:

- Some cases arrive at court following the arrest of a suspected fraudster, but prior to the completion of an investigation. This occurs, for instance, in cases in which a credit card fraud is perpetrated and the suspect is arrested immediately, or in cases where a suspect is arrested at her work when her colleagues are convinced that she has defrauded her employer. In these cases, the arrestee is entitled to bail within 48 hours, although magistrates will usually allow an additional seven days to complete the initial investigation. Generally, however, even nine days is insufficient to establish definitively whether she constitutes a flight risk, and the prosecutor is then obliged to decide whether or not to oppose bail. The fact that she is familiar with the nature of fraud will mean that she is in a better position to oppose bail than she might otherwise have been. In this regard, the views of the investigator who made the arrest described in the textbox in the previous chapter are worth recording. He insisted that in any other court the arrestee would not have been denied bail, for the simple reason that the prosecutor would not have understood, and would not have been able to convey effectively to the

magistrate that the accused, although arrested for a R850 fraud, was a suspect in fraudulent transactions totalling R95,000. So convinced was he of this, that something he considered while following the fraudster, was whether he would be able to arrest her in the jurisdiction of the Pretoria Magistrate's Court.

- In cases in which the investigation is completed before the trial, the prosecutor's obvious preparation means that guilty accused persons are more likely to plead guilty. More to the point, defence counsel, knowing that the prosecutors at the SCCU tend to be that much more prepared, may be more willing to advise their clients to plead guilty. They hope that this can be used to persuade the prosecutor to ask the court for a less punitive sentence. Indeed, although the SCCU does not keep official figures in this regard, it does appear that the number of cases closed with a guilty plea in this court is higher than the average elsewhere. As one defence attorney told me, "I advise my clients that they have a choice: try to persuade the court that you are innocent, or try to stay out of jail. Usually I tell them that they should plead guilty and hope for a lighter sentence." This comment also reflects the fact that a competently completed fraud investigation is more likely to throw up unambiguously incriminating documentary evidence than is the case for investigations into other types of crime.
- There appears to be general agreement that, as plea bargaining practices develop—a process some see as the legitimisation of a approach that has always been used illicitly—the SCCU prosecutors will be well-placed. Their intense preparation will put them in a much more advantageous position in these negotiations than their colleagues who have not participated in the investigation. This will both speed up these proceedings, as well as ensure that the sentences handed down on the basis of these bargains will be that much more severe than they would otherwise be.
- In addition to these more-or-less expected benefits derived from the integration of the investigative and prosecutorial processes, defence counsel interviewed suggested that one of the unintended benefits of the tighter integration is that the administration of justice in the Specialised Commercial Crime Court appears not to have been corrupted. Comparing the integrity of the process to processes they have seen at other courts in Pretoria, counsel suggested that the fact that the prosecutor and investigator worked so intimately on cases made it more difficult to corrupt the investigation.

Dedicated magistrates

The advantages described above in relation to the developing expertise of the prosecutors attached to this court are also applicable to magistrates.

- Magistrates at the Specialised Commercial Crime Court have also become familiar with the ins and outs of commercial crimes and the character and significance of the evidence that is produced in court. For this reason court cases are heard more efficiently. Indeed, one defence attorney complained that on one occasion there appeared to be the possibility that his client might profit from a mistake made by the prosecution. However, the magistrate, on the point of breaking the rule of never 'descending into the arena', helped the prosecution get its case back on track.
- One of the reasons police officers enjoy working with the prosecutors appears to be the input that they can then make into deliberations regarding what sentence to propose to the court in the case of a conviction, and whether or not to request a custodial sentence. There is also a feeling among investigators that the combination of dedicated prosecutors and magistrates means that sentences in the Specialised Commercial Crime Court tend to be more severe than in other courts. They point out that criminal matters heard at both the ordinary regional courts and (particularly) the high courts tend to be dominated by violent crimes. In this context, some magistrates and judges appear to become more lenient towards people convicted of non-violent crimes, simply because they seem less serious. This, they say, is not the case in this court, with the magistrates having a reputation for being quite severe.

Advantages specific to the SCCU in its current format

As the above list of gains made by the integrated nature of the investigation and prosecution of commercial crimes in Pretoria testifies, there are important benefits attached to proceeding in this way. At the same time, however, it is important to recognise that there is also a range of factors which, while adding to the success of the current model, may prove to be unsustainable, and perhaps not fully replicable. It is important to acknowledge these factors before endorsing the model as an unqualified success. They include the quality and quantity of its personnel, the assistance it has received from outside the criminal justice system and the 'co-location' of the prosecutors and investigators dedicated to the pursuit of fraudsters and commercial criminals.

Quality and quantity of personnel

The most obvious organisational advantage of the SCCU rests in the quality and quantity of its personnel. The prosecution staff of the SCCU consists almost exclusively of state advocates and senior state advocates. This means that they are more qualified, and, more importantly, more experienced than many of their peers, making their contribution to the investigation of cases that much more significant than might be the case if less experienced or skilled prosecutors were involved in the system. In addition, when it comes to trials, the fact that the prosecution in the Specialised Commercial Crime Court is somewhat more sophisticated than is the case in most other regional courts indicates a good success rate. At every stage from start to finish, the contribution made by prosecutors weighs more heavily, and is more likely to result in conviction and the imposition of a serious penalty. Moreover, as a result of their rank, they are also better paid, and, therefore less likely to be tempted to leave the Prosecution Authority.

A second issue related to the human resource complement of the SCCU is the fact that there are adequate numbers of prosecutors in the unit, which means that there is far more time available to prosecutors to prepare cases. Of course this is not only a result of the unit's personnel strength—its organisation and management are also key. Whatever the reason, however, many prosecutors insist that this is one of the primary reasons why they enjoy working for the SCCU: they are simply not under the same impossible pressures to prepare and present cases simultaneously as are their colleagues in other courts. Obviously this directly improves their presentation of cases, but it also improves case preparation, because staff morale is not negatively affected by impossible workload pressure. Indeed, one prosecutor told me that the reason she had applied to join the SCCU in the first place was that work pressures at the regional courts were simply too onerous. This may mean that it is somewhat easier for the SCCU to fill vacancies when they arise, allowing it a greater pool of talent from which to draw new recruits.

While it would be inappropriate to argue that the nature of the cases and the urgency attached to dealing effectively with commercial crime does not necessitate the deployment of these skills, it does appear that the advantages conferred for this reason makes it difficult to compare the independent impact of the integrated investigation and prosecution of cases.

Private sector support

A second reason to believe that the SCCU model is successful at least in part because of factors not directly related to the nature of the model itself, is that there has been some private sector assistance to the unit in its establishment.

There are clearly elements of this involvement which are replicable—the management procedures and the workflow monitoring systems used in the SCCU, developed with the assistance of BAC, can be copied relatively free of cost, and might be implemented if appropriate staff are available. However, the provision of additional human resources may not be copied so easily. Thus, the staff assisting the SCCU and Commercial Branch in Pretoria with the management and administration of the process, as well as with the actual investigation and prosecution of cases may not be available to other courts if they were to implement integrated investigation and prosecution procedures. This may mean that the implementation of these procedures in those courts will not achieve the same kind of results.

The absence of the involvement of outsiders in the establishment and operation of the integrated investigation and prosecution functions may also have a more subtle effect: the loss of the ‘honest broker’ in assessing and settling the inevitable disputes that occur when two organisations with different staff, different cultures and, most importantly, different lines of organisational accountability attempt to work together.

In this regard, one of the under-appreciated roles that outsider involvement can play in the establishment of integrated projects and processes such as these, is to act as a sounding-board and advisor in disputes over the appropriate way to handle issues which can or do become sources of inter-organisational tension. These issues may originate within the individual organisations—as may be the case if a detective feels poorly treated by a prosecutor or if a prosecutor feels a detective is not pulling her weight—or from outside their immediate environment. Consider, for instance, the difficulties that may arise if the mandate of the Commercial Branch changes (a process driven by SAPS head office, not the Pretoria Commercial Branch) in ways that are incompatible with the expectations and understanding of the role of the SCCU. It is quite plausible that such changes could destabilise working relationships for any number of reasons and, in such circumstances, having access to organisationally neutral ‘advisors’ familiar with the nature of the work could make the difference between serious problems and more manageable problems.

It should be noted immediately that it is, of course, also possible for outsiders to sharpen existing tensions or to create new ones if they play their role inappropriately, or if they act in a way that undermines the credibility and professionalism of the central figures in the process. This has, in fact, been a problem in some organisational re-engineering initiatives in the criminal justice system when the recipients of assistance began to resent the involvement of outsiders who were thought to be insensitive to the organisation's needs, or ill-informed about the process of overcoming obstacles. Suffice it to say that there appear to be no magical remedies, and that each process comes with risks associated with the nature of the project and the personalities of the role-players involved.

It is, of course, important not to overstate the case that outside assistance explains the success of the Specialised Commercial Crime Court. At best, such assistance is merely facilitative. It is the allocation of resources to the project by the public agencies, together with the hard work and dedication of public servants that make up the core inputs of the court. Any suggestion that without the input of outsiders this project would not have worked ought to be dismissed. At the same time it is probably true that the speed with which the institution was up and running has something to do with the facilitative and supportive role of BAC.

Co-location of investigators and prosecutors

Another reason for thinking that replicating this approach may be difficult, is more prosaic: the fact that the investigators and prosecutors involved in these cases can all be housed in the same building means that working together is a good deal easier than would otherwise be the case. And, while the roll out of this model to Johannesburg has been advanced by the provision—at minimal cost—of a building able to house investigators and prosecutors, this may not be possible everywhere.

Managing workplace tensions between police and prosecutors

In previous chapters a court was characterised as an informal workgroup bringing together police, prosecutor, defence and magistrate to process cases. This characterisation is helpful to the extent that it undermines a more hierarchical and unitary conception of the nature of the court as an institution. However, it can also be misleading if the informal workgroup—conflict-ridden as it may be—is understood as being composed of people with more-or-less similar organisational and professional outlooks. Thus, if we understand the notion of an infor-

mal workgroup to mean that it is a group of like-minded people getting together to complete a task, we will be overlooking some of the key organisational problems which have bedevilled reform and integration projects in criminal justice systems throughout the world. In numerous cases, the sheer difficulty in getting inter-organisational co-operation has undermined the efforts of the managers and policy-makers who proposed and led these initiatives.⁴⁴

To take one example: Widlake recounts the apparently unsuccessful workings of England's Serious Fraud Office, an institution with a mandate similar to that of the Scorpions, and using both police officers and prosecutors who retain a degree of organisational independence. Widlake describes as "delicate" the relationship between police officers and prosecutors working together on cases, and argues that the clash of organisational cultures is part of the reason why the SFO has had a series of high profile failed investigations/prosecutions.⁴⁵ This failure is made more glaring by the fact that, as an institution, the SFO has been granted some draconian police powers in order to perform its functions.

That there is a marked difference in the organisational cultures of the police and the Prosecution Authority is not surprising, even though they are jointly responsible for ensuring that wrongdoers are convicted in open court. These differences can be partially explained by the recruitment pools from which staff are drawn, with the prosecutors being law graduates and the police being, in general, somewhat less academically inclined. These differences are accentuated by the rather more militaristic organisational culture of the police service relative to that of the Prosecution Authority, and the widely different work experiences of the staff in the two organisations. In addition, in the nature of things, prosecutors are readily employable in a variety of roles in the private sector, making it more difficult to retain them and giving them greater perceived freedom than their colleagues in the police.

The fact that the staff of these two organisations manage to work successfully together in the Special Commercial Crime Court should not be seen as a given. It has taken, and continues to require, conscious effort to make it so. This success of the model cannot be taken for granted.

Possible problems associated with integrated investigations and prosecutions

Although there are clearly many reasons why integrating the work of investigators and prosecutors is desirable, there are potential problems and risks

associated with this. Indeed, the first criticism has already been described above: one of the effects of integrating prosecution functions into the investigation of crime is that it may tend to reduce the independence of the prosecutor in the exercise of her discretion as the investigation unfolds, and when it comes to court. In this regard, however, it should be pointed out that neither prosecutors nor investigators at the Commercial Branch and SCCU believed that there had been any compromising of prosecutorial independence. On the contrary, many insisted that they thought that prosecutors were better able to exercise their discretion, having had much more insight into the docket than would otherwise have been the case. In any event, as members consistently insisted, a prosecutor's training is intended to help her overcome any subjectivity in the exercise of her discretion.

That said, it is hard to believe that there will not be cases where the relative closeness of the prosecutor to the investigator will not cloud her judgement. It is doubtful, however, whether the risks and consequences of this are significant enough to warrant any public policy concern. It is unlikely that the potential negative consequences, were they ever to be actualised, would make so material a difference to the outcome of a case or the nature of a sentence imposed, as to bear worrying about. The one possible exception to this may arise if a prosecutor against her better judgement chooses to oppose bail at the request of the investigator and, as a consequence, the accused person spends an unjustifiable amount of time behind bars.

A more compelling argument against this sort of co-operative work between prosecutor and investigator, however, is analogous to the general argument against creating specialist units in the SAPS: they are *ad hoc* responses to structural problems and, therefore, amount to little more than papering over of cracks.

The essence of the argument against over-specialisation in the police is that when specialist units are set up, it is generally because the normal, station-based detective units are unable to deal with the particular problem. Naturally, there are many cases where the nature of the work means that geographically bound detectives will not be able to deal with a particular crime problem. One thinks, for instance, of serious organised crime. Similarly, there may be cases where very scarce skills are required, and housing these in a specialised unit and making them available to the police service throughout the country is organisationally and economically efficient. One example of this may be the setting up of a team of investigators to investigate serious computer crimes.

However, there are also occasions when specialised units are set up purely because of a lack of capacity at station level. When this is the case, so the argument goes, setting up a specialised unit can over time worsen the underlying problem by removing accountability for dealing with the problem from the station. More importantly, this creates an organisational reason not to deal with the real, underlying problem—the lack of capacity at station level.⁴⁶

Similarly, even though the SCCU, with the establishment of its integrated methodology, assists in resolving commercial crimes cases in the short-term, it may be argued that it will simply disguise the real problem, namely the lack of personnel and skills in the Commercial Branch and prosecution service. Indeed, as a number of people interviewed acknowledged, the integrated working arrangements may not have been necessary, or would have a less pronounced effect, if the police and prosecutors could fulfil their own functions successfully independent of each other.

The Specialised Commercial Crime Court and the scales of justice

Thus far this monograph has looked at the way that detectives and prosecutors working together and preparing cases for the Specialised Commercial Crime Court have impacted on the efficiency and effectiveness of law enforcement efforts to combat commercial crime and fraud. On the whole, it has been found that these innovations have raised levels of efficiency and effectiveness. However, some of the reasons why this is so may not be entirely replicable, and may reflect the fact that the SCCU is somewhat better staffed than many other units in the prosecution service.

In an earlier chapter it was pointed out that this is not the only basis upon which one ought to evaluate the impact of court and criminal justice innovations. Instead, one ought also to look at the extent to which such innovations may impact on the fairness of the criminal investigation and trial. So, before concluding this chapter, it is necessary to consider the possible effects that the existence of this court and the unique character of the working relationship of investigator and prosecutor may have in this regard.

Before looking at any concerns in relation to the integrity and fairness of the process, one should note that, on the whole, it is likely that the overall impact of having prosecutors work closely with investigators will raise the level of compliance with due process requirements, rather than lower them. Having

a greater insight into the process of investigation, and knowing that the consequence of relying on ill-gotten evidence is the failure of one's case, a conscientious prosecutor ought to be able to guide the investigator away from investigative techniques that may infringe on the rights of the suspect. Thus, on the whole, one would expect that greater integration of work would increase compliance rather than weaken it—not least because the prosecutor will be more directly accountable for any failures to comply with the requirements of the law.

In addition, to the extent that the integration of efforts reduces the case cycle time, the fact that cases are completed more quickly means that the accused, particularly the innocent accused person, benefits from integration.

At the same time, however, and as we have already noted, there is a small risk that the inter-weaving of investigative and prosecutorial functions may undermine the prosecutor's objectivity when she is required to exercise her discretion in the course of a trial. This, as we have said, appears to be a small risk with reasonably insignificant consequences. A more pressing problem, however, may occur if a prosecutor and investigator 'conspire' to infringe the rights of the suspect or accused person. This is not a risk that ought to be treated lightly—witness Judge Davis's comments when he found that some of the staff of the Directorate of Public Prosecutions in Cape Town had used underhanded methods to extract evidence from the media in the Pagad trials. But there is no evidence that this kind of infringement of proper prosecutorial practice has, in fact, occurred in this court.

Another potential area of concern relates to the assertion that is sometimes made that when organised business is involved in the delivery or reform of a public service, it must mean that it is somehow distorting the delivery of that service to its own benefit. It must be stated that no person interviewed in the course of this research suggested that this might be the case. However, some crime prevention and law enforcement initiatives—such as the gating of communities and the rent-a-cop initiative in Cape Town—have occasionally met with some criticism that they have the effect of skewing the distribution of resources in the criminal justice system and reducing equal access.

It is not implausible that a similar criticism might be voiced in relation to the Specialised Commercial Crime Court, the SCCU and the work of the Commercial Branch. Such an argument might go as follows: business has a particular interest in combating commercial crime because it affects its bottom line. It has, therefore, concentrated some of its resources and efforts on

the way that the state deals with commercial criminality. In doing so, not only has it focused on its own needs, rather than the law enforcement priorities of government, but it has managed to divert resources away from issues that affect the ordinary person in the street. A more cynical observer might add that, by involving itself so directly in the functioning of the investigation and prosecution of certain crimes—even going so far as to provide additional resources—business has put itself in a position to dictate which crimes are investigated and prosecuted in Pretoria, or (more disturbingly) not.

It is worth re-emphasising that there is no evidence that anyone has actually made this argument in relation to the Specialised Commercial Crime Court. Nevertheless, given the somewhat populist tone which often accompanies debate on the proper role of organised business in public policy, it is not too far-fetched to imagine that there might be those who would make this argument. However, that does not by any means imply that it would hold water. Indeed, the argument itself is weakened by its assumption that combating commercial crime successfully benefits only business, rather than the economy as a whole.

More to the point: although one can argue that the SCCU is less under-resourced than are many other courts, it is by no means clear that this reflects anything other than the complexity of the cases which are dealt with by the unit. In any event, the fact that the state has chosen to provide resources to combating commercial crime in the way it has, suggests that it too regards this crime as a public policy priority. Furthermore, all parties insist that there have been no occasions on which anyone from outside the criminal justice system has sought to influence a decision about whether or how to investigate/prosecute a suspect. Indeed, the structure and decision-making process of the fund from which the consultants are paid to assist the Commercial Branch and SCCU is such that no donor can direct funds to any particular matter. It is true, of course, that these funds are used to supplement public resources devoted to combating commercial crime, but it does not appear that these resources have been used to target or undermine any particular investigation.

Conclusion

This chapter has reviewed the impact of the Specialised Commercial Crime Court and the integration of the investigation and prosecution functions in cases that come before it. On the whole it has concluded that its functioning manifests many of the potential benefits associated with the specialisation

and/or dedication of courts to particular crime problems. Thus, the court handles a large number of complicated matters with a relatively high degree of efficiency. Moreover, there does not appear to have been any compromise in the quality and fairness of trials.

That said, it has been acknowledged that at least part of the success of the experiment is accounted for by the fact that, compared to other courts, this court appears to have a relatively large number of skilled prosecutors. However, the effect of the integration of investigation and prosecution and the introduction of new management systems cannot be satisfactorily disaggregated, so it is impossible to say precisely what accounts for the efficiency and effectiveness of the court and the investigation and prosecution of cases.

It has also concluded that many of the risks associated with court specialisation or dedication identified in the previous chapter appear not to have had a material effect on the outcomes of the processes which make up this innovation in the administration of justice. In particular, the problems associated with court specialisation—the difficulties of rules of precedence and the policing of the boundaries of the court's jurisdiction—have simply not arisen, because this court has the status of a normal regional court. We did however identify some risks arising from the potential cosiness of the relationships between the various role-players in the court, but none of the people interviewed suggested that such problems had ever occurred.

CHAPTER 6

CONCLUSION

The initial intention of this monograph was to describe and explain the way the Specialised Commercial Crime Court works and what impact this methodology has on the productivity and effectiveness of the court. A second objective was to use the court as a prism through which to view the policy questions arising from the establishment of specialised courts in general. As will now be clear, however, this latter objective was only partially achieved, as the crucial innovation explaining the methodology and performance of the Specialised Commercial Crime Court does not lie in the court itself, but in the way that the investigators of Pretoria's Commercial Branch and the prosecutors of the Specialised Commercial Crime Unit (SCCU) work together in bringing cases to court.

Some time has been spent examining how the integration of investigation and prosecution works and the pros and cons thereof. It has been argued that, in general, the potential risks associated with the integration of this work have not resulted in material compromises to the goals and principles of criminal justice policy and practice in a democracy. These risks include the loss of prosecutorial independence, undesirable cosiness between actors with distinct tasks, and the potential introduction of bias into decision-making processes that demand independence and objectivity. At the same time, this integrated approach to the management of cases has clearly enhanced the quality of both investigation and prosecution, leading to improved turn-around times and higher conviction rates.

The court, and its unique investigative and prosecutorial processes, can therefore be regarded as a marked success. However, the fact that the portfolio of cases coming to trial in this court is quite different from that of any other court makes it impossible to rigorously compare data on productivity and effectiveness.

It has also been suggested that a full account of the reasons for the success of this innovation must include the fact that this project has had some outside support. Moreover, the prosecution team servicing this court appears to be somewhat less under-resourced and more highly qualified than is the case in other regional courts.

These two issues mean that it is not possible to be entirely confident that the integration of investigation and prosecution in other courts will result in the same improvement in productivity as is evident in this court. It does suggest, however, that a combination of improved working methods and increased resources may well improve the productivity and effectiveness of courts elsewhere in the criminal justice system.

In relation to the broader question of court specialisation it has been argued that there are likely to be both positive and negative consequences associated with setting up institutions reserved for hearing only a limited range of cases. Among the benefits are increased efficiency, the rapid development of the law, and the ability to concentrate people with appropriate skills at those points in the system where society is most likely to reap the rewards of using their particular speciality. The potential difficulties include the awkward problems associated with clearly identifying the remit of the court to ensure that its jurisdiction and the rules of precedence were properly defined; the potential for the eccentric development of the law; and excessive cosiness, potentially opening the door to corrupt practices.

In reviewing the contrast between what we called court specialisation and court dedication, it was argued that dedication, while conveying many of the benefits of specialisation, does so without creating some of the organisational and legal difficulties that arise when courts are established outside of the normal court structure. It is submitted, however, that there are risks associated even with court dedication, and that these need to be borne in mind when members of the criminal justice system propose these measures.

What emerges from this review of the issues, however, is not a recipe for the establishment of specialised courts, or the reservation of court resources for the creation of dedicated courts. Rather, it is suggested that this is a process which needs to weigh up the various trade-offs associated with improving efficiency in ways which may compromise some of the other goals of criminal justice—the integrity of the process and the fairness of the result. For this reason, this monograph does not close with the traditional list of recommendations. Rather, it closes with the hope that the issues raised here will be helpful to persons involved in criminal justice policy development, and that it will go some way in assisting them to think through some of the challenges raised.

NOTES

- 1 Here we have said “almost any other part of the criminal justice system” because, for obvious reasons the integration of investigation and prosecution in many of the offices of the Directorate of Special Operations is more complete because both investigator and prosecutor work for the same unit.
- 2 BAC is currently assisting with the roll-out of a replica of this court and its systems in Johannesburg and has secured corporate sponsorship (mainly from Nedcor and The Banking Council) to assist with the setting up of the required infrastructure.
- 3 Thurman Arnold quoted in GF Cole, Performance measures for the trial courts, prosecution and public defence, in *Performance Measures for the Criminal Justice System*, Bureau of Justice Statistics, Princeton University Study Group on Criminal Justice Performance Measures, NCJ-143505,1993, p 87.
- 4 In this regard, the argument of D Gambetta, *The Sicilian Mafia: The business of private protection*, Harvard University Press, Cambridge, 1996 reflects the long-term consequences of a failure to provide a legitimate and effective impartial system of courts. He argues that the origin of the mafia in Sicily can be traced to the failure of the Italian state, unified in 1860, to extend such a system to Sicily. This created a market opportunity for the privatised enforcement of contracts—protection—which is, he insists, the essence of mafia activity. The fact that the mafia remains an organised crime problem in Italy and, until recently at least, dominated organised crime elsewhere in the world reflects the impact the failure to provide courts in rural Sicily had on world crime problems!
- 5 South African Law Commission, Discussion Paper 96: The Simplification of Criminal Procedure, 2001, p 7.
- 6 This ‘adversarial’ system—based on the English legal system—is often contrasted to systems in continental Europe which are more ‘inquisitorial’. Here the magistrate controls the pre-trial phases of cases—the investigation and gathering of evidence. At trial the magistrate calls witnesses and leads the questioning of them. Clearly, this system places much more faith in the capacity of the magistrate (and, therefore, the state) to conduct investigations professionally and to protect the interests and rights of suspects and accused persons. Nonetheless, the South Africa Law Commission is investigating ways in which South African trial courts could be made more efficient through the adoption of measures originating in more inquisitorial

systems. Such measures include giving the presiding officer a greater role in case management, providing her with access to the police docket, and requiring the defence to disclose the basis of its case prior to the start of the trial.

- 7 M Feeley, Two models of the criminal justice system: an organisational perspective, in S Stojkovic, J Klofas and M Kalinich, *The Administration and Management of Criminal Justice Organisations: A Book of Readings*, Waveland Press, Prospect Heights, 1999.
- 8 This is not to say, of course, that all accused persons and their counsel always and everywhere share an interest in the *speedy* finalisation of cases. On the contrary, it is often in the defendant's interests to delay the completion of cases for as long of possible in the hope that with the passage of time the quality of the prosecution's case will deteriorate. Similarly, a cynic might point out that, on some level, defence counsel have a financial interest in longer cases rather than shorter ones. Defence counsel interviewed in the course of this research, however, suggested that only foolish attorneys (or ones who could not fill their diaries with new cases) would adopt delaying tactic merely to beef up their billable hours because such an approach would soon become obvious to the prosecution who would then be much less inclined to assist that attorney (and her clients) in subsequent cases.
- 9 Characterising a court in this fashion has important practical and policy implications, not the least of which is that changes to workflow, organisational structure and/or organisational rules in courts need to be considered not merely in relation to the effect they will have on the actors to which they apply, but also on the rest of the 'group'. It is quite conceivable, therefore, that some changes aimed at improving efficiency may fail to do so either because of their impact on the behaviour of other role-players or because, informally, the group has already devised solutions to the problems which such changes purport to deal with. This partly explains the argument that there is good reason to doubt that many organisational and policy reforms aimed at increasing the efficiency of courts fail—they simply cannot negotiate the complexities of the formal and informal work rules governing the practical exercise of administering justice. For more on this see E Doleschal, The dangers of criminal justice reform, in Stojkovic, et al, op cit.
- 10 EJ Clynych and DW Neubauer, Trial courts as organisations: A critique and synthesis, in Stojkovic, et al, op cit, p 71.
- 11 The United States Department of Justice has set out a series of 22 performance standards divided into five distinct performance areas comprising for the team of autonomous and semi-autonomous actors that constitute the court:
 - *access to justice* standards relate to the accessibility of the machinery of courts to the people they serve;
 - *expedition and timeliness* relates to the completion of cases and the performance of all other court functions;
 - *equality, fairness and integrity* standards relate to the extent to which the courts uphold due process rights, provide case-specific, individualised justice, treat

- actors consistently and fairly, and ensure that their actions are consistent with established law;
- *independence and accountability* performance measures look at the extent to which the courts retain their independence from the other branches of government; and
 - *public trust and confidence* standards relate to public perception of the court.

The 22 performance standards linked to these five performance areas seek to refine further these performance areas, with a total of 68 distinct quantifiable performance measures developed on the basis of these standards. Perhaps the elements most obvious by their absence from the above list are any mention of the role of the court—understood as the informal workgroup of presiding officer, prosecutor, investigator and defence team—in the prevention of crime and the enforcement of the law. Thus there is no mention of conviction numbers or rates, or anything vaguely related to the nature of sentences imposed. These standards do, however, set out a clear and realistic set of criteria against which the performance of courts, as well as the impact of innovations in the management or institutional character of courts, can be measured.

Given the federal nature of America's structure of government, the Departments of Justice cannot impose these measures on courts, nor are local or state courts accountable to the department for their performance. In the US, therefore, the documents setting out these measures are merely advisory, offered in the hope that courts will use them to monitor and, therefore, improve their performance.

These performance areas, standards and measures are, for the most part, also reflected in the policy goals of South Africa's Department of Justice and Constitutional Development as reflected in the Department of Justice's Justice Vision 2000. However, that document's purpose is not confined to setting out a set of performance areas for South Africa's courts, dealing, as it does, with a much wider range of responsibilities which the Department has. It does not, therefore, set out its assessment of the key objectives, goals and performance areas for courts in a manner similar to that of the Bureau of Justice Assistance, which, for our present purposes, is more helpful. See the Bureau of Justice Statistics, *Trial Court Performance Standards with Commentary*, BJA, Washington DC, 1997.

- 12 Schönteich reports data on the causes of delays in South African courts, finding that most hours were lost in district courts because rolls were finalised before the scheduled close of court-business. Problems with the prosecution in District Courts caused the second lowest number of hours to be lost, with defence, magistrates, interpreters and witnesses all being more wasteful of court hours. In regional courts, 'consultation' which, presumably, involved the prosecution resulted in the third largest number of lost hours, with prosecution and investigation causes not even being ranked. See M Schönteich, *Lawyers for the People: The South African Prosecution Service*, ISS Monograph Series No. 53, Institute for Security Studies, Pretoria, 2001, pp 109–10.

These data do not detract from the point made in the text that most time is lost in completing investigations/prosecutions in the investigation phases since Schönteich's data refer only to cases that have already begun.

- 13 A British study of the reasons for adjournments in courts in that country found that about 54 per cent of adjournments resulted from the inability of the prosecution or defence to proceed on the intended date. A further 17% resulted from the fact that requested information such as previous convictions or psychiatric reports were not available. Fourteen percent resulted from first hearings where the accused pleaded non guilty, with a further 14% resulting from the non-attendance of the defendant, while 11% were to allow the case to go to a higher court. Other reasons for delays included the need for an interpreter or the awaiting of the finalisation of cases in other courts. See C Wittaker, A Mackie, R Lewis and N Ponikiewski, *Managing Courts Effectively: The reasons for court adjournments*, Home Office, UK, 1997.
- 14 BJ Olstrom and RA Hanson, *Efficiency, Timeliness and Quality: A new perspective from nine state criminal courts*, National Institute of Justice, Washington DC, 2000.
- 15 Ibid.
- 16 Ibid, p 89.
- 17 Ibid, pp 103–4. Schönteich's contention that each awaiting trial prisoner costs the state R80 per day is, it is submitted, misleading. The figure of R80 per day reflects the average cost per prisoner per day. The relevant figure for working out the costs to the state of the time spent by these prisoners is the marginal costs of their stays—covering the food, health care and other costs of incarceration. These are closer to R10 per day per prisoner.
- 18 Ibid, pp 107–9.
- 19 Ibid, p 193.
- 20 Ibid, p 153.
- 21 The following section is a brief summary of the main points contained in chapter seven of Schönteich, op cit.
- 22 Before 1994, a number of laws were on the statute books which sought to assist the state in the prosecution of certain offences. These laws created presumptions in the state's favour. The presumptions placed an onus on persons accused of certain offences, which they had to rebut by proof on a balance of probabilities to be acquitted of the charges against them. After 1994 the constitutional court declared a number of such presumptions invalid and unconstitutional.
- 23 Department of Justice, *Justice Vision 2000*, Department of Justice, Pretoria, 1997, pp 26–32.

- 24 South Africa's courts structure is currently being reviewed by a commission chaired by Chief Justice Chaskalson with a view to rationalising the structure and ensuring that it is both coherent and constitutional.
- 25 This reluctance became a matter of public record in the first half of 2002 when Parliament debated the draft Immigration Bill and members of the Justice Portfolio Committee rejected the establishment of specialised immigration courts, a proposal made in the draft Bill presented to Parliament.
- 26 Equally, some matters arising out of a single set of facts could conceivably create causes of action falling within the remit of the specialised courts as well as actions falling outside of those remits. Under those circumstances, the narrowness of the definition of the mandate of specialised courts could mean that the cases may have to be divided between different courts.
- 27 This section relies heavily on E Cazalet, *Specialised courts: Are they a quick fix or a long-term improvement in the quality of judges?* Paper presented to a World Bank conference in 2001 and P Du Rand, *The phenomenon of specialised courts*, paper presented to a departmental seminar on the Immigration Bill in 2001.
- 28 This argument is not, of course, new. So important is the resulting increase in productivity associated with specialisation that Adam Smith accorded the division and specialisation of labour pride of place in his theory of economics setting out its importance in the first chapter of *The Wealth of Nations*. The progressive and continuous division of labour, he argued, meant that the same number of people would be able to produce a "great increase in the quantity of work" largely because of the "increase of dexterity of every particular workman". See A Smith, *The Wealth of Nations*, Penguin Books, England, 1983, p 112.
- 29 Ibid.
- 30 Ibid.
- 31 Ibid.
- 32 There is, however, another species of crime which some might characterise as commercial crime: the violation of laws regulating the conducting of business activity in ways that harm the environment or undermine the health and safety of workers and/or consumers. The violation of these laws—whether they govern the nature of services offered by banks, worker safety or environmental standards—may well occur in the dishonest pursuit of a quick buck. In some cases, statutory offences linked to these regulatory endeavours will be added to the charge sheet in an investigation/prosecution run through the SCCU if a conviction on these counts may be possible in addition, or as an alternative, to a conviction for fraud/theft. However, for the most part, 'pure' violations of these laws are not handled by the Commercial Branch and the SCCU, being within the remit of agencies in other government departments.

- 33 This operational approach to defining commercial crime is markedly different from the theoretical approach developed by criminologists and sociologists, the gist of which is to identify as criminal various acts by the wealthy and powerful in order to refute the notion, common to many discourses on crime, that it is the poor who commit crimes.
- 34 CR Snyman, *Criminal Law*, Butterworths, Durban, 2002, p 520.
- 35 Adams & Adams, *Trade Mark Handbook*, Adams & Adams, SA, 1999, pp 33–4.
- 36 KPMG, *Southern Africa Fraud Survey*, KPMG, Johannesburg, 2002, p 12.
- 37 It is for this reason that it is hard to credit the claim of Business Against Crime that the appropriate comparison of the 170+ cases finalised per year in the Specialised Commercial Crimes Court is the claim that in 1997 in the whole of Johannesburg, only 15 convictions for commercial crime were obtained. It seems extremely unlikely that like is being compared with like.
- 38 These average values, it should be pointed out, reflect the *potential* losses associated with the cases. Since many cases are brought before any loss is incurred, this obviously overstates the real cost of fraud to South African businesses.
- 39 These data have been gleaned from various documents on the SAPS website and can be accessed at <http://www.saps.org.za/crimeinfo/bulletin/index.htm>.
- 40 This list is taken from the National Prosecuting Authority, *Policy Manual*, NPA, Pretoria, 1999, p A2.
- 41 For more detail on this point, see A Altbeker, *Solving Crime: The state of the SAPS detective service*, ISS Monograph Series No. 31, Institute for Security Studies, Midrand, 1998.
- 42 For more on this, see A Altbeker, Internet frauds: A basic typology, *Nedbank ISS Crime Index* 5(1) 2001, and A Altbeker, Intangible evidence? Policing in the information age, *Nedbank ISS Crime Index* 5(4) 2001.
- 43 Ibid.
- 44 Perhaps the most celebrated of these failures to get adequate inter-agency cooperation in the recent past have been those brought to light by the singular failure of the various law enforcement agencies in the United States to share information that might have helped to prevent the terrorist attacks of September 11 2001.
- 45 B Widlake, *Serious Fraud Office*, Warner Books, Great Britain, p 46.
- 46 This argument is pieced together from similar points made in J Redpath, *Leaner and meaner: The restructuring of the Detective Service*, ISS Monograph Series No. 73, Institute for Security Studies, Pretoria, 2002, Chapter 4.