

MEMORANDUM ON THE OBJECTS OF THE PREVENTION AND COMBATING OF CORRUPTION BILL

1. BACKGROUND TO AND OBJECTS OF BILL

1.1 Since the enactment in 1992 of legislation dealing with corruption, various proposals have been received relating to the amendment of this legislation. For example, it has been suggested that the common law crime of bribery be re-instated and further that-

(a) the crime of corruption should be broadened to cover all agents, public or private; and

(b) the legislation should apply extra-territorially in order to cover any gifts given or received outside our borders.

It has also been suggested that "anti-corruption legislation" should create a crime when public officials are used or manipulated to commit irregularities.

1.2 Rather than amending the Corruption Act, 1992 (Act No. 94 of 1992), on a piece-meal basis, the Bill aims at giving effect to recommendations emanating from a total review of the current legislation. This will contribute to Government's initiatives in developing an overall anti-corruption strategy. The provisions contained in the Bill follow the trend of modern international legislation, namely, the "unbundling" of corruption, in terms of which various specific corrupt actions and corrupt practices are defined and prohibited.

Following the trend of modern legislation internationally, the Bill envisages the incorporation and development of a number of different provisions regarding various types of corrupt practices. Some of the important provisions of the Bill are highlighted hereunder:

1.3.1 Part 1 of the Bill (clause 3) creates the general offence of corruption and applies to any person in the public or private sector. In terms of this provision any person is guilty of the offence of corruption who accepts or agrees or offers to accept any gratification from any other person, or who gives or agrees or offers to give to any other person any gratification, in order to act, personally or by influencing another person so to act, in a manner that amounts to, amongst others, the illegal, dishonest, unauthorised, incomplete, or biased performance of any functions arising out of a constitutional, statutory, contractual or any other legal obligation or that amounts to the abuse of a position of authority, breach of trust or the violation of a legal duty or a set of rules. The word "gratification" has been defined to include a wide range of benefits and avoidance of losses. For a contravention of this provision, clause 26(1) provides, in the case of a sentence to be imposed by a High Court, for imprisonment up to a period for imprisonment for life and in the case of a sentence to be imposed by a regional court, to a fine or to imprisonment for a period not exceeding 18 years.

1.3.2 Part 2 of the Bill (clauses 4 to 9) provides for offences in respect of corrupt activities relating to specific persons. These offences include offences relating to public officers, foreign public officials, agents, members of the legislative authority, judicial officers, and members of the prosecuting authority. The penalty for a contravention of any of these provisions is the same as for the general offence of corruption.

1.3.3 Part 3 (clause 10) aims at replacing the common law crime of bribery. Clause 10 prohibits the receiving and offering of unauthorised gratification by or to a person who is party to an employment relationship. Whereas the common law crime of bribery only applies to persons in the public sector, the offence in clause 10 aims at also applying to persons who are party to an employment relationship in the private sector. The penalty for this offence is the same as for the general offence of corruption.

1.3.4 Part 4 of the Bill (clauses 11 to 15) provides for offences in respect of corrupt activities relating to specific matters. These offences include offences in respect of corrupt activities relating to the testimony of witnesses and evidential material during certain proceedings, contracts, the procuring and withdrawal of tenders, auctions, sporting events and gambling games and games of chance. The penalty for any of the offences in Part 4, is the same as for the general offence of corruption.

1.3.5 Part 5 of the Bill (clauses 17 to 19) creates offences relating to possible conflict of interest and other unacceptable conduct. In terms of clause 17(1) any public officer who acquires or holds a private interest in any contract, agreement or investment emanating from or connected with the public body in which he or she is employed or which is made on account of that public body, is guilty of an offence. This offence does not apply, amongst others, to a public officer who acquires or holds such interest as a shareholder of a listed company or whose conditions of employment does not prohibit him or her from acquiring or holding such an interest. Clause 18 deals with the intimidation and improper inducement of witnesses and clause 19 deals with the intentional interference with, hindering or obstruction of the investigation of and offence. The maximum penalty for the contravention of an offence in clauses 17(1) and 19, is 10 years imprisonment, and for an offence in clause 18 is the same as for the general offence of corruption, namely, imprisonment for life.

1.3.6 Part 6 of the Bill provides for offences relating to corrupt activities. This includes the offence of accessory to or after an offence (clause 20), and the attempt, conspiracy and inducing another person to commit an offence (clause 21).

1.3.7 Chapter 3 of the Bill provides for investigations regarding the possession of property relating to corrupt activities. In the first instance clause 22 provides for an investigation procedure in terms of Chapter 5 of the National Prosecuting Authority Act, 1998, in respect of property that may have been used in the commission, or for the purpose of or in connection with the commission, of an offence under Chapter 2 or property that may have facilitated the commission of such an offence, or enabled any person or entity to commit such an offence, or provided financial or economic support to a person or entity in the commission of such an offence. In the second instance clause 23 provides for the application by the National Director of Public Prosecutions, and the issuing of an investigation direction by a judge in respect of the possession of property disproportionate to a person's present or past known sources of income or assets. The National Director may-

(a) summon the suspect or any other person, specified in the investigation direction, who is believed to be able to furnish any information relating to the property in his or her possession or under his or her control, to appear before him or her or a person authorised thereto, at a time and place specified in the summons, and to be questioned or to produce that property;

(b) question that suspect or other person, under oath or affirmation, and examine or retain for further examination or for safe custody such property; or

(c) enter any premises where the suspect is or is suspected to be and there inspect and search the premises, examine and seize any property found on the premises which has a bearing on the investigation in question.

Any person who refuses or fails to give any information or explanation when required to do so in terms of the above provisions, is guilty of an offence and liable to a fine or to imprisonment for a period not exceeding 10 years.

1.3.8 Clause 24 provides for the application of a presumption, subject to strict requirements. The provisions of this presumption are in line with the guidelines laid down by the Constitutional Court in recent decisions. Clause 25 rules out the raising of certain offences by an accused person. This clause provides, amongst others, that where an accused person who is charged with an offence under Part 1, 2, 3, or 4, or section 20 or 21 (in so far as it relates to the aforementioned offences), it is not a valid defence for that accused person to contend that he or she did not have the power, right or opportunity to perform the act in relation to which the gratification was given, accepted or offered; or that he or she accepted the gratification without intending to perform the act in relation to which the gratification was given, accepted or offered; or that he or she failed to perform the act in relation to which the gratification was given, accepted or offered.

1.3.9 In terms of clause 27 the National Director of Public Prosecutions, a Deputy Director or a Director must authorised the institution of a prosecution in respect of a contravention of clause 17(1) (the offence relating to the acquisition of a private interest in a contract of a

public body), clause 23(1)(b) (failure to answer questions or to give explanation regarding property) and clause 34(2) (failure by tenderer to disclose endorsement and certain offences).

1.3.10 Chapter 6 of the Bill provides for the establishment of a Register for Tender Defaulters. This Register is established in the Office of the National Treasury. In terms of clause 28 a court may, in respect of an accused who has been found guilty in respect of corrupt activities relating to tenders and contracts, in addition to imposing any other sentence, issue an order in terms of which the particulars of the convicted person or enterprise must be endorsed on the Register. This may include the endorsement of enterprises, partners, managers and directors involved in the commission of the offence. Furthermore, the National Treasury may or must, as the case may be, where the Register has been so endorsed, impose certain restrictions in respect of the persons or enterprises so endorsed. This includes the termination of an agreement, the determination of a period (between 5 and 10 years), for which the endorsement must remain on the Register and the disqualification relating to future tenders and contracts.

1.3.11 Clause 34 creates a duty to report certain corrupt transactions. It is important to note that this duty only applies to persons who hold a position of authority as defined in the Bill. Furthermore, the duty only applies where such a person knows or ought reasonably to have known or suspected that certain serious offences have been committed and where the offence involves an amount of R100 000, or more.

1.3.12 Clause 35 provides for extraterritorial jurisdiction in respect of offences committed in terms of this Act.

2. DEPARTMENTS/BODIES/PERSONS CONSULTED

The Department of Public Service and Administration, the Department of Finance, all Directors of Public Prosecutions, Unit Heads within the National Prosecuting Authority and members of the Policy Unit of the Department of Justice. The Portfolio Committee on Justice and Constitutional Development also hold public hearing regarding the contents of the Bill.

3. IMPLICATIONS FOR PROVINCES

None.

4. FINANCIAL IMPLICATIONS FOR STATE

None.

PARLIAMENTARY PROCEDURE

The State Law Advisers and the Department of Justice and Constitutional Development are of the view that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), since it contains no provisions to which the procedures set out in section 74 or 76 of the Constitution applies.