CORRUPTION

TOWARDS A COMPREHENSIVE SOCIETAL RESPONSE

INTRODUCTION

"In the changing circumstances of our times, a conservative assault on the constitution from the very powerful in our society is raising its ugly head. It is beyond doubt that corruption and patronage are so pervasive, rampant and crippling in our society that we are on the verge of being deemed a dysfunc- tional state."[1]

The preamble of the South African Constitution envisages a society based on democratic values, social justice and fundamental human rights. Government is to be based on the will of the people; the quality of life of all citizens is to be improved and the potential of each person freed. Corruption is one of the greatest threats to the construction of such a society. Corruption is therefore an antithesis to democracy and the rule of law. Corruption diverts resources that are needed to improve the lives of citizens tot enrich a few, at great cost to many. Corruption prevents the state from fulfilling its constitutional obligations, erodes the legitimacy of our democratic government and subverts the rule of law. It gnaws away at the ethical fabric of our society, and stifles economic growth. It has a powerful negative effect on foreign investment by destroying investor confidence. Studies show that resources diverted by corrupt acts and resources withheld or diverted due to corruption is thought to represent 25% of Africa's GDP and to increase the cost of goods by as much as 20%.

CASAC, being an initiative led by progressive people who aim to advance the South African Constitution as a platform for democratic politics and the transformation of

1 Sipho M Pityana, Sunday Times, 24 September 2010

our society locates corruption within the context of public accountability and good citizenship of which sound corporate governance forms a part. We are concerned with the exercise of power whether in the public or private sectors, and in particular with the abuse of that power which detracts from our constitutional values and principles. The fight against corruption is integral to the pursuit of rights and human dignity for our people. The existence and perpetuation of corruption promotes inequality and undermines democratic institutions and processes. CASAC believes that South Africa needs to develop and entrench the fundamental values of a National Integrity System in all spheres of society as a foundation to prevent and combat corruption. We are in danger of becoming a society that tolerates corruption, and it is through a process of public education and citizens taking responsibility for the eradication of corruption that we must resist this trend.

At the outset we need to be clear on the definition of corruption. In the global discourse the problem of corruption was historically conceived in a narrow and restricted manner. It focused the gaze of attention on the recipient of the bribe and this precipitated the racial and cultural stereotyping of corruption as an almost uniquely African phenomenon. This was further reinforced by the use of tools such as the Corruption Perception Index (CPI) as a measure of corruption – this Index surveyed the opinions of the private sector actors on public sector corruption. A typical definition was that corruption signified the abuse and misuse of public power and public resources for private benefit and that corruption involves behaviour on the part of the public sector, whether politicians or civil servants, in which they improperly and unlawfully enrich themselves, or those close to them, by the misuse of power and responsibility entrusted to them. This simplistic framing of the problem saw the politicians and public sector as the beneficiaries of corruption and the private sector as the victims.

Governments are also susceptible to promoting their own national interests, be they political or commercial, through corrupt means. It has become common practice for business delegations to accompany Heads of State or government delegations on foreign visits in order to promote bilateral trade. This form of facilitation and introduction that may ultimately lead to arms length dealings should not attract the label of corruption. It is when the boundary of the legitimate pursuit of the national interest is crossed that concerns are raised.

Corruption needs to be understood as an unlawful arrangement between two or more parties, those who give and those who take, in exchange for mutually beneficial favours and gains. There is a supply side and a demand side to corruption. This definition also needs to recognize that corruption is a practice that takes place in the public sector, the private sector and even the civil society sector. It is also important to acknowledge that corruption is not restricted to purely commercial transactions but may also be present when citizens seek to access social services such as health,

welfare and education services. In these instances one party may be coerced into providing a benefit to another due to unequal power relations that continue to characterize our society.

A more appropriate definition may see corruption as a transaction or attempt to secure illegitimate advantage for national interests or private benefit or enrichment, through subverting or suborning a public official or any person or entity from performing their proper functions with due diligence and probity.

There is growing evidence that corruption is tightening its grip on the South African state and threatening the stability and well-being of our people. This document aims to lay the basis for a practical discussion about what ought to be done by government, by citizens, and by civil society, to address corruption. It suggests the creation of a dedicated agency responsible for dealing with corruption through the triple strategy of enforcement, education and prevention.

Corruption is becoming so pervasive and corrosive that it can, in a relatively short period of time, create the perception that nothing can be done about it. We dare not allow the situation to arise whereby corruption is seen as an inevitable fact of life in South Africa. We believe that South Africa has not yet reached this point of no return. Whilst corruption poses a major governance challenge, there are concrete, practical steps that can be taken to halt and reverse the tide of corruption. We must seize the moment and turn the tide.

The document is divided into two chapters. The first chapter briefly addresses the problem of corruption from a historical and ethical perspective. It argues that while corruption is widespread in South Africa, it is deeply at odds with our new democratic order and the values that inspired the struggle for freedom, dignity and equality. The second chapter focuses on practical issues, evaluating existing anti-corruption law and institutions and suggesting targeted reforms to address the problem.

CHAPTER 1

LEADERSHIP, VALUES AND CONSULTATION: THE NECESSARY ELEMENTS OF AN EFFECTIVE RESPONSE

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1. The origins of corruption in South Africa

South Africa experienced more than 300 years of colonial rule, racial domination and apartheid. Through conquest, colonialism, dispossession and institutionalised racial discrimination, the ruling elite abrogated to themselves power, wealth and exclusive access to state resources (land and other economic resources) and exerted significant authoritarian control over all aspects of life. As in other closed, autocratic states, corruption flourished.

Unfortunately some South Africans view corruption as a new phenomenon that began to affect this country only since 1994. For some, the issue is racialised. South Africa is often compared to other African and developing countries that have struggled with corruption, on the assumption that majority rule inevitably led to corruption due to the intrinsic features of African culture.

Such assumptions are false. They fail to recognise and acknowledge that before 1994, much of the foundation of the South African state was ethically and legally corrupt. Apartheid itself was declared a crime against humanity by the United Nations. It is now time to declare corruption "a crime against the poor". Civil society must therefore declare war on corruption.

The extent and nature of the corruption of the apartheid state was documented at length in a report prepared by civil society in 2006 (the Civil Society Report which was presented to the National Anti-Corruption Forum)[2]. It documented that corrupt behaviour in South Africa has for centuries been systemic and perpetrated by individuals and groups within the dominant class[3]. Corruption and immorality was encoded in the very DNA of the pre-democracy South African state and affected every part of the bureaucracy.

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2 "Apartheid grand corruption: Assessing the scale of crimes of profit from 1976 to 1994", A report prepared by civil society in terms of a resolution of the Second National Anti-Corruption Summit for presentation at the National Anti-Corruption Forum, Institute for Security Studies, May 2006 p 2. See also Carmel Rickard, Thank you, Judge Mostert, Penguin: 2010 for an account of the Information Scandal.

3 Id at p 25.

Dr Frene Ginwala emphasised this point in a recent statement at a CASAC event:

> "Apartheid was a criminal system and was maintained by criminal means, with scant regard for public or private morality, or respect for human life. The activities of agents of the state were unconstrained, institutions lost their legitimacy, and growing numbers of citizens abandoned previously accepted norms of behaviour as they began to condone, rationalise and legitimise injustice and oppression. The defence of apartheid knew no bounds and both legal and illegal methods were acceptable."[4]

It is well documented that numerous areas in which grand corruption flourished under apartheid including: arms purchases and covert defence funding; military activities (in Namibia and Angola, involving the South African Defence Force); activities by members of the Broederbond; corruption involving the executive in both the apartheid state and the 'homelands or Bantustans'; exchange control (circumvention of laws); oil purchases by the state; and sanctions busting, including activities involving the private sector. This is amplified in the Civil Society Report as well[5].

As well as debunking the idea that corruption has only become a problem after the advent of democracy, the Civil Society Report shows that the corruption of the past is causally related to present corruption. It found that the legacy of corruption in apartheid "had entrenched itself to such an extent that it would inevitably serve to corrupt the new order."[6] Those members of the bureaucracy and private sector who had been involved in old order corruption were quick to establish corrupt relationships with the new members of the political elite, and the centuries-old patterns of patronage began to repeat itself. Apartheid was inherently corrupt, politically, morally and economically, based as it was on a lack of respect for human dignity.

The Chairman of CASAC, Sipho M Pityana, has pointed to new challenges in the democratic era:

> "[T]he reality of politics in an open democratic sphere saw the ANC attract to its ranks new members motivated by both a desire to make a meaningful contribution to transformation, but also self-serving careerists and opportunists seeking personal advancement and gain."[7]

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4 Frene Ginwala, Speech at CASAC Dinner, 21 January 2011.

5 "Apartheid grand corruption: Assessing the scale of crimes of profit from 1976 to 1994", A report prepared by civil society in terms of a resolution of the Second National Anti-Corruption Summit for presentation at the National Anti-Corruption Forum, Institute for Security Studies, May 2006, p 7.

6 Id at p 5.

7 Sipho Pityana, "Strong Civil Society: A condition for good governance", address to the Inyathelo Conference, 15 November 2010.

These factors – the institutional culture of past corruption, the presence of individuals seeking personal gain from public office, as well as corporates seeking to exploit the tolerance of corruption – have resulted in increasing levels of corruption in South Africa and also explain why it has been so difficult to counteract. The culture of corruption has permeated all facets of our society at all levels.

To recognise the role of our history in establishing and sustaining current patterns of corruption is not to accept defeat. But it helps us to understand the nature of the problem. There is nothing inevitable about corruption. We argue in Chapter 2 that many of the fundamentals are now in place in South Africa to make it possible to decisively deal with the problem. It is important, however, that firm and co-ordinated action be taken now before the problem becomes so entrenched and South Africans so accustomed to it that it cannot be undone. We must be wary of permitting a culture of impunity to prevail.

2. Sources of corruption

As well as a proper understanding of the genesis of corruption in South African, it is vital to acknowledge that, both under apartheid and at present, corruption is not committed only by those in government. Private sector corruption is equally widespread in South Africa. The definition articulated earlier points to the different dimensions of the problem,

Large multinational corporations as well as local businesses have enormous incentives to engage in corruption, as the profits from doing so are significant and the risks of being caught and punished are relatively low.

The recent emergence of evidence of large scale fraud and anti-competitive collusion by big businesses in many sectors of the South African economy, such as construction and food, are evidence of the fact that the private sector causes just as much damage through unethical and illegal behaviour as corrupt public servants[8]. A culture of self-enrichment at the expense of the public good has been adopted and begun to take hold in parts of the public and private sectors, and it must be opposed wherever it is found.

It follows that a successful anti-corruption strategy cannot focus on public servants and politicians only, but must incorporate sufficient criminal and economic disincentives to also change the behaviour of those in the private sector. In Chapter 2, we show that there are adequate criminal sanctions and asset recovery mechanisms to

8 See, for example: http://mg.co.za/article/2011-02-04-building-collusion-brick-by; http://www.businessday.co.za/articles/Content.aspx?id=125582.

do so under South African law, and argue that the problem is not an absence of legal mechanisms, but a failure to adequately implement and enforce them.

3. South African values

The national liberation movements in the battle against the apartheid regime, did not merely aim to defeat an enemy. The majority of South Africans fought for a new set of ideals. We pursued a vision of a society that would be the antithesis of the one that it replaced: one in which dignity, freedom, and democracy reign.

Out of the struggle against apartheid, South Africa "crafted through a process of broad consultation, under the mantle of a Constitutional Assembly, a constitution that won widespread acclaim for its far-reaching bill of rights and institutional arrangements, and for its progressive vision."[9] The Constitution is not just the product of political compromise. It is also the result of a "profound political struggle based on the principles of the Freedom Charter"[10].

The existence of corruption is incompatible with this ideal, and is an affront to the culture and values of the liberation struggle. Yet it is proving difficult for these mass democratic movements to keep corruption from the door. Sipho Pityana has argued that:

> "The mission to deliver a just and decent society is being derailed by a bare-knuckled contest for power and resources. Whilst we may have built schools, hospitals and clinics we have not been able to direct the resources to these institutions to enable them to function properly and deliver a quality service to the people."[11]

It is this trend that we must seek to halt and reverse, using all the weapons at our disposal.

The values of the liberation struggle which were originally articulated in the Freedom Charter, and are among the founding values in 1996 Constitution, provide the essential conceptual and moral foundation for the battle against corruption. They should be drawn upon for inspiration and emphasised in anti-corruption education and advocacy.

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9 Sipho Pityana, "Strong Civil Society: A condition for good governance", address to the Inyathelo Conference, 15 November 2010.

10 Id.

11 Id.

4. Successes since 1994

There have been significant successes in the fight against corruption since 1994. The second chapter of this document and the annexures demonstrate that South Africa has taken significant steps to ensure that its substantive law of corruption complies with the requirements of international law. The common law of corruption has been supplemented by legislation modelled on international best practice. There are some important gaps in our substantive law (demonstrated in Chapter 2), but a great deal has been achieved in a relatively short period of time.

The South African legal environment has changed radically since 1994. The Bill of Rights and legislation flowing from it have gone some way to establishing a legal environment which is antithetical to corruption. The culture of secrecy and authoritarianism that existed before 1994 has been replaced by legal norms favouring democracy, accountability and transparency. Legislation such as the Promotion of Access to Information Act[12] and the Promotion of Administrative Justice Act[13], together with institutions such as the Competition Commission and the Chapter Nine bodies make it possible for civil society and concerned citizens to hold the state and private bodies to account in ways that would have been inconceivable in the past. Protected by the right of freedom of expression under section 16 of the Constitution, the media now play an important role in the detection and exposure of corruption.

Institutions such as the Asset Forfeiture Unit and the Special Investigations Unit have had several notable successes in apprehending and prosecuting corrupt individuals and recovering the proceeds of crime. Chapter 2 suggests several key institutional and legal reforms that will allow us to build on these past successes.

5. Conclusion

Because corruption cuts across so many sectors of our society and is so entrenched, any attempt to deal with it effectively will need to have a high degree of legitimacy amongst ordinary South Africans and civil society. It cannot be seen as a politically partisan project. For this reason, it is crucial that any strategy should be preceded by a broad consultative process, in which all sectors of society are included, and as a result of which the final recommendations take into account the views of interested parties. We have an unshakable resolve to place the interests of the country before narrow political interests

As with the struggle against apartheid, the battle to rid ourselves of corruption will require the active participation of a broad coalition of actors. The anti-apartheid struggle brought together various sectors of South African society religious

12 Act 2 of 2000.

13 Act 3 of 2000.

formations, youth and student bodies, trade unions, women's groups, academics and various professional organizations, rural structures and many others. It was this unity of action and purpose that ultimately defeated apartheid.

It is also important to recognise that successfully combating corruption is a matter of ensuring that sound values shape and inform every individual's conduct. Dr Frene Ginwala has argued that the values of "personal integrity and honesty, accountability, transparency, equity, efficiency, developmentalism, and fundamental rights and freedoms including freedom of speech, access to information, democracy and participation" must "permeate the institutions of state, the corporate sector, the professions, and civil society."[14] It is for this reason that education is such a crucial component of any credible strategy to combat and prevent corruption. It is a responsibility that rests not only on anti-corruption agencies but also on organs of civil society.

Finally, strong leadership and an unflinching political will are required, from government, civil society, and the private sector. Ginwala in arguing for a National Integrity System says:

> "Above all we need strong and determined leadership that will lead by example. The example set at the top levels of the political power structure is crucial. We need to practice what we preach. One cannot expect integrity from others unless leaders conform to the highest ethical standards."[15]

14 Frene Ginwala, Speech at CASAC Dinner, 21 January 2011.

15 Id.

To defeat corruption will require the engagement of all South Africans. CASAC seeks to facilitate this engagement, by liaising and consulting with government and civil society with a view to developing a zero tolerance approach to corruption. Organisations in different sectors should develop their own strategies and mechanisms for eradicating corruption. We say that South Africans must "**Red Card Corruption"**.

CHAPTER 2

IDENTIFYING KEY LEGAL AND INSTITUTIONAL REFORMS THAT COULD MAKE A DIFFERENCE

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1. Introduction

Despite comprehensive legislation and the existence of numerous anti-corruption institutions, corruption appears to be waxing not waning. Numerous public figures and members of government have recently expressed concern about growing levels of corruption.[16] In 2007 then ANC Secretary General (and now Deputy President) Kgalema Motlanthe mourned the loss of the "age old values that underpin our struggle" and continued that we now have "crass materialism and the heartless value system of individuals."[17] According to the United Nations, some 13% of South Africans report having been faced with a bribe situation in the last year.[18]

Much of the literature on measurements of corruption is based on perceptions rather than objectively verifiable data. The difficulty in measuring corruption has resulted in a reliance on perception-based indicators, and has led to a focus almost exclusively on the recipients of bribes rather than the bribe-payers. This is evidenced by Transparency International's Corruption Perceptions Index (CPI), which measures perceived levels of public sector corruption around the world[19], paints a picture of increasing levels of corruption in South Africa. Both our absolute score out of ten and

16 Senior members of government who have recently expressed concern include the Minister of Finance, the Minister of Justice, and the Minister of Public Service and Administration. See: http://www.news24.com/SouthAfrica/News/Baloyi-warns-corrupt-officials-20101209; http://www.fin24.com/Business/Plans-to-fight-corruption-imminent-20101031; http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=163975&sn=Detail&pid=71619.

17 Interview on Radio 702 on 11 December 2007, reported in The Star on 12 December 2007

18 United Nations Human Development Report 2010, 20th Anniversary Edition, at p 165. This UN report is available at http://hdr.undp.org/en/.

19 The CPI measures corruption on a scale from 0 (perceived to be highly corrupt) to 10 (perceived to have low levels of corruption). While there are valid concerns about the CPI's methodology, it does provide some insight into perceived corruption.

our ranking have steadily declined over the last 10 years. The 2010 CPI placed South Africa in 54th position with a score of 4.5 out of 10. It must also be noted that a Bribe Payers Index was inaugurated in 1999 to measure the extent of corruption by companies in developed countries as perceived by private sector players in developing economies. It attempts to assess the supply side of bribery. It is interesting to note that it does not canvass the opinions of public servants in developing countries, only private sector practitioners. Transparency International also initiated the Global Corruption Barometer in 2003 to assess the perception of the general public about corruption. The 2009 report reveals an increase in the perceptions of the private sector as being corrupt, and in many countries the private sector was identified as being the most corrupt sphere.

South Africa is not the only country that is grappling with strategies to combat and prevent corruption. It is a worldwide phenomenon. International recognition of the scale of the problem has recently led to a range of important international and regional conventions aimed at preventing corruption. South Africa has signed and ratified six of these agreements:

1) The United Nations Convention against Corruption (UNCAC);
2) The African Union Convention on Preventing and Combating Corruption (AU Convention);
3) The Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention);
4) The UN Convention against Transnational Organised Crime (UNTOC);
5) The Southern African Development Community Protocol against Corruption (SADC Protocol); and
6) The Southern African Development Community Protocol on Combating Illicit Drugs (SADC Drugs Protocol).

There are other regional and international instruments that deal with specific aspects of corruption, e.g. money-laundering.

If corruption is left unchecked, the growth and stability of our constitutional democracy will be imperilled. Accordingly, it is urgent that our legal and institutional responses to corruption be strengthened to tackle corruption effectively.

2. Outline of this Chapter

This chapter is divided into four main sections. The first contains a brief discussion of the key constitutional provisions relevant to corruption. The second provides an

outline of South Africa's international obligations in relation to corruption. The third section discusses the many institutions responsible for dealing with corruption in South Africa. It notes that the profusion of institutions results in overlapping responsibilities that create difficulties for co-ordination and often result in piecemeal and patchy approaches to corruption. Accordingly, it proposes the establishment of a dedicated, independent agency responsible for investigation, prevention and education. Such an agency would strengthen the institutional architecture and facilitate co-ordination among different sectors of society, and fulfil South Africa's international law obligations. The fourth part focuses more narrowly on the legal rules and procedures that prohibit or inhibit corruption. It contains an analysis of the legal rules regulating corruption and identifies shortcomings that exist in our rules and procedures.

This chapter does not contain comprehensive law reform proposals. Annexed are three further documents which contain a more detailed analysis of South Africa's international obligations relating to corruption, the current law on corruption in South Africa and a description of the Botswana Directorate on Corruption and Economic Crime (DCEC). We include this for illustrative purposes, and recognise that other similar examples (such as that in Hong Kong) should also be considered.

The purpose of this chapter is to identify key weaknesses in the current legal rules and procedures and institutional frameworks in the light of our constitutional commitments, international obligations and the need for an effective framework to combat corruption.

PART ONE: SOUTH AFRICA'S CONSTITUTIONAL FRAMEWORK

3. Constitutional Framework

As mentioned above, the Constitution requires that our democratic government be accountable, responsive and open. Corruption is antithetical to these founding values in our Constitution. It is also antithetical to an equally important and related founding value – the rule of law, a principle that requires that all public power be exercised lawfully.

These founding values underlie many of the rules and provisions in our Constitution. For example, throughout the Constitution there is an emphasis on the importance of the ethical obligations of those who exercise public power, whether as members of Cabinet, Parliament, the judiciary, or as public servants. Section 96(2) of the Constitution states that members of Cabinet and Deputy Ministers may not undertake

any other paid work, or "act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or use their position or any information entrusted to them to enrich themselves or improperly benefit any other person."[20] Section 195 of the Constitution which provides for the basic values and principles governing public administration commences by asserting that "a high standard of professional ethics must be promoted and maintained". Legislative initiatives to combat corruption thus give effect to the founding values of our Constitution and many of its specific provisions.

PART TWO: SOUTH AFRICA'S INTERNATIONAL OBLIGATIONS

4. International obligations

South Africa is a party to six international agreements relating to corruption and organised crime. The primary anti-corruption functions identified by international instruments are: investigation and prosecution; prevention; education and awareness raising; co-ordination; monitoring and research; international co-operation in criminal matters including mutual legal assistance and extradition. [21]

In summary, an analysis of the treaties makes plain that South Africa has inter alia, the following obligations:

- To establish an independent anti-corruption agency or agencies;[22]
- To ensure that steps are taken to investigate and where appropriate prosecute corrupt acts;[23] to prevent corruption by removing obvious opportunities for corruption;[24] and to educate the public on the harms of corruption.[25]

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20 See also section 136 of the Constitution which provides similarly in relation to Premiers and MECs of provinces.

21 "Specialised Anti-Corruption Institutions: Review Of Models", OECD Report (2007) at p 5-6: http://www.oecd.org/dataoecd/7/4/39971975.pdf

22 See article 20 of the AU Convention, article 6(2) of the UNCAC and article 9(2) of UNTOC.

23 See chapter 3 of UNCAC; articles 1 and 3 of the OECD Convention.

24 See art 5(2) and art 5(3) of UNCAC.

25 See article 5(8) of the AU Convention.

- To ensure transparency and access to information in the fight against corruption;[26]
- To establish mechanisms that encourage participation in the fight against corruption by the media, civil society and non-governmental organisations;[27]
- To adopt measures that address corruption not only in the public sector but also in the private sector;[28] and
- To co-operate with other states in criminal matters, and to afford other states "the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings" in relation to corruption.[29]

Of particular note is the clear obligation to establish independent, well-resourced bodies to combat corruption through investigation, prevention and education established by these binding international agreements. So, the United Nations Convention against Corruption (UNCAC) obliges States Parties to ensure the existence of a body or bodies to prevent corruption and oversee the implementation of the obligation to prevent corruption and to increase and disseminate knowledge about the prevention of corruption.[30] The body or body must be granted the necessary independence and material resources to carry out its functions effectively and free from any undue influence.[31] States Parties are also required to ensure "the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks."[32]

The AU Convention requires Parties to "establish, maintain and strengthen independent national anti-corruption authorities or agencies and to designate such

26 See articles 9 and 10 of the UNCAC and article 4(1)(d) of the SADC Protocol.

27 See articles 5(1) and 13 of UNCAC and article 13 (4) of the SADC Protocol.

28 See article 11 of the AU Convention and article 12 and 21 of UNCAC.

29 See Chapter 4 generally and more specifically articles 43 and 46(1) of the UNCAC.

30 Article 6(1) of UNCAC.

31 Article 6(2) of UNCAC.

32 Article 36 of UNCAC.

agency to the Chairperson of the Commission of the African Union at the time of signing or ratifying the Convention.[33] It also obliges States Parties to take measures to educate the public and to: "Adopt and strengthen mechanisms for promoting the education of populations to respect the public good and public interest, and awareness in the fight against corruption and related offences, including school educational programmes and sensitization of the media, and the promotion of an enabling environment for the respect of ethics."[34]

These international obligations provide a helpful benchmark against which to consider the existing South African legal and institutional framework to combat corruption. The international obligations provide a benchmark not only because as a state South Africa is bound to honour its international obligations, but also because the international conventions are often based on experience and best practice developed around the world.

PART THREE: CURRENT INSTITUTIONAL FRAMEWORK AND A PROPOSAL FOR A DEDICATED INDEPENDENT AGENCY

5. Existing South African anti-corruption institutions

It is clear the international conventions require the establishment of an independent anti-corruption agency or agencies. There are several existing institutions mandated to address corruption in South Africa. For example, the South African Police Service (SAPS which includes the Directorate for Priority Crime Investigation[35]), the Special Investigating Unit (the SIU)[36], and the Asset Forfeiture Unit (which is based in the office of the National Director of Public Prosecutions) have the power to investigate matters and refer them to the National Prosecuting Authority (the NPA) for prosecution. The Public Protector and Auditor-General of South Africa also have an important investigative and monitoring role to play but their primary function is not to address corruption. In addition, the National Treasury has significant powers of prevention, as it is tasked with prescribing the frameworks and systems in terms of

33 Article 20(1) of AU Convention.

34 Article 5(8) of AU Convention.

35 Chapter 6A of the SAPA Act 68 of 1995, as amended.

36 Special Investigating Units and Special Tribunals Act 74 of 1996.

which organs of state manage their finances. The Financial Intelligence Centre investigates money laundering crimes.

There are several multi-agency initiatives dealing with investigation and prevention. For example, the Anti-Corruption Task Team comprises the Hawks, the SIU, the NPA (through the Asset Forfeiture Unit and the Special Commercial Crimes Prosecutors), and has set a target of 100 convictions in three years. There is also a multi-agency initiative working on prevention located in the National Treasury, consisting of the Office of the Accountant-General, South African Revenue Service, and the Financial Intelligence Centre.[37] The Department for Public Service and Administration (the DPSA) has recently announced the established of a Special Anti-Corruption Unit within the DPSA which is to act in partnership with the SIU to investigate cases of alleged corruption.[38]

The existing framework has three challenges. First, despite the plethora of institutions in place with the responsibility of enforcing the prohibitions on corruption, one finds that many key provisions aimed at prohibiting corruption are not adequately monitored or enforced. Departmental investigations into allegations of corruption are very slow and often inconclusive.[39] Disciplinary proceedings against public servants are apparently rare as are criminal prosecutions, and if instituted are often settled on inappropriate terms. Prosecutions for violations of the Public Finance Management Act (PFMA) are virtually unheard of. Ethical codes of conduct for parliamentarians, members of the executive and civil servants often do not seem to be effectively enforced. Similarly, financial disclosure obligations are often not effectively monitored or enforced. Nor are prohibitions on public servants doing business with government. According to the Auditor General, disciplinary procedures were only initiated in 13% of the 3134 cases where public servants were discovered to be doing business with government in breach of public service rules.[40] The fact that there are so many institutions responsible for fighting corruption with overlapping mandates

37 See the Department of Public Service and Administration report to the Parliamentary Portfolio Committee in November 2 www.pmg.org.za/files/docs/100519**anticorruption**_0.ppt

38 Id.

39 In its report to the Parliamentary Portfolio Committee in November 2010, the Department of Public Service and Administration reported that between September 2004 and March 2008, 4202 cases of alleged corruption had been referred to individual government departments (1923 to national departments, and 2181 to provincial departments). The DPSA received feedback in respect of only 31% of these cases (1292) and only 335 cases were finalised.

40 See the DPSA report to the Parliamentary Portfolio Committee in November 2010.

means that a coherent and comprehensive response is absent. The result is that the battle against corruption is compromised.

Secondly, despite the large number of organisations mandated to combat corruption, and despite the clear international obligation to educate the public on the harms of corruption, there is no institution in South Africa with a clear mandate to educate South Africans, raise awareness about corruption and to conduct a public campaign of any kind. A body such as the National Anti-Corruption Forum (comprising representatives of business, government, and civil society) could have played such a role but this entity has proved ineffective. Civil society bodies including NGOs, professional bodies, trade unions, business groups, religious, cultural and community organisations together and separately they form important elements in the fight against corruption; they possess the expertise and resources to take on the crucial role in developing public awareness of corruption and its implications.

Thirdly, again despite the international obligation to establish an independent agency or agencies to combat corruption, none of the bodies whose primary mandate is to address corruption is clearly institutionally independent. Although the Public Protector and Auditor General are institutionally independent, their primary mandate is not to combat corruption. The SAPS, DPCI, and Asset Forfeiture Unit, who bear some responsibility to combat corruption, are all directly responsible to the Executive, and their heads and personnel are not expressly protected against dismissal or removal. The Special Investigating Unit cannot conduct official investigations without a Presidential Proclamation, again demonstrating its dependence on the Executive. Although there is room for debate about what safeguards the requirement of independence imposes, it is unlikely that any of these institutions would be considered to be independent.

6. A dedicated independent agency to combat corruption

A solution to all three of these problems would be to create an independent anti-corruption agency with a mandate to combat corruption by following a three-pronged strategy of enforcement (including investigation and referral for prosecution), prevention, and education. Such an institution if properly funded and well staffed would enable decisive and effective action to be taken.

The single most important factor in sustaining an independent agency is the existence of political will and support for the agency.[41] Even the most well crafted institution will fail if the requisite political will does not exist. A dedicated independent agency is not a miraculous solution to the scourge of corruption. This model does not find

41 See "Specialised Anti-Corruption Institutions: Review of Models" OECD Report 2007 p 17 (n 22 above).

favour with some commentators in the corruption field[42], and it is not always considered the most effective possible response.[43] The creation of a dedicated anti-corruption agency is not a panacea. In some countries that have implemented this model they have proven to be ineffective.[44]

But criticism of the single agency model often turns on the institutional failings of a central agency due to a lack of funding or political support. Many of the objections and shortcomings thus focus on a real or perceived lack of political will to deal with corruption. But if there is truly no political will to address corruption, then no mechanism, existing or proposed, can succeed.

An independent agency to combat corruption exists in Botswana. It is interesting to note that Botswana continues to be ranked as the least corrupt country in Africa. Scoring 5.8 out of 10 and ranked 33 in the world on the 2010 CPI,[45] Botswana is perceived to be less corrupt than countries such as Taiwan, South Korea, Poland and South Africa. Botswana has consistently been in the top 40 countries in the last 5 years, and, based on the CPI, is clearly dealing with corruption effectively. Botswana appears to be on the opposite trajectory to South Africa. Annexed to this report is a short memorandum (annexure C) describing the Directorate on Corruption and Economic Crime in Botswana.

A dedicated independent agency to combat corruption will need to be established statutorily. The OECD Report emphasises that it is crucial that the legal foundation of an anti-corruption agency be clearly spelt out: "An anti-corruption institution should have a clear legal basis governing the following areas: mandate, institutional placement, appointment and removal of its director, internal structure, functions, jurisdiction, powers and responsibilities, budget, personnel-related matters (selection and recruitment of personnel, special provisions relating to immunities of the personnel if appropriate, etc.), relationships with other institutions (in particular with law enforcement and financial control bodies), accountability and reporting, etc. The legal basis should, whenever possible, be stipulated by law rather than by-laws or governmental or presidential decrees. Furthermore, internal operating, administrative,

42 See, for example, H Kroukamp, "Corruption in South Africa with particular reference to Public Sector Institutions: The evil of all evils", *Journal of Public Administration*, Vol 41 No. 2.1 (July 2006) at p 213.

43 See also L Camerer, "Prerequisites for effective anti-corruption agencies", Institute for Security Studies.

44 See P Meagher, "Anti-Corruption Agencies: Rhetoric Versus Reality," *Journal of Economic Policy Reform*, 2005.

45 In 2009 Botswana's score was 5.6 and its ranking 37.

and reporting procedures and codes of conduct should be adopted in legal form by regulations and by-laws."[46]

CASAC seeks to ensure that there should be wide consultation on the appropriate model for the new agency, and that input should be obtained from civil society, government, business and citizens. Public support and the support of civil society are vital to success.

There are two aspects of a single agency that we now consider: institutional design and the principles that should inform it; and the mode of operation of the agency.

A. Institutional Design

(a) Independence

It is of the utmost importance that the agency be independent of other arms of government. An independent agency is likely to function more effectively and to engender public confidence. Because investigations of high-level corruption often attract political pressure, safeguards must be put in place to ensure that the agency and its investigators can perform their task without fear or favour. If it is to be successful, such an agency must inspire public respect and confidence. Citizens must feel that they can report corruption without fear of victimisation, confidentially if they so choose. They must also be confident that allegations will be thoroughly and impartially investigated.

(b) Accountability

The agency must be held accountable for the execution of its mandate. Independence from the other branches of government should not result in a lack of accountability. What are the options to achieve this?

The correct balance between independence and accountability could be struck by providing for civilian and / or Parliamentary oversight over the agency. In Hong Kong, for example, five citizens' committees provide advice and monitor the activities of the Independent Commission against Corruption (ICAC). One committee advises the Commissioner on policy, another advises on corruption prevention, another on education and a fourth on public complaints against ICAC officers themselves. In addition, a committee of citizens oversees decisions to close investigations.[47] Civilian

46 OECD Report (n 21 above) from p 18.

47 "A committee of trustworthy citizens is given the role of looking at investigations that investigators propose should be closed and of advising whether or not the investigation should be closed. These citizens meet about once a month for half a day and consider the cases that are to be closed. They can question the investigating officers. If they agree with the proposed closure, they advise accordingly. If they do not, they can advise that further investigation

oversight would be a valuable addition to the institutional response to corruption in South Africa. It would enhance the legitimacy of the system and undermine the perception that the new agency is beholden to vested political interests.

A Parliamentary oversight committee could also be valuable to ensure the accountability of the agency. It would receive regular reports from the head of the agency and oversee its functioning. The reports would of course also be available to the public. Parliament's Standing Committee on Public Accounts (SCOPA) could be given a specific mandate to deal with corruption but we would need to ensure that such parliamentary institutions have the appropriate power and resources to execute their mandates.

(c) Appointment of Director or Governing Board of Agency

The manner of appointment of the head or governing board of the agency is crucial. There are several possible models for appointment.[48] The independence of the agency would be enhanced if the appointment is made after a call for nominations from civil society by an independent appointment body with representatives from the three arms of government, as well as of civil society. The criteria for the appointment of the agency head or governing body should include competence, integrity and perceived independent-mindedness.

(d) Provision for individual and institutional independence

should be done or that the legal advice should be reconsidered. Their work is, of course, confidential." Bertrand de Speville, *Overcoming Corruption: The Essentials* 2010 at p 25.

48 For example, the appointment could be made by the President; by inter-ministerial committee; or by a civilian body.

The independence of the head of the agency should also be safeguarded. This can be done by providing for a non-renewable term of office of between five and ten years.[49] It should be as difficult to remove the agency head as it is to remove a sitting judge. [50]

The head of the agency should have a substantial degree of control over the personnel who are hired by the agency (particularly the Chief Accounting Officer of the agency) as well as over the drafting of the budget of the agency which should be presented directly to Parliament.

(e) Adequate resources

The UN Convention against Corruption requires States Parties to provide adequate resources to anti-corruption agencies.[51] One of the most common causes of failure for anti-corruption initiatives is the lack of resources which often reflects an absence of political will.[52] Establishing and maintaining an effective anti-corruption agency is extremely costly.[53] For an anti-corruption agency to be effective, sufficient resources must be made available to it, and it must control its own budget. Like any other organ of state, it must be subject to scrutiny by the Auditor-General.

(f) Appointment of staff of agency

Senior personnel must be appointed by the agency itself. Staff should be qualified and competent and free from any taint of corruption. It is also important that the agency's staff should be demographically diverse / representative.

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49 This is similar to the tenure of the Auditor-General. Section 189 of the Constitution provides:

"The Auditor-General must be appointed for a fixed, non-renewable term of between five and ten years."

50 Section 177 of the Constitution provides:

"(1) A judge may be removed from office only if—

(a) the Judicial Service Commission funds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and

(b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.

(2) The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.

(3) The President, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of subsection (1)."

51 See for example article 6(2) of UNCAC.

52 B de Speville *Overcoming Corruption: The Essentials* (2010) cited above n 47 at p 71.

53 OECD Report, above n 21, at p 19.

Personnel should enjoy an appropriate level of job security in their positions. Measures for protection from threats and duress on the law enforcement staff and their family members should be in place.[54]

The new agency will require a broad range of technical skills in numerous different areas. Corruption needs to be approached at various levels and requires specific expertise, knowledge and skills in a variety of fields, including law, finance, economics, accounting, civil engineering, social sciences, and other domains.[55]

B. Mode of operation of agency

(a) Investigation of all complaints

Every complaint that is received by the agency should be investigated, no matter how apparently insignificant. International experience suggests that a significant proportion of complaints never lead to prosecutions. Nonetheless, the commitment to investigating every allegation removes the perception that the agency will have a particular bias or agenda. In order to avoid the strain on resources that would follow from a full-blown investigation of each complaint, the creation of a filtering mechanism in the form of a preliminary investigation to determine whether the complaint should be pursued may be considered. The temptation to focus only on the most apparently serious matters must be resisted.[56]

A difficult question is whether the agency should have the power to institute its own investigations in the absence of a prior report or complaint. This is a matter which will require careful consideration as there are strong arguments both for and against. Should the agency should have original powers of investigation, and perhaps a

54 OECD Report (n 21 above) at p 18.

55 OECD Report (n 21 above) at p 15-6.

56 De Speville (see n 47 above at p 55) offers the following reasons why this is important:

- What appears to be a minor matter quite often unravels into a much more serious case.
- For the citizen who has brought himself to make a complaint, the matter will be important. If it is dismissed as unimportant, he is unlikely ever to return to the authorities, perhaps with a crucial piece of information. If community support is to be won, the minor complaint must be taken seriously.
- Picking and choosing which reports to investigate and which to ignore gives rise to suspicion of improper influence having affected the decision or, worse, of corruption in the investigating unit.
- Ignoring some complaints gives the impression that some corruption is tolerated, that double standards apply.
- The fact is that widespread small-scale corruption can do serious damage to the well-being of a country. Furthermore, a single small act of corruption can have disastrous consequences.
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"corruption intelligence capacity" as distinct from the general crime intelligence gathering capacity possessed by the SAPS?

It is also important that allegations of private sector corruption be fully investigated. Consideration should also be given to granting legal powers to the members of the agency for the purposes of investigation, including the interception of communications, detention for interrogation, access to financial data, witness protection powers, and asset freezing, recovery and confiscation.

The power of the agency to investigate complaints must be fully protected. As the Public Finance Management Act 1 of 1999 (PFMA) and the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA) give significant powers over investigations to the accounting officers in government departments, they may require amendment. Accounting officers must not have the power to prevent the agency from conducting an investigation.

(b) Prosecution

The agency should work closely with prosecutors, but should not prosecute matters itself. Decisions to prosecute should be based solely on the objective principle of sufficiency of evidence which will remove perceptions that they agency has its own agenda. Requiring the NPA to conduct prosecutions will provide an additional check on the independent agency, as the NPA will need to consider whether the evidence that has been uncovered does indeed warrant prosecution. Nevertheless as is the case with all complex prosecutions, it is vital that investigators work closely with prosecutors from the early stages of cases.

The discretion of the NPA, in terms of the current prosecution policy, not to pursue a prosecution where to do so is deemed to be contrary to the public interest should not apply in corruption cases. Here the sole criterion for prosecution should be the sufficiency of evidence. The existence of discretion in this area can create the perception that differential standards are being applied.

(c) Prevention of corruption

The new agency will have to provide advice to government on how to prevent corruption. This will require analysis of how opportunities for corruption arise. Procurement, the provision of services and social benefits to the public, excessive criminalisation of conduct that provides opportunities to law enforcement officers to extort payment from members of the public are all areas that will need to be investigated and analysed by the agency to identify ways in which the opportunities for corrupt behaviour can be controlled and reduced. The use of information technology may be of particular value. For example procurement-related processes may be monitored by establishing electronic databases to track procurement activity

and monitor the beneficiaries of state tendering. Patterns of questionable procurement might thus be identified.

(d) Education of the public

The new agency will need to embark on a major public education drive to inform the public about the harms of corruption. Partnerships will need to be developed with NGOs, business, labour and community organisations as well as the media to ensure that public education and awareness about corruption reach all sectors of society. A vigilant and empowered civil society will be a critical bulwark against corrupt practices.

(e) Co-ordination with existing institutions

Should existing institutions continue to investigate corruption either in collaboration with the agency or on their own? Or should they be obliged when they come across incidents of corruption or suspect corruption to report it to this new agency? Existing institutions with a mandate to deal with corruption may have to be brought under the umbrella of the new agency. For example, the DPCI is currently responsible for the investigation of priority crimes. It would be possible either to excise corruption from the mandate of the DPCI; or to absorb those units of the DPCI dealing with corruption into the investigative arm of the new agency.

(f) Partnerships with Civil Society

South Africa's anti-corruption strategy also needs to make better use of partnerships with civil society and business, which would be consonant with the approach set out in the international conventions. There are already effective models of this kind of partnership in SA which could be more effectively deployed against corruption. For example, Business against Crime supports government in the fight against crime and has undertaken various initiatives to reduce violent crime, to improve skills in the criminal justice system, etc.[57] The South African Banking Risk Information Centre (Sabric) is a company established and funded by the South African banks to assist banks in the detection and prevention of bank related crime. This sort of information and skills-sharing could be of great assistance in dealing with corruption. There is also a growing desire by NGOs and labour unions to act to stem the tide of corruption. These efforts should be co-ordinated to enhance their effectiveness.

(g) International Co-operation

The proposed agency will also be responsible for co-operating with corruption investigations carried out in other countries, as required by the AU Convention and other international instruments. Such co-operation will extend to co-operation with

57 See http://www.bac.co.za/

regard to extraditions[58]; mutual legal assistance[59]; and the conduct of joint investigations[60]. PART FOUR: THE EXISTING LEGAL FRAMEWORK AND ITS OMISSIONS AND SHORTCOMINGS

7. Legal rules and procedures for preventing corruption

Attached to this memorandum is Annexure B setting out the details of the existing law on corruption in South Africa. From that annexure it can be seen that South Africa's substantive law of corruption provides, with the exception of a few gaps, an adequate basis for addressing the problem of corruption and is generally in compliance with our international obligations. The five most important omissions or remaining challenges are: (a) inadequate protection for whistleblowers; (b) the failure to implement a "cooling-off period" for politicians or public servants going into business upon leaving public office; (c) the failure to ensure that codes of conduct ensuring disclosure of interests are implemented and enforced; (d) the absence of any regulation of party political funding; and (e) problems with the interpretation and application of our criminal procedure rules which permit accused persons to pursue strategies which delay or even avoid the criminal process.

A. Whistle-blowing

Protection for whistle-blowers is essential to create a culture of disclosure of wrong-doing. The Public Protector, Adv Thuli Madonsela, recently questioned whether whistle-blowers are adequately protected in South Africa.[61] A comprehensive report by the Open Democracy Advice Centre (ODAC) has made the same point at length.[62]

While the Protected Disclosures Act 26 of 2000 (PDA) provides some protection for whistle-blowers[63], it does not do enough to encourage a culture of whistle-blowing. In

58 Article 44 of the UNCAC.

59 Article 46 of the UNCAC. Mutual legal assistance may be required in respect, inter alia, of taking evidence or statements from persons; effecting service of judicial documents; executing searches and seizures and freezing of assets; examining objects and sites; providing information, evidence, and documents; tracing the proceeds of crime; and asset recovery.

60 Article 49 of the UNCAC.

61 http://www.pprotect.org/media_gallery/2010/17112010_sp.asp

62 Patricia Martin, "The Status of Whistle-blowing in South Africa: Taking Stock", published June 2010 by the Open Democracy Advice Centre.

63 See Annexure B at pp 28-31.

the ODAC report[64], Patricia Martin identifies a range of problems with South Africa's whistle-blowing environment:

(a) The scope of protection is too narrow
First, protection under the PDA is limited to whistle-blowers in a formal permanent employment relationship, excluding citizen whistle-blowers. It thereby excludes all persons in other commercial relationships with the relevant organisation. This is despite the fact that members of the public may be compelled by laws such as the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PACCA) and the Financial Intelligence Centre Act 38 of 2001 to report corrupt and other unlawful conduct of individuals and organisations with which they may well have no employment or other commercial relationship.[65] Disclosures to corruption hotlines and sectoral complaints mechanisms are not regarded as protected disclosures by the PDA.

Second, protection is limited to disclosures about the employer only. The disclosure must relate to the conduct of the employer or an employee of the employer. This needlessly restricts the scope of protection to the employment relationship. Consider an employee who makes a disclosure about a client to her employer, and the employer transfers the employee rather than antagonising the client. Such an employee would not be protected by the PDA.

Third, the PDA only protects the employee against an occupational detriment committed by the employer or another employee of the organisation.

Finally, the range of recipients to whom a protected disclosure may be made is too narrow, excluding bodies and organisations other than the Public Protector and the Auditor-General (such as professional bodies and the media) that are capable of doing something about allegations and which are mandated to receive and act on allegations of corruption and irregular conduct.

(b) There is no express obligation on organisations to encourage and facilitate whistle-blowing
Martin argues that "In the absence of legislative obligations, organisations are not likely to create appropriate policies and procedures and in the absence of appropriate policies and procedures, it is unlikely that we will see an improved culture of transparency and positive receptiveness to whistleblowers within organisations."[66] No such obligations are created by SA's statutory framework.

64 Patricia Martin, "The Status of Whistle-blowing in South Africa: Taking Stock", published June 2010 by the Open Democracy Advice Centre.

65 Id at p 67.

66 Id at p 83.

(c) The protections and remedies for whistle-blowers are too weak to create confidence

Martin points out that the majority of disclosures made by members of the public are anonymous. This is "linked to a lack of confidence in the ability of the laws to protect the whistleblower's identity and to protect them against retaliation."[67] Disclosures to any bodies other than the Public Protector or Auditor-General (such as professional bodies or other constitutional or statutory oversight bodies) are not protected under the PDA.[68]

(d) There is no public body tasked with providing advice and promoting public awareness; and no public body dedicated to monitoring whistle-blowing.

South Africa has no institution for monitoring, publicising, or advising the public on issues of whistle-blowing.

In response to these gaps, Martin suggests: developing a consolidated and consistent framework for whistle-blowers that will provide equal protection to all whistle-blowers; expanding the scope of protection under the PDA; promoting knowledge and use of the relevant legislation; and the creation of a culture of disclosure through compulsion or encouragement of organisations.[69] She also suggests the establishment of "a dedicated adjudication body which must be vested with investigative and enforcement powers to overcome the cost barriers and to prevent abuse of the current judicial process by reluctant employers."[70]

The possibility of conditional amnesty for whistle blowers implicated in corruption

Linked to other legislative reforms, the institution of a mechanism for providing conditional amnesty to the party to a corrupt relationship who comes forward and makes a full disclosure should be considered. This may provide an incentive for whistle-blowing and disclosure, and give investigators and prosecutors additional leverage in pursuing corruption.

B. Cooling-off periods

As yet, there are no nationally determined rules concerning a "cooling-off period" which would prevent politicians or senior public servants from going into business immediately upon leaving public office. The Western Cape legislature has just enacted legislation to regulate this.[71] The absence of a clear set of rules means that there is a "revolving door between government and business where public officials are recruited

67 Id at p 77.

68 Id at p 81.

69 Id at p 118.

70 Id at p 121.

into the private sector, taking up lucrative jobs with the same corporate interests who had business pending before them when they served in government."[72]

However, the Department of Public Service and Administration has recently announced that it intends to craft legislation that will force senior government officials who leave the public service to cool off for a year before joining companies that do business with the state.[73] This is a step in the right direction. However, the one-year period may be too short to effectively prevent corruption of this kind. It might be better if the period were substantially longer. As noted before, this rule should apply to politicians in all spheres of government (national, provincial and local) as well. In addition, stricter regulations governing the employment of public servants by companies that have a financial relationship with their department should be considered. The acquisition of shares and interests in such companies should be prohibited both during employment and for the cooling off period.

A further question that is not covered by existing legislation or ethics regulations is the ability of the family members of government officials to engage in business with state institutions. Several of the codes require the disclosure of interests held by family members, but they are silent on the circumstances, if any, in which family members are barred from dealing with the state. In our view, this is a significant omission which requires immediate attention. Clear rules regulating this issue will enhance the legitimacy of the democratic process and enable individuals to know what conduct is permissible.

C. Funding of political parties and independent candidates

Global Integrity is an international NGO that measures the strengths and weaknesses of national-level anti-corruption systems.[74] In its most recent assessment of South

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71 The Western Cape Procurement (Business Interests of Employees) Act 2010 was signed into law on 8 December 2010. It prohibits provincial government employees and their families from holding more than 5% shares, stock, membership or other interests in an entity that does business with the provincial government, unless approval is given by the relevant Minister in accordance with certain criteria set out in the Bill; requires entities to disclose whether they are owned or part-owned by employees of the Western Cape government before a contract with the provincial government can be signed; and requires all provincial government employees will be required to disclose their business interests at prescribed intervals. (Statement issued by Western Cape Premier, Helen Zille, December 8 2010, accessed on: http://www.capegateway.gov.za/eng/pubs/news/2010/dec/209779).

72 See Collette Schulz-Herzenberg, "Why Ethics Regulations Continue to Fail SA", 2 September 2009, polity.org.za.

73 "State takes steps to stop 'javelin throwing'", Business Day 26 November 2010, http://www.businessday.co.za/articles/Content.aspx?id=127910.

74 www.globalintegrity.org.

Africa, by far the biggest weakness identified is the regulation of party political funding. Section 236 of the Constitution provides that "To enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis." That legislation exists.[75] Article 10 of the AU Convention also requires States to adopt legislative and other measures to: (a) Proscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and (b) Incorporate the principle of transparency into funding of political parties. However, there is no legislation which requires disclosure of donations to political parties. There are no limits on the size of contributions from any source, no limits on total party expenditure, no requirements of disclosure of contributions or their sources, no requirements for the auditing of the income and expenditure of political parties, and no agency monitoring the financing of political parties. There are also no regulations governing the financing of individual political candidates. Perhaps company law should be amended to provide that all corporate entities shall disclose all donations that they make, whether to individuals, charities, NGOs or political parties.

Obviously, this lack of regulation provides clear opportunities for corruption to flourish. Until proper regulation is put in place, the opportunity for corruption will remain.

D. Lengthy trials

High profile criminal trials are notoriously prone to extended delays. Accused persons often take every opportunity to delay their trials, forcing postponements, and taking interlocutory challenges and appeals. It is important to seek a solution that protects the rights of the accused person, on the one hand, but ensures speedy trials, which is itself a constitutional right, on the other. This might best be achieved by the creation of a special court to deal with corruption and serious economic crime, with provision for expedited appeals to the Constitutional Court where necessary. Establishing such a court would need great care to avoid any perception of double standards of justice.[76] The question of expediting trials is a complex one which is relevant not only to corruption but to all serious commercial crime and will require careful research and consideration beyond the scope of this memorandum.

E. Disciplinary proceedings against public servants

It is clear that relatively few disciplinary proceedings are launched against public servants.[77] When they are, they are often time consuming and difficult. Instituting

75 Public Funding of Represented Political Parties Act 103 of 1997.

76 OECD Report (n 21 above) at p 20.

77 See the DPSA Report to the Portfolio Committee, n 38 above.

disciplinary proceedings requires specialised legal knowledge. The establishment of an anti-corruption labour law unit either within the independent agency or within government with the function of providing advice to managers on the institution of disciplinary proceedings against public servants would facilitate the task of managers in combating corruption within their departments.

CONCLUSION

There can be no doubt that the struggle against corruption will only be won if there is a broad and committed partnership between political parties, government, business , labour and other organs in civil society to seek an effective way to curb corruption. Any institutional or legal framework will be ineffective if the major role-players in a democratic society are not committed to eradicating corruption. In part, the growth of a culture opposed to corruption will be fostered by an educational campaign which points to the deep harm caused by corruption, and by a campaign which clearly educates citizens as to what constitutes corrupt conduct.

There is a broad desire among civil society to eradicate corruption. Many organisations and citizens now perceive that corruption undermines the capacity of the state to carry out its constitutional obligations to improve the lives of South Africans. Once there is a widespread commitment within government, political parties and civil society to address the problem of corruption, there is no doubt that there is much that can be done to combat it effectively. This memorandum has suggested some key interventions to improve our chances of combating corruption with a view to bringing within our reach the constitutional vision of a South Africa in which the lives of all are improved.

NEXT STEPS

CASAC calls on all sectors of South African society and all citizens to engage with this report and its proposals, and to make their own contributions as to what should be done to stem the tide of corruption. We call on government, political parties, business, labour, NGOs, professional bodies, the media, student and youth groups, religious and faith-based organizations, women's groups, community organizations and social movements to consider appropriate action within their sectors as well as in broader society, and what we as a country ought to do.

With regards to this report it is suggested that discussions, comments and opinions around the following issues be canvassed and made known:

- The definition of corruption
- The role of civil society in preventing and combating corruption
- The nature of public education campaigns around corruption
- The desirability and need for a dedicated, independent agency
- The mandate of such an agency – investigation, prevention and education
- How should it relate to existing institutions such as the Hawks, the SIU, AFU etc

- How should its independence be asserted, and how should it be held accountable
- Should it be able to initiate its own investigations or only deal with complaints it receives
- What legal powers should it have – arrest, interception of communications, access to financial data. Asset freezing, recovery and confiscation
- Should there be a public interest discretion not to prosecute in cases of corruption
- How do we generate a zero tolerance approach to corruption

CASAC welcomes a debate on the matters raised in this document by all citizens and organs of civil society through our website – www.casac.org.za. CASAC would also endeavour to participate in discussions convened by other organizations to promote this national conversation.

List of Annexures

A. South Africa's International Law obligations in respect of corruption.
B. The South African law on corruption.
C. The Botswana Directorate on Corruption and Economic Crime.