

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.