

AN INTEGRITY COMMISSION FOR SOUTH AFRICA

The idea is right, its time is now

The timeline

1994 – A new beginning under an interim Constitution

1997 – The final Constitution, our supreme law, comes into operation including:

Multi-party democracy under the rule of law [C 1]

Foundational values of openness, accountability and responsiveness [C 1]

Prohibition of laws and conduct inconsistent with the Constitution [C 2]

A state which must respect, protect, promote and fulfil the rights in the Bill of Rights [C 7(2)]

A transformational Bill of Rights, with rights that are justiciable including non-derogable core rights and sophisticated socio-economic rights [C Chapter 2]

A new public administration bound by lofty values and principles [C 195(1)] designed to ensure efficiency, effectiveness, ethics and accountability

An independent judiciary [C Chapter 8]

Independent state institutions supporting constitutional democracy [C Chapter 9]

An independent National Prosecuting Authority [C 179]

A new and legislated independent police complaints directorate [C 206(6)]

A national assembly to make laws and to hold the national executive to account while maintaining oversight over it [C 55]

A President who heads the national executive as well as being the Head of State [C 83] with extensive powers [C 84]

2001 Coming into operation of the Scorpions or Directorate of Special Operations a multi-disciplinary body within the NPA to prevent and combat organised crime and corruption

2004 Coming into operation of PRECCA, the Prevention and Combatting of Corrupt Activities Act [other anti-corruption legislation from the PFMA, the Public Finance Management Act, which puts flesh on the procurement provisions of C 217 to the Prevention of Organised Crime Act or POCA is conveniently collected on the home page of the Public Protector (www.pprotect.org.za)]

2009 Scorpions disbanded and replaced with Hawks or Directorate of Priority Crime Investigation.

2011 Hawks legislation struck down in Court as invalid for want of compliance with the Constitution on the basis that corruption is a human rights issue and that in the absence of effective and independent state machinery, the rights guaranteed in the Bill of Rights are threatened and the international obligations of the state are compromised. Court orders parliament to take

remedial action to create effective and independent anti-corruption entity.

2012 Purportedly remedial legislation tweaking the powers of the Hawks is passed in response to the court order

2014 For a second time the Court finds the remedial legislation unconstitutional in numerous respects, it corrects some of the errors in the legislation itself but significantly rejects arguments that independence is best achieved by locating the anti-corruption machinery of state outside of the police. Visit www.accountabilitynow.org.za Glenister case page for more details

2009 to date – the effectiveness and work-rate of the Hawks declines markedly, corruption increases and litigation concerning key personnel of the Hawks multiplies.

2014 – The first Head of the Hawks, General Anwa Dramat is suspended for his alleged involvement in illegal renditions

2015 – Dramat resigns and is replaced by Berning Ntlemeza

2016 Dramat is charged with kidnapping in relation to the alleged renditions dating back several years.

2016 The appointment of Ntlemeza is challenged in the High Court on the basis that it was irrational for

the national executive to appoint him due to his unsuitability for office based on adverse court findings against him.

2009 to date – the effectiveness and work-rate of the NPA declines, its leadership is captured by the executive thereby undermining its independence as can be gleaned from the career paths of Vusi Pikoli, Menzi Simelane and Mloxi Nxasana as well as the striking off applications pending against senior personnel of the NPA.

2015 A Pan African Conference on Combatting Corruption is held in Cape Town. It resolves that:

1. **Noting** the corrosive and pervasive nature of corruption in the world today, both in the private and in the public sectors.
2. **Identifying** corruption as a symptom of moral depravity, inimical to respect for and promotion of human rights, especially those of the poor and marginalised.
3. **Recognizing** that it is the duty of states, commercial enterprises and all right thinking people to prevent and combat corruption because corruption is generally a serious and deplorable crime.
4. **Appreciating** that constitutional democracy under the rule of law and social stability are not served when corruption is endemic.
5. **Noting** that the widely accepted criteria for effective and successful anti-corruption entities include specialization by, training of, independence for, guaranteed resources for and security of tenure of staff of anti-corruption entities.
6. **Acknowledging** that corruption in Africa has reached levels that threaten and undermine economic progress and growth throughout the continent despite the adoption and domestication of international, continental and regional instruments of international law that commit most countries in Africa to prevent, combat, investigate and prosecute corruption.
7. **Concluding that** corruption with impunity is inhibiting investment, increasing the cost of conducting business, undermining service delivery and exacerbating poverty in Africa and that corruption must be curbed to facilitate higher and more equitable economic growth.

CONFERENCE RESOLVES THAT:

- a. Governments should establish, strengthen, promote and, where appropriate, constitutionally entrench anti-corruption entities that comply with the criteria noted in clause 5 above, both structurally and operationally.

- b. In the formulation of policy and laws, corruption should universally be regarded as an infringement of human rights, which is both immoral and unethical.
- c. Existing anti-corruption entities should be assessed and reviewed for their structural and operational compliance with the criteria noted in clause 5 above for the purpose of making adjustments and reforms where they are required.
- d. Greater protection and incentivising of whistle-blowers, whether or not they are employees, should be considered in order to fortify this important aspect of the combating of corruption through appropriate investigation, prosecution and punishment of the corrupt in both the private and public sectors.
- e. The nurturing of anti-corruption entities, both in the state and in civil society, through public education and the stimulation of the necessary political will to regard corruption as immoral, unethical and as a crime that violates human rights and undermines constitutionalism, should be encouraged through all means available in all forms of media.
- f. A sanctions system, such as that developed by the World Bank, should be considered for implementation at the level of national jurisdiction in relation to all public procurement in whatever sphere of government, including procurement by state owned enterprises.
- g. The private sector and civil society organisations should be encouraged to adopt and implement anti-corruption compliance programmes as contemplated by the Organisation for Economic Co-operation and Development.
- h. Governments should establish a framework for the open and comprehensive declaration of assets and interests by all political office bearers and public officials.

The recipe for effective anti-corruption machinery of state.

The judgment of the Constitutional Court in *Glenister II* adopts the criteria recommended in the research of the OECD regarding anti-corruption entities. This judgment binds government.

There are five criteria known by the acronym STIRS:

1. Specialization as regards dedicated personnel, structure and operations

2. Training of personnel in the investigative, educational, preventative, prosecutorial and forensic skills required for effectiveness
3. Independence both operationally and institutionally from interference or influence of a political nature
4. Resources which are guaranteed and adequate to the task at hand at any given time, and
5. Security of tenure of office of the personnel of the anti-corruption entity.

Where the Hawks fall short of the binding criteria

- (a) The Hawks are not and do not purport to be dedicated to dealing with corruption and organised criminals involved in corrupt activities. Their mandate is far wider covering all manner of “priority crimes” as their official title indicates. This is not appropriate compliance with the specialization criterion.
- (b) The training of the Hawks compares unfavourably with that given to the Scorpions. Personnel of the latter were sent to Scotland Yard and the FBI for proper training.
- (c) It is in respect of independent operation and structure that the Hawks are most wanting. It is unthinkable that some or other cabinet minister would run a media conference for any of the Chapter Nine Institutions. They are too independent for that to occur. However, the Minister of Police and the

Minister of State Security recently saw fit to hold a media briefing on behalf of the Hawks in relation to their clash with the Minister of Finance over the alleged or supposed “rogue unit” in SARS. The structure of the Hawks as a unit within SAPS is incompatible with its independence. SAPS are not required to operate independently, the Hawks, to the extent that they are the premier corruption busters of the nation ought to be independent.

- (d) Resources for the Hawks ought to be determined directly by Parliament. They are not. This inhibits their capacity to do their work efficiently and effectively on an on-going basis.
- (e) Security of tenure of office has proved elusive for a large number of prominent Hawks, including the unit’s first Head. The appointment and removal machinery for a truly effective anti-corruption entity is far more secure than that in place for the Hawks.

Why an Integrity Commission?

- (i) In the absence of effective and independent machinery of state to deal properly with corrupt activities the implementation of the Bill of Rights by the state is placed in jeopardy and its obligation to respect, protect, promote and fulfil the rights in the Bill of Rights is compromised by the

syphoning off of state funds to the corrupt in amounts that run into billions each and every year.

- (ii) The capacity of the state to comply with its international obligations to maintain effective anti-corruption machinery is compromised
- (iii) The culture of impunity abroad in the country will mushroom unchecked without such machinery
- (iv) The capacity of the state to effect service delivery and even to pay grants and pensions, including parliamentary pensions, will be deleteriously affected by the failure to create an Integrity Commission
- (v) The dysfunction in the criminal justice administration will continue unless an Integrity Commission is appointed.

What constitutional amendment is required?

Accepting the need for an Integrity Commission involves relatively minor amendment to the provisions of Chapter Nine of the Constitution to create this Commission to function in a manner that complements the powers and functions of the Auditor General and the Public Protector.

The select committee of the National Assembly on Policing has been given draft legislation for this amendment and for the enabling legislation that should accompany it.

The governing principles for Chapter Nine Institutions as set out in C 181 would apply, without amendment other than to include its name, to the Integrity Commission.

Why does South Africa not already have an Integrity Commission?

Many African countries which are party to the same international treaties and agreements as South Africa meet their obligations under these international instruments by creating independent Anti-Corruption Commissions.

It is more positive to name the Commission with this function as an Integrity Commission in that with integrity there is no corruption.

Thus far South Africa has resisted the trend elsewhere on the continent for reasons that do not stand up to sound legal or political scrutiny. There has been an absence of the political will necessary to stand up to corruption in high places and a closing of ranks behind leaders whose integrity may be open to doubt or suspicion.

The task of this Committee is to persuade the legislature that it is necessary, in the exercise of maintaining oversight over the national executive and exacting accountability from it that the formation of an Integrity Commission is the best way forward to a corruption free country in which the Bill of Rights is properly implemented, services are delivered effectively and efficiently and a better life for all is achieved due to economic growth that results from the attractiveness of the country as a

destination for investment whether from local or foreign sources.

The adoption of the proposal that an Integrity Commission be formed is the best antidote to a financial ratings downgrade that is available at this delicate time in a dangerous year for the economic well-being of South Africa.

Accountability Now
15 April 2016.