



## **SECTION 4**

# **COMMISSION BREAKAWAY SESSIONS**

## INTRODUCTION

The plenary session was followed by the Commission sessions. While plenary sessions are important in setting the tone and generating wide debate, Commission sessions were valuable in that they provided a space for focused discussion by a limited number of delegates. It is also important to note that the issues which emanated from the Commission sessions were fed into the plenary sessions.

There were six Commissions running parallel to each other. They were divided into the following groupings:

- Commissions 1 and 2 : Ethics and Prevention of Corruption;
- Commissions 3 and 4 : Combating Corruption; and
- Commissions 5 and 6: Transparency, Oversight and Accountability.

Each Commission had a Chairperson and a Rapporteur. The Rapporteurs of the Commissions as indicated above reported jointly to the plenary sessions on proceedings and recommendations from the Commissions.

In each Commission speakers who are experts in their field were identified to make a presentation on the subject that was dealt with by the respective Commissions. This presentation served as an introduction to the debate that ensued in each Commission. Each Commission identified key issues on how to deal with corruption.

One of the key issues which emanated from the two Commissions on Ethics and Prevention of Corruption is that a zero-tolerance approach towards corruption should be adopted. In this respect it was noted that the Rapporteurs indicated that each government department should have an anti-corruption component that ought to implement an effective anti-corruption policy. Furthermore, in order to prevent corruption it was noted that the teaching of ethics and values should be accompanied by a marketing campaign in all the sectors in order to inform and empower the citizens on the effects of corruption.

Some of the key issues which emanated from the Commissions on Combating Corruption were that the stipulations under the Prevention and Combating of Corrupt Activities Act (No. 12 of 2004) should be made clearer and that the judiciary needs to be educated in the field of corruption as a whole. Important to note from the discussion in the Commissions on Combating Corruption was the high focus it placed on corruption in the insurance industry. For example, it was mentioned that the insurance industry generates huge profits, however, these profits cannot be passed on to the consumers because of the cost of corruption.

The key issues which emanated from the Commissions on Transparency, Oversight and Accountability includes the concern that corruption should not be hidden and that the scope of the NACF should be broadened.

Overall, the debates in the various Commissions made a huge contribution to maximizing the objectives of the Summit. In this respect it needs to be noted that one of the objectives of the Summit was to unite the various sectors to a common programme of action in terms of dealing with corruption. This was basically achieved because the resolutions that followed the debates are centered around the joint efforts and unified strategies that must be maximized by the three sectors in the fight against corruption.

## COMMISSION 1 : ETHICS AND PREVENTION

**Chairperson: Mr Geoff Rothschild<sup>7</sup>**

**Rapporteur: Ms Karen Borchers<sup>8</sup>**

### 11.1 PRESENTATION BY MR MERVYN KING<sup>9</sup>

The phrase “Business is an ethical enterprise in itself” appeared in the King II Report on Corporate Governance. It is ethical because it creates opportunities for men and women to improve their lives, it creates an opportunity for local community where an entrepreneur can take his vision and put it into practice. It also gives people an opportunity to enhance their own talents, consequently the community improves. Can there be anything more ethical than starting and running a business which improves the lives of others? Consequently, it certainly follows as a matter of logic, that one therefore should conduct that business ethically; as ethically as if one is dealing with an individual.

I stand here today as director of several companies on three continents. As Chairman of the Audit Committee, I do not manage corruption or wrongdoing by pretending that it doesn't exist. It does indeed exist and these are the steps I take to deal with it:

- The first priority is to create a Code of Conduct, which in my judgment, is a “living” entity and not just something to put on the wall. All of us in this hall come from different homes each with our own different degrees of culture, values and education, so it is only fair that if you walk into my business, it is for me to advise you how I want you to behave. So the Code of Conduct actually becomes a term in

<sup>7</sup> Geoff Rothschild is Chairperson of the Johannesburg Stock Exchange (JSE).

<sup>8</sup> Ms Karen Borchers is a Programme Co-ordinator at Business Against Crime (BAC) .

<sup>9</sup> Mervyn King (SC) represented the Private Sector at the Summit.

the contract of employment. For example, senior managers of the organizations which I chair, have a term in their contract, that if their style of life changes - I will want to know how they acquired these new assets, and if there is no reasonable explanation in the sole opinion of the Remuneration Committee, they can be dismissed.

- When staff join the organization they have to declare their interests, similarly, if they are promoted to become a director or senior manager. So a Code of Conduct has to be a living document.
- The Code of Conduct can also be given to your suppliers and if they breach it, it is a material breach of contract and you can cancel the supplier.
- If the leader, or director, is corrupt in any way, it is going to go right through the organization. If a fish is left out of the refrigerator, it will start rotting from the head down – that is exactly what happens in an organization. So as leaders we are actually stewards of shareholders' interests.

There are many procedures to manage corruption: external and internal audits, audit committees, etc. but these procedures need careful managing. In certain organizations, I have developed what I call a Corruption Audit and I will share the details with you:

- A corruption audit is conducted every six months.
- Do I have a dominant manager?
- Do I have a manager who overrides procedures (in my experience corruption happens when you override procedures)?
- Corruption also happens when the procedures are unreasonable, if procedures become rigid they stultify enterprise, managers then feel they can't cope with that procedure and override it. So procedures have to be reasonable.
- What is the manager's lifestyle – how has it changed in the last six months?
- The over-zealous employee who never takes lunch and may always be on the telephone. Beware!
- The employee who never takes leave. Why?
- Is there a proper segregation of duties? It would be very strange if the Internal Audit was conducted by the Senior Warehouseman, for example. Then you are inviting corruption.
- Are your controls tight enough on a reasonable basis - not over-zealous?
- Is one person sitting with too much knowledge?

- Have you limited the opportunities for corruption? When you send people to negotiate, send several (not one or two). Experience dictates that a conspiracy of three or four is more difficult than the dishonesty of one or two.
- What is the general morale in the organization?
- Is the finance department properly staffed from a skills point of view?
- Are employees properly remunerated?
- What are the business ethics of the leaders of the business?
- Are references carefully checked before taking on new employees?
- Are staff rotated as much as possible?
- Employee declaration of interests.
- Are grievance procedures adequate?
- Are reconciliations being done timeously?
- Is there socializing with stakeholders?
- Perhaps there should be a contract prohibition on gambling.
- Are there unexplained “hushed” or “long” phone calls
- Claims that originals are lost.
- Signature approvals should not be pressured and/or batched.

These are all practical measures which can be put in place. Points for an internal audit in business are very important:

- The audit needs to ensure that the necessary checks and balances are in place.
- Internal audit is an aid to management - audits are not only watchdogs they need to be given status and given an open-door to the Chairperson of the Board.
- They need to be independent in the sense that their appraisal on the part of management is an interesting balancing act.
- They must check the adequacy and effectiveness of systems and the reliability and integrity of information.
- As an outside director one needs to ensure that there is some assurance on the information being placed before you.
- Is the business reviewing compliance?
- Is it safeguarding assets?
- Has it appraised the economics of the resources in the group?
- Is it reviewing operations against objectives of the business plan?

## The Audit Committee

- Interaction with the external auditors.
- Are the Board's terms of reference adequate for the Audit Committee to check risk, finance statements, accounting policies, effectiveness of the annual audit, etc?
- Are significant transactions being adequately checked?
- What is the effectiveness of internal audit?
- Are internal and external audit working together?
- Interim financial information – there can be an external audit on your final accounts but usually the interims are not externally audited, so you need some affirmation.
- What is the effectiveness of information coming before the Board?
- Has the risk been properly assessed both positively and negatively? Risk is identified so that when a business opportunity comes along, you will know if you can take a risk or not.

Corruption is a reality. I believe that as business people we need to manage it and be aware of it and not adopt an ostrich approach. Let's remember the importance of effective Internal Audit, Corruption Audit and an Audit Committee in the fight against corruption.

### 11.2 PRESENTATION BY REV. RICHARD MENATSI<sup>10</sup>

Corruption touches everybody - even a man of the cloth! No one is immune to corruption, therefore when I stand up to speak here I speak as one who will also participate and assist in trying to eradicate corruption in our country.

Corruption is an enormous handicap to the development of democracy in a developing country like South Africa. It is a social scourge and it touches everybody, even those who are supposed to preach against it. It is an affliction that debilitates the daily economic and legal transactions upon which all of us ultimately depend for our material survival. For many people corruption is invisible, as it is often limited to specific sectors of the economy. For others, it is an omnipresent feature of their existence. In all cases, however, corruption is ultimately derived from the personal choices of individuals to violate the law that St Paul, in the Christian religion, reminds us, is written on our hearts.

We must recognize that all societies, no matter how sound their moral and institutional cultures are in some way marked by corrupt activities. To religious people, corruption is

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<sup>10</sup> Rev Menatsi is with the National Religious Leaders Forum (NRLF).

a form of sin, unethical and a grave injustice to society. Corruption is a form of moral disintegration since it leads us away from living a life in accordance with our dignity as Christians. As such, corruption results not simply in alienation from God but in a failure to realize each human being's destiny as the person he or she ought to be. To make reference again to the Christian faith, the Christian gospel proclaims the necessity for all people to live and act justly towards their neighbours and to rectify any acts of corruption. Here I can quote some texts within the Christian Bible "Zacchaeus said, look Lord - here and now I give half of my possessions to the poor, and if I have cheated anybody out of anything I will pay back four times the amount" – Luke 19v8. In this sense the standard of justice is an expression of the essential equality and dignity of a human person and encapsulates what Christians call the golden rule – always treat others as you would like them to treat you. It is a moral virtue not to be corrupt.

How can we work towards some form of prevention? There are no easy solutions to the problem of corruption. As demonstrated, it arises from a variety of causes not least of which is the basic fact of human greed. Many of the incentives to engage in corrupt actions are very difficult to overcome, overcome however, they must be. This is why we are gathered here this afternoon. The illegality of corruption in itself raises grave moral questions. One should presume that the laws are just and ought to be obeyed. There are some societies in which corruption appears to be an integral part of the culture and our presence here today is a serious preventative act to not allow our country to embrace such a culture. The question becomes one of who should play the critical role of shaping a culture of anti-corruption? Here I would like to cite that the first and critical role-players are the family and religious groups. The family is the most affirmative influence upon the lives of most people – you and me. Religious institutions have an indispensable role to play in this regard. Secondly, the state and Government is the most powerful role-player in creating and sustaining an anti-corruption culture for they preside over the muscle, law enforcement and prosecution to combat corruption.

Independent, anti-corruption institutions like the Scorpions with visible success records are crucial. In fact in our prevention drive there should be many such institutions. Economic institutions, business – as we've just heard – is of pivotal importance in the role they can play in combating corruption. Now I also dare to say that this conference, the National Anti-Corruption Summit, is another more comprehensive, all-inclusive, critical role-player in creating this culture of anti-corruption. I myself belong to the National Anti-Corruption Forum and therefore I can speak about it with self-criticism - unless this body is endowed with more responsibility and accountability rather than just being simply consultative, this body will not fulfill this critical role. So, I wish this gathering as we discuss, that as sectors, as role-players we will certainly ascend to the ethical values of honesty, integrity and good governance.

### 11.3 PRESENTATION BY PROF MOLLIE PAINTER-MORLAND<sup>11</sup>

I want to focus on the three aspects I believe we need to build an ethical culture in an organization:

- i). Formulation -codes of conduct, ethical values in various public service departments and corporations.
- ii) Integration structures, policies and procedures. How do we manage the ethics function of organizations and the preventative function of organizations and departments?
- iii) Evaluation -research, surveys, assessments, evaluations and audits.

We have a lot of good structures already:

- new legislation;
- governance regulation and benchmarks;
- best practices;
- there are many agencies working on the problem;
- international conventions are being signed;
- whistleblowing; and
- capacity, etc.

So a lot of good things are happening! However, it must be asked whether existing legislation is being adequately implemented and whether we understand the values and principles that legislation is trying to protect? To really answer the question of why we need legislation we have to get to the point where we understand why these things are necessary and then move towards better implementation.

We also need to question the anti-corruption units and departments. There have been numerous initiatives and an increase in capacity in public service departments and the Public Service Commission (PSC) has recently conducted a survey on where these capacities actually exist and how many departments have established an Anti-Corruption Unit – and there are not that many. The survey showed that many departments still have to build this capacity. And where departments have an Anti-Corruption Unit we still have to ask further questions: Do they have sufficient staff? Where are they located? To whom do they report? Are they high enough in the organization to have an impact?

<sup>11</sup> Prof Mollie Painter-Morland is with the Centre for Business and Professional Ethics of the University of Pretoria.

In the future, we need to develop survey instruments that could be used together with the PSC's research database that will tap into intangibles and track trends and the actual culture of organizations. We need to try and go beyond the check-box approach where people say, we have all these documents in place, we have all these policies, but we need to start asking why we have these policies, and do we really believe in them in an organizational environment? We need more buy-in from top management, of course, and then ownership on departmental and professional levels. We really have to understand why corruption prevention is so important: it is about values, it is about what we care about as a society and as a department. We need to focus on that. Then, since this is Africa perhaps ethics training should take the form of story-telling to share some of these messages. Story-telling is true to our culture and will help us make better progress.

In terms of anti-corruption units, it would help to have a decentralized task team or committee for the units to work with. Normally there are too few of them and the job is way too large. So, just disseminating and de-centralizing that functional bit in an organization could be very helpful in terms of the role-out, especially since the people are normally new in their positions and there are only a few of them. Then, regarding consistent standards and enforcement - we need to get rid of the perception that the small fish get fried and the big fish get away! Certainly the scepticism that I encounter when I work with public servants is – “sure you look at us, but everyone else is getting away with it and making a lot of money”.

In terms of research, once again, the intangibles – the unwritten rules reflecting the cultural variables are important. These are not the rules on paper because those are clear and we have first-world legislation, standards and best practices. But we have to work on culture, analyzing the trends, revising our programmes and engaging with the public and with stakeholders. We already know all of this. If we want to make something work we cannot just instruct people to do certain things, we have to tell them why it is important to do them. It is possible to counter fatigue if people understand why all of this is necessary. It is about what we care to protect in our society, it is about culture. Bad news turns into good news if we can address the root of the problem. I think that is ethical culture in all organizations.

## COMMISSION 2 : ETHICS AND PREVENTION

Chairperson: Chris Dlamini<sup>12</sup>

Rapporteur: John Mafunisa<sup>13</sup>

### 12.1 PRESENTATION BY MR BRADLEY CURNOW<sup>14</sup>

First of all, a brief view of what has been happening in the private sector regarding corruption and ethics. How successful have they been and how successful have we experienced them to be? It has been our experience that most of the things that have happened in the last decade relating to ethics, corporate governance, good citizenship, etc. have been quite formal. We have instituted much legislation and other aspects that have had a lot of impact in the business world – such as the Financial Intelligence Centre Act (FICA) regulations, which have had a significant direct financial impact on institutions like banks, insurers and assurers who have had to comply with the provisions therein.

Similarly, another piece of crucial legislation, is the Prevention and Combating of Corrupt Activities Act, which has recently been promulgated. This legislation imposes serious, onerous obligations on everyone – especially on business in terms of reporting corrupt activities as well as significant financial crimes (significant being above R100 000).

We have seen in most industries that there have been particular and specific prevention and detection mechanisms that business has put in place to try and create channels for the reporting of breaches of ethics and good governance. One such idea is a company hotline and the internal capacities have had to be created to investigate and deal with the information that comes up via those hotlines. It is clear that business has realized that the fight against corruption and against bad ethical behaviour isn't one that is just within one's own corporate entity. It does need to move beyond that into cross-company or cross-industry initiatives that try to come to grips with these issues and make an impact.

So if mechanisms are in place, why do we still have perception-based surveys that suggest all of our sectors have a significant level of corruption? Possibly what we are seeing is increased reporting resulting in a heightened awareness of corruption and incidents of corruption, and thus leading to a perception that we now have more corruption than we did 10 years ago – a perception that is inaccurate. We probably know about a lot more incidents today only because of increased media reporting.

<sup>12</sup> Chris Dlamini represents World Online and is with Basebenzi Investments (an investment arm of the Food and Allied Workers Union).

<sup>13</sup> John Mafunisa is with the Democracy and Government Section of the HSRC.

<sup>14</sup> Bradley Curnow is the Manager of the Forensic Sciences Division of Santam.

A very interesting dimension is whether we ought to be teaching ethical behaviour? And not only what one shouldn't do, but what one ought to do as an ethical person or company? We teach lots of other things but certainly in my organization, we have people coming into the organization and within our company we have to teach them about what our ethical standards are. It is an excellent idea for us to talk about that and debate whether we ought not to be doing that earlier in the process, so that we have candidates coming into our companies that already have an understanding of what ethical behaviour is. It is not something that we need to learn during an induction process. I think this is an interesting and exciting idea.

One of the other major challenges we have to deal with going forward, is that there is still a reluctance to report. We have legislation that now compels companies and individuals within those companies to report any act of corruption, no matter how trivial they might seem; we are also compelled to report significant financial crimes. Yet again, although it is early days yet, experience is that we will report what we have to and if the legislation doesn't clearly and definitively require us to report something, then the better course is not to report it! This stems from some cultural holdovers.

I also believe there are some deficiencies in our current Protected Disclosures Act. It does not adequately provide protection for the reporter coming forward and taking the risk in exposing corruption. More importantly, what we have done with the Protected Disclosures Act, is dealt with one side of the equation only - we have said, we will try and protect you if you report (admitting that there are negative consequences very often to the reporter or whistleblower). We certainly must do more to make sure that the Protected Disclosures Act is improved - but on the other side - we also need to be encouraging reports, not so much stressing the fact that we will protect against the negative consequences but trying to devise positive consequences for whistleblowers. I think that is starting to happen, one saw that in the US with the Enron case, where the whistleblower is the hero of the tale. But that is a new development. Certainly, I do not see that happening too much in our context. It is something that we ought to strive for, where the reporter is seen to be someone who is admired, rather than vilified.

### **12.2 PRESENTATION BY MS ALISON TILLEY<sup>15</sup>**

One might describe the resolution relating to whistleblowing at the 1st National Anti-Corruption Summit as resoundingly achieved. If you will recall, what was resolved was: "...to implement the following resolution as the basis of a national strategy to fight corruption: To support the speedy enactment of the Open Democracy Bill to foster greater transparency, whistleblowing and accountability in all sectors."

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<sup>15</sup> Ms Alison Tilley is the Chief Operating Officer of the Open Democracy Advice Centre (ODAC).

The Open Democracy Bill had already been tabled in Parliament on 24th July 1998 at a joint sitting of Parliament's Portfolio Committee on Justice and the National Council of Provinces' Select Committee on Security and Justice. This is when a public consultation process also started on the Bill.

On the 23rd and 24th of March 1999 the Justice Committee heard submissions on the Bill. This is where the NGOs under the banner of the Open Democracy Campaign Group reiterated civil society's position that the scope of the Bill had to be extended to include the private sector. This call was echoed in the language of the resolution from the Summit, made a few weeks later, to "foster greater transparency, whistleblowing and accountability in all sectors [and not just in the public sector]."

On 28th October 1999 the Chairperson of the Justice Committee Advocate Johnny de Lange made the first indication that the Committee would be willing to pursue the whistleblower protection section of the Bill as a separate piece of legislation. He also triggered agreement in the Committee that the UK law would be used as a very important example to draw from when the Committee deliberated on the re-drafting of the current whistleblower protection sections of the Bill. The committee also agreed that the whistleblower protection sections of the Bill should be extended to include the private sector as well.

A new draft Bill was then circulated which drew extensively on the British Public Interest Disclosure Act (PIDA). This was enacted in 2000 and brought into operation in February 2001. Even though in terms of the new draft the Act would apply to the private sector as well, one of the major criticisms of the draft was that where an employee has been dismissed and has qualified for protection in terms of the Act, the compensation is limited to 24 months salary. This is a small amount when considering the 'other costs' to the whistleblower, which can often include protracted and expensive legal proceedings, negative perceptions of the whistleblower by the community and potential employers, not to mention the cost to personal and family life.

A major initiative to implement the PDA has come from the public sector. Under the direction of the Public Service Commission, an independent body created by the Constitution to enhance excellence in governance in the public service, workshops took place nationally to train officials on the legislation and to get their input on how best to implement it.

Employees at the workshops said that while they were aware in a number of cases of fraud and corruption taking place in the public service, that they were too scared to blow the whistle on it for fear of becoming victims of what the Act referred to as 'occupational

detriment'. Identifying the crime was one thing, blowing the whistle another and their fear of reporting the corruption extended way beyond the workplace, to the protection of their property, their families and their own lives. The report recommended that whistleblowing be implemented in each province and an infrastructure be put in place to ensure effective whistleblowing. Booklets were also distributed to all managers, explaining the provisions of the Protected Disclosures Act.

Sadly, the same initiatives for fighting corruption in the workplace have not been mirrored by the Private Sector in South Africa where corporate fraud and corruption are frequently reported. ODAC did an informal survey of the top 100 companies listed on the JSE in 2004, getting responses from 33 of them. The main function of the survey is to serve as an informal follow up study on the figures reported by the KPMG 2001 Ethics Survey, to assess whether this figure has improved in the private sector.

What has the impact been of the training, consulting and education that has been done around whistleblowing? Three or four years ago, we were still explaining the concept – now people know who whistleblowers are, and they often know that they have some kind of protection. They also know that that protection is often inadequate – we have seen whistleblowers survive being disciplined for blowing the whistle, only to be forced out of the organization months later for “poor work performance”. The whistleblowers that survive are often people who keep their heads down – they don't speak to the media, they accept suspension or disciplinary procedures without complaint, they focus on the issue around which they blew the whistle, and they certainly have not been people who sue for damages. They are being harassed and subject to occupational detriment – but they also prove that you can survive if you play your cards right.

We have also not seen clear positive responses from senior government figures in response to whistleblowing. Their response tends to be silence, perhaps as a result of the fact that in many cases disciplinary proceedings are pending. A more positive immediate response might head off such disciplinary proceedings. The charges in such hearings are often 'bringing the department into disrepute' or releasing Departmental information without the permission of the whistleblower's superior. We do not believe the charges are competent in the case of a whistleblower, but in any event, the whistleblower must nevertheless often defend their actions in response to such charges. And the other parts of the Open Democracy Bill? The part of it dealing with privacy is now with the SALRC, who are considering data protection legislation. The Open Meetings section of the Bill vanished and has not been seen since. The part dealing with Access to Information was passed in the shape of the Promotion of Access to Information Act, enacted in February 2000, brought into operation in March 2001.

That legislation, considered one of the most progressive in the world, has run into problems of its own – I have not been asked to address those, but I can tell both anecdotally and empirically that the most likely response to a request for information will be silence. Implementation remains an enormous challenge. Perhaps with both of these pieces of law, the challenge is more than just a new law – we are trying to change how people think about power. We are asking people to do at least two difficult things. We are asking employees to stand up and tell their employers that there is something wrong – the fire exits are welded shut, the prisoners are smuggling guns, the safety training is too short and isn't working, assets are being overvalued, proper tender procedures are not being adhered to – and we are asking employers to listen, and discipline those who put lives, businesses, and reputations at risk, even though they may be very powerful individuals. We are asking the courts to punish those employers that don't listen, and not to blame the messenger.

### **12.3 ETHICS AND PREVENTION OF CORRUPTION FROM AN ORGANISED LOCAL GOVERNMENT PERSPECTIVE BY MS MAKHOSI KHOZA<sup>16</sup>**

Today I am not speaking from a Local Government perspective, but from the organized Local Government perspective. I am actually the CEO of SALGA and we are there to represent the interest of municipalities and to promote and protect the institution of Local Government. As Local Government we are a part of Government and we interact with you on a daily basis. News of Local Government is often in the newspapers, so you probably know more about corruption at Local Government level than at National or Provincial level!

As organized Local Government we have identified corruption as the enemy of development. It is the enemy of our own agenda to develop our communities and to keep the promise that we made in 1955, as all South Africans when we adopted the Freedom Charter and hence we have as organized Local Government, redefined what we perceive or see as unethical behaviour or practice. Simply we are saying, this is a practice which does not develop the agenda of Local Government. The most important thing for us here is that as SALGA we have identified corruption at Local Government level taking place. There are four categories of corruption that we see:

- i) Corruption between a councilor and a service provider.
- ii) Corruption at an official level, where the official will advise his preferred supplier of the procedure, inform him of pricing and give him details of the other submissions.

<sup>16</sup> Ms Makhosi Khoza is the Chief Executive Officer of the South African Local Government Association (SALGA).

We have a policy which we are now trying to review, which says we must award a job to the lowest tender. However, this proposed policy is not necessarily the best because that is what is opening us up to a lot of these corrupt practices. There is always more than one party when this type of corruption takes place.

- iii) Companies not adhering to specifications. An example of this is the low-cost housing schemes, where companies have built sub-standard houses which are prone to collapse within a year or so. Unfortunately, there is often inadequate or no oversight role at municipal level. Sometimes we find there is no recourse for this situation. Do you remember the case of all those toilets? Millions of rands was spent in building those toilets which were far away from people. This type of corruption is the least spoken about but costs municipalities millions of rands every year. There is also corruption of established, big multi-national companies, especially with regard to water concession contracts, i.e. the municipality and the service provider agree that they will not raise the water tariff more than a single digit for the next three years. Then within a year, the company comes back and says they made incorrect financial projections and now need to increase the tariff by 22%.
- iv) The vandalization of municipal properties. Unfortunately, the majority of this type of corruption is done by our own communities. A vacant building will often be simply dismantled, the doors, windows, bricks, etc all stolen. Most of the time, this kind of corruption is ignorance. Many of these people are short-sighted, just thinking about their own shack and not the community as a whole. As SALGA, this is where we will be playing a major role in bringing awareness to communities. We need to sensitize them about these issues.

We have found that councilors get into these kinds of corrupt practices because they are poorly remunerated. A mayor of a rural municipality earns perhaps R2 000 per month. I don't think people appreciate this problem. In the old dispensation, being a councilor was not a form of employment, it was done on a voluntary basis and people had other business interests or were retired from business. Whereas in the new dispensation the reality is that being a councilor is a fulltime form of employment. Some of these people only hold this one job and sometimes where we have managed to attract school principals to be mayors, they soon quit, because once you have been declared a fulltime councilor (which 90% of mayors are), you can't have more than one job. You can't survive on R2 000 if your permanent job has been paying you a proper salary. We find that some of the people who have been forced to stay on, actually get a lot of pressure from their own communities since they are now fulltime statesmen. People have the expectation that they we will be better resourced than them and they end up getting involved in corrupt practices.

We also need to understand the motive for corrupt practices – usually this is greed! There are 284 city metros (municipalities) and each of them has a mayor. Some municipalities are richer than others and the richer municipalities will find that the motive is greed. At Local Government level we have not been able to attract sufficient numbers of councilors who are conversant with a number of issues. Officials will add many benefits into the contract that the councilor does not understand. The councilor will only approve the fee on the contract – which will not say “inclusive of all fringe benefits” and they will add benefits in the form of percentages. In total that package could then become between R800 000 or over R1 million, and it is a difficult situation because the councilor himself has signed it and thus authorized the payment. This is the situation that we see all the time in the papers about these highly-paid municipal managers. Sometimes it is a practice which is not punishable because it is done legally. This is why we have moved away from the normal definition of corruption to saying that any behaviour or practice that does not advance the developmental agenda we classify as corruption and we will find legal ways and means to address those.

DPLG has, in consultation with SALGA, come up with a draft to assist with anti-corruption at Local Government level and to raise awareness on good governance. Very often, more is said on bad behaviour than on praiseworthy achievements. We have not really been promoting good governance in the process. People who are responsible for corrupt activities get themselves talked about in a negative way – whereas if things run smoothly, nothing positive will be said. We should therefore start training people to realize how good service is worthy of credit and is praiseworthy on their part. Good officials must be made to realize that their honesty pays. They are not necessarily expecting a monetary reward for a job well done, but they do deserve recognition for their honesty and a good pat on the back. Newspapers should be encouraged to profile honest officials for their good work and communicating how much the municipality has saved as a consequence of their good service.

The last one is obviously implementation of the current legislative framework and ensuring that municipalities comply with them. As you know, there is already the Municipal Finance Management Act and in terms of this Act councilors are no longer part of the tendering committees. Previously councilors chaired these committees and it was unfair on them because they were vulnerable and also unfair on the municipality because they were putting councilors in that position and they ended up fighting over who gets the tender, as opposed to which community gets what service. So as organized Local Government, we support the Municipal Finance Management Act and are also trying to get municipalities to implement the Prevention and Combating of Corrupt Activities Act. People must understand that with Local Government there is a

vacuum and this space is the most difficult one to fill because from 1995 to now, we have moved from 1 300 municipalities to 284.

During that amalgamation process, there were a lot of opportunists who used the transition vacuum to advance their own interests. All of us were more into amalgamation, integration and so forth and we never really thought about what corrupt possibilities we were opening up during the process. Where corrupt acts were perpetrated it was very difficult to deal with them legally. Local Government salaries are now very high, some of the officials get more than a Director-General or the President. Some municipal managers get packages of R1,3 million per annum. In some cases, more than 20 municipalities combined into one; then the town clerk or municipal manager from that group would take all 20 salary packages of the previous individual municipalities and combine them into one package – then justify this by saying, I now have 20 times more work than previously! Because nobody was looking at this and everyone was fully involved with the transition period, they actually got away with it and the reality of the situation is that its very difficult for us to get out of it unless the contracts are terminated.

We are unable to get out of the worst cases we have right now. These are people who belonged to the old dispensation and who realized that change was coming. They drew up contracts with the municipality at that time itemizing their pensions, medical aids, numerous benefits for their children, etc. and the municipality now cannot rescind those contracts. It is a real problem because this also causes a lot of racial tensions within municipalities. Organized Local Government is responsible for making decisions regarding salaries, conditions of service, etc and now we have to tell employees in the new dispensation that these benefits were actually incorrect. They say: “if they were incorrect why can’t you correct them?” But the terms are actually contracted and have been signed, so it is impossible to get out of them. So we are trapped for this generation unless something drastic happens.

Municipal employees in the new dispensation have to sign five-year contracts, performance management contracts and we no longer guarantee them a pension forever – pensions are therefore their own responsibility - but it is unfair to them given the fact that many have the added complication of ill health due to AIDS. Now it seems like we are punishing these people but there is no other way of correcting the wrongs. As a municipality we would never be able to achieve financial sustainability.

## COMMISSION 3 : COMBATING CORRUPTION

**Chairperson: Adv Vusi Pikoli<sup>17</sup>**

**Rapporteur: Ms Koko Mokgalong<sup>18</sup>**

### 13.1 COMBATING CORRUPTION IN THE INSURANCE INDUSTRY BY MS CAROLINE DA SILVA<sup>19</sup>

When I looked at 1999 the major themes of my message back then were around the need to:

- share information;
- set up databases towards sharing information;
- establish procedures to facilitate whistleblowing and to protect whistleblowers; and
- create blacklists of dishonest and corrupt people involved in our sector.

All of the above I maintained back then (and we all agreed as they were part of the resolutions) would be effective in combating corruption and that the laws of the land would have to recognize the support we need to use information to fight corruption. I will now attempt to paint a picture of how the use of information is developed and how effective it has been in our sector in combating corruption.

Although I am representing the private sector here today, by virtue of my position within the insurance sector, I am going to lean towards what has happened in that sector. I am sure we can extrapolate it out to other business sectors. I will also demonstrate where we are the weakest and the fact that it appears to be a consequence of the fact that we need support from other sectors: from the public sector, from communities and also from other private sectors within the business community.

In 1999 we had only just started developing an information-sharing database. There were concerns then around breach of privacy of individuals, especially with regard to creating a blacklist. Some of those concerns are still there today. These databases in the insurance industry are now fully functional and we share around 80 to 90% of information in the insurance industry. Initially the databases were only used as fraud and

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<sup>18</sup> Ms Koko Mokgalong is a Commissioner at the Public Service Commission.

<sup>19</sup> Ms Caroline da Silva was an executive member of the South African Insurance Association (SAIA) – but has since resigned.

corruption combating tools in that they were used to determine whether an insurance claim or the service providers to that claim were fraudulent or corrupt in any way. I think by using limited information in a limited sector it gave the insurance industry some sense of comfort around the competitive nature of sharing information. Initially they were worried that they would lose competitive advantage if they share information. It also gave them a sense of comfort that information can be shared and blacklists can be created within the framework of South African law. The law allows for it. Once that sense of comfort was given in the insurance industry, it was then that the real use of information started to flourish. While this discussion today is on combating fraud, I think it is difficult to steer away from fraud prevention, because as soon as you effectively start to combat fraud, there is a preventative lesson in that. People start to say: “they will catch me” “they will detect me”, “they will prosecute me”, and that, in itself, is a method of prevention.

Once the companies became comfortable with sharing information, it was then that the use of information was widened, and this is where information really came into its own in fighting corruption. Insurance companies now no longer just look at claims, they share all information. If you have a new client that wants to access insurance, an enquiry is sent to the shared database – which in turn allows access into the motor manufacturing database of vehicles and into the STEP stolen vehicle database, in fact, into a whole host of databases. Conversations and discussions have been held with SARUS around reciprocal agreements on data sharing with the Department of Home Affairs and with the Licensing Departments (both drivers and vehicles). We are hoping to extend our use of data into other information that databases hold, such as case information, lists of stolen goods, etc. A great deal of public and private sector information is shared in this way.

Basically we are now branching out this information and thus, it is cross-sectoral and not only for use in the insurance industry, but it is insurance industry linked to the public sector. We have not fully developed all the information-sharing possibilities, partly because of technological restrictions and partly because public information is subject to far more restrictions and sensitivities than perhaps private sector information. We are trying to extend the collaboration to information with SAPS beyond just stolen vehicle data, we are discussing downloading of bulk information on stolen vehicles to more than just the insurance industry but to a wider sector of the private sector through organizations like Business Against Crime (BAC). In due course we will naturally ensure that we address all concerns around security and privacy of the data.

A recent agreement has been made with the cellphone companies regarding blacklisted cellphones which will now be shared with the insurance sector. We now know how corrupt the cellphone sector is.

While this sharing of information between the public and private sectors is off to a good start, some business cross-sectoral agreements are only at start-up stages. The business or private sector is made up of so many sectors – and we still do not share information amongst ourselves very effectively yet. It is a recognized fact that if someone has been taking advantage of the insurance sector, they are certainly going to be working corruptly in another sector as well. To give a recent example from the mining sector: they were watching employees in their own organization working with syndicates stealing precious metals and pilfering them out of the mines. A huge case of evidence has been building up against these corrupt employees and they were just about to swoop and make their arrest, when the Scorpions and the Asset Forfeiture Unit swooped on the same group of people for money-laundering activities. This was a duplication of effort and a duplication of cost and a less-comprehensive case against the individuals, simply because no one had shared information across the particular sectors. The gap has now been recognized and cross-sectoral information sharing has been set up through BAC. A Memorandum of Understanding and Intent has been signed by the insurance sector (both life and short-term), motor manufacturers, the motor retail industry, the Consumer Goods Council (which represents retailers like Pick 'n Pay, Woolworths, etc), and the banking sector.

In talking to all these different sectors, once people sit down and communicate with each other, certain corrupt practices can be identified that impact on more than one sector. For example, the insurance industry and the banks have recognized there are certain corrupt practices around de-registration of written-off vehicles: where the salvage is being sold for higher values and the criminals are using these de-registered vehicles to steal other vehicles. A Code of Conduct to address these particular issues is in the process of being drafted.

In 1999 we also discussed the need to promote whistleblowing and the need to protect whistleblowers. Most insurers and companies in the private sector have fraud lines dealing with internal fraud. We have also recognized the need to establish industry-wide fraud lines which allow for the anonymous reporting of fraud and corruption by consumers as well as employees. We have established ours. It has been running successfully and is not expensive to run. The expense centres on continuously keeping the public aware of the fraud line, advertising it and keeping the momentum going.

For us, communication is key to effectively combating corruption and the laws of the country need to support and promote this. If we take credit information (which is always a sensitive area), the insurance industry may use credit information to combat corrupt practices, for example, someone claims for a stolen television, the credit information will

tell us that there has been a recent application through Teljoy and that the TV was a stolen one – and not owned by the applicant. You can pick up these kinds of details from credit information. The National Credit Bill which is about to be launched may impede or limit people's use of credit information to fight corruption and combat fraud. Once information is used to identify corrupt practices and people, the process of investigation, prosecution and blacklisting then commences.

One of the tools that is proving effective is the pooling of information resources in investigation techniques. An industry committee has been set up which is made up of industry and forensic investigators, members of SAPS, members of the Scorpions and they all share their successes and frustrations and look for ways to improve investigations and combating and prosecution techniques. One of the areas where there is a weakness is in the level of successful prosecution of fraud and corruption. This is often because the police still see fraud (especially insurance fraud) and corruption as a victimless crime. They think that if the insurance company is big enough to carry the loss and if it has paid out the money claimed – they would rather prioritize those crimes with real, palpable victims. Another reason is that insurance fraud can sometimes be so complex that it requires specialist investigators. Even the general public, to a large extent, sees insurance fraud as acceptable. Very often the general public are not aware as to what is illegal, for example, claiming for items that were not stolen, or colluding with the panel beater to include the excess in the quote. Everyone has a duty to create awareness amongst communities that these kinds of practices are illegal.

The industry is in the process of drafting what we call an “Aggravating Circumstances Document”, which we hope will be used in court by prosecutors to rid the court of the impression that insurance fraud, crime and corruption are victimless. Instead of having hundreds of companies developing individual relationships with law enforcement, we are also giving consideration to establishing a centralized investigation bureau in an effort to deal with the current pressure we put on the state. The other reason for unsuccessful prosecution is the complexity of fraud and corruption within the private sector. To a large extent this has been dealt with by the Commercial Crime Unit and courts, which insurers use when cases are complex or when they exceed R60 000 in value. It is our concern that these courts are not fully utilized and if they were utilized to the maximum capacity, there might be some constraints on their capacity.

Once a fraudster, corrupt employee, service provider or broker is identified, their names are listed on a blacklist to prevent them from taking advantage of another company. Blacklisting needs to be done carefully, always balancing the right to privacy with the need to combat fraud and corruption and also by allowing those listed the right to correct

any information which is incorrect. Private sector databases are set up to allow for the maintaining of blacklists or corrupt employees, as well as corrupt service providers and fraudulent clients. The regulator of the financial services sector, the Financial Services Board, will also maintain a database of corrupt brokers and individuals within the financial services sector – far wider than the insurance sector.

The private sector has also learnt the value and dangers of using the media in combating corruption. If successful cases of fraud and corruption are published in the media it may create a negative perception that the sector itself is corrupt and that corruption is so rife that the industry should not be trusted. Like Government, we need to focus on a campaign that makes it clear to the general public that where corruption is uncovered – it is uncovered because it is being fought and not because it is overtaking us or is uncontrolled. We use the media:

- to warn the corrupt that we take fraud and corruption seriously and we will prosecute;
- that the victims of insurance fraud and corruption are the many innocent insured who will end up paying higher premiums; and
- that the country in general could lose international investor confidence.

So what have been the results of our efforts? Well in 1999 I reported that insurers, just the insurance industry alone, estimated that between 15% and 35% of all claims are fraudulent or contain a fraudulent element. This cost was over R2 billion a year. Recent research at the end of 2004 showed that all these initiatives had cut down fraud and corruption to between 5% and 10% of all fraudulent claims. That is a level of between R750 million and maybe R1.5 billion at the top level. So we're gaining ground in the battle against corruption, but it is not yet won.

Now that each business sector has launched its own initiatives in fighting fraud and corruption and have individually started winning some of the battles, we are at last ready to escalate our fight to the next level. To date the efforts have been cross-sectoral: business, private sector and community – but the focus should now be on multi-sectoral efforts. Through organizations like BAC we will rely to a large extent on co-operation with the public sector and community for success. It is at this stage that the laws of South Africa to support these initiatives will be fully tested.

### 13.2 PRESENTATION BY MR CHEZ MILANI<sup>20</sup>

I am speaking under the banner of civil society and coming from a labour background, consequently, there will obviously be a labour bias to what I am saying.

In a company or union environment, if someone has issues of corruption that they want to raise effectively, litigation can squash them if they don't have the resources. They do not have the option of the witness protection programme that they do in other countries. The person reporting the corruption may be out in the cold throughout the procedure and this places them in a very disadvantageous position.

We need to structure our initiative – perhaps through intervention by the NACF. The NACF has potential and I think the base has been laid. In the FEDUSA context, members belong to the trade union and the trade union belongs to the federation, and the federation is represented on the NACF. If an issue is raised anywhere in that structure, it can be taken to federation level, to the representative who is serving on that body and he/she will articulate it in the Forum. In essence, what I am saying is that we need to beef up the NACF for those uninformed individuals who have issues around corruption. In 'beefing up' the NACF there are pointers which I believe the Forum should focus on:

- Providing a co-ordination role - we cannot expect the NACF to do the work of the Scorpions and SAPS, but they are a post-box, something can be deposited there and they can see that it goes to the right players and that there is a follow-up check to find out what happens to the issue at a later stage to ensure that issues don't end up in 'File 13'.
- Taking responsibility for the hotline – we hear various hotlines have been launched but those are a few sector-specific numbers. The NACF needs to take responsibility for publicizing the numbers and following up or keeping track of the cases. Obviously there is more clout when a big player, like the NACF, checks up on an issue and ensures that it is followed through, it brings more capacity to it and puts the spotlight on the individuals that should be delivering in those areas to get the momentum going.
- Public Relations campaigns - I believe the NACF is well situated to take ownership of Public Relations campaigns towards changing the perceptions of the person in the street. I'm sure if the public realize all the legislation that has been passed, the protocols that have been signed and the deliberations that are going on here, it would change their perceptions into a more realistic view of anti-corruption initiatives.

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<sup>20</sup> Chez Milani is the Secretary General of the Federation of Unions of South Africa (FEDUSA).

- Advising on issues of whistleblowing – one has heard that term often but the public needs educating around the whole issue.
- New areas – I heard recently of someone who had flown a private aircraft into Mozambique. Since he was not prepared to pay the requested bribe, his plane was subsequently confiscated and is still in Mozambique after five years. This individual is losing money and has no recourse of any kind. This is an instance where I believe the NACF should be raising the matter on his behalf to help him get his plane back. We should realize that perhaps we have a gap in our legislative framework and are also not really reaching where we should be reaching.

There is a legitimate and transparent business arrangement around ‘kickbacks’, where a percentage of the money goes into the unions. However, clearly it is unacceptable to ask for ‘kickbacks’ from people for services rendered - that would be considered a corrupt practice. Are we assisting members where they have genuine problems around corruption? Are we giving them the necessary support and capacity to take their enquiries further? Regarding the question of dissemination of information, what is being done around corruption? I know in our own organization, this is one of the areas we have been pursuing to assist with this national strategy. Hotlines were mentioned in this particular industry and perhaps labour should seriously consider civil society having a dedicated hotline that they take responsibility for. Many organizations have their own industry-specific constitution – perhaps we should be adding something into their constitutions around corruption and how to deal with it. In this way, the average member will become aware of how to cope with anti-corruption.

In many organizations, administration may not be up to scratch and perhaps negligence is creeping in. Negligence will eventually result in intent – and people will start pushing the parameters. One needs to make sure that the whole area is tightened up. When defining corruption we need a concerted and holistic effort. Finally, corruption undermines our national pride and effectiveness and clearly has to be rooted out.

### **13.3 REPORTING CORRUPTION BY MR NICOLAAS VAN GRAAN<sup>21</sup>**

Last year when the Prevention and Combating of Corrupt Activities Act came into operation, I compiled a national circular for all police officials informing them of the Act and the various definitions. Then before I knew it, I was invited to give a presentation at the Anti-Corruption Summit, so thank you for the honour.

I want to give you my own perspective. I am from the Legal Services of SAPS - not on the investigation side although I work very closely with the investigators. What I will

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<sup>21</sup> Nicolaas van Graan is Director of Legal Services of the South African Police Services (SAPS).

focus on today is the reporting of corruption as set out in Section 34 of the Act. At face value if one looks at the Act, one's first opinion would be how easy it is to prove corruption because there are 21 new offences in the Act (compared to the single offence in the 1992 Act). These 21 new offences cover all the various forms of corruption. There are issues included now which in the past would not have been seen as corruption, i.e. the mere intimidation of a witness can now be seen as corruption. One interesting new form is the "acceptance of unauthorized gratification to do one's work" – this is the old "bribery" which is now back in the Act.

To get back into reporting as the starting point to combat corruption, I will explain what our analysis has so far shown:

- Section 34 of the new Prevention and Combating of Corrupt Activities Act says: "... a person who is in a position of authority (which is also defined in the Act) or who has reason to believe or suspect or ought reasonably to have known that another person has committed corruption as defined in this new Act, or the common law offences of theft, fraud, extortion, forgery involving an amount of R100 000 or more, must report such suspicion to any police official...." This is what the Act requires, it goes on to say that failure to report such acts constitutes an offence.
- Section 34 also states that the National Commissioner has to issue directions for the taking down of a report of corruption and initiate a further investigation.

Those directions were issued in a Government Gazette no. 26552 of 16 July 2004 which includes the following procedure:

- "If a police official receives a report of corruption, he or she must immediately open an enquiry on the Crime Administration of the Police". That is the ordinary reporting system of the Police, where we report our crimes. It is not a case docket.
- Next, a police official must take down the report of the person who made it in a freestyle form.
- The police official must then acknowledge the report and issue a written receipt containing the official reference number and case number.
- Once the police official has that report he/she must submit it to the Head Office of the South African Police Services.
- The Commercial Branch then receives the report, allocates an official reference to it and does some preliminary investigations to ascertain whether there are indeed grounds for criminal investigation (many of these reports turn out to be just gossip!).

- If there are grounds to investigate they will refer the case to the Commercial Branch in the province where the incident occurred, for investigation.

This then is the process in a nutshell which is now prescribed by legislation, specifically Section 34 of the Act. In theory, this should be the ideal mechanism to deal with corruption. I have looked at reports made to the Police since July last year when the reporting obligation came into operation, and it was interesting to note that from 1st January 2005 to 16th March this year alone there were 289 reports of corruption (nine less than for the six months of last year). However unfortunately, when the reports were analysed, we realized that no one is reporting corruption – people see Section 34 as the new means to report crime to the Police. Instead of going to the Police Station, we now have an Act that says we can report crime to the Commercial Branch in Pretoria. So the bottom line is that even issues such as murder or any concern outside the mandate of commercial crime are reported to the Police at the Commercial Branch because people think they have to report crime to the Police at Head Office.

The form we designed made a clear distinction between corruption and ordinary common law offences which go hand-in-hand with corruption. This is not a means to report crime, this is a means to report corruption as such. Not a single one of the nearly 600 reports received to date disclose corruption. The main purpose of Section 34 is to facilitate the reporting of corruption, however, from the 600 reports we have received, not a single one dealt with corruption per se. The reports disclosed fraud, false pay slips, even a bash at a neighbour – but no corruption.

There are two departments for the criminal investigation of corruption: the Directorate of Special Operations and the Police. By offering special reporting procedures through the Act, we are endeavouring to get criminal convictions – such convictions may not necessarily come about as a result of anonymous reporting to hotlines or through other reporting mechanisms.

If a perpetrator is criminally convicted, his name will go onto a blacklist and it would then be possible to stop him committing further acts of fraud or corruption. The blacklisting mechanism is also included in this Act - the so-called “Register for Tender Defaulters”. This register is still in its infancy and at this stage we are not sure how effective it will be. For someone with a criminal record for corruption or theft, the record will remain forever and only a Presidential pardon will get one’s name removed. However, record of a minor offence can lapse after 10 years in terms of the Criminal Procedure Act.

So we are fighting for convictions in the hope that this will make a difference in the war against corruption.

## COMMISSION 4 : COMBATING CORRUPTION

**Chairperson: Mr Pravin Gordhan<sup>22</sup>**

**Rapporteur: Ms Lorinda Nel<sup>23</sup>**

### 14.1 PRESENTATION BY MR PAT CUNNINGHAM<sup>24</sup>

In January of this year a survey was conducted by Research Surveys regarding attitudes and perceptions of South Africans about corruption in this country. I am sure that we are all aware of the survey. To briefly repeat the results:

- On the question as to whether there is corruption in senior levels of government, 79% of respondents agreed, 10% disagreed and 11% didn't know.
- With regard to whether police officers take bribes, 75% agreed, 14% disagreed and 11% didn't know,
- On the question as to whether corruption was getting worse in the country, 76% agreed, 18% disagreed and 6% didn't know.
- On the question as to whether corruption was becoming a way of life in South Africa, the respondents gave a clear 74% agreement, 24% disagreed and 2% didn't know.

It is not my intention today to debate these figures or the method whereby the research was done. My one concern is that the survey only appears to have researched corruption within government and did not include the private sector as well. Whether we accept these findings as infallibly correct is debatable, but what I believe we must accept is that there is obviously a strong perception amongst the public that corruption is rife within South Africa judging by the last question in the survey and that three-quarters of those surveyed feel that corruption is a major problem and that it is getting worse.

Perception, I would venture to suggest, turns on communication and it is this aspect that I would like to dwell on today as one way, amongst many, that can contribute to the combating of corruption, both in the public and private sectors. In 2003, Mr. Rapea (The then Deputy Director-General, DPSA) admitted to the Public Service and Administration Portfolio Committee that the government had not provided the public with enough

<sup>22</sup> Pravin Gordhan is the Commissioner of the South African Revenue Services (SARS).

<sup>23</sup> Ms Lorinda Nel is with Business Against Crime (BAC).

<sup>24</sup> Pat Cunningham is the Executive Director of the South African Fraud Prevention Services (SAFPS).

information regarding corruption in Government. From a private sector perspective I personally know of no organization that acts as a corruption watchdog or provides meaningful information to the media and public on private sector corruption. So we are faced with what is obviously a total lack of communication from both Government and the private sector with regard to combating corruption. I have personal experience of members of the public who wish to report fraud and corruption and have no idea how to do this and very often their lack of trust in the police means that they just don't bother. Coupled to this problem is a general perception that the National Anti-Corruption Forum does not operate effectively. I would comment that with a membership of 30 members coming from across the South African demographic spectrum, it is possibly not surprising that this body appears to have failed to reach consensus on a variety of issues. My comments so far have dwelt on perceptions and past experiences. This summit is about the future and the way forward in addressing and preventing corruption. I have already said that communication is a vital tool in the combating process, but what exactly do I mean by communication? Let me examine a few possibilities.

In our modern world, society is blessed with possibly the fastest and most effective forms of communication that have ever been available to mankind. The Internet, bulletin boards, LAN's and WAN's, cellphones, SMS, Bluetooth and so on. Do we utilize these resources to maximum effect? I think not. We have computer software readily available for data storage, yet do we share such data with each other to combat the corruption problem. I think not. Do ministries and departments in government communicate with each other, does business in the private sector communicate with each other. I can vouch for the latter by saying, certainly not. Even within many large corporates, business units do not communicate with each other on a variety of issues, including fraud and crime and I would suspect that the same occurs within government. In many instances in the private sector the profit motive and competitive edge take precedence over moral values connected with such things as fraud and corruption. On this point, I believe it is necessary to remind ourselves that in corruption there are always two parties...the corrupter and the corruptee. The former normally emanating from the private sector and the latter being a government employee. Obviously we can say that without the corrupter there would be no corruptee and yet all the talk appears to be about corruption in government, the corruptee, and very little about corruption in the private sector, the corrupter. The time has now arrived for more of a joint approach between Government and the private sector and that the communication of corruption prevention becomes the forefront of the attack on this menace. How can we develop a better communication ethos? Let us consider these possibilities and hopefully they may lead to discussion in our session today.

To start with I would see the formation of a joint venture between Government and the private sector which would have a full time Secretariat. Experience shows that Forums and committees often fail purely because the members thereof can only offer part time service and their priorities, rightly so, lie with their full time work. I think the example of the Hong Kong's Independent Commission Against Corruption (ICAC) is a possible point of departure for my proposal and the comments of the then Governor of Hong Kong, Sir Murray MacLehose are worthy of note "...I think the situation calls for an organization, led by men of high rank and status, which can devote its whole time to the eradication of this evil; a further and conclusive argument is that public confidence is much involved and clearly the public would have more confidence in a unit that is entirely independent and separate from any department of the Government, including the Police". I subscribe wholeheartedly to these sentiments and with respect to Mr. Kgwele in the Portfolio Committee, I do not agree with him regarding the Hong Kong model.

The venture, or shall we call it The South African Corruption Prevention Organization (SACPO), would be jointly funded in equal shares by Government and the private sector. It would need to be headed by a totally independent Chief Executive with staff being jointly recruited from the public and private sectors. The Organization should have as its objectives the following:

- Liason between Government and the private sector to ensure effective communication.
- A wide marketing profile so that the whole of the South African population is fully aware of the Organisation and its objects and can be the focal point for the reporting of corruption. I am aware that a whistle blowing service is available, but again, how many people outside of the public service are aware of it, very few I believe.
- The development, management and operation of an Internet website that will provide the South African population with advice and assistance on corruption, the combating thereof and the reporting of suspicious or actual corrupt practice.
- The organization would be responsible for the processing of received information. The initial investigation would be examined by the organization and a decision taken as to its referral. In this way the time of the NPA, and the SAFPS would not be wasted by frivolous complaints and reports. Such matters as life style audits and initial investigation work would form part of the organization's mandate.
- Within the website a full corrupt practices Data Management System (DMS) would be employed wherein those convicted of corruption are named and the manner of

their deeds are well documented. More commonly called Name and Shame, the database would be open to everybody and would have full search facilities.

- For those cases of corruption where a conviction has not been achieved, I see the DMS providing the facts and location of the corrupt practice without the actual names of those suspected of the corruption.
- The identification and development of a communications system, I think certain Americans call it Swarm technology, whereby there is effective communications between all role-players, for not only reading about, but also reporting on, fraud and corruption.

There is a corruption website already available, but again this sits on a government site and is a sub-set of a larger site. Perhaps the site should again be totally independent and be part of the suggested SACPO?

### **The Organisation's primary function would be that of communication:**

- between Government and the private sector on corruption and indeed other fraudulent conduct;
- between the South African population and both the government and the private sector with regard to corruption; and
- the marketing of South Africa, both locally and internationally, as a country that takes the prevention of corruption seriously, has put in place measures that address the issue of corruption and makes our country a worthy place to invest in.

Let us turn to the subject of the data management system already mentioned. This issue has been the subject of discussion and recommendation by government. Firstly, does such a database actually exist? And if it does, how can it be accessed and what does it contain? Without wishing to market the organization which I represent as the Executive Director, it is necessary for me to comment on the success of data sharing that is enjoyed by the participants in our non profit organization. As an example one member bank in November and December of last year prevented more than R20 Million in fraud through being able to access a central data sharing system and identify people who have committed fraud. But I must stress that this must be done in an independent environment without pressure from competing forces.

A corruption data sharing system should ideally not be operated by either government or the private sector independently, but by an organization referred to above, it would then be the very core of an effective and combined effort to combat corruption in our country.

Moving to the National Anti-Corruption Forum, which has already been briefly mentioned. There is consensus that the Forum has not operated effectively for reasons already mentioned. In addition the following, as outlined in the Memorandum of Understanding, namely;

- the Public Service Commission is tasked with the preparation of an annual report; and
- the funding of the Forum is borne by the Public Service Commission

creates the perception that the Forum is “just another government body” and participation by the private sector thus becomes problematic. Should an organisation as I have proposed be established then the functions of the National Anti-Corruption Forum would by default be taken over, managed and funded by the joint venture. I submit that the Government is placing an unfair and unnecessary burden upon itself with regard to the establishment and management of an anti-corruption body. The private sector, as the corrupter, is equally responsible for the eradication of fraud and corruption and it is a joint responsibility of both sectors in combating this pandemic to join forces, with alacrity to eradicate the problem.

Having read the Resolutions of the First National Anti-Corruption Summit, I readily submit that my suggestions today are very much in line with those Resolutions, with one very important and I believe necessary difference. That is, the need for the independent stand-alone organization, which I have already touched upon and equally funded by government and the private sector, managed by an independent Board, operating without political interference and providing a well marketed, full time and professional service to the South African society in the combating of corruption.

To summarize, I am of the opinion that the goals and Resolutions of the First Summit have not all been met, the Public Service Anti-Corruption Strategy as outlined in the PSA Portfolio Committee, Country Corruption Assessment Report of April 2003 is lagging far behind and that the private sector in South Africa has not made a meaningful contribution, in real terms, to the combating of corruption, rather seeing it as a government function. Partnerships, as proposed in the Strategy report are not effective as, again, they involve part time participation. I therefore respectfully submit that this forum considers the proposal for a totally independent organization, in the form of a joint venture between Government and the private sector to address the corruption issue and hopefully change the perception held, not only by the majority of South Africans, but also international donors and agencies that South Africa is a corruptors paradise.

## 14.2 TRANSPARENCY INTERNATIONAL - COUNTRY STUDY REPORT 2005 : NATIONAL INTEGRITY SYSTEMS BY MR HENNIE VAN VUUREN<sup>25</sup>

I would like to give you a civil society perspective on what we think are some of the key issues or concerns around combating corruption in South Africa. A Country Study Report on National Integrity Systems was undertaken for Transparency International. I will report on some of the recommendations from that study.

Firstly, we realize that corruption in South Africa is clearly not at any stage endemic. It is a major problem but it is a global problem as much as it is an African problem. According to the World Bank, about a trillion dollars annually is lost to corruption and about R500 billion is paid in bribes annually. So when we say, in the Department of Social Services in South Africa between R1 and R2 billion is lost annually; the SETAs lose a further R1 billion and the Road Accident Fund (RAF) another R1 billion. These are indicators of the scale of the problem. This is as much of a problem in the private sector as well. According to the former Minister of Justice, corruption in the private sector may be costing the economy as much as R50 billion annually. So, clearly, it has a massive impact on development and the delivery of basic services in South Africa. For civil society that is the point of departure. The issue is the delivery of basic services to ordinary South Africans and how do we ensure that corruption doesn't undermine that process?

Some of the key findings from our study are that tremendous strides have been made in the past 10 years and we recognize those both in terms of institutions and in terms of legislation to fight corruption. South Africa has developed a complex set of laws and institutions and has the political will to fight corruption all the way to the top. Similar to the Constitution which frames them, many of these institutions and laws are regarded as examples of good practice, but practical difficulties remain and these are capacity, implementation and enforcement.

### **The following are priorities for combating corruption –**

- The role of anti-corruption agencies and the co-ordination amongst those agencies. We don't dispute the fact that we have these key agencies, several of which are framed by Chapter 9 of the Constitution as well as the traditional law enforcement and anti-corruption agencies.
- For the multi-agency approach to succeed, the Scorpions need to exist as a separate entity within the NPA. If the Scorpions were taken into the South African

<sup>25</sup> Hennie van Vuuren is a Senior Research on Anti-Corruption Strategies with the Institute for Security Studies (ISS).

Police Services, they couldn't fulfill their obligations to prosecute and we realize the important role that the Scorpions play in combating corruption.

- In the long run the report proposes that we may need to re-open the issue of a single national anti-corruption agency in order to avoid duplication of functions, improve co-ordination and build the profile of the state's commitment to combat corruption. Its success would be a measure of our understanding that democracy and democratic institutions are sustainable.
- In terms of law enforcement, the issue of investigating corruption within the SAPS needs to be re-visited.
- Implementing legislation. We turn to the Prevention and Combating of Corrupt Activities Act and the Register of Tender defaulters. Here we need to have high-profile cases that are prosecuted, this is the only way that the legislation becomes an effective tool in terms of combating corruption.
- The relevant state bodies and co-ordination of the Department of Justice must ensure that the country's judges, magistrates and prosecutors are made aware of the content of the new Act.
- Business bodies need to make companies aware that the bribery of foreign public officials is prohibited, and the National Prosecuting Authority and the Department of Foreign Affairs need to develop a mechanism for receiving such complaints.
- The duty to report must be strictly enforced and the National Prosecuting Authority should prosecute those who do not adhere to directives.
- The implementation of the Promotion of Access to Information Act must be monitored and the public and private sector must commit to promoting access of information and not hindering it.
- Whistleblowers need protection, not only in law, but the Protected Disclosures Act needs to exist beyond that and this process of re-looking at the PDA by the SA Law Reform Commission needs to be speedily concluded so that whistleblowers get a sense that there is adequate protection.
- Whistleblowers must be celebrated as heroes. They are not getting their due recognition in the fight against corruption.
- Disclosure is a key to preventing and combating corruption. Disclosure requirements need to be enforced.
- Gaps in the South African corruption framework. There are two major gaps that civil society would like to highlight:

- i) Party finance support – We need our elected representatives to create a law that ensures transparency in terms of the private funding of political parties and which caps the expenditure on election funding. Party finance can be abused by the corrupt and by organized criminals and we do not always recognize that.
- ii) Post-employment restrictions - The Public Service Commission and the DPSA need to ensure that this matter is placed on the public agenda. There were commitments made towards the end of last year in Parliament, by the Department of Public Service and Administration that this would be further discussed following the Telkom debacle and the way in which individuals have moved from positions within the public sector to the private sector and parastatals, that they themselves had authority over those parastatals or had authority over legislation that affected those corporations.

#### **Areas that require further monitoring:**

- Procurement – the implementation of the supply chain management framework must be monitored. We need to ensure that the accounting officers have the capacity and oversight to implement aspects of the framework.
- Private sector – Business must address the issue of fronting more vigorously.
- Local government – More focus needs to be placed on combating corruption at the site of service delivery, this applies to both provincial and to local government. Where we know that corruption has become endemic within a department or within a municipality a ‘Troubleshooting Department’ needs to be created, similar to the intervention in the Eastern Cape.
- **Public sector** anti-corruption strategy – We have had a Public Sector Anti-Corruption Strategy since January 2002 which the DPSA is required to implement. The timetables that exist for the strategy have already passed. A new timetable for implementation is needed so that the media, civil society, etc. can better monitor the implementation.

The issues mentioned above are key towards combating corruption in South Africa but the last one I want to raise as we look forward is we also may need to look backwards. What has been discussed this morning on a number of occasions is the issue of large-scale corruption that took place under Apartheid. We know that Apartheid-era secrecy provided a breeding-ground for corrupt activities – if we look at the secret military and oil funding. We know that R4 billion was allocated to the Military for secret funding in 1980. That was the equivalent of the dollar value back then, so we’re looking at about

R25 billion for which there was no proper accounting at any stage. The same in terms of expenditure on oil and money pumped into the former homelands.

So at this point, we are saying that democracy has potentially consolidated far enough for us to turn back and look at large-scale corruption under Apartheid. South Africa may now be ready to consider prosecuting crimes of corruption that took place under Apartheid in order to return stolen wealth.

### **14.3 AGENCIES THAT COMBAT CORRUPTION IN SOUTH AFRICA BY MR WILLIE HOFMEYR<sup>26</sup>**

Combating corruption is of vital importance! The public sees corruption exposed in the media but unfortunately, they do not always see the positive action taken to deal with corruption, thus a feeling that ‘crime rules’ is the popular perception of the man-in-the-street. I am going to run through the various agencies in South Africa that deal with corruption.

#### **14.3.1 The SA Police Service (SAPS)**

The SA Police Service has a wide mandate to investigate all forms of corruption, most of which are dealt with by the Commercial branch with most of the serious cases dealt with by the Organized Crime Units. The Office for Serious Economic Crime has recently been set up to deal with very complex economic crime cases, including corruption.

#### **14.3.2 The National Prosecuting Authority (NPA)**

In the National Prosecuting Authority (NPA), the National Prosecution Service has a mandate to prosecute all forms of corruption in normal courts around the country, whilst the Specialized Commercial Crime Courts, initially set up in 1998 in Pretoria, are now being rolled out in other centres. The NPA oversees the combining of the work of the SA Police Service with that of the National Prosecuting Service and employs specialized prosecutors and detectives who work together from the onset of a case. Special magistrates are also employed to ensure tougher sentencing for people convicted of corruption.

#### **14.3.3 The Directorate of Special Operations (DSO)**

The Directorate of Special Operations (popularly called the “Scorpions”) was established under the auspices of the NPA to focus on the most serious cases or

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<sup>26</sup> Willie Hofmeyr is the Deputy National Director of Public Prosecutions, Head of the Asset Forfeiture Unit (AFU) and also Head of the Special Investigation Unit (SIU).

organized corruption. The Scorpions work with analysts, accountants, etc. and have specific focus on money laundering and racketeering.

#### **14.3.4 The Asset Forfeiture Unit (AFU)**

The Asset Forfeiture Unit (AFU) also falls under the NPA and uses the Prevention of Organized Crime Act to seize and forfeit proceeds of crime, including corruption. The Unit can seize assets even if there no conviction – when there is sufficient evidence to prove a case on the balance of probabilities. This is a powerful weapon when people have unexplained wealth but have little or no evidence to show where it comes from.

#### **14.3.5 The Special Investigating Unit (SIU)**

**History** - The SIU is an independent statutory body that reports to the President and Parliament. It receives its budget through the Department of Justice and Constitutional Development. It was created in terms of the Special Investigating Units and Special Tribunals Act, 1996. The first SIU was established in 1996 headed by former Judge Willem Heath. Judge Heath resigned in June 2001 after a Constitutional Court finding indicated that a judge was not able to head an investigating unit. The SIU then formally ceased to exist. The President established a new SIU by Proclamation R118 on 31 July 2001, and appointed Willie Hofmeyr as its head.

**Role** - The SIU functions in a manner similar to a commission of inquiry in that the President refers cases to it by issuing a proclamation. The major function of the SIU is to investigate corruption and maladministration, and to take civil legal action to correct any wrongdoing. During the 2003/04 financial year, the SIU:

- prevented losses of more than R370 million;
- recovered R13 million from persons involved in corrupt practises; and
- in addition, more than 50 cases were referred for arrest, and more than 100 for disciplinary action.

The focus of the SIU is the public sector, but it also deals with private sector accomplices. It can also investigate private sector matters that cause substantial harm to the interests of the public. The Unit aims to work with government departments to assist them to fight corruption more effectively. Since August 2001 the SIU has rapidly expanded its capacity to fight corruption, and its staff complement has grown from 67 to over 250 by April 2005. Much of this expansion has been by forming partnerships with

departments who funded the SIU to create a dedicated anti-corruption capacity to work with them. For example:

- the Department of Correctional Services is funding a team of over 30 SIU investigators to work with the department to root out corruption in prisons;
- the Eastern Cape Department of Housing, Local Government and Traditional Affairs has enlisted the assistance of a team of 17 SIU members to deal with corruption and maladministration at several municipalities; and
- the Department of Transport will be funding a team of 75 SIU investigators to investigate corruption in the issuing of licenses from March 2005.

### **Other functions of the SIU**

- i) Civil litigation - The SIU is the only institution that uses civil law to fight corruption and it has important advantages. It is often difficult to prove the crime of corruption because it almost always takes place between individuals who are equally guilty and do not want to give evidence.

A civil case is easier to prove because the case only has to be proven on a balance of probabilities, and not beyond a reasonable doubt as in a criminal case. Because the SIU's mandate includes maladministration, it is also sufficient to prove that proper procedures were not followed, or that the person was negligent. Thus the SIU can, for example, obtain court orders:

- to compel a person to pay back any wrongful benefit they received;
- to cancel contracts when the proper procedures were not followed; and
- to stop transactions or other actions that were not properly authorised.

The SIU litigates its cases in the Special Tribunal, a specialised court based in East London that deals specifically with its cases, and where there are not the usual long delays.

- ii) Law enforcement powers - The SIU has most law enforcement powers. It can compel people to hand over documents that it needs, and it can obtain warrants to do searches and seizures to obtain evidence. An important power of the SIU is its ability to compel people to answer questions under oath even if such answers incriminate them in criminal activity. The answers can be used against them in the civil action, for example to recover money, but cannot be used as evidence against

that person in a criminal trial. It may, however, be used against their accomplices. A major benefit of this power is that most suspects admit that they owe money to the State, and offer to pay it back, rather than face the risk of lying under oath. Should they lie, and it is discovered later, they can be imprisoned for perjury, even if they are not found guilty of any other offence.

- iii) Working with the police and prosecution on criminal cases - The SIU focus is on civil action and it does not have the power to make arrests or prosecute suspects. To avoid duplication of work, the SIU cooperates closely with SAPS or the DSO (“Scorpions”). When it uncovers criminal activity, it usually does a complete criminal investigation as well, and then hand a court-ready docket to the SAPS or DSO to arrest and charge the suspect. It works closely with the National Prosecuting Authority to ensure that prosecutions are done as soon as possible. It also works with the Asset Forfeiture Unit in cases where its powers are more suitable to recover the proceeds of crime.
- iv) Training and staff development - Training has become a key focus due to the shortage of persons with the specialist skills to undertake complex investigations. The SIU has therefore launched its own trainee investigator programme to ensure that it becomes less dependent on recruiting skilled staff from SAPS or the DSO. In addition, intensive training is provided to existing staff.

### **Other institutions with a more specific focus**

- the DPSA - co-ordinates overall strategy as part of specific interventions;
- the Public Service Commission - monitors the general effectiveness of corruption effectiveness;
- the Auditor-General – has a mainly preventative role but often commissions forensic audits;
- the Public Protector – investigates individual complaints;
- the Independent Complaints Directorate – focuses on the SA Police Service only and extends the focus of corruption; and
- the SA Revenue Service – often plays a vital role in specific cases.

## **The Prevention and Combating of Corrupt Activities Act, 2004**

The Act is an important new tool in fighting corruption and it is a major challenge to ensure that this Act is properly implemented. It will provide for hearings on wealth suspected of being illegally acquired and legally compels officials in the Public Service to report on corruption.

### **Future challenges include:**

- better focus on corruption investigations (especially in the Eastern Cape province);
- improved co-ordination between the various agencies;
- the building of a better anti-corruption capacity in the country; and
- building better international co-operation.



## COMMISSION 5 : TRANSPARENCY, OVERSIGHT AND ACCOUNTABILITY

**Chairperson: Adv Karen McKenzie<sup>27</sup>**

**Rapporteur: Dr M S Ramaite<sup>28</sup>**

### 15.1 ANTI-CORRUPTION FRAMEWORKS BY MR PETER GOSS<sup>29</sup>

In South Africa, there is no national anti-corruption strategy. There is a public sector anti-corruption strategy but there is no national framework, which stems from the resolutions of the First National Anti-Corruption Summit. There is a framework that covers elements of a typical strategy and whenever I go about this kind of business, I look at what best practice suggests and how one can measure what is currently being done in one's particular jurisdiction as compared to best practice.

#### **A National Anti-Corruption Framework should include:**

- provisions for a sound criminal justice system operating on legislation and regulatory environment issues;
- organizational policies and procedures as a backdrop;
- some alternative specifics for example, what we call “blacklisting”; and
- awareness passages and integrity as well as ethics promotion (transparency, accountability and oversight).

#### **In order to have effective transparency, accountability and oversight there needs to be:**

- transparent tendering and procurement practices;
- provisions for declaration of financial interests at various levels: at political level, public and business levels;
- procedures for declaration of conflict of interests (financial interest is one thing, conflict of interest is another). One should actually be declaring both actual and potential conflicts of interest if you are involved in a transaction associated with whatever organization you serve and if you have a personal interest conflicting the interest you are represented in as an official of that enterprise;

<sup>27</sup> Adv Karen McKenzie is the Chief Executive Officer of the Independent Complaints Directorate (ICD).

<sup>28</sup> Dr Silas Ramaite is the Deputy Director of Public Prosecutions at the NPA, (Directorate of Public Prosecutions).

<sup>29</sup> Peter Goss is the Director: Advisory Section of PriceWaterhouseCoopers Forensic Services (Pty) Ltd.

- standard procedures for recruitment of public officials – are key – and I think one can extend that to the private sector as well;
- performance standards across all sectors;
- right of access to public information; for example, regarding budgets in the public domain and regarding expenditure;
- disclosure of political party funding and finances; and
- encouragement for whistleblowing.

### **The following considerations should be taken note of:**

- provisions for blacklisting individuals and entities;
- an ombudsperson and different kinds of overseers for different professions;
- an independent body for receiving complaints (in South Africa the most prominent one we have is the ICD);
- law enforcement or policing agencies;
- parliamentary oversight of government; and
- encouraging civil society involvement in various forms of media participation, NGOs and the public in general.

These are the key components of a sound transparency, accountability and oversight framework within a national integrity framework.

### **We must take stock of the following:**

- Prevention and Combating of Corrupt Activities Act (blacklisting) - it may not be practical to implement the blacklisting provision, particularly within the private sector. How does one make the private sector police themselves? There are many companies operating who do not function under any particular body.
- Ombudspersons – We know that the banking environment of the financial sector has several ombudspersons. We have an ombudsperson for the public service. Local government has several ombudspersons now at the local government and municipal level. This is an area that needs serious attention.
- Independent body for receiving complaints – At the moment there is the impression that this body, to a large extent, is a hotline falling under the Public Service Commission, and of course, depending on the nature of the corruption to be reported, there are about 20 organisations to go to.

- Parliamentary oversight of government – Opposition, I guess is one player here and I'm not so sure that the public is doing enough in this regard.
- Encouraging civil society involvement – SANGOCO mentioned that it has developed a Code of Conduct for its members, ODAC has done a serious job in assisting in developing the Promotion of Access to Information Act and the Protected Disclosures Act. Transparency International is involved in developing various solutions and the Public Service Accountability Monitor keeps an eye on things.

**Solutions – the key challenges are:**

- The absence of procedures to aid implementation – in this particular area we have, for example, the PFMA in the public sector requiring compliance with certain rules. There is no equivalent piece of legislation in the private sector. Private companies have their activities controlled by the Companies Act. The King II Code of Corporate Governance unfortunately has absolutely no authority at all, it is a number of beautiful suggestions about corruption and fraud but has no actual “teeth” to it!
- Policing of legislation – We have much legislation and a big challenge for us is how we're going to police the Protected Disclosures Act and, in fact, whether it needs policing?
- Cost and implication of implementation not adequately understood – We are seeing this extensively with the Financial Intelligence Centre with the money laundering legislation under the Prevention of Organized Crime Act.
- Limited impact on unethical practices – The current legislation and framework is not addressing real corruption. It is not addressing the traffic cop that pulls over your family member on the roadside, nor is it addressing the community where one can get a Social Services Disability Grant when you are not disabled. Corruption like this is almost a culture in some parts of the country.
- Public sector – The public sector, as the main driver, has done a phenomenal job in setting up the backdrop and the templates in which we now have to operate. My worry is that perhaps players like civil society, the private sector, etc. have been invited to the party late in the day. We cannot invite ourselves.
- Accountability – This is a serious area of concern. How is business made to be accountable for corruption within business?

There is a worrying tone being set in this area, for example, the plea bargain arrangements for the travel voucher scam. Should parliamentarians be given the option

of a plea bargain, if we want to show accountability and oversight? They are oversight players themselves, should they be given that kind of option?

- Publishing of sanctions – Too little of this takes place. We see too little of the results of corruption investigations. We read about sensational matters but we don't see the ultimate outcome.
- Education/training/awareness – The professions need to establish stringent codes of conduct for their members. The construction industry has got several players who look after ethics in that sector. Unless those bodies start taking ownership and have more of a stick to wield, we are not really going to address this problem in sectors other than the public sector.

### **15.2 TRANSPARENCY, ACCOUNTABILITY AND OVERSIGHT FROM A CIVIL SOCIETY PERSPECTIVE BY MS JUDITH FEBRUARY<sup>30</sup>**

I am going to be looking at transparency, accountability and oversight from a civil society perspective and discussing some of the initiatives that civil society has started.

I think when we talk about oversight, transparency and accountability, what we are really talking about are the three elements of good governance and what good governance is. So often we use these terms and we see them as 'nice to haves' but they actually are for a particular reason. Its like talking about 'parliamentary oversight' – what do we mean by that? Why is it important, why is it good? For me, these elements: oversight, transparency and accountability – are about good governance but also about people - citizens - and I think that if we take a typical approach to issues of corruption and issues of governance, we run the risk of forgetting what it is really about.

We noted that South Africa has done comparatively well according to the National Integrity Study. We have done well to put in place a very sophisticated framework of governance and have achieved a sophisticated anti-corruption apparatus at all levels. We would do well to remind ourselves that South Africa has made phenomenal progress in this regard.

At Parliamentary level (and this is the area that I watch particularly), there has been the Code of Ethics. The basis of this Code of Ethics is really the issue of disclosure, and the prevention of corruption and conflicts of interest. One needs to understand when

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<sup>30</sup> Ms Judith February is the Convenor of the Civil Society Network Against Corruption.

monitoring the rulings of the Ethics Committee, for example, that the Code was never really intended to be punitive. There is a punitive element to it, but it really is about building a culture of accountability and entrenching that accountability.

When you think about the biggest expenditure post-1994 - the Arms Deal - I would argue that Parliament didn't cover itself in glory when exercising oversight over the Executive in that regard. Referring to 'Travelgate', we are not doing well enough to entrench a culture of accountability and integrity when so many MPs are involved in a scandal such as this. Having said that, we need to look and see whether plea bargaining is indeed the best way of going about dealing with this and if so, there needs to be complete openness about it. If there has been plea bargaining, the public has the right to know on what basis the plea bargain has been made.

There have also been within Parliament, breaches of the Code of Ethics, such as the Minister of Defence forgetting to disclose - and other MPs not disclosing their interests in the gift register. There needs to be leadership from the front in this regard. We did some research on disclosure and wanted to look at the levels of disclosure within the Executive and quite frankly, that wasn't easy. Until now, we're not certain which of the members of the Executive had disclosed or not. So that doesn't create the most positive public perception.

At Local Government level as well we've seen that there has been a lot of corruption (Plettenburg Bay in the Western Cape, Big Bay and so on).

### **There are two important omissions at the moment. These are:**

- Post-employment restrictions – The notion of the revolving door. What happens when senior public servants, members of Cabinet or Parliament (and this is controversial, they don't like it when we talk about this), move from their portfolios into the private sector and use the contacts that they have gained, to move into the private sector? Should there be regulation on this? At the moment in South Africa, there isn't and the revolving door just keeps revolving.
- The regulation of private funding of political parties - There is no legislation before Parliament of any kind to regulate private funding to political parties.

So, what is needed is a multi-pronged approach between government, business and civil society in trying to force accountability. This is not only the business of Government, it is everyone's business. It is the business of business. I am quite encouraged by the Johannesburg Stock Exchange's Social Responsibility Index, which is about trying to engender a culture of accountability amongst listed companies. It is a voluntary index

but I think it's a start and creates the kind of peer pressure for people to entrench the good things about King II, the triple bottom line and so on. We would support that, but more initiatives from business in that way would always be welcomed.

Are we becoming a society where corruption is endemic? We are at the point where we have to ask whether we are going to sit back and allow things to slide - or whether we will take the framework and use the political moment that there is. This requires leadership from government and also from civil society and from business in partnership. That partnership will take not only resources but political will.

### **15.3 ROLE PLAYERS WITHIN THE STRUCTURE OF GOVERNMENT BY MR FREEMAN NOMVALO<sup>31</sup>**

#### **INTRODUCTION**

Thank you Chairperson. It is a little difficult to be the last person to speak, particularly after able speakers Peter and Judith. Before I start, let me share with you, that I will make this as short as possible. I will just flesh out what the structures in government are, which you all know. I'm not going to suggest any solutions. I will share something on Parliamentary oversight and also the roles of the different committees in Parliament as well as other role players in government. Then I will touch briefly on the private sector. The reason for that is that each time we talk about corruption the focus is on government. We need to talk about corruption wherever it exists. To this end, I want to share something that – if you go back to late 1994, early 1995, up until 1996 when Trevor Manuel was appointed as the Minister of Finance and rewind the talk that was making the rounds, in the press, as well as in the corridors of the opposition parties. It was extremely negative and there were things that were taking place that were a result of that negativity. However, government stuck to its course in terms of what it had to do.

#### **ESTABLISHMENT OF THE ASSET FORFEITURE UNIT**

After the establishment of the Asset Forfeiture Unit (AFU) there were stories about the judicial system recently. The ruling party was apparently not happy about what the judicial system was doing. We understand the wisdom of establishing the AFU now, but at the time of its establishment because they were working on the way the legislation was crafted, there were comments like – “we are not the drafters of the legislation, we apply the law as we get it” – which suggests that there were certain arms of society that

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<sup>31</sup> Sithembiso Freeman Nomvalo is the Accountant-General at the National Treasury.

were actually proposed to be very positive about this initiative that government was engaged in. Government stuck to its course because it was the right thing to do. There was no opposition party that was saying to government: “Do those things.” Government wanted to do those things because it felt it was necessary. Those that followed the negotiations will understand that some of the institutions came into existence because the ruling party, knowing at the time it would be the majority, felt that it would be difficult for itself to condemn its own members. It had absolute power and they say power corrupts, absolutely. They understood that phenomenon and they established the ombudspersons. Even against resistance at the time, from the people who actually should have naturally expected to accept the institutions.

So, the picture I am painting here is that I do not personally think, it is so much the lack of political will. I think we’re making progress because there is political will. The route is long and the route will have problems. I think as soon as one identifies the problems it will go better. Just one correction to Judith February – we don’t spend a lot of money on arms. We need to look at the numbers, the single largest amount of money that we spent, if you look at the numbers over the years that it has come down in real terms and in absolute terms.

### **PROTECTING SOCIETY**

We need to deal with corruption in a manner that seeks to protect society - not to attack certain people within society. The focus tends to be more on government, as I have said, but there are many issues that actually defraud the very same society that we stand for. So I’m not going to talk about those that are normally expressed because everybody says that, and I agree with it, it needs to be solved. I am going to talk about the ones that are not easy to talk about. So, its not that I’m trying to defend government but I’m trying to bring the other perspective that is less spoken about.

### **THE STRUCTURE OF GOVERNMENT**

The structure in government pertains to the legislative authority, executive authority and judicial authority and each one of them play important roles in ensuring oversight and in ensuring that the very same things that we are talking about we are able to fight with. And I’m not going to go into details with that, I can answer questions specifically if necessary. But then, how do these institutions work in practice? You have got the Executive Authority, where a lot of the activity takes place in relation to what government does and in relation to what needs to be done in fighting corruption. The institutions of government complement each other. The Constitution has a framework for that. Audit

Committees have to be established that are going to attempt to do certain things in relation to what is being done at the workplace. It is important that these are established..

I just want to mention one point on the Audit Committees. Again, I am talking about issues relating to corruption. For example, let's take Peter Goss. Peter is from PriceWaterhouseCoopers. Then we assume that Judith February is from KPMG, which are both auditing firms. Judith has done work for us in government that is appalling. Peter sits as the Chairperson of the Audit Committee in government and Peter had to adjudicate over what Judith has done. What are the professional ethics and all of those things that they espouse in the profession? One cannot say the wrong things, one cannot attack one's competitor. So it makes it difficult. Of course, we suggested as government that we get people like Peter, with the relevant skills, because there is a skills shortage in the country, to be on the Audit Committees. But it has its weaknesses because at some point these people do not stick to what they need to be doing in terms of their professional ethics, but may have other considerations motivating them. Others have actually gone to a point of lobbying Accounting Officers to get it to take certain decisions so that they can obtain tenders. Again, in my books, this happens because they are privy to confidential information, which in itself constitutes corruption.

There is one problem that sometimes arises in these issues and that is when people are in the same political party, you expect they are not going to investigate each other. I don't think that is entirely true. While there is always an inherent risk that people protect each other, it doesn't always follow that they will. This is because there is legislation that has to be implemented and there are all sorts of other mechanisms that need to be dealt with. Then the Executive Authorities, of course, are accountable to Parliament. SCOPA deals with financial issues. The Portfolio Committees deals with performance management and service delivery issues. By discussing issues they may find that its not a government official defrauding government, it may be somebody from the private sector. These are the issues that we need to talk about. We need of course, to deal with government officials who are defrauding government, but we need to deal with those private sector people that are also defrauding government.

SCOPA considers the Auditor's Report, it looks at issues in relation to financial management in terms of the PFMA and issues of unauthorized expenditure and so on. This is again where we need to be very, very careful with what we do. We can take the 'Travelgate' or any other reported case. Until you have actually gone into the merits of the case and established what went wrong, who was at fault, who did what, one cannot jump to conclusions.

The Auditor-General is independent in terms of the law. He does not account to any Executive Authority, only to Parliament. Of course there are certain issues that they will deal with in their discretion and I think we need to respect that.

When you talk of Parliament then you talk about enhancing public participation in the political processes. It is supposed to enhance civil society participation because people who sit there come from all corners of South Africa and are supposed to represent their local communities. People demand things and they (politicians) must deliver those things that are demanded. They are accountable to the people who elected them.

In terms of Parliamentary oversight: Section 55 (2) of the Constitution says that ‘The National Assembly must make sure that it creates the mechanism through which the Executive Authority reports to them’. Section 92 (3) (b) puts an obligation on the Executive Authority to report to Parliament. So, the Executive Authority cannot say that he/she cannot report because there was no mechanism.

## **CONCLUSION**

In conclusion I want to address the question about policing. Depending on how you craft a piece of legislation, you sometimes have to police but sometimes it is important that you create an environment in which certain things are declared illegal. Therefore, we shouldn't legislate ourselves into a situation where we actually limit the ability to do the things that we need to do – of primary importance is service delivery. Too much legislation can work against service delivery. So in balancing all of these things we need to make sure that we strike the balance that will allow us to continue providing the service that is needed but at the same time not lose the ball in terms of fighting corruption. It is absolutely critical that we do that. When you talk about the issues of policing, we shouldn't demand policing to a point where it actually is virtually impossible for government to continue doing the things that it needs to do. We need to fight corruption in order to ensure that we create a better life for all.

## COMMISSION 6 : TRANSPARENCY, OVERSIGHT AND ACCOUNTABILITY

Chairperson: Mr Alvin Rapea<sup>32</sup>

Rapporteur: Dr Norman Maharaj<sup>33</sup>

### 16.1 PRESENTATION BY MR COLM ALLAN<sup>34</sup>

One of the principal weaknesses characterizing efforts to combat corruption across all sectors of South African society, in the past ten years, has been the tendency to view corruption as an exclusively individual and ethical issue. Insufficient attention has been paid to the systemic context which enables individuals to evade accountability and commit acts of corruption. This includes the constitutional system of checks and balances designed to oversee the effective management of public resources by government departments and to ensure the accountability of public officials and politicians.

The question I want to address is: How effective have parliamentary, constitutional and citizen oversight bodies in South Africa been in holding government to account for the proper management of public resources and for its anti-corruption efforts? My approach to this question is informed by two basic contentions:

- corruption is an accountability issue; and
- corruption is primarily a systemic rather than an individual issue.

But let me start by defining accountability in relation to the public sector and with reference to South Africa's new democratic Constitution. What does accountability mean? And why is corruption an accountability issue?

“Accountability is an impersonal obligation by politicians and public officials to explain their performance and justify decisions taken during the course of their management of public resources. It is not a personal favour”.<sup>35</sup>

This obligation derives from Chapter 10 of the South African Constitution, which among other things binds the public administration to the principles of transparency, accountability, and the efficient and effective use of public resources.<sup>36</sup>

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<sup>33</sup> Dr Norman Maharaj is a Commissioner with the Public Service Commission (PSC).

<sup>34</sup> Colm Allan is the Director of the Public Service Accountability Monitor (PSAM).

<sup>35</sup> Part of this definition of accountability derives from Hugh Corder, Saras Jagwanth and Fred Soltau, 1999, Report on Parliamentary Oversight and Accountability, Chapter 2.

<sup>36</sup> The Constitution of the Republic of South Africa, 1996, Act 108 of 1996, Sect. 195.

Corruption is a breach of this accountability obligation between ordinary citizens and those who hold public office on their behalf. It involves the use of public power and resources for private gain. This is inevitably at the expense of the creation of public infrastructure and the effective distribution of public goods and services (such as healthcare, education and welfare).

**The accountability system** - It is commonly accepted in South Africa that our apartheid legacy continues to exert an influence over the current democratic system of government. After 1994, the democratic state inherited the majority of its systems and functionaries from the previous apartheid and 'Bantustan' government administrations. These administrations were characterized by a complete lack of financial transparency, an ethos of entitlement and a sense of contempt for public accountability.<sup>37</sup> The new South African Constitution and its accompanying public service and public finance legislation, were designed to transform these systems and mindset.

The Constitution established a number of vital structures and institutions to limit corruption and actively ensure the accountability of the executive arm of the South African government and public sector. The four main pillars of this accountability system include:

- effective parliamentary oversight bodies (including portfolio committees to oversee the performance of national and provincial government departments and public accounts committees to oversee the effective financial management of national and provincial departments);<sup>38</sup>
- independent law enforcement agencies (such as the National Prosecuting Authority<sup>39</sup>, and its Directorate of Special Operations, the Scorpions) and constitutional protection agencies<sup>40</sup> (including the Auditor-General<sup>41</sup>, the Public Protector<sup>42</sup> and Public Service Commission<sup>43</sup>);
- a vigilant, informed and free press<sup>44</sup>; and
- an active and informed civil society<sup>45</sup>

<sup>37</sup> See for instance, Streek, Barry and Richard Wicksteed, 1981, *Render Unto Kaiser, a Transkei Dossier*, Johannesburg: Ravan Press.

<sup>38</sup> Section 55 of the South African Constitution, 1996, states that Parliament must provide for mechanisms 'to ensure that all executive organs of state in the national sphere of government are accountable to it', and must 'maintain oversight of the exercise of national executive authority, including the implementation of legislation' and all organs of state.

<sup>39</sup> Section 179 of the Constitution states that the NPA 'has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings'.

<sup>40</sup> In terms of Chapter 9 of the South African Constitution these bodies (excluding the Public Service Commission) are referred to as 'state institutions supporting constitutional democracy'.

<sup>41</sup> In terms of Section 188 of the Constitution the Auditor-General 'must audit and report on the accounts, financial statements and financial management of all national and provincial state departments and administrations, all municipalities and any other institution required by legislation'.

<sup>42</sup> Section 182 of the Constitution confers on the Public Protector 'the power to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice', and 'the power to report on the conduct found and to take appropriate remedial action'.

<sup>43</sup> According to Section 196 of the Constitution the Public Service Commission is responsible for 'the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service' and is accountable to the national Parliament.

<sup>44</sup> Section 16 of the Constitution guarantees 'freedom of the press and other media'

<sup>45</sup> Section 32 of the Constitution guarantees 'everyone' the 'right of access to any information held by the state', whereas Section 33 guarantees 'everyone' the 'right to administrative action that is lawful, reasonable and procedurally fair'.

The critical question is how effectively have these accountability provisions been implemented in practice?

Effectiveness of accountability and oversight mechanisms - It is often not recognized that the primary site of public service delivery in South Africa is via its nine provincial administrations. Roughly 58 percent of budgeted expenditure is administered by the provinces, with around 38 percent administered through national government departments. For this reason, questions need to be asked about the effectiveness of current oversight of public expenditure management and service delivery in our provinces, and not merely within national government.

If we use the Eastern Cape Province as an example, it is clear that corruption is not merely informed by the personal greed and lack of integrity on the part of individuals in positions of power. The underlying causes of corruption in the Eastern Cape are primarily structural and relate to the state of weak financial management within government departments and the poor functioning of provincial oversight and accountability structures.

For the past eight years, the Office of the Auditor-General has provided a detailed account of the lack of effective strategic planning, the arbitrary budgetary processes and the absence of effective financial controls in government departments in the province. As a result, at the conclusion of his annual financial audits, the Auditor-General has been forced to issue departments with audit disclaimers for the equivalent of 79 percent of the provincial budget, or an amount of R125 billion, since 1996/97.

An audit disclaimer is issued when so many transactions are excluded from the department's financial statements, and so little supporting documentation can be produced to justify the department's expenditure, that no effective audit could be conducted in the first place. Audit disclaimers indicate a serious lack of financial control measures and a lack of effective financial management within the entity being audited. In monetary terms these audit opinions translate into the failure of the Eastern Cape administration to properly account for the use of R125.4 billion out of a total budget of R157 billion over a period of 8 financial years. Whilst this does not mean that this amount has been misappropriated or stolen, because no documents have been produced to verify how these funds were used it is not possible to demonstrate that significant amounts of these funds have not been misappropriated or stolen.

In addition, the Auditor-General has pointed to numerous acts of financial misconduct by departmental heads and financial officers in Eastern Cape departments, which constitute criminal offenses in terms of the Public Finance Management Act, over the

three-year period between 2001 and 2004. Yet, not a single financial official has reportedly been charged or subjected to disciplinary proceedings for financial mismanagement in the province in response to these audit findings.

Moreover, in 2002 the Auditor-General pointed out that not a single resolution passed by the Eastern Cape Standing Committee on Public Accounts (SCOPA) had been implemented in the 7-year period between 1995 and 2002. This is despite the fact that the Constitution empowers oversight bodies such as SCOPA to compel public officials and members of the executive to appear before them and to account to them. Subsequent research by the PSAM has shown little improvement in the implementation of SCOPA resolutions since this time.

Since 1999 the PSAM has been tracking cases of public sector misconduct, maladministration and corruption in the Eastern Cape. In this time PSAM researchers have attempted to establish what corrective action has been taken in response to a total of 659 cases. Only 9 percent of these (60 cases) were found (by the PSAM) to have been met with a successful resolution. These cases collectively account for an amount of R6.9 billion, of which only 5 percent (R325 million) has reportedly been recovered or properly accounted for. The PSAM database includes 331 specific cases of corruption, only 8 percent of which (28 cases) were found to have been resolved. In addition, this database lists 168 cases of maladministration, of which only 2 percent (2 cases) were deemed resolved.

There can be little doubt that the context of weak financial management within the province, which has served to enable the numerous acts of corrupt maladministration listed above, has been further aggravated by a lack of integrity on the part of high profile officials and politicians. Since 1996 there have been a number of widely publicized cases of impropriety involving members of the Eastern Cape executive, none of which have been met with effective internal disciplinary action (to date). Among others, these include:

- Ex-Eastern Cape Premier, Makhenkesi Stofile's use of R20 000 of travel funds to pay for the private flights of his family members in contravention of regulatory codes. (Stofile was subsequently promoted to national Minister of Sport in April 2004).
- Eastern Cape Health Minister, Dr Bevan Goqwana's acknowledgement that he owned a private ambulance service and private specialist practice whilst in office. He also acknowledged to employing a senior state doctor to work in his private practice after his appointment, contrary to regulations governing members of the

executive. (Goqwana was subsequently reappointed to a second term of office as provincial Minister of Health in April 2004, despite these admissions).

- The Eastern Cape Ministers for Agriculture and Welfare, Max Mamase and (his wife) Neo Moerane, who were arrested in March 2005 for receiving payments from a Cape Town-based property dealer. Mamase acknowledged entering into an irregular R16 million land deal with this businessman in contravention of the Public Finance Management Act.

Effectiveness of national oversight and Constitutional bodies - My intention is not to attempt to generalize the shortcomings of parliamentary oversight and constitutional bodies in the Eastern Cape to the rest of South Africa's provinces and its national government. No comparable research (to that undertaken by the PSAM) has been conducted into the performance of these provinces or national government departments which would serve to substantiate such a claim.

If the recent Arms Deal or 'Travelgate' investigations are viewed as a litmus test of the effectiveness of national oversight bodies a number of weaknesses have been exposed. In the case of the Arms Procurement Deal, although this deal was subjected to a multi-agency investigation, a number of serious questions remain.

### **These include:**

- The omission of key protection agencies from the investigation: Why did the NPA, Public Protector and Auditor-General originally agree to the participation of the Heath Special Investigating Unit (SIU) in the Arms Deal investigation (which was the only agency with the power to cancel the procurement contracts) and then, after interventions by the executive, renege on this agreement and claim that the inclusion of the SIU in the Joint Investigating Team (JIT) was unnecessary?
- The failure of the JIT to address vital questions: Why did the Standing Committee on Public Accounts (SCOPA) and Parliament come to adopt the final JIT report into the arms deal when it failed to answer the vital question of whether the contract represented value for money, or whether the offset undertakings (of R110 billion in direct foreign investment and the creation of 65 000 jobs) were ever likely to be realized? Why did it accept a report that failed to recommend disciplinary action against any government official or executive member implicated in irregularities in the Arms Deal? This was despite finding a conflict of interest and the blatant flouting of tender procedures by Shamin 'Chippy' Shaik, who was involved at every level of the selection and negotiation process (from the specification of tenders to acting as the secretary of cabinet during decision-making meetings).

- Executive interference: What role did executive interference in the workings of SCOPA, and interference by prominent members of the ruling party (such as Tony Yengeni) who were under investigation by the NPA, play in the acceptance of this report? What role did such interference play in the removal of Andrew Feinstein (a senior, but independent thinking, ANC MP) from the Committee and the resignation of the Committee chair, Gavin Woods?
- The revision and omission of key report findings subsequent to consultation between members of the JIT and the Executive: Why did the Auditor-General and Public Protector provide a draft copy of the JIT report to the President and members of the national executive, whose conduct was effectively under investigation? Why did Parliament tolerate this breach of standard auditing and oversight procedures? Why were substantial changes made to the draft JIT report which removed or watered down findings which were critical of the role of the Cabinet sub-committee (headed by then deputy President Thabo Mbeki)?
- The failure of the Public Protector to thoroughly investigate the Deputy President's conflicts of interest: Why has the Public Protector, who is tasked with investigating breaches of the Executive Members Ethics Act, still not investigated and pronounced on the blatant conflicts of interest involving Deputy President Jacob Zuma and payments/loans he continues to receive from one of the beneficiaries of the arms deal, Shabir Shaik of Nkobi Holdings? The Executive Ethics Code makes it clear that any member of cabinet must declare any personal interest in a matter before cabinet, or in relation to which he/she is required to take a decision, and recuse him/herself from these proceedings. We know that this did not happen. The sub judice rule (invoked by the Public Protector) clearly does not apply given that Zuma has not been charged with a criminal offense and because this matter requires resolution through a civil disciplinary hearing rather than criminal trial.
- The failure of Parliament to uphold its ethics code: Why has Parliament's Ethics Committee failed to take action against Zuma when the parliamentary code of conduct states that 'members should not place themselves under any financial or other obligation to outside individuals or organizations that may influence them in the performance of their official duties'. This is in spite of the prominent role played by Zuma in ensuring the exclusion of the Special Investigating Unit from the deal. Similarly, why was Tony Yengeni allowed to resign from parliament without any form of disciplinary sanction by the Ethics Committee, after he admitted to defrauding parliament by not declaring massive discounts on vehicles obtained from yet another arms deal beneficiary (Daimler-Chrysler Aerospace/EADS)?

Again, if we look at Parliament's handling of the 'Travelgate' scandal, where over 20 serving MPs were reportedly involved in the corrupt and fraudulent submission of millions of rands worth of travel vouchers, the question is why have none of these

individuals been disciplined by parliament's Ethics Committee or by their own political parties? Why has the NPA allowed these public representatives, who are tasked with the oversight of the performance of government departments and guarding the public interest against corruption, to escape jail terms by signing plea bargains?

These examples raise questions not only about the effectiveness of national parliamentary oversight and constitutional bodies, but also their independence from executive interference. This is particularly the case in instances, such as the Arms Deal investigation, where they have been called upon to respond to alleged breaches of the Constitutional and regulatory framework by members of the executive.

### **The role of civil society**

The above discussion raises a number of difficult questions about the role of anti-corruption activists and civil society organizations (CSOs) in South Africa in upholding the country's Constitutional accountability framework.

Civil society's support for the constitutional accountability system (set out above) has been woefully inadequate. The failure to uphold this system is primarily the result of civil society activists, including trade unionists and journalists, failing to separate their personal and political interests from their civic responsibility to defend the public interest. This includes a responsibility to hold the executive and administrative arms of government accountable for their performance. Post-1994, a weakness of both CSOs and parliamentary oversight structures, has been their tendency to engage with government administrators and the executive on the basis of personal ties and political loyalties. This has resulted in a culture of 'silent diplomacy' with respect to sensitive issues such as corruption and maladministration. It has also resulted in the withholding of public criticism of the performance of 'allies' and ex-'comrades' in government.

In this regard the Arms Deal investigation has also served as a litmus test for the effectiveness of civil society oversight over government expenditure. It is a test which civil society failed if we are to consider the following questions:

- What steps were taken by social activists and advocacy CSOs to support and strengthen the work of parliamentary oversight structures and constitutional bodies during the course of the arms deal investigation? In particular, what support was given to conscientious and rigorous MPs such as Andrew Feinstein, Gavin Woods and Raenette Taljaard serving on SCOPA and Thandi Modise who served on parliament's Defence Portfolio Committee?

- What steps have been taken by the trade union movement to ensure that the work of parliamentary bodies overseeing large-scale government procurement transactions consistently protects the economic and developmental needs of South African workers? For instance, what steps were taken to ensure that the arms deal was thoroughly investigated and, among other things, that the offset undertakings forming part of the deal were viable? What steps have unionists taken to monitor compliance with these undertakings to ensure the delivery of promised trade, foreign investment and jobs? Why, for instance, were no concerns raised on the issue of potential South African job losses resulting from the irregular de-selection of local arms supplier, CCIL, in favour of the French supplied system offered by CSF Thompson in conjunction with Schabir Shaik's Nkobi Holdings?

Civil society's responses to all of the above questions range from 'very little' to 'nothing'.

More broadly, on the issue of civil society oversight of public expenditure, questions need to be asked about the extent to which journalists and the media have successfully familiarized themselves with government's budgeting, planning, public expenditure management and oversight cycle. Detailed knowledge of these processes are indispensable if the public is to be independently informed of government's performance in managing public resources at national and provincial levels. In addition, questions need to be asked about the steps CSOs and social activists have taken to monitor and intervene in the above budgeting and public expenditure oversight processes for purposes of advancing citizens' socio-economic rights.

It is clear from the above reflections that civil society has experienced difficulty in relating to the changed forms of engagement with government, and the possibilities for social activism (including anti-corruption advocacy) within South Africa's new democratic constitutional framework. The reliance on old struggle loyalties currently appears to outweigh the reliance on democratic institutions as a means for pursuing socio-economic rights.

A related difficulty experienced by civil society post-1994 has been the failure to draw any distinction between the two spheres of government – the Legislature and the executive – and to factor this into its strategies to ensure economic development and improved service delivery.

In any democratic state, members of government are obliged to make themselves accountable to the public. The constitutional separation of powers between the executive and the Legislature provides the basis for a relationship of oversight of the performance of government ministers and officials, by ordinary parliamentarians. Executive members (national cabinet ministers or provincial MECs) have the power to

control public resources, issue instructions to public officials and implement government policies. Members of parliament (including provincial Legislatures) and constitutional bodies, on the other hand, are tasked with the responsibility of overseeing the effectiveness of this implementation process.

By contrast, in the eyes of many South African advocacy CSOs and anti-corruption activists it is assumed that their personal relationships with ex-comrades in the executive and in senior public office gives them privileged access to power and the direct ability to influence the implementation of government policies. Often this has led to the conclusion that civil society with the executive arm at government should share responsibility for the implementation of government policies. This is an assumption which is central to the current structure and objectives of the National Anti Corruption Forum (NACF). It is fundamentally mistaken.

The NACF: Advice or Accountability? - The multi-sectoral National Anti-Corruption Forum (NACF) was launched in June 2001 with a promise by the Minister for Public Service and Administration, G J Fraser-Moleketi, that it would not simply be another 'fancy talk shop'. It would serve as a 'very powerful' weapon in the war against corruption. The NACF, chaired by the Minister for Public Service and Administration, is composed in equal thirds of (ten) representatives from the government, business and civil society sectors. Thus far, however, the government delegation appears to have been comprised primarily, if not exclusively, of members of the national executive.

Four years down the line, the NACF has not even succeeded in delivering as a 'fancy talk shop'. Whilst the standard excuse offered for its failure has pointed to the difficulty of coordinating the schedules of the national cabinet Ministers (constituting the government delegation) a more plausible reason is the fundamental confusion at the heart of the objectives listed in the NACF's Memorandum of Understanding (MOU).

**The basic objectives to be met by the NACF can be summarised as:**

- to provide for cross-sectoral information sharing on anti-corruption strategies; and
- to advise national government on the implementation of its anti-corruption strategies.

The fact of the matter, however, is that the implementation of government policy is the responsibility of the executive arm of government alone. By mistakenly becoming involved in advising government on the implementation of its anti-corruption strategy civil society and business run the risk of having to assume joint responsibility for the

implementation process itself. The current focus of the NACF risks making civil society and business responsible for the failed implementation of these policies when they patently do not have the necessary power to implement them in the first place.

Ultimately, there is a crucial difference between a civil society relationship with government based on the offering of 'advice', and a relationship premised on the principle of holding government to 'account'.

Since the public administration has a Constitutional obligation to uphold the principles of transparency and accountability and to ensure the efficient and effective use of public resources, ordinary citizens have the right to demand explanations from government and to hold it accountable for its decisions regarding the management of these resources. By contrast, government is under no obligation to take the advice rendered by citizens, CSOs or paid consultants seriously.

To rectify this situation the NACF's objectives need to shift to the promotion of more effective accountability structures within each sector i.e. civil society, business and the public sector. In particular, its focus on the public sector should shift from getting business and civil society to provide 'advice' on the implementation of anti-corruption strategy to the executive arm of government, to facilitating the ability of oversight bodies and these sectors to hold the executive and public administration to account for their implementation of these strategies.

Among other things, this would require the composition of the government delegation on the Forum to be altered to include representation by constitutional bodies and parliamentary oversight committees. It would also require the introduction of a hierarchical relationship within the NACF, in line with the constitutional separation of powers. In these terms the executive and administrative arms of government would be required to report back to parliamentary and constitutional oversight body (as well as business and civil society) representatives sitting on the Forum on their progress in implementing anti-corruption initiatives.

Given its current structure and focus the NACF is unlikely to add value to the existing anti-corruption efforts of any sector (short of assisting in the process of raising public awareness). In order for the NACF to ensure such value-add it would need to be transformed into a vehicle through which unresolved cases of corruption and maladministration in each sector could be reported and addressed. It could thereby act as a reliable channel through which successes in the resolution of cases could credibly be communicated back to the public to enhance their confidence in the integrity of politicians, officials and civic leaders.

Such a focus would assist in the process of holding those responsible for civil and criminal resolution of corruption and maladministration cases accountable for their performance. This recommendation, however, presupposes the existence of effective mechanisms for identifying and addressing conflicts of interest and corruption within each sector. In instances (specifically, within civil society and the private sector) where such mechanisms do not exist, the NACF should assist in facilitating their establishment. But in those instances, such as in the public sector, where constitutional mechanisms have been established but are not functioning effectively, the NACF should serve the primary purpose of strengthening these bodies. This as opposed to setting itself up as an alternative to, or means of bypassing, them. In particular it should assist in raising public awareness around the functions of oversight bodies, and help to strengthen their work by providing them with up-to-date research and information on the performance of government departments.

The new challenge: building effective democratic oversight - For the above reasons the focus of civil society anti-corruption advocacy needs to be re-directed toward strengthening the development of effective parliamentary and constitutional oversight of government. Civil society's current strategy of partnering with the executive in a bid to ensure the implementation of government policy has necessarily led to the withholding of criticism of the government executive.

By maintaining their independence from the executive and the public administration, and by helping to monitor the performance of these arms of government, anti-corruption activists and civil society research organizations can help oversight bodies take the necessary steps to ensure that government policies are implemented.

But for this to happen CSOs need to take on board new notions of advocacy and engagement with government which are based on the principle of accountability. They also need to begin to make better use of South Africa's new Constitutional and public expenditure management framework in order to help ensure that public resources are used more effectively. This will require CSOs and social activists to adopt new skills to analyse and critique government's budget priorities, expenditure trends, business plans and actual performance in delivering public services. It will also require a move away from a primary preoccupation with policy formulation on the part of civil society research and advocacy organizations to refocus on their attentions on the enforcement of legislative controls over public expenditure and on monitoring the nuts and bolts of actual service provision.

As long as anti-corruption advocacy organizations and oversight bodies continue to interpret accountability as an interpersonal favour to be politely requested from

individual members of the executive and senior officials, the mistaken approach of 'silent diplomacy' around high profile cases of corruption and maladministration will continue. The net result of this approach will be a set of comfortable elite relationships between civil society 'advocacy' specialists and government officials within ineffective 'talk shops' such as the current NACF. These relationships will inevitably be forged at the expense of the strengthening of existing democratic oversight institutions.

Whilst the ability of civil society to draw on 'allies' and ex-'comrades' in government may have been a useful means to obtain support for proposed legislative and policy amendments during periods of intense policy and legislative formulation this period has long since passed. The new priority for all sectors of South African society is to ensure the implementation and enforcement of these regulatory provisions. This means working to ensure the effective functioning of parliamentary committees and oversight institutions as a whole, such that these structures outlast the individuals (and political allegiances) that constitute them at any given point in time. Only on this basis can a sustainable set of mechanisms for ensuring accountability and controlling corruption in South Africa be built.

## 16.2 ETHICS AND PREVENTION OF CORRUPTION IN THE PUBLIC SECTOR BY MR SHAUKET FAKIE<sup>46</sup>

### INTRODUCTION

Corruption and financial misconduct, amongst others, can be viewed as obstacles to economic and social development of the South African economy, which ultimately impact negatively on our society and threaten good governance. These in turn erode stability and trust, and damage the ethos of a democratic government. It is a vicious circle... The macro-economic and social costs are immense. Fraud and corruption cost the country in the region of R40 to R50 billion in 2003. (only those reported) – many cases are not reported.

To augment my audit function I deemed it necessary to create an investigations unit to look into issues of proberty and financial misconduct. This additional function has been entrenched in the new Public Audit Act, 2004 (Act No. 25 of 2004).

What is corruption? The Prevention and Combating of Corrupt Activities Act, 2004 defines the term 'corruption' as any person who-

- accepts or agrees or offers to accept any gratification from any person, or
- gives or agrees or offers to give to any other person any gratification,

<sup>46</sup> Shauket Fakie is the Auditor-General.

in order to act in a manner-

- that amounts to the illegal, dishonest, unauthorised, incomplete, or biased; or
- designed to achieve an unjustified result;

What is Financial misconduct? This is detailed in the PFMA and the MFMA as follows: specific non-compliance with such legislation is found to be willful or negligent.

### **EXPECTATION GAP**

Currently there appears to be an expectation gap as to what the functions of audit and management are in terms of financial misconduct. The responsibilities of the Auditor-General(AG) and management are outlined as follows:

- **Management responsibility** - The primary responsibility of management for the prevention of financial misconduct rests with both those charged with the governance and the management of an entity. Management needs to set the proper tone, create and maintain a culture of honesty and high ethics and establish appropriate controls to prevent and detect financial misconduct within an entity. One of the most effective ways for management to prevent financial misconduct is to institute a sound system of internal control, (sound internal checks and balances).
- **Auditor-General responsibility** - The Auditor-General is primarily responsible to audit the financial statements, accounts and financial management of entities in the public sector as prescribed in the Public Audit Act, 2004.
- **Expectation that the external audit should prevent and detect financial misconduct** - There appears to be a general expectation that external auditors are responsible for the prevention and detection of financial misconduct. When an external audit is performed, it is based on audit standards to provide reasonable assurance that the financial statements are a fair representation of the affairs and transactions of an entity for a specific period. This does not require the external auditor to provide ultimate assurance that the transactions are free from financial misconduct. However, certain additional procedures are performed when financial misconduct is identified during an audit to quantify the impact thereof on the fair presentation of the financial statements.

## FINDINGS OF THE AUDITOR-GENERAL IN 2003

During this period the following was found that could relate to financial misconduct as contained in the PFMA and the MFMA:

Irregular expenditure : R 30,2 million  
Unauthorised expenditure : R 111,5 million  
Fruitless and wasteful expenditure: R 0,4 million

This represents 0,1% of the total expenditure of the national departments for the 2003/04 financial year.

During investigations that were conducted, including performing company searches for officials at specific national and provincial departments and municipalities, the AG found that only a limited number of employees had declared their own or their families' interest in businesses that transacted with their employers or other spheres of government.

### Ethics in the public sector

Ethics in the public sector is governed by a code of conduct that has been developed by the Public Service Commission.

- The code of conduct prescribes the manner in which employees must conduct themselves to achieve an acceptable level of ethics within the public sector.
- Declaration of interest : one of the ways in which the code of conduct instills acceptable ethics in the public sector is to require all employees to declare interests that they have in businesses transacting in the public sector.
- An enforced code of conduct should deal effectively with those suspected of transgressions. Effective action, as prescribed in the disciplinary policies and related legislation, needs to be complied with when dealing with transgressions. The mandatory reporting requirements as per the PFMA and the MFMA should also be complied with rigorously.

## CONCLUSION

In an attempt to combat irregular activities in all spheres of government, it is imperative that an effective code of conduct be implemented and followed. It is the responsibility of each and every South African to contribute to an ethical society to prevent irregular activities from taking place.