

## SURVEY ON MEASURES TO COMBAT CORRUPTION

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### INTRODUCTION ON THE SOUTH AFRICAN SITUATION

South Africa is a new democracy that emerged in 1994 after decades of struggle. During the years of struggle, South Africa was a fragmented country and the majority of its people were subjected to a corrupt political, social, economical and moral regime. The legacy of this regime called *apartheid* caused lasting and structural inequalities in the distribution of goods and services as well as inequalities in fundamental opportunities like education, health and employment. In short, the regime created generations of poor people.

In 1994 the Government that was elected democratically by the majority of people, embarked upon a programme to reconstruct and develop South Africa to the benefit of all its people. The programme of growth, reconstruction and development was fraught with obstacles and legacies created by the *apartheid* regime. One such obstacle was the prevalence of corruption in parts of the private and public sectors.

Early in March 1997 the government Ministers responsible for the South African National Crime Prevention Strategy established a programme committee to work on corruption in the criminal justice system. The committee's work evolved and eventually the South African government approved a National Campaign Against Corruption in 1998. The first step in the process involved holding a Public Sector Anti-corruption Conference in November of 1998, involving government, parastatals and organised labour unions. This conference was held in preparation for a national summit against corruption.

Fundamental to the fight against corruption was the involvement of all stakeholders. A National Anti-corruption Summit was convened in early 1999, involving government leaders, political parties, Business, organised religious bodies, the NGO sector, donor countries, the media, organised labour unions, academic and professional bodies and the public sector. The National Anti-corruption Summit created a powerful platform for the National Campaign Against Corruption in that it recognised the societal nature of corruption, and that the fight against corruption requires a national consensus and coordination of activities. The Summit adopted a range of resolutions for implementation in the Public, Business and Civil Society Sectors of the country. These resolutions relate to combating corruption, preventing corruption and building integrity and raising awareness. Amongst others the Summit resolutions require the different Sectors to develop sectoral anti-corruption strategies that are to be coordinated and integrated at a country level. In August 1999 the different Sectors commenced with implementation of the Summit resolutions.

Much of the deliberation at the National Summit hinged around the co-responsibilities that exist for fighting corruption. Delegates at the Summit recognised that corruption prevails in all Sectors with inter-relationships as far as causes and remedies of corruption are concerned. Thus the resolution to address corruption through a variety of means and sectoral cooperation. This is similar to the wider South African

approach to address its growth, reconstruction and development challenges through partnership and cooperation.

Early in 2001, the different Sectors agreed to the establishment of a National Anti-corruption Forum. The Forum is a high level body comprised of 30 leaders from the three Sectors, each Sector enjoying equal representation and responsibility. The founding charter of the Forum requires members to-

- establish a national consensus through the coordination of sectoral anti-corruption strategies,
- advise government on the implementation of strategies to combat corruption,
- share information and best practice on sectoral anti-corruption work and
- advise all Sectors on the improvement of sectoral anti-corruption strategies.

The Forum is expected to provide the key input into finalisation of the South African National Anti-corruption Strategy.

South Africa's quest for addressing the scourge of corruption through partnership and cooperation extends also to regional and international cooperation, be it within the framework of international instruments such as declarations and conventions, participation in global programmes or donor assistance.

South Africa has adopted a holistic and integrated approach to corruption, with a good balance between prevention, law enforcement and monitoring and evaluation. The fight against corruption has been designated an issue of governance, and in terms of the South African model of governance, made the responsibility of the Governance and Administration cluster of work of the National Executive. In fact, fighting corruption is a priority area of the cluster. The Minister for the Public Service and Administration, Ms Geraldine J. Fraser-Moleketi, is leading this programme of Government.

South Africa is confident that its programme will be successful, mainly because of its multi-sectoral and multi-agency approach. Whilst the public service has adopted very specific strategies, other entities are part of the process of moral regeneration of our country. We thus do not view the fight against corruption narrowly as an issue of law enforcement, but seek to address all issues, such as the contribution of Civil Society to making a difference.

## **A. Economic and Fiscal Policies**

### **I General**

#### **1. What policy measures do you have in place to ensure transparency and certainty in the granting of incentives for investment?**

Incentives granted by way of the Income Tax Act, 58 of 1962, are granted in terms of clearly specified criteria contained in legislation and regulations. As an example, a rate of 15% on the first R100 000 of taxable income and an accelerated write-off of manufacturing assets are available to small business corporations. The criteria for qualifying as a small business corporation are objectively specified in the tax rate schedule and section 12E dealing with the accelerated write-off. SARS has listed the processes it regards as manufacturing processes in Practice Note 42.

In addition, where the granting of an incentive requires an evaluation of competing factors, reporting requirements in respect of decisions taken are laid down. As an example, section 12G provides for an additional 50% or 100% deduction of investment expenditure in respect of a qualifying strategic industrial project. This section requires that the Minister of Trade and Industry –

- provide reasons for any decision to grant or deny an application for approval of a project,
- publish of the particulars of an application in the *Government Gazette* with 30 days of the decision, and
- provide an annual report of approved projects to Parliament and the Auditor-General.

Information regarding the abovementioned is available on the website of the South African Revenue Service ([www.sars.gov.za](http://www.sars.gov.za))

2. **Do you have any administrative guidelines with respect to**

- (a) import/export licensing;**
  - (b) foreign exchange allocation; or**
  - (c) allocation of land-use permits;**
- which are designed to ensure efficiency, fairness and transparency in the process?**

(a) Import/export licensing

Customs undertakes the licensing of importers / exporters who are allocated customs code numbers and whose details are kept on a central database. The licensing and registration process is currently being amended as part of a modernisation programme undertaken by SARS. One of the outcomes thereof will be clearly formulated provisions within the Customs Act, 91 of 1964, stipulating the process that must be followed, the requirements that must be met, and sanctions for non-compliance. This will bring legal certainty and transparency to the licensing and associated processes. The existing guidelines are the following:

Outline of System

South Africa has one licensing system. This system make provision for the granting of permits to meet reasonable requirements of merchants and manufacturers. Licenses are issued upon written application by proposed importers. The Department of Trade and Industry, Sub-Directorate: Import and Export Control is the issuing authority.

Purposes and coverage of Licensing

Goods still subject to import control and for which licenses are granted are listed in Government Gazette No. 11630 dated 23 December 1988 (as amended).

Licenses are valid for the importation of goods from any country, the choice of the country of supply being left entirely to the importing party.

Licensing is not applied for the purpose of protecting domestic producers.

Import control is applied pursuant to powers conferred on the Minister of Trade and Industry by Section 2(1) of the Import and Export Control Act, 1963 (Act 45 of 1963). The licensing is not statutorily required, i.e. the legislation is permissive, not mandatory. The legislation leaves the designation of products to be subjected to licensing to administrative discretion. It is possible for the Government to abolish the system without legislative approval.

### Procedures

The licensing regulations are published in the Government Gazette and in certain instances supplemented with policy documents.

Import licenses are available to all merchants and manufacturers. No steps are taken to ensure the utilization of import permits. Quotas do not apply in South Africa. Particulars of import licenses granted are not publicized as information of this nature can only be disclosed with the consent of the permit holder.

The length and time for processing applications is dependent on the nature and extent of the application. In general applications are dealt with immediately upon receipt.

Licenses are valid for the calendar year indicated thereon and may be used for customs clearance of goods shipped prior to 31 December of that year.

Applications for import licenses are considered by the Department of Trade and Industry. Sub-Directorate: Import and Export Control. In the case of a limited range of goods, applications are also considered by the Departments of Agriculture, Health and Environment Affairs. In certain instances, the obligation is on the prospective importer to approach these bodies.

With the exception of licensing in respect of used goods or goods controlled in terms of the Montreal Protocol, for health and environmental reasons, licenses are issued without applying quantitative restrictions.

### Eligibility of importers to apply for a license

All persons, firms and institutions that comply with the requirements are eligible to apply for licenses.

### Documentation and other requirements for application for a license

A new Importer is required to complete an importer's registration form. Otherwise, no forms are prescribed. The following information is required:

- Importer's reference number;
- name and business address of applicant;
- quantity and description of goods to be imported as well as the custom tariff heading; and
- value of goods to be imported

Normal customs documents and, where applicable, and import permit is required upon actual importation.

There are no deposits or advance payments associated with the issue of licenses.

There are no licensing or administrative charges.

#### Conditions of licensing

A license is valid for the calendar year during which it is issued, but may be used for customs clearance of goods shipped before 31 December of that year. The validity of the license cannot be extended.

There is no penalty for non-use of a license or a portion of a license.

Licenses are not transferable between importers.

No other conditions are attached to the issue of a license.

#### Other procedural requirements

There are no other administrative procedures required prior to the importation.

Foreign exchange is automatically provided by the banking authority provided that an import license is produced or evidence is furnished that an import license is not necessary. Foreign exchange is always available to cover licenses.

#### (b) Foreign exchange allocation

Foreign exchange control is the responsibility of the South African Reserve Bank who, at regular intervals, and as the need arises, issues exchange control circulars to authorised dealers, commercial banks, customs and other interested parties that aim to regulate matters relating to foreign exchange. The role of customs in particular is to enforce foreign exchange measures instituted by the Reserve Bank at time of exportation.

South Africa does not have a regime of "foreign exchange allocation", but still has an exchange control system. The only quantitative limits that exist are those in respect of discretionary transfers or payments such as gifts to non-residents or travel allowances availed of by South African residents. Certain capital account (financial account) transactions also only have quantitative limits. The legal and administrative framework consists mainly of the following:

#### The Currency and Exchanges Act

The Currency and Exchanges Act, and more specifically Section 9 thereof, is the foundation of exchange control in South Africa. Section 9(1) of the Act provides that the "Governor-General (the President) may make regulations in regard to any matter directly or indirectly relating to or affecting or having any bearing upon currency, banking or exchange."

#### The Exchange Control Regulations

The current set of Exchange Control Regulations was promulgated on 1 December 1961, and amended from time to time. In terms of the Exchange Control Regulations, the control over South Africa's foreign currency reserves, as well as the accruals and spending thereof, is vested in the Treasury. The Treasury is defined as "... in relation to any matter contemplated in these regulations, means the Minister of Finance or an officer in the Department, who deals with the matter on the authority of the Minister of Finance.

### Orders and Rules

The Minister of Finance issues Orders and Rules under the Exchange Control Regulations and the current set was published on 1 December 1961, and amended from time to time. The Orders and Rules contain various orders, rules, exemptions, forms and procedural arrangements.

### Delegation

The Minister of Finance delegated effectively all powers and/or functions of the Treasury to the Exchange Control Department of the South African Reserve Bank ("the Exchange Control Department"). The Exchange Control Department is therefore, responsible for the day-to day administration of exchange control in the Republic of South Africa.

### Authorised Dealers

The Minister of Finance has also appointed certain banks to act as Authorised Dealers in foreign exchange. This appointment gives these banks the right to buy and sell foreign exchange, but subject to conditions and within limits prescribed by the Exchange Control Department. Authorised Dealers in foreign exchange are not the agents of the Exchange Control Department but act on behalf of their customers.

### The exchange Control Rulings

Authorised dealers in foreign exchange are authorised by the Treasury to deal in foreign exchange. The Exchange Control Rulings ("the Rulings") are issued by the Exchange Control Department, as the delegate of the Minister of Finance, and contain certain administrative measures as well as the permissions, conditions and limits applicable to transactions in foreign exchange which may be undertaken by Authorised Dealers. The Rulings are amended from time to time by way of Exchange Control Circulars ("Circulars"). The Rulings and Circulars are made available to all Authorised Dealers and although for their use only, are not secret and the contents thereof may be made available to the public.

Applications for foreign exchange received by authorised Dealers from their customers are dealt with by them if the applications fall within the parameters outlined in the Rulings, without reference to the Exchange Control Department.

### The Exchange Control Manual

The Exchange Control Manual was first issued by the Reserve Bank in October 1990 to assist Authorised Dealers in foreign exchange, their customers and other interested parties, by providing a general understanding of the purpose, scope and operation of the exchange control system in the Republic and in the

Common Monetary Area. The manual merely serves as a general guideline and does not replace or supersede the Exchange Control Regulations or Orders and Rules, nor the norms and policies as applied by the Exchange Control Department from time to time. The current set was issued in January 1996. The Publication of the Exchange Control Manual has served the useful purpose of conveying to and creating with the general public a proper understanding of the policies and norms applied by the Exchange Control Department. The Exchange Control Department constantly updates the Exchange Control Manual to reflect current policies and norms. Changes to policy and norms applied are on a regular basis conveyed and communicated to the Authorised Dealers, through personal interviews with applicants, who are always accompanied by a representative of the Authorised Dealer concerned.

The policy and norms are further more conveyed, discussed and communicated to various professional bodies such as the Association of Law Societies.

The Exchange Control Manual is available to all Authorised Dealers in foreign exchange, as well as to various interested parties. It is, furthermore, also available on the website of the South African Reserve Bank ([www.resbank.co.za](http://www.resbank.co.za)).

**3. Have any measures been taken or are any planned to simplify regulations (e.g. customs administration) in order to reduce the scope of bureaucratic discretion?**

The number of provisions in the Income Tax Act, 58 of 1962, and other fiscal legislation which permit the Commissioner to exercise discretion has been systematically reduced over the past decade. The exercise of any such discretion is subject to judicial review in terms of the common law, the Administrative Justice Act, 3 of 2000, or the Income Tax Act, 58 of 1962.

The following measures currently under development will impact positively on simplified Customs regulations as well as on the limitation of bureaucratic discretion:

- The development of various automated solutions to replace current paper processes will result in business rules being applied uniformly by the system and reduce discretionary decisions.
- The re-write of the current Customs Act is, inter alia, aimed at bringing legislation in line with international best practices, simplifying processes and addressing existing weaknesses.
- The re-engineering of processes currently taking place within the SARS modernization programme also results in those processes becoming more streamlined and the regulations surrounding it more uniform and less complex.
- In all of the above processes care is taken to ensure that developments are in line with the provisions of the Kyoto Convention on the Simplification and Harmonization of Customs Procedures.

4. **Do you have any mechanisms in place to inform or educate the population on fiscal and tax regulations?**

*Radio*

More than 85% of the South African population listens to the radio and different surveys have established that an equal number of the South African population own radio sets.

The SABC receives a grant from the government to support educational radio initiatives and uses this grant to offer government departments free slots on radio to air educational programmes.

Shows and features

SARS has taken advantage of the offer and has, in conjunction with the SABC, produced a programme that is aimed at raising awareness about tax and related matters in a campaign that has lasted six months. Radio has given a unique medium that has been able to cope with language diversity (11 official languages in the country), countrywide reach and a cost-effective way of disseminating complex information in a more accessible manner.

The format of the shows is as follows:

- Introductory insert which explains the tax type or topic
- A question and answer section that captures the main points of the presentation
- A live interview with a SARS official with the telephone lines opened and listeners are invited to ask questions.

SARS regularly makes staff available for SABC and independent broadcasters' talk shows to enhance SARS' visibility and answer listeners' questions on tax.

Radio spots

Radio spots have been used effectively to announce deadlines for the submission of tax returns, as well as to punt and explain the various tax types using catchy pay off lines.

*Television*

Popular soap operas

Plans are in the pipeline to place SARS posters, leaflets and have a tax related story line woven into popular soap operas. To reinforce the message, consideration is being given to using popular soap and other television actors and actresses to advertise SARS' messages in prime television slots.

Shows

SARS regularly makes staff available for television interviews and debates on topical tax matters.



## *Print*

Pull out adverts

Pull out adverts explaining using cartoon style graphics to explain the Income, Provisional and Capital Gains Tax have been used with great success.

Editorial support

SARS provides answers to readers' questions and assists journalists with technical information for articles.

## *Billboard advertising*

Electronic billboards to advertise messages in high-density areas have been used.

## *Buses, trains, taxis, trailers etc.*

A campaign that will see the use of buses, trailers, taxis as a backdrop for tax messages thus spreading the reach and saturating the target market, will soon be launched.

## **II Management of services in the public interest**

### **5. Do you have any institutions and general mechanisms in place to ensure efficient management and delivery of public services?**

The Auditor-General and the Public Protector (ombudsman) play key roles in ensuring that services are efficiently delivered. At the macro-budgetary level, the National Treasury also play a key role to align service needs and performance with budgets, as is discussed in 8. below. The Public service Commission monitors and evaluates the efficacy of public service employment and organisational policies, as well as the application and effectiveness of service delivery policies. Also see 9. below.

### **6. Do you have a mechanism in place to deal with public complaints with respect to the delivery of public services? If so, please describe.**

All departments of State are required to establish service delivery improvement programmes, including service complaint mechanisms, publication of service commitment and publication of service standards. Details can be found in the Public Service Regulations on the following Website: [www.dpsa.gov.za](http://www.dpsa.gov.za).

### **7. Are there any measures in place to monitor the management of privatised services?**

Privatised services are monitored at departmental level.

## **III Financial management**

8. **Do you have any procedures in place to ensure open and transparent processes for the preparation of the government budget, its execution and monitoring?**

Government has undertaken a number of reforms to improve transparency in the budget process. The move towards programme budgeting was the first step in this process linking money appropriated by Parliament to specific programmes that Government delivers. The second reform was the introduction of three-year budgeting, which increased the scope with which departments could plan, and citizens could see forward estimates for budgets. The introduction of the Medium Term Budget Policy Statement is also designed to improve transparency in the process. This statement is available in October of the financial year and provides economic and budget frameworks as well as policy priorities for the next years' budget. Annually, the Government publishes The Peoples Guide to the Budget, a popular newspaper version of the budget in five languages. In addition to these Government also publishes the Budget Review, the Estimates of National Expenditure, the Estimates of Revenue and the Division of Revenue Act. Budget documentation is increasingly focused on outputs and objectives rather than just money.

Information regarding the abovementioned and other documentation is available on the Internet at : [www.treasury.gov.za](http://www.treasury.gov.za):

- Treasury Guidelines
    - Budgeting, Planning and Measuring Service Delivery – October 2001
    - 2002 Estimate of Expenditure – October 2001
    - Preparing Budget Submissions – April 2001
  - Public Finance Management Act, 1999 (Act 1 of 1999 as amended by Act 29 of 1999)
  - Treasury Regulations for departments, constitutional institutions and public entities – April 2001
  - Guide for Accounting Officers – October 2000
9. **Are there any institutions set up to ensure timely scrutiny of public accounts and oversee the legitimacy of public expenditures?**

**AUDITOR-GENERAL**

The powers and functions of the Auditor-General are set out in Section 188 of the Constitution of the Republic of South Africa, 1996 (Act no 108 of 1996), as well as the Auditors-General Act, 1995, (Act no. 12 of 1995). The Auditor-General is enjoined by the Constitution to audit and report on all the accounts, financial statements and financial management of national, provincial and municipal entities and any institution or entity required by

national or provincial legislation to be audited by the Auditor-General, as well as any institution funded from the National Revenue Fund or provincial Revenue Fund or receives money for a public purpose.

According to Audit standards adopted by the Auditor-General in terms of the Auditor-General Act the Auditor-General has the responsibility to express an opinion as to whether or not the financial statements of an institution audited by him, in all material respects, fairly present the results of the operations in accordance with the prescribed accounting practice. An opinion is also expressed as to whether or not the transactions comply with the relevant laws and regulations applicable to financial matters. Finally, the Auditor-General has to satisfy himself or herself that satisfactory management measures have been taken to ensure that resources are procured economically and utilised effectively and efficiently. The Auditor-General is then required to report on the audits conducted to the legislature that has a direct interest in the audit and any other authority prescribed by legislation. To ensure transparency and accountability, all the audit reports of the Auditor-General must be made public.

For more information on the Auditor-General, visit the following Website:  
[www.agsa.co.za](http://www.agsa.co.za).

#### STANDING COMMITTEE ON PUBLIC ACCOUNTS (NATIONAL ASSEMBLY)

The Committee (established in terms of the Standing Rules for the National Assembly) is the mechanism through which the National Assembly exercises oversight over the expenditure of public money, which it annually appropriates to executive organs of State in the national sphere of government.

The Standing Committee on Public Accounts enables the National Assembly, in respect of financial management, to fulfil its constitutional obligation to scrutinize and oversee executive action. Section 55 (2) of the Constitution, on the role and powers of the National Assembly, states, *inter alia*, that "the National Assembly must provide for mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it". In a non-partisan fashion, the Committee conducts searching and rigorous assessments of financial administration in the national public sector by holding accounting authorities accountable for their spending of taxpayers' money and their stewardship over public assets in order to ensure regular, economical, efficient and effective government spending.

The Committee therefore strives to ensure that institutions at National level –

- constantly improve the quality of their financial management, especially internal control systems;
- remain within their budgetary constraints, and expend funds in accordance with the purposes determined by Parliament;
- provide value for money through the services rendered to the public

and the State; and

- are exposed and held accountable if they transgress the law as it pertains to financial management.

Similar oversight powers for Provincial Legislatures are embedded in Section 114 (4) of the Constitution.

#### **IV Public procurement**

##### **10. What institutions are there which are responsible to monitor and ensure transparent government procurement practices?**

The Auditor-General monitors adherence to the State (National) and Provincial Tender Board's prescripts regarding transparency in public sector procurement. At present the public sector procurement system is in process of being reformed. The State Tender Board will be dismantled as from 1 April 2002, on which date new Treasury Regulations regarding procurement by central government will be promulgated. A separate component whose responsibility it will be to monitor compliance to the Regulations will be established and operative also from 1 April 2002. Transparency is one of the core aspects of public sector procurement and this is one of the aspects that will be monitored on a regular basis.

##### **11. How often are government procurement procedures and practices reviewed?**

The procedures and practices are reviewed regularly. As described in 10 above, the present system is currently being reviewed. The establishment of a separate component dealing with research on best practices for supply chain management, including procurement, has already been approved and it is envisaged that this new component will become operative as from 1 April 2002.

##### **12. What guidelines and criteria have been devised for national and international competitive bidding for contracts for goods, civil works and services?**

- a) The whole public sector procurement system is currently regulated by the various Tender Board Acts and the Preferential Procurement Policy Framework Act, No. 5 of 2000. The latter prescribes that the preferential evaluation criteria must form part of the official tender documents in order to redress past imbalances in procurement.
- b) Section 217 of the Constitution prescribes that the procurement of goods and services must be through a system which is fair, equitable, transparent, competitive and cost-effective.
- c) The Cabinet issued General Procurement Guidelines applicable to public sector procurement. These guidelines are based on five pillars for procurement, namely:
  - (i) Value for money
  - (ii) Open and effective competition

- (iii) Ethics and fair dealings
- (iv) Accountability and reporting
- (v) Equity

**13. Has your government prepared standard bidding documents, established processes for public bid opening, set objective criteria for bid evaluation, and instituted a system for review of awards?**

- a) Tender documents are usually in a standard format, together with specific clauses and technical prescripts related to the specific tender. It is a prescript to all departments that the evaluation criteria of any tender must form part of the tender documents.
- b) Tenders are advertised in the various Government Gazettes. The Government Tender Bulletin is available on the Website: [www.treasury.gov.za](http://www.treasury.gov.za). International tenderers may bid on any tender. When the manufacturing of the products by local manufacturing is of vital importance to the industry, and the Minister of Trade and Industry certifies this, such tenders will be advertised with the tendering condition that only locally manufactured goods will be considered. Even under such conditions international tenderers are allowed to tender, provided that the products are manufactured locally.
- c) The tenders are opened in public and tendering authorities are compelled to give reasons for passing over any tender.

**14. Are there institutional arrangements for collection and distribution of data on public procurement prices of goods and services of similar specification from different agencies?**

Not at this stage, this is seen as an opportunity that will be addressed as part of the ongoing procurement reform.

**15. Are there measures to ensure accountability of contractors and provisions for sanctions, including disqualification, in relation to those guilty of corrupt practices?**

It is prescribed in the tendering conditions that any misconduct or non-performance of contractors must be reported to the relevant Tender Board who has the authority, notwithstanding any other remedies, to restrict the tenderer / contractor from tendering for a period as decided by the Tender Board. The national and provincial tender boards are informing each other of restrictions imposed by a board.

**V Trade and Industry**

**16. What measures have been taken for eliminating corruption of public officials in the trade, industry and banking sectors of the economy?**

Public officials are subject to the legislative, disciplinary and conduct regimes that apply elsewhere in the public service, with the exception of the central bank (Reserve Bank) that has its tailored-made disciplinary and conduct regime, specific for the sector in which it operates.

17. **Using one or two examples, explain how in the last twelve months corrupt practices have been dealt with as part of efforts to introduce policy reforms for the liberalization of trade regimes, simplifying regulations and procedures, eliminating or reducing price controls, increasing transparency etc. including in such areas as foreign exchange allocation, taxation benefits and land allocation for industries.**

18. **What measures have been taken to reduce corruption in private corporations?**

Many private sectors groupings have its own anti-corruption arrangements, the most progressive being the banking industry (see Banking Council of South Africa, Website: [www.banking.org.za](http://www.banking.org.za)). Organised Business has created a body called Business Against Crime that fights crime and corruption in a very organised fashion. This arrangement also aids Government by offering training on crimes peculiar to this industry. Organised Business form part of the National Anti-corruption Forum and has taken responsibility for developing a Sectoral anti-corruption strategy. Certain parts of the Business Sector, such as the banking industry, have sophisticated anti-corruption strategies.

Please see the discussion of the National Anti-corruption Forum in the introduction.

19. **Are there any codes of conduct/ ethics that apply to private industry?**

Yes, most industries/sectors have created codes of conduct/ethics, including the non-governmental sector that proudly promotes a code of operation. South Africa has also developed guidelines on good governance, which the private industry applies on a voluntary basis. Public entities are however required by law (Public Finance Management Act, 1999 and Treasury Regulations, issued in terms of Act (see Website: [www.treasury.gov.za](http://www.treasury.gov.za))) to conduct risk assessments and establish fraud prevention plans. These entities are also subject to a code of conduct, based on the afore-mentioned guidelines on good governance.

## **B. The Judiciary**

20. **What process (including the applicable criteria) is used to select and appoint judges? (e.g. government appointment, selection by independent committee, appointment by head of government, participation of legal profession etc.)**

Judges are appointed in terms of section 174 of the Constitution of the Republic of South Africa, 1996 (Act No 108 of 1996). Section 174 deals with the appointment of members of the Constitutional Court as well as Judges of the Supreme Court of Appeal and Judges of the High Court and other judicial officers. The following applies in this regard:

### **(A) GENERAL**

- (i) Any appropriately qualified woman or man who is a fit and proper person may be appointed as a Judge;
- (ii) Any person to be appointed to the Constitutional Court

- must also be a South African citizen.
- (iii) The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when Judges are appointed.

(B) APPOINTMENTS TO THE CONSTITUTIONAL COURT

- (i) The Constitutional Court consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine other Judges
- (ii) A person appointed to the Constitutional Court must be a South African citizen.
- (iii) The President as head of the National Executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly appoints the Chief Justice and the Deputy Chief Justice;
- (iv) The other Judges of the Constitutional Court are appointed by the President, as head of the National Executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly, in accordance with the following procedures:
  - (aa) The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President.
  - (bb) The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made.
  - (cc) The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.
  - (dd) At all times, at least four members of the Constitutional Court must be persons who were Judges of the High Court at the time they were appointed to the Constitutional Court.

(C) APPOINTMENT OF PRESIDENT AND DEPUTY PRESIDENT OF THE SUPREME COURT OF APPEAL

- (i) The President as head of the National Executive, after consulting the Judicial Service Commission, appoints the President and the Deputy President of the Supreme Court of Appeal;
- (ii) The other Judges of the Supreme Court of Appeal are appointed by the President on the advice of the Judicial Service Commission.

(D) APPOINTMENT OF JUDGES OF THE HIGH COURTS

Judges President, Deputy Judges President and Judges of the High Courts are appointed by the President on the advice of the Judicial Service Commission.

(E) ACTING JUDGES

- (i) The President may appoint a woman or a man to be an acting Judge of the Constitutional Court if there is a vacancy or if a Judge is absent. The appointment must be made on the recommendation of the Cabinet member responsible for the administration of Justice acting with the concurrence of the Chief Justice and the President of the Supreme Court of Appeal.
- (ii) The Cabinet member responsible for the administration of justice must appoint acting Judges to other courts after consulting the senior Judge of the Court on which the acting Judge will serve.

(F) JUDICIAL SERVICE COMMISSION

- (i) The Judicial Service Commission consists of -
  - (aa) The Chief Justice, who presides at meetings of the Commission.
  - (bb) The President of the Constitutional Court.
  - (cc) One Judge President designated by the Judges President.
  - (dd) The Cabinet member responsible for the administration of justice, or an alternate designated by that Cabinet member.
  - (ee) Two practicing advocates nominated from within the advocates' profession to represent the profession as a whole, and appointed by the President.
  - (ff) Two practicing attorneys nominated from within the attorneys' profession to represent the profession as a whole, and appointed by the President.
  - (gg) One teacher of law designated by teachers of law of South African Universities.
  - (hh) Six persons designated by the National Assembly from among its members, at least three of whom must be members of opposition parties represented in the Assembly.
- (ii) Four permanent delegates to the National Council of Provinces designated together by the Council with a supporting vote of at least six provinces.
- (jj) Four persons designated by the President as head of the National Executive, after consulting the leaders of all the parties in the National Assembly.
- (kk) When considering matters specifically relating to a provincial or local division of the High Court,



the Judge President of that Division and the Premier, or an alternate designated by the Premier, of the province concerned.

21. **Are there any specific safeguards to protect against corruption in the selection and appointment process? If so, please outline.**

Specific safeguards have been built into the procedures adopted by the Judicial Service Commission for the selection and appointment of Judges.

(A) **THE PROCEDURES FOLLOWED IN RESPECT OF THE SELECTION OF CONSTITUTIONAL COURT JUDGES.**

(i) The Chief Justice must inform the Commission when a vacancy occurs or will occur in the Constitutional Court.

(ii) The Commission must announce the vacancy publicly and call for nominations by a specified closing date.

(iii) Each nomination contemplated in paragraph (ii) must consist of –

(ii) a letter of nomination which identifies the person making the nomination and the candidate;  
the candidate's written acceptance of the nomination;  
a detailed curriculum vitae of the candidate which shall disclose his or her formal qualifications for appointment as prescribed in the Constitution; and  
such further pertinent information concerning the candidate as he or she, or the person nominating him or her, wishes to provide.

(iv) After the closing date, all members of the Commission must be provided with a list of the candidates nominated with an invitation to -

make additional nominations should they wish to do so and such nominations must comply with the requirements of paragraph (iii) above; and  
inform the screening committee of the names of the candidates, if any, who they feel strongly should be included in the short list of candidates to be interviewed.

(v) The screening committee may in its discretion receive and consider nominations received after the specified closing date and must prepare a short list of candidates to be interviewed which must include all candidates who qualify for appointment and who -

are referred to in paragraph (iv); or  
in the opinion of the screening committee or any of its members, have a real prospect of recommendation for appointment.

The short list must be distributed to all roleplayers and publicly announced for comment by a specified closing date.

(vi) After the closing date referred to in paragraph (vi), the short list and all the material received on short-listed

candidates must be distributed to all the members of the Commission.

- (vii) The Commission must interview all short-listed candidates.
- (viii) The interviews contemplated in paragraph (viii) must be open to the public and the media subject to the same rules as those ordinarily applicable in courts of law and must not be subject to a set time-limit.
- (x) After completion of the interviews, the Commission must deliberate in private and must, if deemed appropriate, select the candidates to be recommended for appointment by consensus or, if necessary, by majority vote.
- (xi) The Chairperson and Deputy Chairperson of the Commission must distil and record the Commission's reasons for recommending the candidates selected.
- (xii) The Commission must advise the President of the names of the candidates recommended for appointment and of the reasons for their recommendation.
- (xiii) The Commission must announce publicly the names of the candidates recommended for appointment.
- (xiv) If further candidates have to be recommended, the Commission may in its discretion select them -
  - from the candidates already interviewed mutatis mutandis in accordance with the procedures described in paragraphs (x) to (xiii); or
  - by repeating the whole process mutatis mutandis in accordance with the procedures described in paragraphs (ii) to (xiii).

(B) THE PROCEDURE FOLLOWED IN RESPECT OF THE SELECTION OF JUDGES OF THE HIGH COURTS (INCLUDING JUDGES OF THE SUPREME COURT OF APPEAL) IS THE FOLLOWING

- (i) The President of the Supreme Court of Appeal or responsible Judge President must inform the Commission when a vacancy occurs or will occur in the Supreme Court of Appeal or any of the High Courts.
- (iii) The Commission must inform all roleplayers of the vacancy and must call for nominations by a specified closing date.
- (iv) A nomination contemplated in paragraph (ii) must consist of-
  - a letter of nomination which identifies the person making the nomination, the candidate and the High Court for which he or she is nominated;
  - the candidate's written acceptance of the nomination;
  - a questionnaire prepared by the Commission and completed by the candidate; and
  - such further pertinent information concerning the candidate as he or she, or the person nominating him or her, wishes to provide.

(iv) After the closing date, all the members of the Commission must be provided with a list of the candidates nominated with an invitation to -

make additional nominations should they wish to do so and such nominations must comply with the requirements of paragraph (iii) above; and inform the screening committee of the names of the candidates, if any, who they feel strongly should be included in the short list of candidates to be interviewed.

(v) The screening committee may in its discretion receive and consider nominations received after the specified closing date and must prepare a short list of candidates to be interviewed, which must include all candidates who qualify for appointment who -

are referred to in paragraph (iv); or in the opinion of the screening committee or any of its members, have a real prospect of selection for appointment.

(vi) The short list must be distributed to the roleplayers for comment by a specified closing date.

(vii) After the closing date referred to in paragraph (vi), the short list and all the material received on short-listed candidates must be distributed to all the members of the Commission.

(viii) The Commission must interview all short-listed candidates.

(ix) The interviews contemplated in paragraph (vii) must be open to the public and the media subject to the same rules as those ordinarily applicable in courts of law and must not be subject to a set time-limit.

(x) After completion of the interviews, the Commission must deliberate in private and must, if deemed appropriate, select the candidate for appointment by consensus or, if necessary, majority vote.

(xi) The Commission must advise the President of the name of the successful candidate

(xii) The Commission must announce publicly the name of the successful candidate.

**22. For what length of time are judges appointed (e.g. for life, until a set retirement age, on time limited contract, or otherwise)?**

Judges (Including the Chief Justice and Deputy Chief Justice, Judges of the Constitutional Court, President and Deputy President of the Supreme Court of Appeal, Judges of Appeal and Judges of the High Court) hold office for life

**(A) CONSTITUTIONAL COURT JUDGES**

The Chief Justice and Deputy Chief Justice and a Judge of the Constitutional Court must be discharged from active service on the date on which he or she -

- (i) attains the age of 70 years; or
- (ii) has completed a twelve year term of office as a Constitutional

Court Judge, whichever occurs first.

However, a Constitutional Court Judge-

- (a) whose twelve year term of office as a Constitutional Court Judge expires before he or she has completed 15 years' active service must, subject to paragraph (b), continue to perform active service as a Constitutional Court Judge to the date on which he or she completes a period of 15 years' active service whereupon he or she must be discharged from active service as a Constitutional Court Judge;
- (b) who, on attaining the age of 70 years, has not yet completed 15 years' active service, must continue to perform active service as a Constitutional Court Judge to the date on which he or she completes a period of 15 years' active service or attains the age of 75 years, whichever occurs first, whereupon he or she must be discharged from active service as a Constitutional Court Judge.

Furthermore, a Constitutional Court Judge may at any time –

- (a) be discharged by the President from active service as a Constitutional Court Judge if he or she becomes afflicted with a permanent infirmity of mind or body which renders him or her incapable of performing his or her official duties; or
- (b) on his or her request and with the approval of the President be discharged from active service as a Constitutional Court Judge if there is any reason which the President deems sufficient.

(B) JUDGES OF THE HIGH COURTS AND SUPREME COURT OF APPEAL

A Judge of the High Court, including the President and Deputy President of the Supreme Court of Appeal and a Judge of Appeal, must retire from active service at the age of 70 if he or she has on that date completed a period of active service of not less than 10 years or, if he or she has on that date not yet completed a period of 10 years active service, he or she must retire from active service on the date immediately following the day on which he or she completes a period of ten years active service.

A Judge of the High Court may however retire from active service at an earlier stage under certain circumstances. This applies to a Judge –

- (i) who has already attained the age of 65 years and has performed active service for a period of 15 years and who informs the Minister of Justice and Constitutional Development in writing that he or she no longer wishes to perform active service. In such an event the President has no discretion but to discharge such a Judge from active service
- (ii) who becomes afflicted with a permanent infirmity of mind or body which renders him or her incapable of performing his or her official

duties.

- (iii) who requests the President to be discharged from active service. The President may discharge such a Judge if there is any reason which the President deems sufficient.

However, a Judge who on attaining the age of 70 years has not yet completed 15 years' active service, may continue to perform active service to the date on which he or she completes a period of 15 years' active service or attains the age of 75 years, whichever occurs first, whereupon he or she must be discharged from active service as a judge.

23. What laws exist to ensure the security of tenure of judges?

There are basically two laws that ensure the security of tenure of Judges namely-

- (a) the Constitution of the Republic of South Africa, 1996 (Act No 108 of 1996); and
- (b) the Judges' Remuneration and Conditions of Employment Act, 2001 (Act No 47 of 2001).

24. **Is there any process for the removal of judges for misconduct or incompetence?**

See 25. below.

25. **If there is;**

- (a) what is such process?**
- (b) who makes the decision (Chief Judge, other judges, independent body, the legislature, the Minister, Head of Government, other person or body)?**
- (c) what criteria are applied for such removal?**
- (d) what is the standard of proof?**

The only procedure for the removal of a Judge due to misconduct or incompetence is contained in section 177 of the Constitution of the Republic of South Africa, 1996. In terms thereof a Judge may be removed from office only if-

- (i) the Judicial Service Commission finds that the Judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and
- (ii) the National Assembly calls for the Judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.

The President must remove a Judge from office upon adoption of a resolution calling for the Judge to be removed. Furthermore, the President, on the advice of the Judicial Service Commission, may suspend the Judge who is the subject of the procedure mentioned above.

26. **Are judges able to be removed for other than misconduct or incompetence? If so, how and on what grounds?**

See 25. above.

27. **Have any attempts been made to remove judges in the last five years?**

No.

28. **If so, how many of such attempts have there been, and with what result?**

29. **How does the salary scale for judges compare with:**

(a) **the salary scales for other public servants;**

(b) **the income of the private bar or legal profession?**

**(Please note: no specific figures need be provided in answer to this question.)**

The salary scale of *puisne* Judges of the High Court is slightly higher than that of a Director-General which occupies the highest position in the Public Service. The remuneration of a Director-General consists of an inclusive package while the salaries of Judges are still being calculated exclusively in the sense that they do not reflect other service benefits such as medical fund contributions, motor vehicle benefits, etc. Senior members of the Bar and side Bar in the normal course of events earn more than Judges of the High Court. It is for example generally accepted that when a senior member of the legal profession would take up an appointment on the Bench, he or she sacrifices quite substantially as far as income is concerned.

#### **Additional notes on the Magistracy and National Prosecuting Authority**

##### MAGISTRATES

Concerning the magistracy, s 174(7) of the Constitution provides that –

*“(o)ther judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice”.*

Prior to 1994, jurisprudence recognized that magistrates (who were career and not lay magistrates) were, in respect of judicial work (“on the bench”) just as independent as judges. However, in terms of appointment, remuneration, promotion and discipline, magistrates were public servants and, hence, subject to the Executive. They were also heads of sub-offices of the Department of Justice responsible for many administrative functions.

It is clear that this dual capacity was untenable as the possibility of at least indirect executive influence was too real. Furthermore, remuneration was dependent upon the general public service budget and was therefore notoriously depressed. The potential vulnerability was partially offset by collegial integrity and pride in incumbency of a magistrate’s office.

##### *Governance*

In one sense, Lower Court judicial officers are ahead of judges in terms of self-regulation. Several functioning structures are in place.

The Magistrates Act, No 90 of 1993, establishes a Magistrates' Commission which is also a representative body. Amongst the objects of the Commission is the implementation of the previously quoted s 174(7) of the Constitution (see s 4(a) of Act 90 of 1993). Other objects are –

*“to ensure that no influencing or victimization of judicial officers in the lower courts takes place” (s 4(b))*

and

*“to compile a code of conduct for judicial officers in the lower courts” (s 4(d)).*

The Magistrates Act proceeds to provide for matters such as protection of remuneration: the salary payable to a magistrate cannot be reduced except by Act of Parliament.

#### *Discipline and Complaints*

The Magistrate's Commission operates through a system of committees, an example of which is the complaints committee (s 6B) which is to be accessible to the public.

Any conduct by a magistrate that is alleged to be improper or to have resulted in any impropriety or prejudice, may be reported to the committee which is to investigate and gather evidence. If misconduct is established after a hearing, removal from office could follow. A report on the findings of a tribunal is to be tabled in Parliament and if Parliament recommends the removal from office, the Minister shall so remove the judicial officer from office. (Cf s 13).

#### *General*

Because this paper does not deal primarily with the magistracy, this part of the paper will not deal in detail with relevant provisions. Suffice it to say that governance by their own commission, the adoption of a code of conduct and accessibility (or transparency) are all hedges against the possibilities of corruption. To that is to be added the principle of public hearings and reviewability of decisions which also apply. South Africa also boasts an automatic process of review by the High Court of decisions of magistrates below a certain rank and involving certain threshold sentences.

Although the number of administrative functions has been reduced somewhat, it has not yet been possible to free magistrates from managerial and other administrative tasks. A process of reconstruction is under way which should ideally result in a court services component which frees both magistrates and prosecutors to concentrate on their respective professional tasks.

## **NATIONAL PROSECUTING AUTHORITY (NPA)**

There exists a duality here in the sense that appointments to the rank of Director of Public Prosecutions and higher are directly regulated by the NPA Act, No 32 of 1998, whilst all other ranks of prosecutors are still subject to the laws governing the Public Service (as magistrates were). This is changing. The National Director is in the process of taking over from the Department of Justice responsibility for all prosecutors with a view to creating a single regime.

At present it is only the senior ranks who are appointed by the President. In respect of reduction in salary and removal from office, they are in a similar position to judges.

### *Independence*

It has been long recognized that the prosecution service enjoyed a *sui generis* independence, notwithstanding a history of being overseen by the Executive. In the nature of its duty to pursue contravention of the laws, the existence of unacceptable apartheid legislation led to the prosecution being perceived to be instruments of the previous regime – notwithstanding the prosecution's professional features. The democratic change has brought about a single authority that enjoys legitimacy.

The Constitution itself provides that –

*“(n)ational legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice”. (s 179(4))*

Jurisprudence recognizes that the Prosecuting Authority is independent of the government, but not of the same order of the judiciary.

### *Accountability*

The NPA is accountable to Parliament through a reporting system. Internally, prosecutors are internally accountable through the institution's hierarchy and subject to continual performance monitoring by a Court Management Unit. Naturally, prosecutors are accountable to the courts in their functioning under the laws and the Constitution. As with any other officer of the court, a prosecutor could be removed from the roll of practitioners for misconduct.

### *Discipline*

In terms of its Act (no 32 of 1998), the NPA has drawn up a Prosecution Policy and Code of Conduct.

It has also taken over the functions relating to discipline from the Department of Justice.



In 2000, its Court Management Unit established that there were about 72 prosecutors under suspension or investigation by the Department, but that little progress had been made in processing these matters. In the course of the same year the Unit's disciplinary committees recommended, after hearings, that 16 prosecutors be dismissed – mostly for corruption.

Since instituting dedicated committees of peers to attend to disciplinary matters, the average time taken to finalise serious cases was reduced from three years to six months.

The lesson to be drawn from this is that dedicated attention and quick action to enforce a Code of Conduct is essential to buttress the positive institutional measures intended to lessen the threat of corruption.

## PRACTITIONERS

In South Africa, other officers of the court are lawyers who may be advocates ('barristers') or attorneys ('solicitors'). The former are governed by the Advocates Act, No 74 of 1964, and the latter by the Attorneys Act, No 53 of 1979. The Attorneys Act governs, among others things, trust accounts of practitioners and requires that each holds an (annual) certificate to practice. It is strictly enforced.

Advocates and Attorneys respectively have professional organizations which enforce their codes of conduct and legislation.

Various individual and groupings of lawyers had, before the democratic change, not belonged to the traditional associations. Steps have however been taken since 1994 to unite the various factions. The process is not complete and the next step is the creation of an umbrella Council for Legal Practitioners. This is regarded as necessary to guarantee accessibility to the public and to ensure a transparent enforcement of discipline.

At base, however, all practitioners are subject to the High Court where they are enrolled. They can be removed from the roll on the ground of misconduct.

### **C. The Legal System**

30. **Do you have laws which make any of the following a crime:**

- (a) bribery; or**
- (b) soliciting a bribe;**
- (c) unauthorised use of confidential information obtained in the course of performing duties as a member of the civil service;**
- (d) unauthorised disclosure of confidential information obtained in the course of performing duties as a member of the civil service;**
- (e) improper use by a civil servant of his or her position in the civil service;**
- (f) abuse of office?**

The South African framework contains a range of laws that cover corruption, either directly or indirectly. The framework is as follows:

### **Laws which specifically target corruption**

#### *Corruption Act, Act No. 94 of 1992*

In South Africa corruption is a statutory offence. The Act that serves as the basis for prosecuting corruption cases in South Africa is the Corruption Act, Act No. 94 of 1992. Before this Act was promulgated, corruption and/or corruption related offences were prosecuted in terms of the Prevention of Corruption Act, Act No. 6 of 1958 or as common law crimes. So offenders who otherwise should have been prosecuted for corruption ended up being prosecuted under various other charges such as theft, fraud, bribery etc. The Legislature passed Act No.94 of 1992 which repealed all the previous Acts that dealt with corruption and related offences. The Act also repealed the common law crime of bribery.

### **Other laws which specifically target corruption**

An adequate legal policy framework is in place to deal effectively with corruption. Other than the constitutional guarantees on the independence of the judiciary, a first step in fighting corruption, there are a number of recent legislations that have been passed to support that fight:

#### *National Prosecuting Authority Amendment Act, 2000*

Prior to 2000, there existed three investigating directorates within the National Prosecuting Authority (NPA). Their subject matter was, respectively, Serious Economic Offences; Organised Crime and Public violence and Corruption. The amending law consolidates the directorates into one Directorate of Special Operations (DSO), headed by a Deputy National Director. The main objects of this Directorate are to –

- gather intelligence regarding, and to investigate offences which are identified in terms of the proposed legislation as being committed in an organized fashion;
- ensure that the preparation for the prosecution and the prosecution itself, in respect of these offences, are carried out in the best possible manner.

This legislation emanates from the President's Opening Address in Parliament on 25 June 1999, when he announced that a special and adequately staffed and equipped investigation unit will be established urgently to deal with all national priority crimes, including police corruption.

### Promotion of Access to Information Act, 2000

This Act, previously known as the Open Democracy Bill, gives effect to the right enshrined in Section 32 of the Constitution, namely the right of access to information. In terms hereof everyone has the right of access to any information held by the State and to information held by another person when that information is required for the exercise or protection of any fundamental rights.

This legislation is intended to facilitate the demise of a secretive and unresponsive culture in both public and private sectors which often led to an abuse of power and human rights violations and corruption. It will also foster a culture of transparency and accountability in public and private bodies.

### Protected Disclosures Act, 2000

The Act derived from Part 5 (whistleblower protection) of the Open Democracy Bill, which Part was omitted from that Bill to be dealt with as a separate Bill. The principal objects of the Act are to make provision for procedures in terms of which employees in both the private and public sector may disclose information regarding unlawful or irregular conduct by their employees or other employees in the employ of their employers. It also provides for the protection of employees who make disclosures which are protected in terms of the Act.

The Act came into operation on 16 February 2001. Although the Act is in operation, the guidelines contemplated in the Act, which explain the provisions of the Act and all the procedures which are available in terms of any law to employees who wish to report or otherwise remedy an impropriety, have not yet been finalised. These guidelines, must, in terms of the Act, be approved by Parliament. Draft guidelines have been prepared and comments have been requested from role-players. Obtaining information on all procedures which are available in terms of any law to employees is a task which will take some time and which will require the co-operation and inputs of all role-players, particularly all State Departments.

### Public Finance Management Act, 1999

The Act holds certain senior officials of government departments accountable for the misuse of government money, or what is referred to in the Act as “unauthorized expenditure”. This therefore forces those accountable officials to put systems and controls in their departments that would prevent abuse of State money and those found guilty of such offences are punished.

The Act also places a positive obligation on all government departments to design and submit to Treasury anti-corruption and fraud strategy within stipulated timeframes.

### Prevention of Organised Crime Act, 1998

This Act is intended to introduce measures to combat organised crime, money laundering and criminal gang activities, often the source of corruption. It prohibits certain activities relating to racketeering, that is the planned, ongoing, continuous or repeated participation or involvement in certain offences, amongst others, corruption. It prohibits money laundering and criminalises certain activities associated with gangs and it provides for the recovery of the proceeds of unlawful activities as well as for the forfeiture of criminal assets that have been used to commit an offence or assets that are the proceeds of unlawful activities.

Section 4 of the Prevention of Organised Crime, 1998, provides that any person "who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and -

- (a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or
- (b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person, which has or is likely to have the effect -
  - (i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or
  - (ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere -
    - (aa) to avoid prosecution; or
    - (bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence,

shall be guilty of an offence."

In terms of section 8 of this Act any person who is convicted of this offence is liable to a fine not exceeding R100 million or to imprisonment not exceeding 30 years.

The act seeks to deprive all persons of any ill-gotten gains. Whether the benefit has been acquired through drug dealing or through corruption, the Act allows the state to seize those assets. Assets seized are placed in the Asset Recovery Fund and are used by law enforcement in the fight against crime.

### Commissions Act, 1947

This Act makes provision for conferring certain powers on commissions appointed by the President for the purposes of investigating matters of public concern, including corruption.

### Riotous Assemblies Act, 1956

Section 18(1) provides that any person who attempts to commit any offence against a statute or a statutory regulation (including corruption) is guilty of an offence and, if no punishment is expressly provided for such an attempt, the person is liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

Section 18(2) provides that any person who -

- (a) conspires with any other person to aid or procure the commission of or to commit; or
- (b) incites, instigates, commands, or procures any person to commit,

any offence, whether at common law or against a statute or statutory regulation, including corruption, is guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

#### Supreme Court Act, 1959

Section 24(1)(b) of the Act provides that the grounds upon which the proceedings of any inferior court may be brought under review before the Supreme Court are, amongst others, "interest in the cause, bias, malice or corruption on the part of the presiding judicial officer". Section 46(b) of the Small Claims Court Act, 1984 (Act 61 of 1984), contains similar provisions.

#### Prohibition of Disguises Act, 1969

Section 1(1) provides that any person found disguised in any manner whatsoever and whether effectively or not, in circumstances from which it may reasonably be inferred that such person has the intention of committing or inciting, encouraging or aiding any other person to commit, some offence or other, including corruption, is, unless he or she proves that when so found he or she had no intention, guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 6 months or to both such fine and such imprisonment.

#### Criminal Procedure Act, 1977

Numerous provisions in this Act will of course be applicable to a person who has been charged with any form of corruption and who is being tried. It is perhaps expedient to highlight a few which are of greater relevance to corruption than those of a more general nature. The Act was amended in 1995 to bring the provisions dealing with bail into line with the new constitutional dispensation. These amendments could be argued to tighten up on corruption. Section 60, for instance, sets out guidelines which the judiciary must take into consideration when deciding a bail application, for example, whether the accused person will endanger the safety of the public or any particular person or the public interest, whether the accused person will attempt to influence or intimidate witnesses or to conceal or destroy evidence

(often present in corruption cases), whether the accused person will undermine the objectives or the proper functioning of the criminal justice system (often present in cases of corruption), the prevalence of the particular type of offence (eg corruption) and the relationship of the accused person with the various witnesses and the extent to which they could be influenced and intimidated. In terms of section 60(11) an accused person who is charged with converting the proceeds of a drug-related crime as contemplated in section 7 of the Drugs and Drug Trafficking Act, 1992, and corruption involving amounts in excess of R500 000 bears the onus of proving to the court that the interests of justice do not require his or her detention in custody.

In 1997 some of the bail provisions were amended again. An additional criterion has been inserted which must be considered by presiding officers when they hear bail applications, namely whether there is a likelihood that the release of the accused person will disturb the public order or undermine public peace or security, that is whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community or whether the release of the accused person will undermine or jeopardise the legitimacy or efficiency of the criminal justice system. Other new provisions are also intended to preclude a presiding officer from granting bail in cases of serious offences. Some of the serious offences which have been listed for purposes hereof include "any offence relating to exchange control, corruption, extortion, fraud, forgery, uttering or theft", especially if it is alleged that the offence was committed by a law enforcement officer.

Section 245 provides that if at criminal proceedings at which an accused person is charged with an offence of which a false representation is an element, it is proved that the false representation was made by the accused person, he or she shall be deemed, unless the contrary is proved, to have made such representation knowing it to be false.

Section 256 provides that if the evidence in criminal proceedings does not prove the commission of the offence charged but proves an attempt to commit that offence or an attempt to commit any other offence of which the accused person may be convicted on the offence charged, the accused person may be found guilty of an attempt to commit that offence or, as the case may be, such other offence.

Section 257 provides that if the evidence in criminal proceedings does not prove the commission of the offence charged but proves that the accused person is guilty as an accessory after that offence or any other offence of which he or she may be convicted on the offence charged, the accused person may be found guilty as an accessory after that offence or, as the case may be, such other offence.

#### *Interception and Monitoring Prohibition Act, 1992*

This Act prohibits the interception of communications and the monitoring of conversations except when this has been authorised by

a judge of the High Court after considering the necessity thereof on the strength of an affidavit from a high ranking police officer or high ranking officer from the National Defence Force or high ranking official of the Secret Service. These authorisations may also only be given in respect of certain prescribed serious offences, such as the offences referred to in Schedule I to the Criminal Procedure Act, 1977, offences committed over a lengthy period of time, offences committed on an organised basis, offences committed on a regular basis by the person or persons involved therein, offences which may harm the economy of the country and offences relating to the dealing in drugs.

*Drugs and Drug Trafficking Act, 1992*

This Act, to a lesser extent, may be argued to have an indirect bearing on corruption. The following provisions are relevant:

8.2 Section 9(1) provides as follows:

"Any person may, notwithstanding anything to the contrary contained in any law which prohibits him-

(a) from disclosing any information relating to the affairs or business of any other person; or

(b) from permitting any person to have access to any registers, records or other documents which have a bearing on the said affairs or business,

disclose to any attorney-general or designated officer such information as he may consider necessary for the prevention or combatting, whether in the Republic or elsewhere, of a drug offence or an economic offence, or permit any designated officer to have access to any registers, record or other documents which may in his opinion have bearing on the latter information."

Section 10 places an obligation on certain persons to report certain information to the police. For instance the director, manager or executive officer of a financial institution must report his or her suspicions relating to property received in the course of business, believed to be the proceeds of a "defined crime", to the police and furnish the police with the necessary particulars. Similarly, a stock-broker or a financial trader must report any suspicious transaction which may emanate from the proceeds of a "defined crime".

Section 11 gives the police wide powers of investigation. For instance, a police official may enter or board and search any premises, vehicle or aircraft if the police official has reasonable grounds to suspect that an offence under the Act has been or is about to be committed. Police officials have similar powers to search a person who is suspected of having any drug or thing in his or her possession or under his or her control or custody. They may also intercept postal articles which are suspected to contain drugs. They may question any person whom they consider might have information relating to an offence under the Act and require any person to furnish records, registers or documents which might have a bearing on any such offence. They may also seize anything which in their opinion is connected with or may provide proof of a contravention of the Act.

Sections 13 to 17 set out the offences and severe penalties, which include terms of imprisonment ranging from 1 year to 25 years. Sections 18 to 24 assist the prosecution of these offences by providing numerous presumptions. (Section 21(1)(a)(i) of the Act providing a presumption for dealing in drugs has, however, recently been declared to be unconstitutional by the Constitutional Court). In terms of section 25 of the Act the courts are empowered to declare drugs, substances and articles used in the commission of drug-related offences to be forfeited to the State.

Public Protector Act, 1994

This important Act emanated from the provisions of section 110 to 114 of the Interim Constitution that provided for the establishment of the Public Protector. In terms of these constitutional provisions the powers and functions of the Public Protector included the following:

- "(a) to investigate, on his or her own initiative or on receipt of a complaint, any alleged -
  - (i) maladministration in connection with the affairs of government at any level;
  - (ii) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;
  - (iii) improper or dishonest act, or omission or corruption, with respect to public money;
  - (iv) improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function; or
  - (v) act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person;
- (b) to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by -
  - (i) mediation, conciliation or negotiation;
  - (ii) advising, where necessary, any complainant regarding appropriate remedies; or
  - (iii) any other means that may be expedient in the circumstances; or
- (c) at any time prior to, during or after an investigation -
  - (i) if he or she is of the opinion that the facts disclose the commission of an offence by any person, to bring the matter to the notice of the relevant authority charged with prosecutions; or
  - (ii) if he or she deems it advisable, to refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or make



any other appropriate recommendation he or she deems expedient to the affected public body or authority."

In terms of section 182 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), the Public Protector "has the power as regulated by national legislation -

- (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;
- (b) to report on that conduct; and
- (c) to take appropriate remedial action."

The Public Protector Act, 1994, provides for matters incidental to the office of the Public Protector as contemplated in the Constitution, for example the appointment of the Public Protector and his or her Deputy and personnel, on how matters are reported to the Public Protector, on the investigations of the Public Protector and the like.

Section 6, for example, sets out the powers of the Public Protector. In terms hereof any person can approach the Public Protector with information which could form the subject of an investigation. In terms of section 6(4) the Public Protector is competent -

- (a) to investigate, on his or her initiative or on receipt of a complaint, any alleged -
  - (i) maladministration in connection with the affairs of government at any level;
  - (ii) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;
  - (iii) improper or dishonest act, or omission or corruption, with respect to public money;
  - (iv) improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function; or
  - (v) act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person;
- (b) to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by -
  - (i) mediation, conciliation or negotiation;
  - (ii) advising, where necessary, any complainant regarding appropriate remedies; or
  - (iii) any other means that may be expedient in the circumstances;
- (c) at a time prior to, during or after an investigation -
  - (i) if he or she is of the opinion that the facts disclose the commission of an offence by any person, to bring the

- matter to the notice of the relevant authority charged with prosecutions; or
- (ii) if he or she deems it advisable, to refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or make any other appropriate recommendation he or she deems expedient to the affected public body or authority.

Section 7 sets out how the Public Protector carries out his or her investigations and section 7A gives him or her the power to enter premises for investigation purposes.

*Special Investigating Units and Special Tribunals Act, 1996*

This Act provides for the establishment of Special Investigating Units for the purpose of investigating serious malpractices or maladministration in connection with the administration of State institutions, State assets and public money as well as any conduct which may seriously harm the interests of the public, and for the establishment of Special Tribunals to adjudicate on civil matters emanating from investigations by Special Investigating Units. In terms of section 2 of this Act the President of the Republic may establish and refer to a Special Investigating Unit, headed by a judge, a matter arising from any alleged -

- (a) serious maladministration in connection with the affairs of any State institution;
- (b) improper or unlawful conduct by employees of any State institution;
- (c) unlawful appropriation or expenditure of public money or property;
- (d) unlawful, irregular or unapproved acquisitive act, transaction, measure or practice having a bearing on State property;
- (e) intentional or negligent loss of public money or damage to public property;
- (f) corruption in connection with the affairs of any State institution;
- or
- (g) unlawful or improper conduct by any person which has caused or may cause serious harm to the interests of the public or any category thereof.

Section 4 of the Act sets out the functions of an Investigating Unit, which include, among others, to investigate all allegations regarding the matter in question, to collect evidence and to present evidence before a Special Tribunal. The powers of such a Unit are set out in sections 5 and 6 and include the power to summon and question persons, to call for documentation and objects, to enter and search premises and to institute civil proceedings in a Special Tribunal

In terms of section 7 a Special Tribunal consists of a judge of the High Court and such additional legally qualified members as are deemed necessary. A Special Tribunal has the power to issue suspension

orders, interlocutory orders or interdicts or to make any order it deems appropriate so as to give effect to any ruling or decision given or made by it.

The object of this Act is to provide a mechanism through which serious allegations as mentioned above can be investigated comprehensively and swiftly and at the same time, through which remedial steps can be taken swiftly and cost-effectively, steps which ordinarily would have had to be pursued in the ordinary courts of law.

This Act is in the process of being amended to give effect to a judgment of the Constitutional Court which, in effect, states that a judge cannot head a Special Investigating Unit.

#### *Criminal Law Amendment Act, 1997*

This Act, among others, provides for the imposition of minimum sentences in respect of certain serious offences, including corruption. For instance, in terms of this Act a first offender for corruption, involving amounts of more than R500 000, involving more than R100 000 if committed by a syndicate or group of persons, involving more than R 10 000 if committed by a law enforcement officer, must, generally speaking, be sentenced to a minimum of 15 years' imprisonment, a second offender, to a minimum of 20 years' imprisonment, and a third or subsequent offender, to a minimum of 25 years' imprisonment.

#### *Witness Protection Act, 1998*

The object of this Act is to provide for the better protection of witnesses through witness protection programmes which are administered by a central Office for Witness Protection. It is often difficult to prosecute cases of corruption successfully because of witnesses not coming forward to testify because of intimidation. Offences in respect of which a witness or related person may be placed under witness protection and which have a bearing on corruption directly or indirectly, include the following:

- (a) Any offence relating to dealing in dependence-producing substances if the value thereof is more than R10 000, if the value thereof is less than R5 000 and the offence is committed by a group of persons or by a syndicate or if the offence was committed by a law enforcement officer.
- (b) Any offence referred to in section 1 or 1A of the Intimidation Act, 1982.
- (c) Any offence relating to exchange control, corruption, extortion, fraud, forgery, uttering or theft, involving amounts of more than R50 000, involving amounts of more than R10 000 and the offence is committed by a group of persons or by a syndicate or if the offence was committed by a law enforcement officer.
- (d) Any offence referred to in the Prevention of Organised Crime Act, 1998.
- (e) Any conspiracy, incitement or attempt to commit any offence referred to in the Schedule to the Act.

- (f) Any other offence which the Minister has determined by regulation.
- (g) Any other offence in respect of which it is alleged that the offence was committed by a person, group of persons or syndicate in the execution or furtherance of a common purpose or a conspiracy or by a law enforcement officer, and in respect of which the Director of the Witness Protection Programme is of the opinion that the safety of a witness who is or may be required to give evidence or who has given evidence in respect of such offence, warrants protection.

**31. What other types of criminal offences do you have which are related to corruption?**

See 30. above.

**32. Do you have laws for the restraint and/or forfeiture of the proceeds of corruption? If so, please provide some detail as to the nature of the process for restraint and/forfeiture of such proceeds (e.g. criminal or civil proceedings, whether conviction based, onus and standard of proof, whether there is any reversal of onus).**

See discussion of *Prevention of Organised Crime Act* under 30. above.

**33. Do you have laws against the laundering of proceeds of corruption or corruption related offences?**

The Financial Intelligence Centre Act, 2001 together with the Prevention of Organized Crime Act, 1998 and the International Co-operation in Criminal Matters Act, 1996 produced an anti-money laundering regime which complies in all material respects with the 40 recommendations of the Financial Action Task Force on Money laundering (FATF), which is the de facto international co-ordinating body for anti money-laundering practices. South Africa will seek a close working relationship with and affiliation to the FATF and thereby complete the Republic's compliance with its international obligations regarding money laundering.

**34. Please provide an estimate of the number of criminal investigations that have been undertaken in relation to corruption or corruption related offences over the past five years.**

See discussion of *Corruption Act* under 30. above. Statistics are assimilated under the statistics for other crimes, such as fraud and bribery. South Africa has started a process to refine the statistics and to develop new Prevention of Corruption legislation, which will also provide a basis for statistics.

**35. Please provide an estimate of the number of criminal prosecutions that have been undertaken in relation to corruption or corruption related offences over the past five years.**

See 34. above.

**36. How many of these have resulted in convictions?**

See 34. above.

- 37. What, if any, impediments are there to effective investigations and/or prosecutions in relation to corruption or corruption related offences (e.g. resources, political interference, lack of training or competence for police, prosecutors or judiciary, the restrictive laws of evidence, the technical nature of the offence or offences to be proved, non-reporting of offences)?**

The greatest impediment is the unsatisfactory nature of the *Corruption Act* and this has given rise to the review of corruption legislation described above under 34. To a limited extent, a specialised capacity to prosecute complex corruption cases also exists.

- 38. Explain the mechanisms (e.g. investigative, policing, prosecutorial or other) that have been put in place to ensure enforcement of anti-corruption laws, policies and practices?**

South Africa deploys a range of agencies in the fight against corruption. Their work is shortly illustrated in the following table:

| Agency                             | Investigative role   | Criminal Justice resolution  |
|------------------------------------|--|--|
| Auditor-General                    | Conducts forensic auditing as part of mandate to audit and report on accounts, financial statements and financial management. Provides forensic auditing services in support of criminal justice investigations.   | Refers criminal cases to appropriate agency for resolution (criminal investigation and prosecution). |
| Public Protector                   | Investigates and make recommendations to State departments on any conduct which may have resulted in prejudice to citizens.  | Refers criminal cases to appropriate agency for resolution (criminal investigation and prosecution). |
| Public Service Commission          | Investigates Public Service systems, policies, controls and practices and makes recommendations. Advises the Minister responsible for the public service on codes of conduct for the public service. Performs a Public Service monitoring and evaluation role. | Refers criminal cases to appropriate agency for resolution (criminal investigation and prosecution). |
| Independent Complaints Directorate | Investigates complaints in respect of offences and misconduct committed by members of the South  | Refers criminal cases to appropriate agency for resolution (criminal investigation and               |

|   |   |   |
|---|---|---|
|   | African Police Service.   | prosecution).<br>Allegations of corruption by South African Police Service members are referred to the SAPS' National Anti-corruption Unit.         |
| South African Police Service: Commercial Crime Unit         | Investigates all cases of commercial crime, including corruption in terms of the Corruption Act, 1992 and crimes in terms of over 50 statutes.  | Conducts own investigations and refer to NPA for prosecution.   |
| South African Police Service: National Anti-corruption Unit | Investigates cases of corruption by members of the SAPS only.   | Conducts own investigations and refer to NPA for prosecution.   |
| National Prosecuting Authority                              | Centralised prosecuting authority, institutes and conducts criminal proceedings on behalf of State and investigates as required. Acts against corruption through SAPS and own Asset Forfeiture Unit and Directorate of Special Operations.  | Also recovers proceeds of corruption and other crimes through civil action.   |
| Special Investigating Unit                                  | Investigates serious malpractices or maladministration in connection with the administration of State institutions, assets and public money as well as any conduct which may seriously harm the interests of the State. Able to save, recover and protect public assets through civil law procedure and Special Tribunal to adjudicate civil matters. | Focus mainly on civil action in corruption cases. Where appropriate, works closely with all agencies, many cases resulting in criminal prosecution. |
| Department of Public Service and Administration             | Investigates Public Service matters on request, including matters related to policies, practices, systems and controls. Primary function is policy development regarding Public Service management.   | Refers criminal cases to appropriate agency for resolution (criminal investigation and prosecution).  |
| National Intelligence Agency                                | Provides intelligence support to investigating agencies.  | Refers criminal cases to appropriate agency for resolution (criminal investigation and  |

|                                |  |  |
|--------------------------------|--|--|
|                                |  | prosecution).  |
| South African Revenue Services | This Service's primary responsibility is implementation of Government's tax policies. The Service investigates tax related corruption (including corruption by its own officials), often in partnership with other agencies. | Refers criminal cases to appropriate agency for resolution (criminal investigation and prosecution). |

#### D. International Co operation

39. Do your laws with respect to international co operation in criminal matters (e.g. extradition, mutual legal assistance) cover:

- (a) corruption;
- (b) corruption related offences?

Legislation emanating from the recommendations of the South African Law Commission pursuant to its investigation into International Co-operation in Criminal Prosecutions, was passed by Parliament in 1996. This legislation, in the form of 3 Bills, namely the International Co-operation in Criminal Matters Act, 1996, the Proceeds of Crime Act, 1996 (which was repealed by the Prevention of Organised Crime Act, 1998), and the Extradition Amendment Act, 1996, are intended to play a positive role in addressing corruption across national borders by international criminal organisations, which is taking on enormous proportions in South Africa since we have come out of political isolation.

#### International Co-operation in Criminal Matters Act, 1996

The International Co-operation in Criminal Matters Act, 1996, introduces a new procedure to obtain evidence from foreign states. The court is, in terms hereof, entitled to issue a letter of request, requesting assistance in obtaining evidence in a foreign state. This procedure may be used to obtain evidence that is needed in the course of a trial or in the course of any other proceedings before a court or tribunal to determine whether any conduct constitutes an offence by any person. It may also be used to obtain information for use in an investigation related to an alleged offence. The procedure to be followed in the requesting state to obtain evidence cannot be prescribed by South African legislation. The Act, however, allows for participation by the parties to the procedure to examine witnesses. A major problem experienced by the trial court in proceedings where the evidence was obtained abroad is that it was unable to assess the evidence in the light of the conduct and demeanour of the witness. To alleviate this, the Act allows for a request that a video recording be made of the examination proceedings, which will then form part of the record of the proceedings. Evidence so obtained must be admitted as evidence in the proceedings in so far as it is not inadmissible. Reciprocity is an important feature of the Act, which also provides that effect may be given to foreign requests for

assistance in obtaining information or evidence. This can be done if the Director-General: Department of Justice and Constitutional Development is satisfied that criminal proceedings are pending or that an investigation is being conducted in respect of an alleged offence.

The Act also enables a court in South Africa to require assistance from a foreign state in the execution of a fine or compensatory order imposed by that court. This is done by issuing a letter of request which is sent to the requested state via the Director-General: Justice. It also provides for the reciprocal procedure to execute a foreign sentence or compensatory order in South Africa.

Section 19 of the Act enables a court in South Africa to require assistance from a foreign state in the execution of a confiscation order in respect of the value of the proceeds of the relevant offence. This request is sent to the requested state via the Director-General: Justice. The Act also provides for the receipt of a foreign order aimed at confiscating the proceeds of crime and the registration of such an order by the clerk of the court of the relevant magistrates court. When it is registered it has the effect of a civil judgment in respect of the property or the amount mentioned in the request. Depending on any agreement or arrangement between the requesting state and South Africa, the Director-General: Justice must transfer the amounts realised in the execution of the order to the requesting state. Section 23 enables a court to issue a letter of request requesting assistance in enforcing a restraint order and section 24 provides for the receipt of a foreign order restraining any person from dealing with the property mentioned in the order, and for the registration of such an order by the registrar of a division of the Supreme Court.

The International Co-operation in Criminal Matters Act, 1996, facilitated South Africa's accession to the Convention against illicit Traffic in Narcotic Drugs and Psychotropic Substances.

40. **If your laws relating to extradition and mutual assistance do so apply what, if any, problems have you encountered in relation to seeking or providing such assistance (e.g. dual criminality, lack of information or evidence etc)?**

To date no insurmountable problems were experienced.

41. **Does your law permit restraint and/or forfeiture in respect of the proceeds of corruption or corruption related offences committed in another jurisdiction? If it does, are you permitted to return the forfeited proceeds or a portion thereof to the jurisdiction that sought your assistance?**

Please see discussion of the Prevention of Organised Crime Act, 1998, under Question 30 above.

42. **Is your country considering becoming a party to:**
- (a) **The 1996 Inter-American Convention Against Corruption? (If your country belongs to the OAS grouping).**



- (b) The 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions?**
- (c) The 1999 Council of Europe's Criminal Law Convention on Corruption**

This reply pertains to questions 42 to 45. At present South Africa is a signatory to the Southern African Development Community's Protocol against Corruption and is in the process of ratification. Also, South Africa is, together with other African countries, exploring a possible African Union convention against corruption. South Africa is also actively participating in the process to establish the United Nations Convention against Corruption. At this stage it is not foreseen that South Africa will become party to any of the above conventions, other than subscribe to its principles and similar provisions of the SADC and UN instruments. South Africa is also signatory to the declaration of Pan-African Ministers of the Public Service on a code of conduct for public services.

- 43. **If this is being considered, please give details as to which Convention/s.**
- 44. **Do you have any information about the above Conventions?**
- 45. **Are there any regional initiatives against cross-border corruption in your region?**

**E. General Laws**

- 46. **What laws, if any, are in place to:**
  - (a) control;**
  - (b) audit;****the expenditure of public funds by civil servants, elected officials, government ministers, heads of government or heads of state?**

(a) Public Finance Management Act, 1999 (Act 1 Of 1999)

The aim of the Public Finance Management Act (PFMA) is to secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities of all the public institutions. This Act gives effect to Section 213, 214, 215, 216, 217, 218 and 219 of the Constitution of the Republic of South Africa (Act 108 of 1996). These sections require National legislation to:

- Establish a National Treasury.
- Introduce generally recognized accounting practices.
- Introduce uniform treasury norms and standards.
- Prescribe measures to ensure transparency and expenditure control in all spheres of government.
- Set the operational procedures for borrowing, guarantees, procurement and oversight over the various national and provincial revenue funds.

(b) Auditor-General Act, 1995 (Act no. 12 of 1995).

See response to question 9: Part III: Financial Management

47. **Do you have any laws that provide for protection for "whistle blowers" (i.e. individuals that inform authorities of incidents of corruption)? If so, do you have programmes to provide for the protection of such witnesses?**

See discussion of *Protected Disclosures Act and Witness Protection Act* under 30. above.

48. **Does your law allow for civil actions in relation to cases of corruption? If so, what types of remedies are available? Do such remedies include orders for the return of funds?**

49. **Do you have an independent anti-corruption agency?**

No, anti-corruption work is spread over a number of agencies, but with central coordinating mechanisms.

50. **If you do:**

- (a) **how is it constituted?**
- (b) **what protections are in place to ensure its independence?**
- (c) **what powers does it have?**
- (d) **to what personal body does it report?**
- (e) **and, on average, how many cases does it handle per year?**

51. **Do you have any administrative body or bodies that address non criminal or less serious corruption matters by way of disciplinary or other non criminal sanctions (e.g. public service commission or complaints board, police or other enforcement complaints boards) and if so, please describe the nature, functions and powers of each body?**

See discussion of Public Protector, Auditor-General and Public Service Commission under 30 and 38 above. Disciplinary matters are concluded at departmental levels.

52. **What, if any, areas of the civil service or of government do you consider to be particularly vulnerable in terms of corruption or corruption related offences (e.g. executive, ministers, police, immigration, prisons, customs etc)?**

South Africa is at present conducting a comprehensive corruption country survey under the auspices of the United Nations' *Global Programme against Corruption*. This survey will contribute to a better understanding of trends and causes of corruption and the efficacy of anti-corruption measures.

53. **Are there particular laws, regulations, practices or structures that make such areas particularly vulnerable?**

See 52. above.

**F. Civil/Public Service**

54. **Does your civil service have any guidelines, codes of conduct/ethics or like documents addressing honesty and integrity standards for civil servants? If so, please attach a copy if possible or provide a description of the content.**

Yes, a Code of Conduct for the Public Service has been promulgated by the Minister for the Public Service and Administration. See [www.dpsa.gov.za](http://www.dpsa.gov.za) for a copy of the Public Service Regulations in terms of which the Code applies. The Code serves as a minimum standard and various departments have created additional guidelines on conduct.

55. **How and when are employees made aware of such guidelines, codes of conduct or ethics etc?**

Provincially based workshops have been conducted to promote the Code. The Code forms an integral part of the employment conditions of employees.

56. **Is there any procedure for the review of such guidelines, codes of ethics etc?**

No, but a survey is being conducted to determine both efficacy and popularity.

57. **Does your civil service have a mechanism for investigating allegations of corruption made against its employees? If so, please specify.**

In addition to all criminal provisions, the public service has a disciplinary code that covers all acts of misconduct, including corruption. The code allows individual departments to investigate any form of misconduct and to resolve such cases departmentally through administrative means (note that the disciplinary process is independent and separate from a criminal or civil process) The code can be found on the Website: [www.dpsa.gov.za](http://www.dpsa.gov.za).

The Public Service Commission uses investigation of corruption to identify weaknesses and risks in systems and application of [policies and procedures. As such, investigations are not directed at individuals.

58. **Does your civil service have any written law, policy or guidelines regarding the:**

- (a) recruitment;
- (b) promotion;
- (c) transfer;
- (d) termination;

**of public service employees? If so, please attach a copy if possible or provide a description of the content.**

Employment is extensively arranged through Chapter II of the *Public Service Act, 1994* and the *Public Service Regulations, 2001*. These processes are open, transparent and fair. Appointments are based on training, skills, competence, knowledge, and the need to redress the imbalances of the past

to achieve representativeness. Detailed guidelines for advertising, selection and transparency exists, with specific mechanisms to manage possible conflict of interest. Details can be found at: [www.dpsa.gov.za](http://www.dpsa.gov.za).

59. **Does your civil service have a written law or policy or guidelines requiring senior employees in the civil service to disclose their financial assets, sources of income, or actual or potential conflicts of interest? If so, please specify the policy and if possible, attach a copy.**

Yes, all senior managers are required to disclose financial interests. Details can be found at: [www.dpsa.gov.za](http://www.dpsa.gov.za). Consideration is being given to extending the system to all employees working with procurement.

60. **Is there any written law, policy or guidelines requiring ministers of the government to disclose their financial assets, sources of income or actual or potential conflicts of interest? If so, please specify the policy and if possible, attach a copy.**

Yes, in terms of the Rules of Parliament, all members of Parliament are required to make such disclosures, and these disclosures are recorded in a Register of Members' Interests. Ministers are members of Parliament.

61. **Is an annual report published which deals with civil service integrity?**

No. As a pilot study, a integrity survey is being conducted with a view to setting up institutional arrangements in this regard.

**G. General**

62. **In addition to any specific points mentioned above, what, if any, steps have been taken so far to implement the Framework of Principles?**

Other than the above, no specific arrangements exist.

63. **What, if any, constraints or impediments to the implementation of the Framework of Principles have been experienced?**

None.

64. **What types of assistance would be of use in the implementation of the Framework of Principles:**

- (a) **from the Secretariat;**  
(b) **otherwise?**

At this stage, no direct assistance is required. South Africa will gladly participate in any effort to establish an international mechanism to measure corruption and the implementation of the *Framework*

**INFORMATION**

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