

CHAPTER 6

MANDATE

What is the mandate of the DSO? Given the oft-mentioned problem of overlap with the work of the South African Police Service (SAPS), the accusations of “cherry picking” levelled against the DSO, or concerns that the DSO might use case-selection as a tool for political manipulation, the question is an important one: what is supposed to be the work of the DSO, and how does the DSO choose its cases? Indeed, the broader public might well ask: why did the DSO investigate this case, but not that one? Clarifying the mandate of the DSO should provide the answer to that question.

What is a ‘mandate’?

The term “mandate” itself is not one which is without difficulty: the word means “an official or authoritative instruction or command”⁶⁸ or a “judicial or legal command from superior; commission to act for another”⁶⁹. In law enforcement circles in South Africa, the word has changed its meaning somewhat to take on something of the character of a description of *jurisdiction* (for example, by crime type), or *terms of reference* or even *criteria for intake*.

So, for example, the national commissioner of the SAPS approves the mandates of the various SAPS specialised units. These mandates are supposed to clarify the kinds of cases to be investigated, for example, by a Serious and Violent Crime Unit, or an Organised Crime Unit, rather than at an ordinary police station. A mandate lists certain kind of crimes, perhaps circumscribed geographically or in terms of a class of victims.⁷⁰

A specialised unit is authorised by the mandate to take on matters which match those listed – in other words, matters which fall under their mandate. Should they be faced with a crime that does not match this list, the unit would be able to say “we do not have the mandate to investigate this crime”.

A perennial problem with police mandates is that they provide an illusion of clarity. No matter how clear a mandate, someone in authority will always have

to decide, in a particular matter, whether a case falls within that mandate. In some cases, this might be clear, but in others, not.

One mandate which is particularly clear is that of the Independent Complaints Directorate (ICD) (see *Comparative Performance*). This is because the ICD mandate revolves around the known identity of a possible perpetrator (a police official) and their task is to identify *whether* a crime was committed by a police official, rather than *who* perpetrated the crime.

However, most police mandates revolve instead around crime types, which could become very confusing. Indeed, the rationalisation of the specialised units of the SAPS was to some degree a recognition that crimes and criminals do not keep to tidy boundaries: hence the creation of broadly-mandated units out of specifically-mandated units. For example, the former taxi violence, firearms, and diamond and gold units now all form part of the organised crime units. Imagine one set of facts involving smuggling of firearms by taxi owners with payment in diamonds – under the old system, who would have had the mandate? Now, this set of facts falls comfortably within the mandate of the organised crime units of the SAPS.⁷¹

The DSO's legislative mandate

Within the DSO, and among those who were involved with the drafting of the legislation to create the DSO, a distinction is made between the DSO's *legislative* mandate, and its *operational* mandate. The DSO's legislative mandate (its instruction from Parliament as to the work it must do) in the NPA legislation can be summarised as follows: the DSO has the aim of doing anything necessary for criminal proceedings on offences committed in an organised fashion, or relating to any other offences proclaimed by the president in the Gazette.⁷² In other words, the aim of the DSO must be to investigate "organised crime" and anything else the president by proclamation determines it should investigate. Thus far, the president has not proclaimed any further class of offences.

The definition of "organised fashion"⁷³ in the NPA legislation on the DSO is very similar to the definitions of "pattern of racketeering activity"⁷⁴ and "pattern of criminal gang activity"⁷⁵ contained in the Prevention of Organised Crime Act, possibly reflecting the legislature's intention that the special racketeering⁷⁶ and criminal gang⁷⁷ offences in that act should be DSO matters (see *Context*).

Interviews with those involved in the drafting of the DSO legislation indicated that the DSO's legislative mandate was designed to be broad so that almost any matter could, in terms of the legislation, be argued to fall within the DSO legislative mandate. This was done intentionally so that the DSO would be able to avoid "jurisdictional" arguments in court. It is clear that this legislative mandate is by no means an exclusive mandate – the legislation expressly provides that the SAPS retains all of its policing and investigating powers.⁷⁸

However, such a broad legislative mandate is obviously not a useful operational mandate. Given the limited capacity of the DSO, the operational mandate of the DSO must be far more circumscribed. At the time the DSO was conceived, it was envisaged by the drafters of the founding legislation that the DSO would have a *negotiated* operational mandate. To paraphrase one highly placed interviewee:

"The broad legislative mandate of the DSO was done for legal reasons. The operational mandate must be political, in the sense that the DSO must sit down with for example the Minister of Justice and other key people and work through the type of cases, via analysis of intelligence. The DSO must always keep a reserve for serious things that might crop up, though. The DSO must analyse and audit capacity and decide how many cases people are going to do. Then the DSO must engage with the police and everyone involved; everyone must be on board, there must be buy-in on every level, from the politicians, the police, to intelligence... the DSO must be careful of doing ad hoc 'sexy things'; there must be a set programme."

Subsequent to the launch of the Scorpions significant changes occurred in the general law enforcement environment. Then-commissioner of police George Fivaz was replaced in January 2000 by the current commissioner Jackie Selebi, whose attitude to the Scorpions was less amenable than that of the previous commissioner, possibly because of a desire to defend the image of his police force against a media delighting in unfavourable comparison. Matters were not helped when video footage of a SAPS dog-handler setting his dog on an illegal immigrant was initially taken to the DSO for investigation, rather than to the ICD or the SAPS itself.

During the time between the launch of the DSO and the promulgation of their legislation, the significant press the DSO received, and clashes over turf with the police, made it less and less likely that any kind of negotiated mandate, at least with the SAPS, could be achieved. The legislation, promulgated in early 2001, provided for a Ministerial Committee consisting of members of

Cabinet to sit down and devise procedures to co-ordinate the activities of the DSO, including procedures for the transfer of investigations to or from the DSO, and where necessary the responsibility of the DSO in specific matters.⁷⁹

The DSO itself attempted to draft a protocol applicable to law enforcement agencies for signature by this committee in 2001, but the draft's provisions clearly only had advantages from the DSO's point of view, and was consequently dead-in-the-water. At the time of writing, the s31 committee had still failed to meet, and political developments (see *History*) meant that the committee would be unlikely to meet in the near future to iron out these "procedures" as envisaged by the drafters of the legislation.

The DSO's operational mandate

Nevertheless, the show must go on, and the DSO developed its own criteria for intake of cases after an audit and review of the DSO's case load in 2001, and spent much time refining the DSO's strategic focus on the basis of available intelligence as well as its legislative mandate. The fruit of these labours is the well-known "Circular One"⁸⁰, which outlines both the general and particular criteria which the investigating director will apply before authorising an inquiry or "declaring a matter in terms of s28".

The investigating director of the DSO may investigate any matter which, in his opinion, involves a "specified offence" – one which is related to organised crime or any other categories determined by the president.⁸¹ These matters can be brought to his attention by members of the public⁸², but it is not necessary for the matter to have been brought to his attention by the public for a declaration of an investigation to be made.⁸³ A matter can also be referred by the national director.⁸⁴

In deciding whether to declare an investigation, in terms of Circular One, the first criterion is that the matter concerned must fall within the strategic focus areas of the DSO. The DSO has refined these as being: drug trafficking, organised violence (including taxi violence, urban terror and street gangs), precious metals smuggling, human trafficking, vehicle theft and hijacking syndicates, serious and complex financial crime, and organised public corruption.

These strategic focus areas are an amalgam of matters which had already been important in the DSO's work (for example, taxi violence in KZN, the bombs and gangs in the Western Cape), with an eye on what might come in future, according to available intelligence (for example, human trafficking).

There are a further fourteen general criteria or factors that must be taken into account: What is the seriousness and scope of the offences to be targeted? Are the offences being committed in an organised fashion? Is the syndicate to be targeted well-established, and what impact is it having on its geographical area of operation? To what extent is the syndicate transnational or national, in the sense that it has links with other syndicates and its operation covers more than one jurisdictional area of the High Court? Is the criminal activity involved or complex, and does it comprise at least five persons? What has been the outcome of previous law enforcement efforts in neutralising the syndicate, and would the DSO's team or multidisciplinary approach be more appropriate? Is there potential for applying any provisions of the POC Act? Is the organisation more of a threat than other known criminal enterprises? What is the syndicate worth, and how much money has been involved where economic offences have occurred? To what extent has the syndicate penetrated legitimate structures in the public and private sector? What potential exists for joint task teams with specialised units of the SAPS? Would the involvement of the DSO neutralise potential future loss on markets or industries? What is the public interest, particularly the impact on society as a whole rather than a select group of victims, and what is the potential future risk to society of the offences? And finally, what would be the cost of the investigation?

In addition to the above comprehensive considerations, there are also further criteria that are specific to the kinds of offences involved. These usually include a threshold that must be met of the amounts of money involved in the matter. For example, a corruption matter has a threshold of R500 000, while serious economic offences should involve actual loss of R5m. Organised crime's threshold is R1m, while drug syndicates are set at a threshold of R5m.

Not only must these general and specific factors and criteria be thoroughly considered and canvassed in a request to authorise a matter, the request must cover twenty other specific details around the proposed project, including a list of members who should be "designated" in terms of the legislation to deal with the matter. This request is made to the head of operations, via the operational management desk heads (see *Desks*).

The mandate of the DSO is therefore complex and the procedure for authorisation is highly burdensome. This is arguably as it should be, for the authorisation of an investigation which is likely to consume expensive DSO resources must be carefully considered, and in terms of the principles of administrative law, the investigating director must be able to demonstrate that

he applied his mind to the matter. Nevertheless, this operational mandate, necessary evil that it is, suffers from the same flaws which nearly all mandates of law enforcement structures suffer, whether in South Africa or abroad.

First, it is almost impossible to know even some of this detail about a syndicate or a series of offences to support an authorisation *prior to investigation*: a classic Catch-22 situation – you can't investigate until you're authorised, and you can't be authorised until you've investigated.

The legislation does however provide for the authorisation of a preparatory investigation prior to the authorisation of a full investigation⁸⁵ to obtain enough evidence to justify a full investigation; unfortunately, exactly the same stringent criteria are applied by the head of operations to the authorisation of a preparatory investigation. Regional heads may *enquire* into a matter in order to obtain further evidence to justify an authorised investigation, but such an enquiry must proceed without the special powers which DSO members designated to an authorised investigation enjoy.

Furthermore the system of preparatory investigations and “pre-preparatory enquiries” gives the impression to outside parties that the DSO has begun work on a case (as a *preparatory investigation* or an even less formal *enquiry*) and then drops the matter (when it transpires the criteria are not met and the case is not authorised). This can lead to resentment from outside agencies, who are then left to pick up the pieces, while the evidence may have disappeared or the leads gone cold. Investigators within the DSO often feel discomfort when advising interested parties that the matter will not be pursued by the DSO.

Second, the mandate sets the same financial standard for the whole country, yet the country is patently not financially homogenous: R100 000 in Umtata is arguably equivalent to R1m in Johannesburg. How many cases in the Eastern Cape will make the grade? Third, the mandate revolves around types of crime rather than types of criminals: are not those involved in organised crime probably involved in a multiplicity of crime types?

Possibly most importantly, this operational mandate has been drawn up without any negotiation with any entity outside the DSO, or any instruction from the Ministerial Committee – which, arguably the DSO is entitled to do in terms of the legislation, in the absence of action from the Ministerial Committee. In a sense, Circular One is consequently not a mandate at all in the true sense, but rather a set of internal terms of reference.

Furthermore, the DSO has run into criticism, even from within the organisation, that too much time is spent deciding on what to do, rather than on doing things; some feel “rather do something less serious than nothing”. On the other hand, others fear the DSO will become overrun with more trivial matters, much as the former Heath Unit (now the Special Investigating Unit) was accused of doing (see *Performance*), if it does not apply stringent case selection criteria.

In summary then, the question: why this matter, and not the next, is answered by the terms of Circular One. As to the question, does the DSO cherry-pick? On the contrary, it seems rather than cherry-pick, Circular One ensures that the DSO instead picks the bad eggs, looking only for the really serious matters.

But what about the problem of overlap with the SAPS? An obvious problem with the DSO’s mandate, both legislative and operational, is that organised crime is also a priority of the SAPS, which has a number of specialised units whose mandate it is to investigate the threat of organised crime (see *Comparative Performance*). Some critics suggest that it is a waste of resources for both the DSO and the SAPS to be covering organised crime.

Indeed, it is true that examples of parallel investigations by the DSO and the various specialised units of the SAPS were raised in interviews. However, examples of joint task teams consisting of both DSO and SAPS members were also mentioned. Furthermore, others – even some in the SAPS – feel that the existence of the DSO has led to both productive competition as well as fruitful co-operation between the DSO and SAPS.

From this point of view, if there is overlap, then the solution is not to disband the DSO, but to tinker with its mandate and the procedure by which it takes on cases as well as improve communication, to minimise the extent of overlap and number of parallel investigations.

Furthermore, it is also argued that organised crime in South Africa is such that more than one approach to combating it is in all likelihood justified, and that there is more than enough work to go around for the various agencies concerned. This point of view sees the existence of both the DSO and the SAPS as an important safety net, such that if one entity cannot or will not investigate a matter, the option remains for the other to do so.