



National Integrity Systems
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Questionnaire

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South Africa

The National Integrity System Indicators

Questionnaire

Executive

Can citizens sue government for infringement of their civil rights?

Yes. Section 34 of the South African Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum. This right guarantees everyone involved in a dispute with the government to have that dispute resolved before a court of law or another tribunal or forum. This provision is only applicable to civil disputes and not to criminal disputes.

Practice

On a number of occasions citizens have successfully sued the government through the Constitutional Court for infringement of civil rights contained in the Bill of Rights (Chapter 2 of the Constitution). Notable examples include the case of the *Minister of Health and others v Treatment Action Campaign and others* (2002), in which the Court ruled that the failure by government to provide a comprehensive programme to prevent mother-to-child transmission of HIV was unreasonable and unconstitutional. Another groundbreaking case was *Government of RSA and others v Grootboom and others* (2000), in which the Court noted that the Constitution obliges the state to act positively to ameliorate the plight of the hundreds of thousands of people living in deplorable conditions throughout the country. It must provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The Court stressed that all the rights in the Bill of Rights are inter-related and mutually supporting. Realising socio-economic rights enables people to enjoy the other rights in the Bill of Rights and is thus critical.

Are there procedures for the monitoring of assets, including disclosure provisions, for Cabinet and other government ministers?

Yes. In terms of the Executive Members' Ethics Act (82 of 1998), which applies to Cabinet Members and Deputy Ministers:

- Cabinet Members and Deputy Ministers are required to disclose to an official in the office of the President designated for this purpose, and Members of the Provincial

Executive (MECs) to disclose to an official in the office of the Premier concerned designated for this purpose:

- o All their financial interests when assuming office; and
- o Any financial interests acquired after their assumption of office, including any gifts, sponsored foreign travel pensions, hospitality and other benefits of a material nature received by them or by such persons having a family or other relationships with them as may be determined in the code of ethics.

In addition, the Act prescribes that:

- The financial interests to be disclosed in terms of paragraph (c) must at least include the information, and be under the same condition of public access thereto, as is required by members of the National Assembly as determined by that House from time to time, but may prescribe the disclosure of additional information.

Both the Office of the President and the Office of the Premier in all nine provinces are required to keep a Register of Executive Members' Interests. These registers are not published although any person has the right to access the public part of the register in the office of the Secretary concerned. Alternately the public would have to rely on the Promotion of Access to Information Act (2 of 2000) to access the records. There is also no oversight or sanction mechanism in the Act as it is meant to prevent rather than punish unethical practice.

Similar provisions are found in the Executive Ethics Code (2000). Subsection 5.1 makes it a requirement for members of the executive to disclose their (including their spouse's, permanent companion's or dependent children's) financial interests. Disclosure of financial interests must take place on the assumption of office or on becoming aware of such interest, and on annual basis

Practice

Although the Office of the President and those of the nine provincial Premiers all keep a Register of Executive Members' Interests, most, but not all, National Ministers and Deputy Ministers have appointed a compliance officer in their offices. At a provincial level there appears to be a lack of general awareness about the requirements of the Executive Members Ethics Act and Code of Ethics and the process of implementing a system of annual disclosure appears to have taken place irregularly. This, combined with legal red tape, makes access to the records difficult, at best, for CSOs and the media. Idasa-Pims has, for example, attempted to access a number of the provincial records in 2003 without any success.

Are there procedures for the monitoring of assets, including disclosure provisions, for high-level officials?

Yes. Chapter 3 of the Public Service Regulations, 2001, seeks to regulate financial disclosure by Heads of Departments and other high-level officials. In terms of the Regulations:

- C.1 Every designated employee shall, not later than 30 April of each year, disclose to the relevant executing authority, on the form determined for this purpose by the Commission, particulars of all her or his registrable interests in respect of the period 1 April of the previous year to 31 March of the year in question.
- C.2 Any person who assumes duty as designated employee after 1 April in a year shall make such disclosure within 30 days after assumption of duty in respect of the period of 12 months preceding her or his assumption of duty.¹

Section D of the same chapter of the Regulations outlines various financial interests that are to be disclosed, namely a) shares and other financial interests in private and public companies and other corporate entities recognised by law; b) directorships and partnerships; c) remunerated work outside the public service; d) consultancies and retainerships; e) sponsorships; f) gifts and hospitality from a source other than a family member; and g) ownership and other interests in land and property, whether inside or outside South Africa. Members of the executive are also required to declare any liabilities that they might have.

The PSC's Office of Professional Ethics and Human Resource Reviews is charged with implementing financial disclosure regulations for members of the senior management team in the public service. The responsibility of this office includes investigating alleged instances of non-disclosure that may have resulted in a conflict of interest.

Practice

In 2002/03, the last year for which data is available, 55% of officials at national government level failed to provide the PSC with a financial disclosure form. At a provincial level this is even more worrying, with only 33% of the officials complying. The overall figure for national and provincial compliance is 44%. This situation results in the PSC having to make numerous requests to officials to comply and the end result is that many forms are handed in late. In 2001/02, there is a better record of compliance (82%) as late submissions are included in the total. A lack of awareness, training, sanction mechanisms and limited capacity in the PSC (where one person is responsible for all administrative functions related to the implementation of the financial disclosure forms) have hampered this process.

Are there any differences in procedures and disclosure provisions between elected ministers, appointed ministers and high-level officials?

Yes/no. The procedure and disclosure provisions are governed by different regulations for Ministers and high-level officials. The method of disclosure also differs between the two, though the substantive nature of what is required to be disclosed is similar. An exception is the requirement for Ministers to disclose their liabilities, which is not applicable to other high-level officials. Another is that parliamentarians are required to disclose the interests of their spouses while public officials do not have to do so. The PSC is also looking at including Ministerial advisors as a separate group required to do this. The 'recipient' of the disclosed information also differs. The President and Cabinet must make their disclosure to the Cabinet Secretary and the Public Protector is empowered by law to access this information in the event that an alleged breach of ethical conduct is being investigated. The civil service makes its disclosure to the PSC, while MPs disclosure is made to the House Ethics Committee. This underscores the necessity for political will among the oversight institutions—the Public Protector, in particular, has come under fire from some CSOs for not performing adequately in this regard.

Are there conflict of interest rules for ministers?

Yes. In terms of the Constitution Cabinet, Members and Deputy Ministers may not:

- Undertake any other paid work;
- Act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or
- Use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person.²

The Executive Members' Ethics Act also addresses the issue of conflict of interests. It provides that Cabinet Members, Deputy Ministers and MECs may not:

- Expose themselves to any situation involving the risk of conflict between their official responsibilities and their private interests;
- Use their positions or any information entrusted to them, to enrich themselves or improperly benefit any other person;
- Act in a way that may compromise the credibility or integrity of their office of the government.³

Furthermore, the Executive Ethics Code states that members of the executive:

"must declare any personal or private financial or business interest that they may have in a matter a) that is before the Cabinet or an Executive Council; b) that is before a Cabinet Committee or Executive Council on which the member serves; or c) in relation to which the member is required to take a decision as a member of the Executive".⁴

Members are not only required to declare interests that they may have but also to withdraw from the proceedings of any committee dealing with a matter in which they may have an interest, unless the President/Premier decides that their interest is irrelevant. In cases where a member is supposed to adjudicate upon or decide a matter in which s/he has an interest, the member must declare that interest to the President/Premier and seek permission to adjudicate upon or decide the matter. Disclosure of interest also applies to situations in which a member is meant to make a presentation to another member of the executive.

Lastly, in instances where a member holds a financial or business interest that has the potential to give rise to a conflict of interest in the performance of their duties, the Code states that the member must dispose of such interest or place its administration under the control of an independent and professional person.

Prior to the adoption of the Executive Ethics Code in July 2000, similar provisions regarding conflicts of interest were covered by the Code of Conduct in the Ministerial Handbook (which is marked 'Confidential'), as adopted by the national Cabinet on 18 October 1995. The Ministerial Handbook contains two sets of prescripts: a code of conduct governing executive members and a set of general rules governing such things as their car and accommodation allowances. The latter is still in effect. The code of conduct⁵ (now superceded by the Executive Ethics Code) contains the following provisions for 'clean government':

Ministers (including Deputy Ministers of national government and Premiers and Members of Executive Council of Provinces) shall at all times observe practices that are free from all forms of corruption. Government office, position or privileged information shall not be used to distribute favours or patronage nor to seek or obtain any personal fortune or favour.⁶

Furthermore, the code of conduct prohibits active participation in professional associations or societies, requires Ministers to declare their assets and financial interests, and prohibits an active role in profit-making institutions (requiring directorships to be surrendered and shares to be held in 'blind trusts' managed by independent trustees). Ministers or their immediate dependents are also prohibited from serving on boards of public companies or owning shares directly connected with their official duties. "The test in the case of private companies is whether the Minister can be accused of giving such companies any advantage over their competitors or whether their families are able to derive any improper benefit therefrom."⁷ Apart from a requirement to register gifts exceeding R350, Ministers are also required to exercise the necessary discretion in the use of benefits and privileges in line with the government's commitment to fiscal discipline.

Practice

Instances have arisen where Ministers have, in fact, acted in conflict of interest. Some of these remain unresolved, such as that involving the former Minister of Defence, Joe Modise, now deceased, who held interests in companies awarded contracts in the South African National Defence Forces' multi-billion dollar arms deal acquisition. Allegations have also been levelled against Deputy President Zuma that he also had a close relationship with one of the bidding companies in the arms deal, though these allegations are untested in court. However, despite these notable exceptions, there appears to be a general awareness, particularly at national level, of the risk posed by public scrutiny of such actions.

Are there conflict of interest rules for high-level officials?

Yes. In terms of Public Service Regulations, 2001:

- If there is a conflict of interest the Public Service Commission shall verify the information regarding that interest and consult with the employee in question.

- If, after such verification and consultation, the Commission is of the opinion that there is such conflict is likely to take place, it shall refer the matter to the relevant executing authority.
- Upon the referral, the executing authority shall consult with the employee concerned and take the appropriate steps, including, but not limited to:
 - o The institution of disciplinary action; or
 - o The granting of a waiver to the employee in respect of a future conflict of interest.⁸

Practice

Few cases of conflict of interest have been acted upon. Given the size of the public service, the PSC's limited capacity and the fact that conflicts of interest are often made less apparent through the creation of front companies, many of these instances may go unreported. The Prevention and Combating of Corrupt Activities Act (12 of 2004) does, however, require directors in the public and private sector to report corrupt activities and places an onus of burden of proof on officials to prove the source of unexplained wealth.

Are there rules and registers concerning gifts and hospitality for Ministers?

Yes. The Executive Members' Ethics Act⁹ makes it a requirement for Ministers to disclose any gifts, hospitality and any other benefits of a material nature. The Executive Ethics Code goes further than this, stating that the permission of the President/Premier must be sought before keeping any gift with a value of more than R1,000. If permission is granted, the official must disclose this interest; if denied, it must be returned, declined or donated to the state. The Code also prohibits members from accepting or soliciting a gift or benefit in return for any benefit in their official capacity or which constitutes an attempt to affect the performance of their duties.

Practice

There have been allegations of some Ministers, particularly at provincial level, accepting or soliciting gifts that remain undeclared. Hospitality, such as a Minister or MEC requesting the use of a game farm or private residence belonging to a large corporation, is particularly difficult to track and trace. In other examples, however, there have been attempts to investigate alleged breaches, such as those by the MEC for Health in the Eastern Cape Province who not only ran his own private ambulance service but also employed the Superintendent of a large provincial hospital, the Umtata General Hospital, to work in his private practice. It is claimed that the Public Protector, who investigated the breaches, white-washed them by claiming that as the MEC had been found not guilty in a criminal trial he, the Public Protector, was not required to investigate the matter further.

Are there rules and registers concerning gifts and hospitality for high-level officials?

Yes. The Public Service Regulations¹⁰ list gifts and hospitality from a source other than a family member as one of interests that are to be disclosed by high-level officials, and empower the Director-General in the Office of the PSC to keep a register.¹¹

Practice

Given the relatively slow pace of compliance with disclosure provisions by some departments, it is possible that some officials may have used this opportunity not to disclose gifts.

If so, are these registers kept up to date? By whom? (For Ministers)

The Register of financial interests is divided into a confidential and a private section and both are kept up to date by the Secretary to Cabinet after having been disclosed to the Director-General in the Office of the President.

Practice

There has only been limited public access to these records and not all Ministers have appointed compliance officers to ensure their compliance with the Code.

If so, are these registers kept up to date? By whom? (For high-level officials)

The Director-General in the Office of the PSC is responsible for keeping a register called the Register of Designated Employees' Interests.

Practice

As at 26 March 2003, 27% of senior managers (3,500 individuals) had not submitted their disclosures and some departments had been sent four letters of reminder by the PSC, which had still received no response. Submissions are required to be made by 31 March every year. There is, however, no independent monitoring of compliance by high-level officials. The problem that might arise out of this situation is made evident in the case of Robson Ramaite, the immediate past Director-General in the Department of Public Service and Administration, who is alleged to have held directorships in a number of companies prior to resigning from his post. Another example is the Eastern Cape MEC for Health, Gokwana, who is also listed as a Director of a private hospital (Saint Mary's). These are clear examples of conflict of interest—Gokwana, for example, is responsible for a R4,5 billion budget and should not hold private directorships in conflict with his public position.

Have they legal powers to enforce disclosure by Ministers?

Yes/no. In terms of section 4 of the Public Protector Act (23 of 1994), the Public Protector can request information from anyone on a matter being investigated. This provision indirectly empowers the Public Protector to enforce disclosure of interests in cases of alleged breach of the Code. However, it does not make provision for specific enforcement provisions by the Secretary to Cabinet or the Director-General.

Practice

The reliance on the Public Protector to enforce disclosure is necessary but cumbersome. This depends on a matter being investigated by the Public Protector and does not necessarily promote ordinary compliance with the Executive Members' Ethics Act.

Have they legal powers to enforce disclosure for high-level officials?

Yes. The Public Service Regulations¹² provides that any designated employee who wilfully misrepresents or fails to disclose financial interests shall be guilty of misconduct. This provision empowers the Director-General to enforce disclosure or charge the employee of misconduct.

Practice

The fact that 20% of officials have not complied with the Public Service Regulations and have thus far not been sanctioned indicates that enforcement is relatively lax, although awareness is often also low.

Have they staff to investigate allegations for ministers?

Yes. In terms Executive Members' Ethics Act,¹³ the Public Protector shall investigate any alleged breach of code of ethics. The Act also requires the Public Protector to submit a report to the President or the Premier of the province on the alleged breach of code of ethics within 30 days of receipt of the complaint.

Practice

This does happen, as the recent investigation by the Public Protector into the affairs of the Deputy President shows. The Public Protector has refused to investigate the 'interest bearing loans' provided to the Deputy President by his financial advisor, Shabir Shaik, implicated as an

intermediary who secured a bribe on Zuma's behalf in the arms deal. The Public Protector based his decision on the fact that the matter is *sub judice*, however this speaks against the requirement of the Executive Members Ethics Act.

Have they staff to investigate allegations for high-level officials?

Yes. The Constitution¹⁴ empowers the PSC to investigate the personnel practices of the public service. It thus has the duty to investigate any allegations of corruption.

Practice

Yes, although capacity may be an issue.

What powers of sanction are in place against parliamentarians?

The Code of Conduct for Assembly and Permanent Council members, 1997¹⁵ lists penalties that can be imposed if a Member of Parliament has been found guilty of contravening the Code of Conduct:

- The Committee must recommend the imposition of one or more of the following penalties where it has found that a member has breached a provision of this Code:
 - o A reprimand;
 - o A fine not exceeding the value of 30 days' salary;
 - o A reduction of salary or allowances for a period not exceeding 15 days;
or
 - o The suspension of privileges or a member's right to a seat in Parliament debates or committees for a period not exceeding 15 days.

Practice

The sanction provisions are not very severe and it is argued that they are not a powerful enough disincentive to breach of the Code of Conduct by an elected representative. Even the Speaker of the National Assembly has supported a revision of the sanctions on this ground. Members of Parliament can also simply choose to leave Parliament and thereby escape the jurisdiction of the Code of Conduct.

Have they ever been invoked?

Yes. For example, against Winnie Madikizela-Mandela for failing to disclose receipt of about R55,000 a month in donations, and financial interests in the Winnie Mandela Family Museum in Soweto.

What powers of sanction are in place against Ministers who are also parliamentarians?

Same as above.

Have they ever been invoked?

Yes. For example, against the Minister of Defence, Mosiuoa Lekota, for failing to disclose that he was the director of Landzicht Winery and had shares in BZL Petroleum 1169 CC, which posed a potential of conflict of interest because he is a Cabinet Minister and is privy to decisions that affect the petroleum industry and companies in other sectors. He was found guilty of contravening the Code of Conduct for MPs, fined seven days' pay and given a written reprimand by the Parliamentary Ethics Committee.

What powers of sanction are in place against Ministers who are not parliamentarians?

In South Africa members of the executive are drawn from the legislature, thus they are also parliamentarians.

Have they ever been invoked?

Not applicable.

Are there restrictions on post-ministerial office employment?

No. The Joint Investigative Team(JIT) into South Africa's arms deal (consisting of the PP, NDPP and AGSA) did, however, make a recommendation in its final report in 2001 that:

"Parliament should take urgent steps to ensure that high-ranking officials and office bearers, such as Ministers and Deputy Ministers, are not allowed to be involved, whether personally or as part of a private enterprise, for a reasonable period of time after they leave public office, in contracts that are concluded with the State".¹⁶

Thus far there has been no action to suggest that the recommendation is receiving serious consideration.

Are members of the Executive obliged by law to give reasons for their decisions?

Yes/no. The Promotion of Administrative Justice Act (3 of 2000) gives effect to the right to administrative action that is lawful, reasonable and procedurally fair and the right to written reasons if a member of the public has been adversely affected (as determined by the Constitution). It also gives members of the public the right to challenge the decision of administrators in court. However, this legislation also calls for the need to promote sufficient administration and so therefore a balance must be found to ensure that members of the Executive, acting as 'administrators', are not bound to having to provide a written reason for every administrative decision.

In cases where members of the Executive, acting as 'administrators,' refuse to give reasons for their decisions, remedy can be found in the Promotion of Access to Information Act.

Practice

The definition of the term 'administrators' has been tested in the Constitutional Court and it does not cover all members of the Executive for every single one of their actions. Noticeable exceptions may be, for example, when the President appoints a commission of enquiry in his/her capacity as Head of State, when legislatures legislate, and when municipalities pass budgets.

Do Ministers or equivalent high-level officials have and exercise the power to make the final decision in ordinary contract awards and licensing cases? Is this power limited to special circumstances?

The State Tender Board, appointed by the Minister of Finance, is delegated (through the State Tender Board Act (86 of 1968) the power to procure supplies and services for the State, and, subject to the provisions of any other Act of Parliament, to arrange the hiring or letting of anything or the acquisition or granting of any right for or on behalf of the State, and to dispose of moveable property for the State. These provisions are currently being reviewed by the Ministry of Finance as part of the new framework on supply chain management. All procurement is regulated by these regulations. There are exceptions,however, such as in the arms deal. A Cabinet committee gave preference to non-costed considerations (off-sets, strategic considerations) in awarding tenders, as opposed to costed considerations (value for money, price). The result, famously, is that the deal has been dogged by allegations of

corruption ever since. The Preferential Procurement Policy Framework Act also allows the State Tender Board to overlook certain bids based on the need to advance historically-marginalised tendering parties.

Are there administrative checks and balances on decisions of individual members of the Executive?

Yes. The Constitution¹⁷ makes members of the executive collectively and individually accountable to Parliament.

Practice

Members of the executive are, from time to time, requested to appear before a parliamentary portfolio committee, although committees have expressed concern that Ministers are not always accommodating of these requests (often on repeated occasions) and thereby undermine the stature of Parliament.

Legislature

The legislative authority is vested in Parliament, which consists of the National Assembly and the National Council of Provinces (NCOP).

Is the Legislature required to approve the budget?

Yes. In October of every year the Ministry of Finance publishes the Medium- to Long-Term Provisional Budget (MLTP). This provides an overview of budgetary priorities for the following three-year period. The process to finalise the budget for a particular year commences in March of the year prior to the Minister's February budget address to Parliament. (Provinces are required to submit comment on the budget by August of a given year and the allocation takes place in March of the following year). In it, the Minister tables the allocation of money to the national, provincial and local governments and to public services such as education, health care, policing, housing, etc. The Minister's presentation is followed by deliberation in Parliament and parliamentary committee hearings and is concluded when Parliament approves the Budget. Various committees are involved in the Parliamentary budget process, most notably the Joint Budget Committee (established in October 2002). Other committees that play a role are the Select Committee on Finance, the Financial and Fiscal Commission and the Portfolio Committee on Finance.

Section 55(2) of the Constitution tasks the National Assembly to maintain oversight of the exercise of national Executive authority. This gives Parliament the power to amend the national Budget compiled by the executive. This prerogative is also supported by section 77(2) of the Constitution.

Practice

A shortcoming already observed in 2000 was that South Africa does not have legislation that assigns fiscal management responsibilities between the executive and the legislature. The Constitution allows for Parliament to amend the Budget, but this has seldom been taken advantage of. For example, the NCOP can return the Budget to the National Assembly if it feels that provinces, which are responsible for a substantive portion of budget expenditure, have not been allocated a sufficient portion of the Budget, but this has not been done and remains a hollow provision. It may, depending on one's perspective, reflect attempts by the Treasury to consult broadly on budgetary needs, but could also result from the majority party's clear majority in the NCOP. Furthermore, the actual details of the budget are highly technical and therefore are difficult to scrutinise by MPs who may lack capacity in this area.

Are there significant categories of public expenditure that do not require legislative approval? (Which departments does this involve, what is their expenditure and what percent does this represent of the government's annual expenditure?)

No. The Public Finance Management Act (1 of 1999)¹⁸ deals with the national Budget. Section 34 provides that unauthorised expenditure must be approved by Parliament for it to become a charge against the Revenue Fund. This provision thus reinforces the fact that Parliament must approve all categories of public expenditure. The single exception is the Emergency Reserve Fund of approximately R3 billion.

Are there conflict of interest rule for parliamentarians?

Yes. The Code of Conduct for Assembly and Permanent Council Members, 1997 (hereafter the Code) regulates conflicts of interest for MPs. It provides that:

A member must (a) declare any personal or private financial or business interest that that member or any spouse, permanent companion or business partner of that member may have in a matter before a joint committee, committee or other parliamentary forum of which that member is a member; and (b) withdraw from the proceedings of that committee or forum when that matter is considered, unless that committee or forum decides that the member's interest is trivial or not relevant.¹⁹

In addition if a member makes representations as a member to a Cabinet member or any other organ of the state with regard to a matter in which that member or any spouse, permanent companion or business partner of that member has a personal or private financial or business interest, that member must declare that interest to that Cabinet member or organ of state.²⁰

Practice

The Code is unlikely to be a disincentive to parliamentarians who are acting in conflict of interest as it lacks severe penalties.

Are there rules and registers concerning gifts and hospitality?

Yes. The Code requires the Registrar to keep a Register of Members' Interests and requires MPs to disclose registrable interests:

- Members must disclose to the Registrar, on the form prescribed for this purpose by the Committee, particulars of all their registrable interests.
- The first disclosure must be within 30 days of the opening of Parliament after an election, in the case of an Assembly member, or of a member's appointment as a member, in the case of a permanent Council member. If a member has no registrable interests, a "nil" return must be submitted.
- After the first disclosure, members must annually disclose particulars of their registrable interests at a time determined by the Committee.²¹

The kinds of financial interests that are registrable interests are shares and other financial interests in companies and other corporate entities; remunerated employment outside parliament; directorships and partnerships; consultancies; sponsorships; gifts and hospitality from a source other than a family member or permanent companion; any other benefit of material nature; foreign travel (other than personal visits paid for by the member, business visits unrelated to the members' role as a public representative and official and formal visits paid for by the state or the member's party); ownership and other interests in land and property; and pensions.²²

The Code outlines details of registrable interests to be disclosed. With regards to gifts and hospitality the provision provides that:

- A description and the value and source of a gift with a value in excess of R350;

- A description and the value of gifts from a single source which cumulatively exceed the value of R350 in any calendar year; and
- Hospitality intended as a gift in kind must be disclosed.²³

Provision is also made for a confidential and a public part of the register.

Practice

There are some shortcomings in the Code including the fact that no mechanism exists to review a Member's declared private interests against his or her activities, to ascertain whether a conflict of interest has occurred or where the potential for such a conflict exists. Furthermore, the value of a Member's interest is contained in the confidential section of the register, to which the public have no access. This removes the opportunity to weigh the potential for conflict of interest according to the value of the disclosure.

If so, are these registers kept up to date? By whom?

Yes. The Code makes provision for the appointment of the Registrar of Members' Interests, who serves the Joint Committee on Ethics and Members' Interests.²⁴ It outlines the functions of the Registrar,²⁵ one of which is to amend any entries in the Register when necessary.

Practice

The Registrar may not, however, act without a specific directive from the Ethics Committee regarding implementation of the Code. The Registrar's office is therefore not independent as it is regulated by the Ethics Committee, in which the majority party is ensured half-plus-one seats. It has been argued that the independence of the Registrar should be formalised.

Have they legal powers to enforce disclosure?

Yes. In terms of rule 32 of the Joint Rules of Parliament, the Joint Committee on Ethics and Members' Interests has the power to "to summon any person to appear before it to give evidence on oath or affirmation, or to produce documents". Thus the Ethics Committee has powers to enforce disclosure.

Practice

A number of high-profile cases involving MPs such as Winnie Madikizela-Mandela, the Minister of Defence, Mosiuoa Lekota, and former ANC Chief Whip, Toni Yengeni, have all taken place in closed Ethics Committee sessions. It is argued that this practice does not allow for adequate public scrutiny of the Ethics Committees' deliberations, an important aspect given the already-weak provisions for sanctions.

Have they staff to investigate allegations?

Yes/no. The Joint Committee on Ethics and Members' Interests is responsible for investigating any allegations of breach of the Code. The Code empowers the Committee to investigate any alleged breach and specifies the procedure to be followed in investigating allegations of breach of the Code.²⁶ The Committee comprises 27 National Assembly members and 13 permanent members of the Council. There is, however, no staff with the specific mandate of investigating allegations.

Practice

Beyond formal deliberations the Committee does not have salaried staff whose function it is to investigate any allegations. The Registrar, beyond her/his duty of maintaining the Register, has a *de facto* advisory role and does not fulfil the function of investigating any allegations.

What powers of sanction are in place against parliamentarians?

Section 19 of the Code lists penalties that can be imposed if an MP is found guilty of contravening the Code:

- The Committee must recommend the imposition of one or more of the following penalties where it has found that a member has breached a provision of this Code:
 - o A reprimand;
 - o A fine not exceeding the value of 30 days' salary;
 - o A reduction of salary or allowances for a period not exceeding 15 days;
or
 - o The suspension of privileges or a member's right to a seat in Parliament debates or committees for a period not exceeding 15 days.²⁷

Practice

The sanctions provided for are not very severe and it is argued that they are not sufficiently powerful to act as a disincentive against breaching the Code. Even the Speaker of the National Assembly has supported a revision of the sanctions mechanism on this ground. MPs can also simply choose to leave Parliament and thereby escape the jurisdiction of the Code.

Have they ever been invoked?

Yes. For example, against the Minister of Defence, Mosiuoa Lekota, for failing to disclose that he was the director of Landzicht Winery and had shares in BZL Petroleum 1169 CC, which posed a potential of conflict of interest because he is a Cabinet Minister and is privy to decisions that affect the petroleum industry and companies in other sectors. He was found guilty of contravening the code of conduct for MPs and was fined seven days' pay and given a written reprimand by the Parliamentary Ethics Committee.

Are there restrictions on post-legislature employment?

No. As indicated, the JIT report made a recommendation that Parliament consider legislating in favour of this. It remains a lacuna and the need for Parliament to pay serious attention to this has been highlighted in a recent report on government ethics in post-apartheid South Africa, published by Idasa.²⁸

Electoral Commission

Is there an independent Electoral Commission?

Yes. The basis for the establishment of the IEC is found in section 3(1) of the Electoral Commission Act (51 of 1996). The Constitution also guarantees the independence of the IEC by stating that it shall be independent, and subject only to the Constitution and the law, and shall be impartial and exercise its powers and perform its duties without any fear, favour or prejudice.²⁹ In addition, the Constitution places an obligation on other organs of the state to ensure its independence, impartiality, dignity and effectiveness, and also prohibits any person or organ of the state from interfering with the functioning of the IEC.

Who appoints the head of the Commission?

The IEC is made up of five members and is nominated by the Committee of the National Assembly, composed of members of all parties represented in the National Assembly. However, it is the President who selects the chairperson and the vice-chairperson of the Commission.³⁰

Political party funding

Are there rules on political party funding?

No/yes. There is no regulation of private funding of political parties in South Africa.

The basis for public funding of political parties is found in the Constitution. Section 236 provides for the enactment of legislation governing political party funding. The Public Funding of Represented Political Parties Act (103 of 1997) regulates public funding of political parties. Only parties that are represented in the National Assembly or any provincial legislature receive public funding. The IEC is responsible for managing the Fund, which is credited by monies appropriated by Parliament and donations from any source. Section 6 of the Act makes it a requirement for political parties to account for the monies they receive from the Fund and empowers the AGSA to audit any political party's financial records relating to moneys received from the Fund. If there are any irregularities, especially where money was spent on activities that are not compatible with the functioning of a political party (see Section 5 of the Act), the accounting officer of the party is liable to repay the money to the IEC, which is credited back to the Fund.

Are substantial donations and their sources made public?

No.

Are there rules on political party expenditures?

No.

Are political party accounts published?

No.

Are accounts checked by an independent institution, are they published and are they submitted to parliament?

Yes/no. Political parties are required to audit and account for public funding they have received. This information is collected by the IEC and presented in Parliament, together with other reports. Political parties are not required to publish their internal records other at a statutory party meeting. These are, however, unlikely to be detailed accounts and may not include funds which are held in various trusts, as is the case with some of the largest political parties in South Africa.

Does that institution start investigations on its own initiative?

Not applicable.

Who appoints the head of the institution?

Not applicable.

Supreme audit institution

Is the national auditor general independent?

Yes. Chapter 9 of the Constitution provides for the establishment of an independent and impartial Auditor General (as one of the State institutions to support Constitutional Democracy). This provision further states that the Office of the Auditor General is subject only to the Constitution and the law and must exercise its powers and perform its duties without fear, favour or prejudice. Other organs of the State are ordered to assist and protect the Office of the Auditor General to ensure its independence, impartiality, dignity and effectiveness. The provision also prohibits any person or organ of the State from interfering with the functioning of the Office of the Auditor General. Each provincial office of the Auditor General is also headed up by provincial Auditor General.

Practice

Although the independence of the AGSA is guaranteed by the Constitution, it is argued that this was severely compromised during the investigation into the arms deal. The AGSA made the findings of his investigation known to the executive (who were, in part, the subject of the investigation), prior to informing Scopa, to which he was to report. The AGSA and his/her provincial offices have a very important role to play as a constitutional oversight body. The political will to act and point out errant departments is a priority and needs to be supported by other organs of State.

Is the appointment of the auditor general required to be based on professional criteria/merit?

Yes. The appointment and the removal of the AGSA is regulated by Section 193(3) of the Constitution, which lays down the required formal qualifications. These are that the AGSA must be a South African citizen, who is fit and proper to hold that office and must have specialised knowledge of, or experience in, auditing, state finances and public administration. The AGSA is appointed for a fixed and non-renewable term of between five and ten years.³¹

Is the appointee protected from removal without relevant justification?

Yes. Only the legislature may remove the AGSA, on the grounds of misconduct, incapacity or incompetence; a finding to that effect by a committee of the National Assembly; or the adoption by the Assembly of a resolution calling for his or her removal from office.³²

Are all public expenditures audited annually?

Yes/no. Section 58 of the Public Finance Management Act places an obligation on the AGSA and auditors (appointed with the explicit approval of the AGSA) to audit financial statements of public entities on an annual basis. The Constitution tasks the AGSA to "audit and report on the accounts, financial statements and financial management of all national, provincial state departments and administrations; all municipalities and any other institution accounting entity required by national or provincial legislation to be audited by the Auditor General."³³ The AGSA is also mandated to audit and report on the accounts, financial statements and financial management of any institution that receives funding from the National Revenue Fund, a provincial Revenue Fund or a municipality, or of any institution that is funded for public purposes.

Is reporting up to date?

No. The Public Finance Management Act requires a public entity to forward its financial statements to the AGSA within a month after the end of a financial year. Thereafter the AGSA submits her/his audit report to the public entity, which is required to submit this report together with the financial statement and an annual report to Parliament. It must be tabled in Parliament within seven months of the end of the financial year in question. Many public entities (including national departments, constitutional entities and public entities) are late in submitting these reports and some have not provided an explanation for doing so. Many budgets are also issued with disclaimers, for example 90% of budgets in the Eastern Cape have been issued with disclaimers in the past six years.

Are reports submitted to a Public Accounts Committee and/or debated by the legislature?

Yes. The AGSA must submit the reports to any legislative body that has a direct interest in them and all reports must be opened to public scrutiny. In addition, section 62(4)(b) of the Public Finance Management Act provides that the AGSA must report to Parliament on specific and general findings regarding the accountability of public entities.

Practice

Some members of the Opposition, such as the former chairperson of the Public Accounts Committee, have criticised the superficial nature of some audit reports. Furthermore, reports by the AGSA are often delayed by the lateness of submission to Parliament by public entities as detailed above, inhibiting Parliament in its duty to scrutinise these reports.

Are all public expenditures declared in the official budget?

Yes. The Estimates of National Expenditure (excluding local and provincial expenditure) are published together with the Budget and include detailed information about the objectives of national spending, including performance information. Approximately a year or two after a given financial year, the final details of national expenditure will be published (i.e. in 2003 the 2000/01 final expenditure report was published). In addition, the Treasury must also publish monthly statements within 30 days after the end of each month on the actual revenue and expenditure per vote. Quarterly expenditure reports are also published by the Treasury. The inter-governmental fiscal review is published at the end of every year and provides details of expenditure at all three levels of government. It is regarded by some as the pride of national financial accountability in South Africa.

The judiciary

Have the courts the jurisdiction to review the actions of the executive?

Yes. Separation of powers is recognised in the 1996 Constitution, which vests the legislative authority in Parliament, the executive authority in the President and the judicial authority in the courts.³⁴ To make the separation of powers among the branches of government more effective, the Constitution makes provision for checks and balances. This is to ensure that the three branches of government are accountable to each other. The courts, especially the Constitutional Court, have the power to review the actions of the executive for compliance with the Constitution and the Bill of Rights, and its decisions or orders are binding on all persons and organs of State.³⁵

Practice

The Constitutional Court has reviewed the actions of the executive on a number of occasions, particularly where they were out of line with the Bill of Rights, most notably in the provision of

socio-economic rights. There is, however, a general recognition that the courts need to be wary of not asserting their authority beyond this mandate, particularly given the electoral mandate of the executive.

Are judges/investigative magistrates independent?

Yes. The Constitution guarantees the independence of the judiciary: "the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice."³⁶ Any person or organ of state is prohibited from interfering with the functioning of the courts, and organs of State are ordered, through legislative and other measures, to assist and protect courts to ensure their independence.³⁷

Are appointments based on merit? Are the appointees protected from removal without relevant justification?

Yes. The Constitution prescribes five types of courts: the Constitutional Court, the Supreme Court of Appeal, the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts, the Magistrates' Courts and any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts. Section 174 regulates the appointment of the judges of the Constitutional Courts.³⁸ The President, as the head of the executive, after consulting the Judicial Service Commission and the leaders of parties in the National Assembly, appoints the President and the Deputy President of the Constitutional Court. The President, after consulting the President of the Constitutional Court and the leaders of parties represented in the National Assembly, also appoints other judges of the Constitutional Court and judges of other courts on the advice of the Judicial Service Commission. Judges may only be removed from office by impeachment. The Magistrates' Commission is responsible for the appointment and the removal from office of magistrates.

Practice

Since the executive makes the final decision with regard to the appointment of judges it has been argued that this may allow a situation to develop where the executive appoints judges who show a predisposition to sharing the same views. The judiciary is, however, wary of state interference and there have been no indications from the executive that it only favours party loyalists.

Are recruitment and career development based on merit?

Yes. The merit of an applicant also includes (but not exclusively) criteria based on the aim of transforming the judiciary's largely white male character to encompass diversity in race and gender representation.

Have there been instances of successful prosecutions of corrupt senior officials in the past three years?

Yes/no. Former ANC Chief Whip, Toni Yengeni, was found guilty of fraud, although corruption charges were dropped by the Prosecution. It has been argued that the weak Corrupt Practices Act (1992), which is soon to be replaced, has not aided the case of successful prosecutions.

Civil service

Are there laws establishing criminal and administrative sanctions for bribery?

Yes. Chapter 10 of the Constitution regulates the civil service in South Africa. Section 195(1) lists principles that should govern the civil service, including a high standard of professional ethics, and subsection (f) provides that the civil service must be accountable.

The Corruption Act (1992), the only piece of legislation designed to specifically counter corruption, has been repealed and replaced by the Prevention and Combating of Corrupt Activities Act (12 of 2004). This accepts a wider definition of corruption, which specifically includes the offence of bribery. Codified offences include accepting and giving gratification by any person or agent, fraudulent acquisition of private interest by any person employed in the public service, bribery of public officers, bribery of foreign public official and the use of office/position for gratification.

Practice

Prior to the promulgation of the Prevention and Combating of Corrupt Activities Act by Parliament, it was difficult, although not impossible, for the offence of bribery to be penalised by a criminal court.

Are there rules requiring political independence of the civil service?

Yes/no. The Constitution provides that no employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.³⁹ The Public Service Regulations, prohibit any political activity in the workplace.⁴⁰ There is, however, no formal law that guarantees the independence of the civil service, as it remains an arm of government and not an independent institution.

Practice

The Minister in charge of the Department of Public Service and Administration and all other members of Cabinet are political appointments and therefore hold membership of a political party. The same applies to many, but not necessarily all, senior administrators.

Are recruitment/career development rules based on merit?

Yes. Section 8 of the Public Service Laws Amendment Act (47 of 1997) provides that in the making of appointments and filling of posts in the public service, the evaluation process shall be based on training, skills, competence, knowledge and the need to redress the imbalances of the past to achieve a public service broadly representative of the South African people, including representation according to race, gender and disability. Thus, even though appointment is based on merit, preference is given to those who are previously disadvantaged. In addition no appointment is made unless someone in the responsible department has filled in the field in the PERSELL database to ensure that qualifications are verified. Any appointment of senior managers can only be made after potential conflicts of interest have been assessed by a department. The appointments of staff from Director-General level and above have to be verified by the National Intelligence Agency and approved by Cabinet.

Practice

Given the nature of the negotiated transition in South Africa, the civil service remains characterised by a diversity of political opinions. However, it is argued that very often many top positions are occupied and assigned to officials close to the thinking of the top leadership of the majority party. This has also, it is argued, been to the exclusion of members of the ruling party who are considered ideologically opposed to the leadership of the party (i.e. are perceived to be 'too left'). Furthermore, the ANC at its National General Council in July 2000 also outlined its 'cadre deployment strategy' which notes that: "Besides the existing mechanism for elected representatives, we need to ensure the accountability of all cadres of the movement wherever they are deployed".⁴¹ This points to the need for the party to ensure political control over redeployed cadres—potentially within both the private and public sector. Another effect of this policy is that some senior managers in the public service are, in effect, politicians and their seniors may have difficulty in ensuring that they act as managers and not as politicians.

Are there specific rules to prevent nepotism? Cronyism? (Note: rules discriminating positively in favour of marginalised or minority groups are not included in this description.)

Yes. The Public Service Regulations prohibit nepotism or cronyism.⁴² They state that an employee shall refrain from favouring relatives and friends in work-related activities and from abusing his or her authority or influence. Members of the Senior Management Service (SMS) are also prohibited from engaging in acts of nepotism. The Public Service Regulations also provide that members of the SMS shall ensure that they minimise conflicts of interest and that they put the public interest first in the performance of their functions.⁴³

Practice

There are many instances of reported abuse of authority, including nepotism/cronyism in the public service.

Are there rules (including registries) concerning acceptance of gifts and hospitality?

Yes/no. The Public Service Regulations only require members of the Senior Management Service - SMS (from Director level upwards) and members of the PSC to file confidential annual disclosure forms, including gifts and hospitality from sources other than family members. (This is also included in the 1997 Code of Conduct for Public Officials.) These forms are submitted to the Minister responsible for a department who is required to submit copies of the forms to the Directorate of Professional Ethics and Risk Management of the PSC by no later than 31 May of the year in question (the reporting period is 1 April of the previous year to 31 March of the year in question).

This excludes the majority of the civil service, who may, particularly where management oversight functions are weak, create an environment conducive to the receipt of petty bribes such as gifts and hospitality.

If so, are these registers kept up to date and by whom?

Yes. The Public Service Regulations stipulate that the Director-General in the office of the PSC keeps a confidential register known as the Register of Designated Employees' Interests and performs other functions in relation to the implementation of the financial disclosure regulations.⁴⁴ This applies only to members of SMS.

Practice

The financial disclosure forms are currently in their third year of implementation, and 20% of designated employees did not submit their first forms.

Have they the legal powers to enforce disclosure?

Yes. The Public Service Regulations provide that any designated employee who wilfully misrepresents or fails to disclose financial interests shall be guilty of misconduct. This provision empowers the Director-General at a national level (and the Head of Department at a provincial level) to enforce disclosure or charge the employee with misconduct.⁴⁵

Practice

Where misconduct is not suspected, this has not been tested, as the PSC has not opted to force compliance. Instead the PSC is now considering recording the submitted forms into an electronic register. Thereafter an audit will be made to establish where conflicts of interest, inadequate disclosure or potential irregularities have taken place and will include recommendations for investigation, where necessary. According to Dr. Daryl Balia, Chief Director of the Directorate of Ethics and Human Resource Reviews at the PSC, it is now considering a number of alternative approaches. These include the decentralisation of the process of financial disclosure, with the PSC instead maintaining an *oversight* function. Each department would appoint a dedicated ethics officer whose role could include:

- co-ordinating the implementation of the regulations in his/her department;
- providing designated employees in his/her department with information and advice regarding the regulations;
- ensuring that all designated employees submit their completed forms and send them to the office of the PSC;
- compiling a list of all designated employees in his/her department;
- conducting follow-ups on designated employees who fail to return completed forms on time; and
- reviewing forms and make notes before sending them to the office of the PSC.⁴⁶

Have they the staff to investigate allegations?

Yes. Only one person is responsible for functions related to implementing the financial disclosure regulations and few investigations have taken place. Thus far the investigative capacity of the PSC in this regard has gone largely untested. One option may be outsource this function to a private sector auditing company.

What powers of sanction are in place?

Employees who fail to disclose or who knowingly provide inaccurate or misleading information are guilty of misconduct in accordance with the Public Service Regulations. This is an offence that would require prescribed disciplinary action.

Have they ever been invoked?

No. They have not been invoked against individual senior managers that have failed to report.

Yes. However, they may have been invoked in circumstances in which gifts or hospitality were the source of an attempt to exert undue influence.

Are there restrictions on post-public service employment?

No.

Are procedures and criteria for administrative decisions published (e.g. for granting permits, licences, bank loans, building plots, tax assessments, etc.)?

Yes. The Promotion of Administrative Justice Act stipulates that in order to give effect to the right to procedurally fair administrative action, an administrator must (unless there are specified exceptional circumstances where this can be reasonably dispensed of with the approval of parliament) provide adequate notice of the nature and purpose of the proposed administrative action to the public.

Practice

Although notices are published it is often difficult to ensure that all communities, particularly those who are indigent and/or based in rural areas, have adequate access to such information. A recent example of a CSO based in an urban centre that found itself informed, but not adequately so, was the Khulemani Support Group, which represents victims of apartheid who are now claiming reparations from multinational corporations that profited from apartheid. When Parliament decided in August 2003 to set up an ad-hoc commission on reparations, only giving the public one week's notice of this, Khulemani and others lodged a complaint as it did not give them reasonable time to make submissions to the committee.

Are there complaint mechanisms for public servants and whistleblower protection measures?

Yes. The Protected Disclosures Act (26 of 2000) makes 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, and provides for the protection of employees who make a disclosure that is protected in term of the Act. Witness protection programmes, administered by a Central Office for Witness Protection, have been set up in accordance with the Witness Protection Act (112 of 1998).

Anti-corruption hotlines have also been established in eight national departments and five provinces to make it easy to report corruption. Cabinet also formally endorsed the establishment of a national anti-corruption hotline, which was launched on 1 September 2004). It is outsourced to a private company and cases are referred to the relevant authorities by the PSC. It serves a single hotline for the public sector although departmental hotlines still remain operational.

Practice

The Protected Disclosures Act has key shortcomings, including a lack of public awareness of how to use the legislation, the fact that identity protection is not available across the board, as well as the cumbersome process whistleblowers who lose their jobs have to undertake to appeal such a decision. The Act is, however, currently being reviewed by the South African Law Commission. The Act does also not provide for compensation in the advent of dismissal/suspension and there is a recommendation that this should equal 24 months' pay.

Are there means for complaints by the members of the public?

Yes. Members of the public can refer to either the Public Protector or the PSC. The Constitution empowers the PSC, either on its own accord or on receipt of any complaint, to investigate and evaluate the application of personnel and public administration practices, and to report to the relevant executive authority and legislature. To give effect to this function the Public Service Commission Act (46 of 1997) also authorises the PSC to hold an inquiry into any matter in respect of which it is authorised by the Constitution or the Act.

One practical example that has been established by a CSO to provide a complaint mechanism for the public is the MyRights website administered by the PSAM. This website makes it possible for members of the public in the Eastern Cape Province to officially register a complaint against civil servants of any government department.

Practice

Many members of the public are not aware of these and other channels available to make a complaint.

Are there administrative checks and balances on decisions of individual public officials?

Yes. Chapter five of The Public Finance Management Act establishes accounting officers in public departments, including the DPSA.⁴⁷ The Act provides that the accounting officer for a department, trading entity or constitutional institution must ensure that that department has and maintains: i) effective, efficient and transparent systems of financial and risk management and internal control; ii) a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulation and instructions prescribed in sections 76 and 77; iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective; iv) a system for properly evaluating all major capital projects prior to a final decision on the project.⁴⁸ The Act also makes Heads of Departments liable for fruitless and wasteful use of resources, for which officials can be fined. This has not been enforced, however. Citizens can also apply to access information through the Promotion of Access to Information Act.

Police and prosecutors

Is the Commissioner of Police independent?

No. The Constitution makes provision for the appointment of the National Commissioner of Police to control and manage the national police service, and provincial Commissioners to oversee policing in the provinces.⁴⁹ The National Commissioner must exercise control over and manage the police service in accordance with the national policing policy and the directions of the Cabinet member responsible for policing.⁵⁰ Thus, the National Commissioner is subject to the South African Police Service Act (68 of 1995) and the South African Police Service Amendment Act (83 of 1998) (the Amendment Act) and takes directions from the Minister of Safety and Security.

Provincial Commissioners are subject to national legislation and to the powers of the National Commissioner. They are thus not independent but are also subject to the South African Police Service Act and the Amendment Act, as well as to the National Commissioner.

Is the appointee protected from removal without relevant justification?

Yes. The Police Service Act regulates the removal of Commissioners. It provides that they can be removed from office due to loss of confidence. The Constitution grants the President as the head of the executive the power to appoint the National Commissioner.⁵¹ The National Commissioner, with the concurrence of the executive of each province, appoints the provincial Commissioners. Neither the Constitution nor the Act list any formal qualifications for Commissioners.

Are public prosecutors independent?

No. The President appoints the head of the NPA and although s/he reports to Parliament, s/he is accountable to the Minister of Justice. The National Prosecuting Authority Act (39 of 1998) does state, however, that "a member of the prosecuting authority shall serve impartially and exercise, carry out his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law."⁵² It prohibits any person or organ of the state, including its employees, from interfering, hindering or obstructing the prosecuting authority and any of its members in the exercise, carrying out or performance of its, his or her powers, duties and functions.

Practice

This has led to some tension between some members of the Executive and the NDPP, who was accused of attempting to assert his independence and that of the special units that form part of the NPA (such as the Scorpions).

Are there special units for investigating and prosecuting corruption crimes?

Yes. These include the DSO, also known as the Scorpions, and the SIU. Both have the powers to investigate and prosecute and the Head of both these units reports to the NDPP.

Is there an independent mechanism to handle complaints of corruption against the police?

Yes/no—only to a limited degree. The ICD was formally established by the South African Police Service Act and has as its main function the investigation of deaths in police custody. It does, however, have the discretion to investigate any other misconduct or any other criminal offence, including corruption. Section 50 of the Act makes the ICD independent by prohibiting

any person or organ of the state, including its employees, from interfering with the Executive Director or a member of the personnel of the Directorate in the exercise or performance of his or her powers and functions.

Practice

The ICD investigates a few cases of corruption annually but these are usually linked to escapes from police holding cells or missing case dockets. Furthermore, the SAPS closed down its internal anti-corruption unit, which, although not independent, was the only dedicated unit to investigate such claims. This was part of an attempt to spread the responsibilities across a number of other specialised units within the SAPS, particularly the Detective Services (including the Organised Crime Unit, General Investigations and Commercial Branch). The ICD has limited investigative capacity, therefore the Detective Services now largely deal with these investigations internally.

Does civil society have a role in such a mechanism?

Yes/no. Members of civil society can lay a complaint with the ICD, which can then either choose to investigate the matter or hand it over to the SAPS for investigation. There is, however, no formal role for civil society.

In the last five years, have police officers suspected of corruption been prosecuted (or seriously disciplined or dismissed)?

Yes. There have been numerous cases where this happened.

Practice

With the closure of the SAPS anti-corruption unit, and its already patchy performance, it is feared that many more cases will go undetected.

Are there any cases of corruption within the prosecuting agencies?

Yes. Few have been exposed, however, a prominent example is corruption within the human resources department responsible for the Scorpions. Similarly the entire witness protection programme had to be closed down in 2000 because corrupt prosecutors had compromised the safety of witnesses by disclosing their whereabouts for bribes. It is now functioning again, however. These are only some of the high-profile cases that have made the news and may be reflect an efficient oversight mechanism. Other recent prominent examples include allegations that the CEO in the office of the NDPP, Marion Sparg, was involved in corruption.

Which legislative instruments can be used by the police and public prosecutors for the investigation and prosecution of cases of corruption/bribery?

Legal instruments applicable include:

- the Corruption Act of 1992 (replaced by the Prevention and Combating of Corrupt Activities Act (12 of 2004));
- the National Prosecuting Authority Amendment Act (61 of 2000);
- the South African Police Services Act (1995); and
- the Prevention of Organised Crime Act (1998).

Is the law applied?

Yes.

Is private-to-private corruption punishable by law?

Yes/no. At present this can be undertaken through the Companies Act, that does not specifically provide for the regulation of private-private corruption. The Prevention and Combating of Corrupt Activities Act includes specific provisions that deal with corruption in the private sector, including private-to-private corruption. The Act provides, for the first time, a comprehensive framework with which corruption in both the public and private sectors can be tackled.

Is the law applied?

No. This seldom happens, if at all. It is hoped that the the Prevention and Combating of Corrupt Activities Act will change this situation.

How many cases of corruption have been undertaken in the past years? How many have been successful? If the number is low, are there other effective measures or other good reasons why the number is low?

No. There have been few cases, though this is likely to be remedied by the Prevention and Combating of Corrupt Activities Act that codifies acts of corruption and bribery (a major lacuna in the present legislation).

Public procurement

Do rules for public procurement require competitive bidding for all major procurement with limited exceptions?

Yes. The Constitution makes provision for a procurement system, which is fair, equitable, transparent, competitive and cost-effective.⁵³

The rules governing state tenders are, however, currently being revised as the original Act is over 35 years old. The new Framework for Supply Chain Management (hereafter the Framework) which was promulgated by *Government Gazette* on 5 December 2003, essentially revamps the procurement process and will look at procurement from the first part of the demand side of the chain to the last link in the supply side of the same chain. This is expected to be a vast improvement on the status quo and will be phased in over time, commencing in December 2003. It will result in the State Tender Board being repealed.

The Framework, together with relevant 'practice notes' issues by the National Treasury, is applicable to all national and provincial departments, constitutional institutions and public entities listed in the Public Finance Management Act. These practice notes include standardised bidding documents, directives for the appointment of consultants and a code of conduct applicable to supply chain management practitioners. The Framework has been promulgated as an amendment of the State Tender Board Act. Previously, the regulations required that procurement of all goods and services must be done only through the State Tender Board. The amended regulations allow for accounting officers of national departments to procure goods and services either through the State Tender Board or in line with the Public Finance Management Act, which empowers accounting officers to manage their departments and accept full responsibility and accountability for all expenditures incurred by them. National departments are allowed the option to arrange their ad hoc tenders through the State Tender Board, or alternatively in terms of the Public Finance Management Act. This system will be available until the State Tender Board Act is eventually repealed. At a provincial level, the tender boards have been, or are in the process of being, dismantled and the new Framework is being implemented.

The major limited (though very important) exception to competitive bidding is policy designed to promote black economic empowerment and that of other groups discriminated against during apartheid. The Preferential Procurement Policy Framework Act was passed to give effect to section 217(3) of the Constitution, which calls for the enactment of national legislation to regulate the procurement system. Due to South Africa's history the Preferential Procurement Policy Framework Act prescribes a preferential procurement policy, which is implemented by following a preference point system. The Act outlines the preference point system as follows:

(i) for contracts with a ZARand value above a prescribed amount a maximum of 10 points may be allocated for specific goals provided that the lowest acceptable tender scores 90 points for price; (ii) for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals provided that the lowest acceptable tender scores 80 points for price. The specific goals mentioned may include—(i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability.⁵⁴

Are the rules laid down in documents publicly accessible?

Yes. The Amendment of the State Tender Board: General Conditions and Procedures (ST 36) Circular Number 5 of 2002 lists all the rules that apply to all tenders, contracts and orders. The Supply Chain Framework and various other tender bulletins and documentation are easily accessible via the Treasury's website.

Practice

Many small- and medium-sized enterprises, particularly those with black ownership that would benefit from the preferential procurement policy, may not know how to access these documents.

Are there strict formal requirements that limit the extent of sole sourcing?

Yes/no. There are no measures explicitly stated. The existing policy framework should, however, deal with instances of sole sourcing that result from unethical bias.

Are all major public procurements widely advertised to the private sector?

Yes. Tenders are widely advertised in the national newspapers. They are also published on the weekly *Tender Bulletin*, which is accessible via the following websites:

- <http://www.gov.za/tenders/>
- <http://www.treasury.gov.za>

Practice

Small- and medium-sized enterprises, which do not regularly access newspapers or the internet, are often excluded from tendering as a result.

Are procurement decisions made public?

Yes. Procurement decisions are published in the weekly *Tender Bulletin*. Only reference numbers are published. Results are furnished upon request.

Is there a procedure to request review of procurement decisions?

Yes. The *Tender Bulletin* provides that any complaints may be lodged with the Public Protector. The State Tender Board, which is regulated by the State Tender Board Act, also reviews procurement decisions. However, the State Tender Board cannot change the procurement decision unless corruption is proven.

Can an unfavourable decision be reviewed in a court of law?

Yes. An unfavourable decision can be reviewed in the court of law. Normal rules of the court apply in accordance with the Promotion of Administrative Justice Act. The Promotion of Access to Information Act can also be used to request access to such decisions.

Are there provisions for blacklisting companies proved to have bribed in a procurement process?

Yes. The blacklisting of businesses that have been found guilty of corruption against the public service was one of the recommendations made by the Public Sector Anti-Corruption Conference (1998). The State Tender Board blacklists such businesses, including the owners and directors, for five years. The Treasury produces a list of blacklisted businesses, which departments must consult before finalising any contracts. This is not publicly accessible and can only be accessed via the Treasury's intranet. This practice is also prescribed in the Framework published by the Treasury. The Prevention and Combating of Corrupt Activities Act also provides for the establishment of a publicly accessible 'corruption register' that is likely to eventually replace the blacklist maintained by the Treasury.

Are there rules and procedures to prevent nepotism/conflict of interest in public procurement?

Yes. The Framework,⁵⁵ and the Policy Guidelines for the Issuance of a Supply Chain Management Framework⁵⁶ outline rules and procedures that are applicable in cases of conflict of interest in public procurement. The Framework provides that:

a) all parties are required to recognise and deal with conflicts of interest or the potential therefore; b) deal with supplies even-handedly; c) ensure that they do not compromise the good standing of the state through acceptance of gifts and hospitality; d) be scrupulous in the use of public property; e) provide all assistance in the elimination of fraud and corruption; and f) adhere to the instructions issued by the accounting officer/ authority as well as the code of conduct for supply chain management officials/ employees issued by the National Treasury.⁵⁷

In an attempt to combat corruption the Framework provides that:

i) Accounting Officers must ensure that all measures are in place to avoid any abuse of the supply chain management system; ii) all allegations of corruption/misconduct must be investigated by accounting officers/ authorities. "Minor" or "Petty" acts of corruption may not be ignored. When justified the South African Police Service and/or the National Intelligence Agency (NIA) should be involved. Details of contact persons must be easily accessible for reporting purposes; iii) Accounting Officers must ensure that all members of the bid/evaluation committees as well as the secretaries to the committees are cleared by the NIA; iv) An official/employee who is involved in the decision-making process must, if a conflict of interest is prevalent: a) declare the private interest; b) recuse himself/herself permanently from such decision-making process; and c) refrain from discussion in any matter related to such process.⁵⁸

Are assets, incomes and life styles of public procurement officers monitored?

No. There is no legal framework governing the auditing of public procurement officers (accounting officers employed in various departments in line with the Public Finance Management Act, and members of the Supply Chain Management Unit). However, the Prevention and Combating of Corrupt Activities Act includes a provision that places a duty on any public official to prove that the source of unexplained wealth is legitimate.

Ombudsman

Is there an ombudsman or its equivalent? Is the ombudsman independent?

Yes. The establishment of an independent and impartial Public Protector (ombudsperson) is prescribed in section 181 of the 1996 Constitution. This provision further states that the Public Protector is subject only to the Constitution and the law and must exercise its powers and perform its duties without fear, favour or prejudice. Other organs of the State are ordered to assist and protect the Public Protector to ensure its independence, impartiality, dignity and effectiveness. The provision also prohibits any person or organ of the State from interfering with the functioning of the Office of the Public Protector.

Practice

Both Public Protectors have been senior officials within the ANC and although they can not be accused of having allowed political interference to take place, both have been loyal party appointees.

Are appointments required to be based on merit?

Yes. The appointment of the Public Protector is regulated by the Constitution, according to which the President shall appoint the Public Protector on the recommendations of the National Assembly. The Public Protector must be a South African citizen and be fit and proper to hold the office. In addition, the Public Protector Act, as amended by the Public Protector Amendment Act (113 of 1998), requires that the Public Protector is:

a) a Judge of a High Court; or b) qualified to be admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having qualified—i) practised as an advocate or an attorney; or ii) lectured in law at a university; or c) has specialised knowledge of or experience, for a period of at least 10 years, in the administration of justice, public administration or public finance.⁵⁹

The tenure of the Public Protector is seven years, which is non-renewable.

Practice

When the last Public Protector was appointed in 2002, Parliament was forced to reopen applications as there was an inadequate response to the initial call for applications. This may be linked to the lengthy tenure and the sometimes politically contentious nature of the position.

Is the appointee protected from removal without relevant justification?

Yes. The Public Protector can only be removed from office on: a) the ground of misconduct, incapacity or incompetence; b) a finding to that effect by a committee of the National Assembly; and c) the adoption by the Assembly of a resolution calling for that person's removal from office. The resolution of the National Assembly must be adopted with a supporting vote of at least two thirds of the members of the Assembly and the President may suspend the Public Protector from office at any time after the start of the proceedings of a committee of the National Assembly and must remove the Public Protector from office upon adoption by the Assembly of a resolution calling for the removal of the Public Protector.

Has an ombudsman been removed without relevant justification in the last five years?

No.

Can petitioners complain anonymously if they fear possible reprisals?

No. Anonymity in reporting procedures is not explicitly provided for in either the Public Protector Act or the Constitution, though a confidential disclosure can be requested. Section 7(1)(b)(ii) of the Public Protector Act does state that the format and the procedure to be followed in conducting any investigation shall be determined by the Public Protector with due regard to the circumstances of each case. When approaching the Public Protector, detailed information must be provided not only regarding the nature of the complaint but also details of other attempts to resolve the matter prior to the approach to the Public Protector, which should not be the office of complaint in the first instance. The complainant will therefore have to disclose her/his identity but can request that this take place in confidence.

Are the reports of the ombudsman published?

Yes. The Constitution makes it a requirement for the reports of the Public Protector to be open to public scrutiny.⁶⁰ Section 8 of the Public Protector Act states further that the Public Protector shall submit a report on his or her Office's activities to Parliament at least once a year. In relation to investigations conducted by the Public Protector, the Act provides that the Public Protector shall submit a report to the National Assembly if:

i) he or she deems necessary; ii) he or she deems it in the public interest; iii) it requires the urgent attention of, or an intervention by, the National Assembly; iv) he or she is requested to do so by the Speaker of the National Assembly; or v) he or she is requested to do so by the Chairperson of the National Council of Provinces.⁶¹

The Public Protector can keep his or her reports confidential in exceptional circumstances.⁶² The Public Protector Act states that if the Public Protector is of the view that a report must be kept confidential, Parliament must be supplied with reasons in support of that view and if the committee concurs, such report shall be dealt with as a confidential document in terms of the rules of Parliament. Exceptional circumstances exist if the publication of the report is likely:

i) to endanger the security of the citizens of the Republic; ii) to prejudice an other investigation or pending investigation; iii) disturb the public order or undermine the public peace or security of the Republic; iv) to be prejudicial to the interests of the Republic; or v) in the opinion of the Public protector to have a bearing on the effective functioning of his or her office.⁶³

Practice

A number of the reports are also publicly accessible via various websites.

Does the government act on the ombudsman's recommendations?

Yes/no. Although government may act against public servants it does not always follow recommendations, particularly with respect to politicians.

Investigative/watchdog agencies

Are there special investigative or watchdogs agencies?

Yes. There are three watchdog agencies in South Africa: the DSO (Scorpions), the SIU and the AFU. The DSO and AFU report to the NDPP while the SIU reports to the executive.

The DSO came into being in September 1999, with the mandate to investigate and prosecute national priority crimes, including corruption within the criminal justice system and grand corruption. This is by far the most high profile of the three. The focus of the DSO is crime of national impact that requires the integration of intelligence, investigation and prosecution. The establishment of this agency is regulated by the National Prosecuting Authority Amendment

Act. Section 7 of the Act establishes the DSO in the Office of the NDPP. The Act also makes provision for the former Investigating Directorates (IDOC, IDOCR and IDSEO) to become part of the DSO.

The SIU was established in 1997 by proclamation by the President, and is regulated by section 2 of the Special Investigating Units and Special Tribunals Act (74 of 1996). The Act mandates the SIU to "investigate serious malpractices or maladministration in connection with the administration of state institutions, state assets, and public money." Thus the SIU has a significant role to play in the fight against public sector corruption.

The NDPP established the AFU in 1999 to put into effect chapters 5 and 6 of the Prevention of Organised Crime Act (121 of 1998), which make provision for the recovery of the proceeds of unlawful conduct and for the forfeiture of criminal assets.

Practice

South Africa has specifically not opted for a single anti-corruption unit, opting rather for improved co-ordination among the agencies responsible for fighting corruption.

What are their main responsibilities (i.e. investigation, prevention, education and awareness, prosecution)?

DSO: The main objective of the DSO is to fight organised crime, corruption within the criminal justice system and grand corruption, serious economic crimes and crimes against the state, for example, terrorism. The National Prosecuting Authority Amendment Act lists the functions of the DSO, namely:

(i) to investigate, and to carry out any functions incidental to investigations; ii) gather, keep and analyse information; and iii) where appropriate, institute criminal proceedings (prosecute) and carry out any necessary functions incidental to instituting criminal proceedings, relating to -aa) offences or any criminal or unlawful activities committed in an organised fashion; or bb) such other offences or categories of offences as determined by the President by proclamation in the *Government Gazette*.⁶⁴

SIU: The responsibilities of the SIU are outlined in the Special Investigating Units and Special Tribunal Act. The SIU is tasked to:

a) investigate all allegations regarding the matter concerned; b) collect evidence regarding acts or omission which are relevant to its investigation and, if applicable, to institute proceedings in a Special Tribunal against the parties concerned; c) present evidence in proceedings brought before a Special Tribunal; d) refer evidence regarding or which are not in conflict with the provisions of this Act, as the President may from time to time request; f) from time to time as directed by the President to report on the progress made in the investigation and matters brought before the Special Tribunal concerned; upon the conclusion of the investigation, to submit a final report to the President; and h) to at least twice a year submit a report to Parliament on the investigations by and the activities, composition and expenditure of such Unit.⁶⁵

AFU: The main function of the AFU is to ensure the forfeiture of assets associated with organised crime such as drug trafficking, high levels of corruption, money laundering and other serious crimes.

Are they independent?

No. None of the three units are independent bodies:

DSO: Members the DSO are subject to the National Prosecuting Authority Amendment Act. They are also subject to the control and direction of the Head of the DSO, who is in turn subject to the control and directions of the NDPP.⁶⁶ The DSO as an institution is not independent. Section 31 of the National Prosecuting Authority Amendment Act establishes a Ministerial Co-ordinating Committee made up of Cabinet members responsible for the

administration of justice, correctional services, national intelligence services, defence and safety and security and any other Cabinet member designated from time to time by the President. This Committee sets: a) policy guidelines in respect of the functioning of the DSO; b) procedures to co-ordinate the activities of the DSO; c) where necessary, the responsibility of the DSO in respect of specific matters and the further procedures to be followed for the referral or the assigning of any investigation to the DSO.

SIU: The SIU is established by Presidential proclamation and is thus subject to the Head of the executive. Section 12(1) of the Special Investigating Units and Special Tribunals Act prohibits any person from wilfully interfering with, or hindering or obstructing the functioning of the SIU.

AFU: The AFU is subject to the NDPP.

Practice

The SIU and its predecessor, Judge Willem Heath, had a serious fall-out with the Minister of Justice and President over the involvement of the SIU in the arms deal investigations. The executive chose to exclude the SIU from the investigations whereas Heath, shortly before being ousted, pressed for the inclusion of the SIU.

The DSO has also come under criticism from some members of the ruling party for attempting to act as if it were independent, particularly given its willingness to investigate senior officials including the Deputy President, Jacob Zuma.

Are appointments required to be based on merit? Are appointments generally based on merit?

Yes. All appointments have to be in line with general procedure for the recruitment of personnel in public administration.

DSO: The National Prosecuting Authority Amendment Act⁶⁷ provides that the Head of the DSO is the Deputy National Director and is appointed by the NDPP. The Act does not lay down any formal qualifications for the appointment of the Head of the DSO. Investigators are appointed by the NDPP on the recommendation of the Head of the DSO. They are subject to security screening by the National Intelligence Agency.

SIU: The President appoints the Head of the SIU. The Special Investigating Units and Special Tribunals Act prescribes that the Head of the SIU must be a judge or acting judge and be fit and proper. However, the appointment of judges to head the SIU was found to be unconstitutional as it compromises the independence of the judiciary, which is protected by the Constitution. This was the ruling of the majority judgment delivered by Judge Chaskalson in the case of *South African Association of Personal Inquiry Lawyers vs Heath and Others* 2001 (1) SA 883 CC. Thus, an amendment was passed in 2001 requiring the President to:

"...appoint a person who is a South African citizen and who, with due regard to his or her experience, conscientiousness and integrity, is a fit and proper person to be entrusted with the responsibilities of that office, as the head of the Special Investigating Unit established by the President."⁶⁸

Practice

The current leadership of the DSO, AFU, SIU and NPA are all regarded as competent and have generally fared well in their positions. Similarly, the staff in the various units are often drawn from among the top ranks of the SAPS and other government agencies. They are attracted by higher salaries and the high-profile nature of some of their work.

Are the appointees protected from removal without relevant justification?

Yes. The NDPP, as who holds the top delegated responsibility for the AFU and DSO, can only be removed on limited grounds during his/her ten-year term of office. Such removal by the President requires the approval of Parliament, unless both Houses of Parliament request that s/he be removed from office.

DSO: Investigators can also be removed from office if their security-screening certificate is withdrawn. The President may remove the Head of the Special SIU from office at any time if there are sound reasons for doing so.

Are their reports published (other than when criminal charges are pending)?

Yes/no. The reports are published for internal review but are not made available to the general public as this, it is argued, might jeopardise a case. The Minister of Justice does, however, report on the progress made with some of the investigations (not necessarily discussing the merits of individual cases) in closed committee briefings to the Parliamentary Portfolio Committee on Justice and Constitutional Development.

Do they report publicly to the legislature on the general scope of their work?

DSO: Yes. The Head of the DSO is the Deputy National Director of Public Prosecutions and reports to the NDPP, who, in turn, reports to Parliament.

AFU: Yes. The Head of the AFU is the Deputy National Director and reports to the NDPP, who, in turn, reports to Parliament.

SIU: Yes. The SIU is required to submit a report to Parliament twice a year on its investigations and activities. Since the SIU was established by Presidential proclamation, it is required to submit a report to the President on its findings.

Can people complain to the agency without fear of recrimination?

Yes/no. The Witness Protection Act established an office for the protection of witnesses. The Schedule of the Act provides that corruption is one of the crimes in respect of which a witness may be protected. Also, the Protected Disclosures Act protects employees in both the public and private sectors who report unlawful conduct, including corruption. However, this does not allow for confidential disclosure—thus whistleblowers are often protected in law but not necessarily in practice.

The National Prosecuting Authority Amendment Act states that if any person:

“has reasonable grounds to suspect that a specified offence has been or is being committed or that an attempt has been or is being made to commit such an offence he or she may report the matter in question to the Head of an Investigating Directorate by means of an affidavit or affirmed declaration specifying: a) the nature of the suspicion; b) the grounds on which the suspicion is based; and all other relevant information known to the declarant”.⁶⁹

However, only the President may refer matters to the SIU for investigation.

Media

Is there a law guaranteeing freedom of speech and of the press?

Yes. The Constitution protects freedom of expression, which includes freedom of the press and other media.⁷⁰

Practice

This is guaranteed, with the exception of hate speech.

Is there censorship of the media?

No. The Publications Act (42 of 1974), which made provision for censorship of the media in South Africa, was repealed and replaced by the Films and Publications Act (65 of 1996), which

is in line with the freedom of expression guaranteed by the Constitution. Section 16(1)(a) of the Constitution guarantees freedom of the press and other media. The media in South Africa play a crucial role in keeping the government in check by investigating and exposing cases of corruption.

Practice

In the past the media have come under attack from the President, who accused the media of racism. Other than sparking a debate on racism in the media, this has had no visible impact on reporting on governance issues. It may, however, establish a climate in which some journalists are wary of being seen as overtly critical of the ruling party and the Presidency in particular. Equally, the owners of large media houses and the SABC may not impose censorship as such, but may show a lack of willingness to back investigative journalism (particularly that which probes difficult cases involving senior officials), which is often crucial in uncovering corruption among the political and business elite.

Is there a spread of media ownership?

Yes/no. The State and private companies own media in South Africa. The SABC offers six television channels, four of which are free-to-air, as well as 19 national and regional radio stations, which have by far the widest reach of any form of media. There are 15 private radio stations and approximately 80 community radio stations. There are other three privately-owned broadcasters, i.e. MNet, DSTV and eTV. Ownership of newspapers is concentrated in five groups that control 16 daily newspapers and 11 weeklies. They are Independent Newspapers (UK ownership), which owns most of the newspapers, Johnnic (publishers of *Business Day* and *Financial Mail*); Nationale Pers (publishers of *City Press*, *Beeld* and *Die Burger*) New Africa Publications and Caxton.

Practice

There is often a duplication of news. This is evident in the SABC where the same news stories are often carried in different languages, and is also evident in large media houses such as the Independent Group.

Do any publicly-owned media regularly cover the views of government critics?

Yes. The SABC does. However, opposition parties often complain that they do not receive sufficient airtime on the SABC.

Have journalists investigating cases of corruption been physically harmed in the last five years?

Yes. One example of this is African Eye News Service where reporters have borne the brunt of threats, intimidation and occasional physical abuse. This is perpetrated by individuals who are being investigated but not sanctioned, either overtly or tacitly, by government.

Do the media carry articles on corruption?

Yes. The media play an important role in raising awareness of corruption and also in investigating high-profile cases. For example, the *Sunday Times* exposed Tony Yengeni's fraudulent conduct in the arms deal, which led to his prosecution. The *Mail and Guardian* exposed Deputy President Jacob Zuma attempt to solicit a bribe of R500,000 in the arms deal. Although the State and not the media is the biggest source of investigations into corruption, the media are one of the most important agencies in this respect.

Do media licensing authorities use transparent, independent and competitive criteria and procedures?

Yes. Icasa regulates the telecommunications and broadcasting sectors, in the public interest. It was established in July 2000 and derives its mandate from four statutes: the Icasa Act (2000), the Independent Broadcasting Act (1993), the Broadcasting Act (1999) and the Telecommunications Authority Act (103 of 1996). Its key functions are to:

- make regulations and policies that govern broadcasting and telecommunications; and
- issue licenses to providers of telecommunication services and broadcasters.

Icasa is also responsible for ensuring that relevant and appropriate broadcasting services are extended to all citizens. It has a responsibility to ensure that rules apply equally to all industry players, including open and transparent processes and fairness through its adjudication functions. Icasa has a mandate, in terms of its enabling statutes, to promote and encourage the ownership and control of telecommunication and broadcasting services by people from historically disadvantaged groups.

Are libel laws or other sanctions used to restrict reporting of corruption?

Yes/no. There are often attempts to use these, but also recognition by the courts of the right to freedom of expression as contained in the Constitution.

Civil society

Does the public have access to information and documents from public authorities?

Yes. Section 32(1) of the Bill of Rights guarantees the right to state information and any information that is held by another person and that is required for the exercise or protection of any rights. The objective of this provision is to create an open and democratic society. Section 32(2) makes provision for the enactment of legislation to give effect to the right to information. The Promotion of Access to Information Act was passed to give effect to the right to access to information and documents from public and private bodies, with limited exceptions.

Practice

The Promotion of Access to Information Act has not been used extensively, although members of the public and civil society are increasingly making use of it (in part assisted by organisations, such as Odac, that promote the use of the Act). It is argued, however, that institutions sometimes prefer to see the courts uphold the right to access to information rather than provide access and thereby avoid expensive litigation.

Do the public authorities generally co-operate with civil society groups?

Yes/no. There is general co-operation between the public authorities and civil society groups, who are either service providers or who work in limited co-operation with government and the State. In the field of broad anti-corruption work there have been attempts to engage CSO stakeholders, particularly at a national level. One such example is the National Anti-Corruption Forum, which has ten civil society members (together with equal representation from business and government).

However, some of the 'new social movements', critical of governments policy on socio-economic issues and willing to participate in civil disobedience, are the focus of much government critique but not necessarily overt suppression (although their activities are monitored by intelligence agencies).

Are there citizen's groups or business groups campaigning against corruption?

Yes. There are a number of groups in civil society such as T-SA, ISS, Idasa, Odac, PSAM, NRLF, trade unions etc. (including members of the Civil Society Network Against Corruption), and some business groups also raise the issue. Details of all groups involved are included in the narrative section of this report.

Are there citizen's groups monitoring the government's performance in areas of service delivery, etc?

Yes. There are a number of these that focus on issues such as water, housing and others. The PSAM in the Eastern Cape Province is an example of a regional CSO that has effectively underscored the link between good government and service delivery.

Do citizen's groups regularly make submissions to the legislature on proposed legislation?

Yes. CSOs are invited to make submissions to Parliament on draft legislation. These are often followed up by an invitation to appear before the relevant portfolio committee to discuss the recommendations.

Does the education system pay attention to integrity issues and corruption/bribery? Is it expected to?

Yes/no. The Ministry of Education is piloting a project on values in education, primarily geared towards ensuring that human rights education, including some issues related to this such as ethical behaviour, is brought into school curricula. This has started with the training 1,000 teachers and will be rolled out in 2,000 schools in the Mpumalanga and Limpopo provinces next year. In addition, the Ministry of Education is looking into piloting a specific anti-corruption curriculum in 2004. This is being developed by the Ministry of Education, the National Youth Commission and the Department of Justice and Constitutional Development and will be funded by the United Nations Office on Drugs and Crime (UNODC).

Regional and local government

The Constitution provides that there shall be three spheres of government, namely, the national, provincial and local spheres.⁷¹ These spheres are to be distinctive, interdependent and inter-related and there must be co-operation between them. All spheres must cooperate with one another in mutual trust and good faith by:

(i) fostering friendly relations; (ii) assisting and supporting one another; (iii) informing one another of, and consulting one another on, matters of common interest; (iv) coordinating their actions and legislation with one another; (v) adhering to agreed procedures; and (vi) avoiding legal proceedings against one another.⁷²

By calling for co-operation the Constitution seeks to ensure that the spheres of government do not compete with one another but share responsibilities and ensure uniformity across the country while bringing government closer to the people.

Are there, at regional and local levels, rules and disclosure provisions similar to those operating at the national level on nepotism, conflict of interest, gifts and hospitality, and post public office employment?

Provincial government: Yes. Similar disclosure provisions are listed. However, there is also no restriction on post-public employment (with the exception of two provinces), as is the case

at a national level. The Executive Members' Ethics Act (82 of 1998) also applies to members of the provincial Executive Councils, and the Code of Conduct for Assembly and Permanent Council Members is also applicable to permanent members of the NCOP. All provincial legislatures have also adopted codes of conduct similar to the national one for Members of the National Assembly. For the civil service, the Public Service Regulations provide that Regulations apply to "all persons, and to institutions governed, in terms of the Act and to persons employed in the Services, the Agency or State educational institutions, only so far as they are not contrary to the laws governing their employment."⁷³ The jurisdiction of the Public Finance Management Act extends to provincial departments, public bodies listed constitutional institutions and legislatures.

Practice

There appears to be a general lack of awareness about the requirements of the Executive Members Ethics Act in the office of the provincial Premiers. Though most have made disclosures, these have not been universally enforced and they remain slow in implementing them. A promising development is that two provinces (Gauteng and Western Cape) have developed post-employment restrictions.

Local government: Yes. Legislation has been enacted to regulate the conduct of the executive and legislature of the local sphere of government. The Local Government Municipal Structures Act (117 of 1998) establishes a code of conduct for municipal councillors, which contains comprehensive provisions aimed at preventing and combating corruption in the local sphere of government. The Local Government Municipal Systems Act (32 of 2000) also contains a code of conduct for municipal staff members, which includes rules and disclosure provisions on nepotism, conflict of interest and gifts and hospitality.

Practice

Conflict of interest, nepotism and other examples of irregular behaviour by members of both provincial and local government are frequently reported in the media. For example, the Eastern Cape Province was particularly plagued by graft involving members of the Executive, some of whom acted with impunity until the national government eventually intervened to rectify the situation in late 2002.

What public offices at regional and local level are appointed by the national government?

All public officials at provincial and local government levels are appointed by the elected provincial and local officials.

Practice

There have been reports in the media during the past year mooted the creation of a 'single pool' from which non-elected officials in all three tiers of government must be appointed. This would not directly affect the powers of appointment but would affect the conditions of service such as remuneration etc.

Is there a legal requirement that meetings of city/town councils be open to the press and public?

Yes. The Constitution encourages maximum participation of the public in local government.⁷⁴ To give effect to this provision, the Local Government Municipal Structures Act establishes ward committees, the objective of which is to enhance public participation in the local sphere of government. In addition, the Local Government Municipal Systems Act⁷⁵ makes provision for the establishment of mechanisms, processes and procedures for public participation in local government. The Act provides that municipal council meetings and meetings of its committees are open to the public and the media.⁷⁶ The public and the media may only be excluded from attending meetings in limited, exceptional cases.

Practice

In some smaller towns or rural areas attempts by councils to hold closed meetings may go unchecked. In addition, the Executive Committee meetings of local and district municipalities are often closed to the public. As this is an important deliberative forum, concern has been raised about this, particularly by parties who are in opposition in individual councils as they are excluded from these meetings along with other members of the public.

Are there clear criteria restricting the circumstances in which city/town councils can exclude the press and public?

Yes. The Local Government Municipal Systems Act excludes the public and media from meetings when:

- It is reasonable to do so having regard to the nature of the business being transacted; and
- A by-law or a resolution of the council specifying the circumstances in which the council or such committee may close a meeting and which complies with paragraph (a).⁷⁷

Do national agencies with a remit to deal with corruption (anti-corruption agencies, ombudsmen, supreme audit institutions, and so on) work at regional and local levels and are there specific agencies with regional and local responsibilities?

Yes.

Public Protector: Section 182(1)(a) of The Constitution empowers the Public Protector to investigate any conduct in state affairs in any sphere of government.⁷⁸ The Public Protector Act, as amended by the Public Protector Amendment Act, also empowers the Public Protector to investigate any alleged maladministration in any sphere of government.

Auditor General: The Constitution requires the Auditor General to audit and report on the accounts, financial statements of all municipalities.⁷⁹ Also, the Public Finance Management Act empowers the AGSA to investigate any public entity or audit the financial statements of any public entity, including entities in the local sphere of government.

Anti-corruption agencies: The DSO, AFU and SIU are also all active in matters that involve officials in local and provincial government.

Progress with government strategy

Has the government announced any anti-corruption strategy and a timetable for implementation?

Yes. The Public Service Anti-Corruption Strategy was adopted by a Cabinet *lekgotla* (meeting) in January 2002. The strategy aims at fighting corruption in a holistic and integrated manner by focusing on preventive and combative measures. The strategy has nine components:

- i) adoption of effective anti-corruption legislation;
- ii) building the capacity of institutions that are mandated to fight corruption;
- iii) protecting whistleblowers and witnesses;
- iv) blacklisting corrupt individuals and business;
- v) improving the management of policies and practices;
- vi) improving management of professional ethics;

- vii) entering into partnerships with stakeholders;
- viii) the need for social analysis, research and policy advocacy;
- ix) raising awareness of the problem, training and education.

Although a timetable for implementation does exist, a copy of the revised timetable for implementation is not available. This may be because government has been slow to implement aspects thereof.

How much of the strategy has been implemented?

not documented and there remain numerous gaps as a result of delays in implementation. The narrative section of this report analyses progress with the strategy at some length.

Is the strategy at national level or regional/local level?

The strategy focuses on both national and provincial/local levels. The Cabinet *lekgotla* that approved the strategy in 2002 did, however, also request that a local government anti-corruption campaign be initiated. Progress has been slow but a unit has now been set up in the Department of Provincial and Local Government and is being staffed to deal with this.

Is the government meeting its own timetable?

No. The government has from the outset had problems in implementing some aspects, though there are some indications of progress.

Donor anti-corruption initiatives

Which bilateral and multilateral donor agencies are based in the country?

Since the mid-1990s many multi- and bilateral donors have established offices in South Africa.

Bilateral donor agencies: Australian Agency for International Development (AusAID), (AusAID), Canadian International Development Agency (CIDA), Danish International Development Agency Danida (DFID), Ford Foundation, French Institute, Gessellschaft fuer Technische Zusammenarbeit (Germany) (GTZ), Norwegian Agency for Development Co-operation (NORAD), Open Society Initiative (OSI), Swedish International Development Institute (SIDA). United States Agency for International Development (USAID). Various Embassises, High Commissions as well as all major German Political Foundations (Stiftungen).

Multilateral donor agencies: European Union (EU), United Programme on AIDS (UNAIDS), United Nations Development Programme (UNDP), United Nations Education and Cultural Fund (Unicef), United Nations High Commission for Refugees (UNHCR), United Nations Office on Drugs and Crime (UNODC), World Health Organisation (WHO).

What types of anti-corruption initiatives have they supported?

- Numerous civil society initiatives, focussing on research, awareness raising, capacity building and advocacy.
- In the public sector there are numerous examples, which include capacity building, technical expertise, secondment of staff and financial support to public bodies (such as the PSC, Department of Public Service and Administration, SAPS, IDC and the Office of the Premier in the Limpopo Province.

Are there any examples of donors co-operating or co-ordinating their programmes?

Yes/no. The Mini-Doubling Group of donors meets three times a year to discuss issues related to the issue of illegal drugs. There is, however, no similar group dealing with corruption.

Future research and donor support

Can key areas or issues be identified in terms of corrupt activity that the research for the report has demonstrated as requiring immediate attention, and which are they?

There are a number of areas, but a focus on monitoring the implementation of anti-corruption measures is key. The impact of corruption on service delivery, linked to this, is also a key area of concern.

Is there a particular aspect of corrupt activity either particular to the country concerned, or significant in terms of effect or impact, that would require more in-depth research?

Although a significant contribution has been made through diagnostic research, more focus needs to be on the actual sites of service delivery (particularly at local and provincial government level), focusing on the effectiveness of corrective actions taken to combat corruption as opposed to relying on perception-based research. Such research would be effective if combined with civil society monitoring, which has proven effective in the Eastern Cape.

The overall monitoring of the implementation and effectiveness of new anti-corruption mechanisms (such as public procurement reform and new anti-corruption legislation) would benefit from research identifying some of the problems associated with implementation and enforcement.

Is there a particular approach or initiative to combating corruption that may be considered for further research or study as an example of best practice?

The implementation of the New Prevention and Combating of Corrupt Activities Bill, together with South Africa's access to information legislation and the Supply Chain Management Framework are all, in their own right, model pieces of policy. They could provide model legislation for adoption by other countries and their implementation and the difficulties thereof should be closely monitored.

The work of the Scorpions, although modelled on similar units in the North, may prove a useful example for other countries within the region that are contemplating similar crack, anti-corruption/organised crime units. The co-operation between the private sector (Business South Africa) and the Special Commercial Crimes Courts could also serve as a model for private sector support that has assisted the State to deal with white collar crime more effectively.

Can key areas or issue relating to possible anti-corruption initiatives be identified as requiring donor support?

- training investigative journalists, which will have to be matched with support from media agencies as well;
- training competent state corruption investigators; and

- general support for civil society monitoring, research, awareness raising and advocacy initiatives. At present resources are invested in public sector anti-corruption initiatives, often to the detriment of CSO initiatives.

Endnotes

¹ Public Service Regulations, 2001, chapter 3, section C.

² Constitution, section 96(2).

³ Ethics Act, section 2(2)(b).

⁴ Executive Ethics Code, section 3.

⁵ Code of Conduct contained in the Executive members Handbook

⁶ Ibid.

⁷ Ibid.

⁸ Public Service Regulations, chapter 3, section G.

⁹ Ethics Act, section 2(2)(c).

¹⁰ Public Service Regulations, chapter 3, section D.

¹¹ Ibid, section B.

¹² Ibid, section H.

¹³ Ethics Act, section 3.

¹⁴ Constitution, section 196.

¹⁵ Code of Conduct, section 19.

¹⁶ Public Protector of South Africa, Auditor-General of South Africa, National Director of Public Prosecutions. Joint Investigative Report into the Strategic Defence Procurement Package. November 2001. Cape Town

¹⁷ Constitution, section 92(2).

¹⁸ Public Finance Management Act (1 of 1999), chapter 4.

¹⁹ Code of Conduct, section 12.

²⁰ Ibid, section 13.

²¹ Ibid, section 6.

²² Ibid, section 7.

²³ Ibid, section 8.

²⁴ Ibid, section 3.

²⁵ Ibid, section 4(1).

²⁶ Ibid, section 17.

²⁷ Ibid, section 19.

²⁸ L Banda, *Government ethics in post-apartheid South Africa*, Idasa-Pims, Cape Town, November 2003.

²⁹ Constitution, section 181(1)(f).

³⁰ Constitution, section 193.

³¹ Ibid, section 189.

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- ³² Ibid, section 194.
- ³³ Ibid
- ³⁴ Ibid, sections 43, 85 and 165 respectively.
- ³⁵ Ibid, section 165(5).
- ³⁶ Ibid, section 165(2).
- ³⁷ Ibid, section 165(3) and (4) respectively.
- ³⁸ Ibid.
- ³⁹ Ibid, section 197(3).
- ⁴⁰ Public Service Regulations, chapter 2, section C.3.7.
- ⁴¹ See: www.anc.org.za
- ⁴² Public Service Regulations, chapter 2, section C.3.3.
- ⁴³ Ibid, chapter 4, part VII.
- ⁴⁴ Ibid, chapter 3.
- ⁴⁵ Ibid, chapter 3, section H.
- ⁴⁶ Interview with author – September 2004
- ⁴⁷ Public Finance Management Act, Chapter 5.
- ⁴⁸ Ibid, section 38.
- ⁴⁹ Constitution, section 207.
- ⁵⁰ Ibid, section 207(2).
- ⁵¹ Ibid, section 207(1).
- ⁵² National Prosecuting Authority Act (39 of 1998), section 32(1).
- ⁵³⁵³ Constitution, section 217(1).
- ⁵⁴ Preferential Procurement Policy Framework Act (5 of 2000)
- ⁵⁵ Published in terms of section 78 of the Public Finance Management Act.
- ⁵⁶ Published in terms of section 76(4) of the Public Finance Management Act.
- ⁵⁷ Framework for Supply Chain Management, section 5.1.2.
- ⁵⁸ Ibid
- ⁵⁹ Public Protector Act, as amended by the Public Protector Amendment Act (113 of 1998)
- ⁶⁰ Constitution, section 182(5).
- ⁶¹ Public Protector Act, section
- ⁶² Constitution, section 182(5).
- ⁶³ Public Protector Act, section 8(2A)(c).
- ⁶⁴ National Prosecuting Authority Amendment Act, 2000, section 7 (1)(a).
- ⁶⁵ Special Investing Units and Special Tribunal Act, 1996, section
- ⁶⁶ National Prosecuting Authority Amendment Act, section 7.
- ⁶⁷ Ibid, section 7.
- ⁶⁸ Ammendment to the Special Investigating Units and Special Tribunals Act (2001)

⁶⁹ National Prosecuting Authority Amendment Act, section 11.

⁷⁰ Constitution, section 16.

⁷¹ Ibid, section 40.

⁷² Ibid, section 41(1)(h).

⁷³ Public Service Regulations, chapter 1, section D, part 1.

⁷⁴ Constitution, section 152(1)(e).

⁷⁵ Local Government Municipal Systems Act (32 of 2000), chapter 4.

⁷⁶ Ibid, section 20.

⁷⁷ Ibid, section 20(1).

⁷⁸ Constitution, section 182(1)(a).

⁷⁹ Constitution, section 188(1)(b).