

# **A review of South Africa's national anti-corruption agencies**

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## A review of South Africa's national anti-corruption agencies

### EXECUTIVE SUMMARY

#### ABSTRACT

South Africa's complex political economy has given rise to several forms of corruption. These have many causes including the fact that the new social forces governing South Africa have historically been excluded from the economy, but now control state power in a context where the state is a major mechanism of accumulation. Anxious to deliver services to previously excluded and marginalized people, the new administrative cadre finds itself stifled by a bureaucratic, rule-bound public system. The state should not be bulldozed into panic reactions but it should, when appropriate, root out corruption through swift decisive action. Bribery, fraud, nepotism and systemic corruption are some of the forms corruption takes in contemporary South Africa. A number of state agencies are in place to combat and prevent corruption. To some extent mandates overlap, and some degree of rationalization is needed to promote effectiveness. Legislative reform, spearheaded by the Department of Justice, will be crucial in improving the efficacy of the agencies that are also hamstrung by a lack of resources and an unmanageable caseload. Central coordination of the activities of the agencies is essential for greater effectiveness of the agencies. The absence of such coordination is insufficient motivation for the establishment of a single anti-corruption agency. The strategic role of such an agency is not clear. Its establishment would be costly and is undesirable at present given other pressing priorities such as job creation, poverty alleviation and the fight against HIV/AIDS.

#### MANDATES

- This is a report of a review of the national anti-corruption agencies currently in operation in South Africa.
- It argues that performance by the agencies could be improved through better coordination and cooperation and concludes by suggesting that a single anti-corruption agency would not be appropriate at present.
- The organisations audited have very specific mandates, whether to recover public funds, audit state expenditure or to collect taxes. In certain cases (e.g. the Special Investigating Unit - SIU), the mandate is very broad and overlaps with other agencies' mandates such as that of the Public Protector and the Asset Forfeiture Unit.
- Dealing with corruption is not the primary function of any of the agencies discussed, apart from the SIU and the SAPS Anti-Corruption Unit.
- The Independent Complaints Directorate (ICD) is able to exercise discretion in terms of dealing with certain cases of misconduct, but corruption issues are not a priority as it struggles with a limited budget to fulfil its prime mandate, namely, investigations into deaths in police custody or as a result of police action.
- There are cases, such as abuse by the police, which can only be dealt with by the ICD.
- Recovery of public monies and assets can take place by both the Asset Forfeiture Unit (AFU) and the SIU.
- There are a number of agencies, including the PSC, the Auditor General and the Public Protector, which can conduct investigations, for example into maladministration. Such efforts need to be co-ordinated.
- Despite each agency seeing its role with respect to corruption issues as fairly unique, they all agree that there is an overlap between their functions and that rational principles should be applied to address the situation.

#### STRUCTURAL ARRANGEMENTS

- There is structural uncertainty as to the future of certain agencies.
- Clarity on the long-term future location of the SAPS Anti-Corruption

Unit is needed. The Commercial Branch of the SAPS is also awaiting clarity regarding its status within the restructured SAPS.

- The Directorate of Special Operations (DSO) now forms part of the National Directorate of Public Prosecutions (NDPP). However, the former Special Directorates on Organised Crime and Public Safety, Serious Economic Offences and Corruption have not been formally structured in terms of their operations, other than to reside under the DSO.
- The ministerial protocols that will spell out the operating arrangements between the DSO and other criminal justice components such as the SAPS have not been finalised.

#### **LEGISLATIVE REFORM**

- Legislative reform with regard to the Corruption Act is needed. The Department of Justice is reportedly completing work on new legislation.
- Proposals have been made for the Auditor-General's Act to be amended in order to bring it in line with the PFMA and to provide for new powers in terms of search and seizure.

#### **RESOURCE CONSTRAINTS**

- Few of the bodies audited believed they have sufficient financial and human resources with which to carry out their mandates.
- In particular, the ICD which has a blueprint of 500 staff and is only able to employ 100 with its budget, which in real terms has remained static, and the Office of the Public Protector, which has a blueprint of 200 staff and is only able to fill only half of these posts due to insufficient resources.
- Certain agencies, such as the DSO, have a very high budget allocation when compared with other bodies, such as the SAPS Commercial Crime Branch.
- Training is seen to be a top priority for all the agencies.
- Internal integrity mechanisms, other than screening of personnel, seem to be acquiring a greater significance.

#### **PUBLIC PERCEPTIONS AND INTERACTION**

- Levels of interaction with the public vary across agencies. This is an area requiring attention. It is vital that citizens are aware who can help in a particular instance. In this way wasteful interaction with agencies can be reduced.
- Public polling of agencies in terms of client satisfaction is starting to happen, although more needs to be done in this area.
- A negative consequence of the multiplicity of agencies is that it encourages "forum shopping" by a public anxious to secure a response to complaints.

#### **CASE LOADS**

- Information on cases, particularly with regard to corruption-related issues, is difficult to obtain. For instance, figures on cases resulting in a conviction are not gathered in the National Prosecuting Authority.
- Certain agencies such as the ICD and SAPS Anti-Corruption Unit as well as SAPS Commercial Crime Branch stand out in terms of having readily available figures. The type of corruption cases being dealt with by agencies is often not clearly specified.
- There are significant backlogs of corruption-related cases (particularly within the SAPS and SIU) that need to be dealt with as a matter of urgency. (The Auditor-General's Forensic Auditing Division is busy with a project in this regard).

- Specialised Commercial Crime courts have offered some relief to SAPS and DSO in terms of dealing effectively with commercial crime cases and there are plans to extend these.
- Many cases land up at an agency not best placed to deal with the complaint – this is particularly true for the Public Protector, the Public Service Commission, ICD and the DSO.
- The referral of such cases amongst agencies is seemingly not tracked in a formal comprehensive fashion, other than the ICD, which keeps a record of referrals. There is no record as to what the outcome of referred cases are, largely limited by lack of follow-up capacity.

**PERFORMANCE**

- Performance and effectiveness indicators between the agencies vary according to their specific mandate.
- Performance could be improved through better use of shared resources based on a clearer understanding of the strategic roles and responsibilities of the respective agencies.

**COORDINATION**

- Interaction between certain agencies does take place, in particular between certain investigating agencies such as the SAPS and the DSO, and in relation to the prosecuting authorities that have a monopoly over the prosecution of cases.
- There is however, no formal agreement with regard to the co-ordination of case-related information.
- The need for formal co-ordination arrangements is emphasized by all agencies. A draft Memorandum of Co-operation that tried to address this issue was not signed in 1999.
- The PSC has signed a Memorandum of Understanding with the Office of the Auditor General.

**THE NEED FOR A SINGLE AGENCY**

- There are differing views on the establishment of a single anti-corruption agency. While there is some support for the idea, real concerns exist about its location, funding and mandate. A single agency should not be encouraged simply because current mechanisms are not functioning optimally.
- It is important to establish whether existing agency or agencies could not be restructured and transformed before planning the establishment of a new body.
- Risks involved in establishing a new single agency include the addition of another layer of bureaucracy to the law enforcement sector and the diversion of already scarce resources from existing agencies and other government priorities including job creation, poverty alleviation and HIV/AIDS programmes.
- The priority should be to retain the current agencies with some rationalisation while making them more effective by formalising co-ordination arrangements.

**ACRONYMS**

AFU	ASSET FORFEITURE UNIT
AG	AUDITOR-GENERAL
DPSA	DEPARTMENT OF PUBLIC SERVICE AND ADMINISTRATION
DSO	DIRECTORATE OF SPECIAL OPERATIONS (SCORPIONS)
IDOC	INVESTIGATING DIRECTORATE: ORGANISED CRIME
IDCOR	INVESTIGATING DIRECTORATE: CORRUPTION
IDSEO	INVESTIGATING DIRECTORATE: SERIOUS ECONOMIC OFFENCES
NACF	NATIONAL ANTI-CORRUPTION FORUM
NDPP	NATIONAL DIRECTORATE OF PUBLIC PROSECUTIONS
NPA	NATIONAL PROSECUTING AUTHORITY
PP	PUBLIC PROTECTOR
PSC	PUBLIC SERVICE COMMISSION
SAPS	SOUTH AFRICAN POLICE SERVICES
SAPS ACU	SOUTH AFRICAN POLICE SERVICES: ANTI-CORRUPTION UNIT
SARS	SOUTH AFRICAN REVENUE SERVICES
SIU	SPECIAL INVESTIGATING UNIT

# CHAPTER 1

## A REVIEW OF SOUTH AFRICA'S NATIONAL ANTI-CORRUPTION AGENCIES

Background	<p>In October 1997, Cabinet noted that “consultation with existing anti-corruption agencies in government to reduce fragmentation” was necessary in the ongoing fight against corruption. A year later, the Public Sector Anti-Corruption Conference resolved that Government should explore the need for a “co-ordination structure while improving and strengthening the role of existing agencies” and similarly, that it should “review the scope and jurisdiction of existing agencies.” The Public Service Commission, as an oversight body responsible for monitoring and evaluation has been mandated to play an active role in evaluating the effectiveness of anti-corruption agencies and to suggest improvements where necessary. Hence the initiation of a national audit of the relevant state agencies involved in combating corruption.</p>
Aims of this project	<ul style="list-style-type: none"><li>• To compile a comprehensive report auditing the national anti-corruption agencies</li><li>• To suggest how the various anti-corruption agencies could function more effectively, including the need for rationalisation if necessary.</li><li>• To assess whether Government should consider the establishment of the national anti-corruption strategy.</li></ul>
Outcomes	<p>This report will inform Government about the effectiveness of existing anti-corruption agencies and the steps it should consider in implementing its national strategy against corruption. The report also shows clearly how the issue of fragmentation is to be addressed in future.</p>
Scope of the report	<p>The report includes a detailed discussion of anti-corruption agencies grouped together for discussion in the following way:</p> <p><b>Constitutional and Oversight Bodies</b></p> <ul style="list-style-type: none"><li>• Office of the Auditor-General</li><li>• Office of the Public Protector</li><li>• Office of the Public Service Commission</li><li>• Independent Complaints Directorate</li></ul> <p><b>Criminal Justice Agencies<sup>1</sup></b></p> <ul style="list-style-type: none"><li>• SAPS Commercial Crime Unit</li><li>• SAPS Anti-Corruption Unit</li><li>• National Prosecuting Authority</li><li>• Directorate of Serious Operations</li><li>• Asset Forfeiture Unit</li><li>• Special Investigating Unit</li></ul>

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<sup>1</sup> The National Crime Prevention Strategy originally included in the Terms of Reference has been excluded from the final report as it is no longer current policy.

- Other Role-players
- Department of Public Service and Administration
  - National Intelligence Agency
  - South African Revenue Services
  - National Anti-Corruption Forum

The role each of these agencies play in the fight against corruption is spelled out in individual reports making up the body of this document. Please see the Appendix for the interview schedule, the list of people consulted and their contact details.

The final chapter of the report aims to capture common problems identified in the current arrangement of anti-corruption agencies and provide some direction as to how they can function more effectively. Questions of rationalisation are addressed alongside a serious consideration of what would need to be in place for South Africa to go the route of establishing a single independent anti-corruption agency.

Research method

Two principal research methods were used to complete this report.

- Document research and analysis: This focused largely on an analysis of annual reports and other relevant documents provided by the agencies under review; and
- In depth interviews: Based on a standard interview schedule a number of intensive interviews were undertaken by Ms Lala Camerer, a senior researcher from the Institute of Security Studies, who also assisted with drafting the final report.

Due to time constraints and for other reasons interviews were not conducted with all the agencies audited in the report.

Key focus areas for the audit were:

- Legislation, mandate and jurisdiction
- Budgets and Resources and
- Cases, results and outcomes

It has not been possible to present all the information collected through the document review and interviews. This would have made the final report too cumbersome. Another problem in the report is that information with respect to key indicators is uneven. For example, in some cases the budget figures over the last three years are reflected while in others the Medium Term Expenditure Framework figures are used. Ideally, similar indicators should have been used with respect to each agency. Such information was not always forthcoming.

Understanding corruption in the South African context

South Africa's complex political economy has given rise to several forms of corruption. These have many causes including the fact that the new social forces governing South Africa have historically been excluded from the economy, but now control state power in a context where the state is a major mechanism of accumulation.

Anxious to deliver services to previously excluded and marginalized people, the new administrative cadre finds itself stifled by a bureaucratic, rule-bound public system. Some management actions, taken in the interests of transformation and empowerment are often construed loosely or through

deliberate distortion as corruption, by sensationalist media reporting.

The state should not be bulldozed into panic reactions but it should, when appropriate, root out corruption through swift decisive action. Bribery, fraud, nepotism and systemic corruption are some of the forms corruption takes in contemporary South Africa.

South African corruption is a manifestation of many problematic social dynamics and tensions. Combating it requires a dynamic and multi-faceted strategy that uses scarce resources effectively on a constructive, shared basis. The development of a simple, clear national strategy for combating corruption that makes use of existing capacity is more of a priority than the creation of a single anti-corruption agency.

A key element of such a national strategy needs to be efforts to prevent corruption and to make society corruption intolerant. This will require long-term education and awareness raising. Sensationalist moral crusades that are punitive and media-driven do little to address the realities of the problem and often serve to polarise people and confuse issues.

## CHAPTER 2: OFFICE OF THE AUDITOR-GENERAL

### Chapter overview

- The Office of the Auditor-General has a constitutional mandate to audit and report on the accounts, financial statements and financial management of all public sector agencies.
- The independence of the Auditor General is guaranteed by the Constitution.
- The Auditor General reports to parliament through the Standing Committee on Public Accounts.
- The Office is financially independent in so far as various local and international auditees generate income.
- There are some problems with regards to the recovery of audit fees from local authorities, which may require national intervention.
- Training is a priority for the Office to sustain its professional image.
- Interaction with the public with regards to educating citizens on the role and functions of the Auditor-General has received focused attention.
- The Office of the Auditor-General is not an anti-corruption agency and does not see itself as having a primary mandate with respect to fighting corruption.
- The role of the Office with respect to corruption is mainly that of preventative action through its very small forensic auditing division.
- The forensic auditing division interacts with other agencies in a supportive role into the investigation of alleged corruption.
- The functions of the Auditor-general overlap in some respect with other agencies such as the SIU.

#### 1. Nature and source of the agency's responsibility

**Vision:** We are the independent world-class provider of public sector audit and related value-adding services.

**Mission:** Providing independent and objective quality audit and related value adding services in the management of resources, thereby enhancing good governance in the public sector.

**Mandate:** The Auditor-General conducts audits of government departments and other public sector bodies in order to provide assurance to Parliament that these accountable entities have achieved their financial objectives and managed their financial affairs according to sound financial principles and in accordance with the legal framework created by Parliament.

In terms of section 188 of the Constitution of the Republic of South Africa, 1996 (Act No 108 of 1996), the functions of Auditor-General are set out as follows:

1. 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 or accounting entity required by national or provincial legislation to be audited by the Auditor-General.
2. In addition to the duties prescribed in subsection (1), and subject to any legislation, the Auditor-General may audit and report on the accounts, financial statements and financial management of:
  - any institution funded from the National Revenue Fund or a Provincial Revenue Fund or by a municipality; or
  - any institution that is authorised in terms of any law to receive money for a public purpose.

**Legislation:** The Auditor-General has been established as a Chapter 9 Institution in terms of Section 181 of the Constitution of the Republic of South Africa, Act no 108 of 1996.

The Auditor-General Act (Act No. 12 of 1995) further sets out the powers and functions of the Auditor-General in terms of the Constitution and other legislation. Following the Constitution of 1996, the Office of the Auditor-General recognised a need to review the Auditor-General Act of 1995. A task team has been appointed to undertake the review process. The Auditor-General Act is currently being reviewed to:

1. align it with the Constitution and with any other relevant, newly promulgated legislation;
2. improve specific operational provisions; and
3. bring the provision of services into line with the latest trends in international public sector auditing.

The Audit Arrangements Act of 1992 established the Office of the Auditor-General and the link between the OAG and the Auditor-General. This act covers all aspects of the OAG and the high-level regulations applicable. Also contained in this Act is the link between the OAG and the Audit Commission, a body set up to act as the board of the Office of the Auditor-General. Clearly demonstrated by this Act is the OAG, which is separate from government with its own decision-making processes as well as its own revenue generating means. The Audit Arrangements Act is in the process of being reviewed to align with the new Auditor-General Act, the strategy of the OAG and the professional environment.

The Public Finance Management Act No 1 of 1999 provides for some additional functions of the Auditor-General. For example, Section 58(3) states that a public entity must consult the Auditor-General of the appointment of an auditor in terms of subsection (2).

## 2. Institutional and operational arrangements

**Independence of the Auditor General:** The independence of the Auditor-General is entrenched in the Constitution of the Republic of South Africa. The Constitution was required by Constitutional Principle XXIV to provide for, and safeguard, an independent and impartial Auditor-General in the interests of the maintenance of effective public finance and administration

and a high standard of ethics in the public service. It is also constitutionally entrenched that no person or organ of state may interfere with the functioning of the Auditor-General. This enables the Auditor-General to be objective and to report without fear or favour.

**Appointment Mechanisms:** The Constitution provides that the Auditor-General be nominated by a committee of the National Assembly composed of members of all parties represented in the National Assembly, and approved by a resolution supported by 60 per cent of all members of the National Assembly. Furthermore, the Auditor-General's term of office is not renewable and fixed for a negotiable term of between five to ten years to ensure his or her independence, and he or she may only be removed from office on very specific grounds (misconduct, incapacity or incompetence). Such a dismissal requires the adoption of a resolution by the National Assembly by a two-thirds majority before the President can remove the Auditor-General from office.

The current Auditor-General Mr Shauket Fakie has been appointed for a non-renewable period of seven years from 1999/2000.

**Reporting and Accountability:** The Auditor-General is accountable to Parliament and reports to the National Assembly through the Standing Committee on Public Accounts (SCOPA). The Audit Commission oversees the operations of the Office of the Auditor-General. The accounts of the Auditor General are reviewed on a quarterly basis by the Audit Commission. Financial statements are submitted annually and audited by an independent firm which doesn't do any contract work for the office.

SCOPA enables the National Assembly, in respect of financial management, to fulfil its constitutional obligation to scrutinise and oversee executive action. Section 55(2) of the Constitution, on the role and powers of the National Assembly, states: "the National Assembly must provide for mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it". The Committee assesses financial administration in the national public sector by holding accounting authorities accountable for their spending of taxpayers' money and their stewardship over public assets in order to ensure, economical and effective government spending.

The Committee therefore strives to ensure that institutions at national level:

- constantly improve the quality of their financial management, especially internal control systems;
- remain within their budgetary constraints, and expend funds in accordance with the purposes determined by Parliament;
- provide value for money through the services rendered to the public and the State; and
- are exposed and held accountable if they transgress the law as it pertains to financial management.

**Powers and Functions:** There are various types of audit activities conducted by the office:

- Regularity auditing – checking that the financial statements are a fair representation of the financial position of the audited body;

- Performance Auditing – checking that resources are purchased economically, used properly and that effective management systems and controls are in place;
- Computer Auditing – Identifying the strengths and areas of potential misuse of computer systems for data entry and financial transactions;
- Environmental Auditing – supporting food environmental protection and management practices through an audit approach to sustainable resource development;
- Forensic Auditing – to facilitate the prevention, detection and investigation of economic crime.
- Transversal audit issues include:
- The Public Finance Management Act and the submission of financial statements which provides time-frames for the submission of financial statements, namely two months after the end of a financial year, which the Auditor-General will monitor and report on.
- Unauthorised expenditure (during the course of the financial year ending March 31 2000, R198 066 209 was revealed and reported in terms of the
- Budget auditing – the decrease in amount not utilised in comparison with the previous year indicates that it is possible that better planning and budgetary controls are in place.

**Special Audit Investigations:** A special report was published on transport-related agencies, authorities and funds and a special review of the selection process of the strategic defence packages for the acquisition of armaments at the Department of Defence was performed. An independent expert forensic investigation into this matter is currently being conducted and four staff members from the forensic auditing division are working on this.

**Forensic Auditing:** A forensic auditing capacity was established in 1997, based on the increasing level and negative impact of economic crime on the public accountability process, which obliges the Office to report on such crime within the public sector. The objective of the Office of the Auditor-General with respect to forensic auditing is to:

- Determine the nature and extent of the perpetration of economic crime and the adequacy and effectiveness of measures that should have either prevented or detected it;
- Facilitate the investigation of economic crime in general by providing support to the relevant investigating and/or prosecuting institutions (by handing over cases and providing accounting and auditing skills).

This focus is in line with recommendations that followed from the International Congress of Supreme Audit Institutions (INCOSAI) in November 1998 where some of the guidelines agreed upon included:

- Taking a more active role in evaluating the efficiency and effectiveness of financial and internal control systems;
- Focusing audit strategy more on areas prone to fraud and corruption;
- Developing high-risk indicators for fraud; and
- Closely co-operating and exchanging information with national and international bodies fighting corruption.

Proactive and reactive strategies have been developed by the forensic auditing division to address corruption.

The **proactive strategy** is aimed at preventing economic crime by promoting an overall fraud awareness culture in the public sector through, inter alia, publications, presentations/workshops and participation in relevant national and international initiatives. The following aspects have been identified to minimise the risk of economic crime:

- Strong financial management systems
- Effective internal controls
- Adequate public awareness (and acceptable standards of conduct)

The **reactive strategy** focuses on the investigation of allegations of economic crime. Allegations submitted to the Auditor General's office are confirmed or refuted by collecting and submitting substantive evidence and findings are reported through the normal audit process or, when applicable, are handed over to institutions with investigating and prosecuting powers.

### 3. Resources and capacity

**Finance:** The Office of the Auditor-General is financially independent insofar as audit income is recovered from the auditees on the basis of actual time spent auditing. Audits of the office are billed on the basis of the audit tariff (rates per hour), which in terms of the Audit Arrangements Act is competitive, and in actual fact cheaper than what the private sector charges.

Supplementary financing in the form of parliamentary appropriation is confined to direct assistance to small auditees. During the year under review (1999/2000) R6.3million (including Vat) was received from the Department of State Expenditure in this respect, of which R1,4million (excluding Vat) is reflected as work in progress.

#### Table of Audit Income

	1999-2000		1998-1999	
<b>Auditees</b>	<b>Rm</b>	<b>%</b>	<b>Rm</b>	<b>%</b>
Government Departments and Provinces	212,9	66	174,7	61
Local Authorities	64,2	20	66,2	23
Statutory Bodies	37,6	12	38,7	14
Assistance to small auditees	4,2	1	4,5	21,3
WHO	3,9	1		<1
<b>TOTAL</b>	<b>322.8</b>	<b>100</b>	<b>284.1</b>	<b>100</b>

Whilst there was a 13% increase in income from the previous financial year, problems experienced in the recovery of audit fees from some local authorities resulted in debtors increasing by 42% when compared with the previous year. The serious financial difficulties experienced by local authorities have put the cash reserves of the Office under tremendous pressure and assistance from the national government to recover these fees requires urgent attention.

**Human Resources:** In mid June 2001 there were about 1300 people working for the Office of the Auditor-General. Staff are paid market related

salaries, which are reviewed annually.

Category	March 2000		March 1999	
	Approved	Filled	Approved	Filled
Executive senior management	128	115	124	113
Middle management	277	244	267	238
Operational	1153	928	1134	917
Total	1558	1287	1525	1268

#### 4. Strategic issues facing the agency

**Training:** The office is making a serious and concerted effort to invest in training. According to the Office's Time Accounting System, during the previous financial year staff spent a total of 45 556 hours on formal training (in terms of the official curriculum) and an additional 32 607 hours on regional training.

**Internal Integrity:** The Office of the Auditor-General has a very strict interview process. NIA and the SAPS are used for security clearance of different post levels.

**Public Interaction:** All reports of the Auditor-General are published with national reports posted on the website ([www.agsa.co.za](http://www.agsa.co.za)). Various publications, in particular [AuditCom](#) go to government departments and provide information on the audit office as well as best practice guides on issues around fraud and efficiency as well as information on parliamentary resolutions. An outreach brochure has been published in several languages to make the public more aware of the office.

**Corruption-related Cases and Outcomes:** Whilst a figure of cases being dealt with nationally by the forensic auditing division is not available, Head Office is currently investigating 29 cases. These include amongst others fraud in the housing scheme in Gauteng, donor funds, tender board collusion and social services in Mpumalanga, misappropriation of funds from district councils in the Northern Province, corruption in the Post Office and the arms deal investigation. The status of these investigations was not readily available.

The Forensic Auditing division is currently conducting two proactive investigations:

- **Code of Conduct for Public Servants:** Questionnaires on the successful implementation of the code throughout the public service have been completed by some 95% of national government departments and the results will be especially valuable in assisting auditors in the prevention and detection of economic crime.
- **Backlog in investigations with investigating and prosecuting institutions:** Co-operation between the various investigating and prosecuting authorities is crucial to the successful investigation and prosecution of economic crime. In terms of providing support to these authorities the Forensic Auditing Component is investigating the backlog experienced with the investigation and prosecution of cases at these authorities (see appendix for progress report.)

5. Performance and effectiveness

**Effectiveness:** On the basis of the above figures it is difficult to assess the effectiveness of the Forensic Auditing division at dealing with corruption. The relative newness of the office (established in 1997) and the limited staff component (11 employees) need to be taken into account when making such an assessment. The division is aware of its limitations, which is why it has focused its efforts on proactive interventions.

The Office as a whole is in the process of developing performance indicators. Audit costs are the main performance indicator in that audit costs should not exceed 1% of the budget of the auditee. Another measure will be the responsibilities under the PFMA where the office has to bring out a report two months after receiving the financials, which is 3 months after year-end. i.e. 5 months after year end all the Auditor-General's reports (about 1400) need to be brought out.

6. Conclusion and recommendation

The primary role of the Auditor General and his Office is to audit and report to parliament within the areas of compliance and financial auditing. However, in line with international trends and because of increases in fraud and corruption (not only in the public sector) a small forensic auditing division has been established.

In performing its primary function the Office of the Auditor-General is however, well positioned to pick up on areas which could be tightened when it comes to preventing fraud and corruption and the main focus of the office in relation to corruption is an approach of prevention. During the interview, the Auditor-General expressed the following view on the Office's focus with respect to corruption:

“It is a new focus within the Office ... in the light of the challenges facing government can we as an Office allow the extent of fraud and corruption to take place which erodes the very fibre of democracy that the government has fought for? We've found that we have a role to play there.”

The several strategies to address economic crime and corruption by the Auditor General are premised on the following principles/understandings:

1. The Office as the external auditor of state institutions is not responsible for the prevention and detection of economic crime in the public sector, since this is the ultimate responsibility of management (Accounting Officers).
2. The Office acknowledges the roles played by other institutions in the prevention, detection and investigation of economic crime. Where possible, these institutions are supported by, inter alia, providing assistance and co-operation.
3. The Office plays an active role in supporting existing initiatives and programmes that aim to prevent corruption, such as the Public Service Task Team and National Anti-Corruption Forum initiatives.

The Auditor-General's Office deals with all government departments. In terms of interaction around corruption related issues there is informal co-operation with a number of key agencies including the Public Service Commission, the Public Protector, the SAPS and the National Directorate of Public Prosecutions. Cases of alleged corruption are referred to the

appropriate agency based on the nature of the complaint. For example when it comes to questions of unethical behaviour the case is referred to Public Protector. Co-ordination mechanisms between the Office and other agencies are informal although the experience of the Joint Investigating Team on the probe into the arms deal may have changed this.

Whilst positive co-operation is received from certain agencies such as the prosecuting authorities, some concerns were expressed at the interaction with the Directorate of Special Operations (where the former IDSEO now falls). Frustration was also expressed at the lack of timely responses. The Auditor-General's approach to dealing with cases is very professional and not always matched by that of other agencies who may experience large backlogs:

According to the Auditor-General "there is definitely overlapping" in terms of agencies: "There are definitely certain common things that any one of the four agencies can deal with and the question is who can do it most effectively." The Auditor-General pointed to the Memorandum of Understanding initiative that sought to establish "informal co-ordination and communication...exactly to avoid duplication of work." Co-ordination is definitely something that needs to be addressed.

#### **Reference Material**

- Interview with Shauket Fakie (Auditor-General), Herman Van Zyl (Executive Manager), Tanya Duvenage (Forensic Auditing).
- Constitution of the Republic of South Africa, Act 108 of 1996.
- Auditor General Act
- Audit Arrangements Act
- Annual Report of the Auditor-General 1999/2000
- Annual Report of the Auditor-General 1998/1999
- General Report of the Auditor General on the Accounts of National Government for year ended 31 March 1999
- General Report of the Auditor General on the Accounts of National Government for year ended 31 March 2000.
- Brochure: The Office of the Auditor-General: Its Public Role explained

## CHAPTER 3

# OFFICE OF THE PUBLIC PROTECTOR

### Chapter overview

- The Public Protector's mandate is to investigate and make recommendations to state departments on any conduct which may have resulted in prejudice to citizens i.e. acting as a buffer between the citizen and the state.
- The Office of the Public Protector is independent and accountable to parliament.
- Whilst better resourced than many of the agencies, the Public Protector's budget is insufficient to fulfil its constitutional mandate of being accessible to all citizens.
- The restricted budget of the Public Protector may hamper the independence as well as effective functioning of the Office.
- It is a concern that so many complaints made to the Office fall outside its jurisdiction.
- The case backlog of the Office is also concerning as well as the time-lag it takes to process cases.
- Some recommendations made by the Office seem to be followed through in an ad-hoc manner with political concerns overriding some other recommendations.
- The lack of formalised co-ordination mechanisms between agencies for case referrals of corruption-related cases as well as follow up/feedback mechanisms is unsatisfactory.
- Any proposals for a single agency approach to addressing corruption will need to locate this body in relation to chapter 9 institutions and not threaten their mandate.

#### 1. Nature and source of the agency's responsibility

**Mandate:** The Public Protector has 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.

The Public Protector shall in term of S4(a) of the Act be competent to investigate, on his or her own initiative or on receipt of a complaint, any alleged

1. maladministration in connection with the affairs of government at any level
2. abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;
3. improper dishonest act, or omission or corruption, with respect to public money;
4. improper or unlawful enrichment, or receipt or any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function; or
5. act or omission by a person in the employ of government at any level, or person performing a public function, which results in unlawful or improper prejudice to any other person.

The Public Protector cannot investigate:

- Court decisions, including convictions and sentences
- Matters occurring before 1 October 1995
- Complaints brought to the attention of the office more than two years after the date of the occurrence which gave rise to the complaint, unless there are exceptional circumstances

- Cases where the complainants failed to follow the prescribed grievance procedure of the offending institution.

**Legislation:** The enabling legislation of the office of the Public Protector is found in sections 181, 182, 183, 193 and 194 of Chapter 9 of the Constitution of the Republic of South Africa Act no 108 of 1996.

National legislation regulating the office is found in the Public Protector Act 23 of 1994. The Public Protector Act embroiders on the Constitution by spelling out that maladministration, abuse of power, improper conduct, undue delay, and an act resulting from improper prejudice to a person, may be investigated. The Public Protector Act no 23 of 1994 broadens the jurisdiction of the Public Protector to include any institution on which the state is the majority or controlling shareholder or any public entity as defined in the Public Finance Management Act. Such institutions include, for example, the major providers of electricity, telecommunications and postal services.

In 1998 the Public Protector Amendment Act No 133 of 1998 came in to operation to amend the Public Protector Act to bring it into line with the Constitution of the Republic of South Africa , 1996 and matters connected such as providing for the preliminary investigation stage.

## 2. Institutional and operational arrangements

**Independence of the Public Protector:** The basis for the independence of the Public Protector is found in the Constitution (section 181(2)) where it provides that the institution is independent, and subject only to the Constitution and the law. The Constitution furthermore prescribes that the Public Protector must be impartial and must exercise his/her powers and perform his/her functions without fear, favour or prejudice. It prohibits (section 181 (4) ) any person or organ of state to interfere with the functioning of the Public Protector and in fact enjoins (section 181(3)) organs of state to assist and to protect the office of the Public Protector to ensure its independence, impartiality, dignity and effectiveness.

**Appointment Mechanisms:** The President appoints the Public Protector in his or her capacity as Head of State, on the recommendation of the National Assembly, in terms of Chapter 9 section 193(5) of the Constitution. The recommended candidate requires a support vote of at least 60% of members of the national assembly. The Public Protector is required to be a South African citizen who is suitably qualified and experienced and has exhibited a reputation for honesty and integrity. The tenure of seven years is non-renewable (s183) and the removal from office only possible on the grounds of misconduct, incapacity or incompetence (S194 (1) and if there is a supporting vote of at least two thirds of the members of the Assembly (section 194(2) and (3)).

The office of the Public Protector came into being on 1 October 1995 with Adv Selby Baqwa appointed for a seven year period as the Public Protector of South Africa.

**Reporting and Accountability:** The Public Protector is accountable to the national assembly and must report on his/her activities and the performance of his/her functions to the assembly at least once a year. The Public Protector must, however, at any time submit a report to the National Assembly on the findings of a particular investigation if:

- He/she deems it necessary

- He/she deems it in the public interest
- It requires the urgent attention of, or an intervention by, the National Assembly;
- He/she is requested to by the Speaker of the National Assembly; or
- He/she is requested to do so by the chairperson of the National Council of Provinces.

Any report issued by the Public Protector must be open to the public unless exceptional circumstances require that a report be kept confidential. 20 special reports have been issued over the last 6 years, in addition to annual reports.

**Powers and Functions:** The Public Protector is neither an advocate for the complainant nor for the public authority concerned. He ascertains the facts of the case and reaches an impartial and independent conclusion on the merits of the complaint.

The office has the following core functions:

- To undertake investigations within its sphere of jurisdiction
- To provide administrative support for such investigations

During an investigation, the Public Protector may, if he considers it appropriate or necessary:

- Direct any person to appear before him to give evidence or to produce any document in his/her possession or under his/her control which, in the opinion of the Public Protector, has bearing on the matter being investigated, and may examine such person for that purpose.
- Request any person at any level of government, or performing a public function, or otherwise subject to his jurisdiction, to assist him in the performance of his duties with regard to a specific investigation; and
- Make recommendations and take appropriate remedial action.

Following such an investigation the Public Protector has to report on the conduct concerned and he/she can take appropriate remedial action. For example, recommendations can be made on how the situation in question should be rectified and how recurrence should be prevented (section 6(4)(c)(ii)).

In serious matters that, in the opinion of the Public Protector, require the attention of Parliament, the Public Protector can approach Parliament for assistance by means of a report. S 2 of the Act provides for the appointment of a committee by the National Assembly for the purposes of considering matters referred to it in terms of the Act. This creates a direct link between the Public Protector and Parliament for dealing with problems regarding the implementation of recommendations. For example, the Nel Committee set up after the investigations into Minister Penuell Maduna's allegations with regard to the former Auditor-General, Henri Kluever.

### 3. Resources and capacity

**Finance:** The budget of the Public Protector has steadily increased since its establishment in 1995. There is however a shortfall between the requested and approved budget:

Financial Year	Budget	Requested	Shortfall
1995/1996	R1 630 000		
1996/7	R4 168 000		
1997/8	R6 827 000		

1997/8	R6 827 000		
1998/1999	R7 438 000		
1999/2000	R15 399 000	R23 535 000	R8 136 000
2000/01	R23 969 000	R32 891 000	R8 922 000
2001/02	R29 371 000	R50 000 000	R20 629 000

This financial year, the office received R29 million instead of the R50 million requested. The requested budget would have been used to computerise the national and regional offices, pay for the rental of accommodation, urgently needed furniture and other sundry expenses. Money is also required to contribute towards funding the Arms Deal inquiry.

The Public Protector noted recently in parliament:

“A major problem facing my office is that it is still not yet adequately resourced. However, having raised this issue, I have noted with appreciation the substantial increase in the budget allocated to my office for the 2000/2001 and 2001/2002 financial years.”

It is clear that the budget is not adequate in terms of fulfilling the Office's constitutional mandate. There is however recognition that this is not a unique shortfall but that it does have adverse consequences for staff morale in terms of their current workload.

Regional offices have been established in six (6) of the nine (9) provinces. In addition to the existing regional offices in the Provinces of North West and Eastern Cape, three (3) additional regional offices were established in the Provinces of Kwa Zulu-Natal, Western Cape and Mpumalanga. During 2001/2002 the office will be expanding its services to the following Provinces: Northern Province, Northern Cape, Free State. Each office will be headed by a Regional Representative and supported by staff as approved in the organisation and establishment blue-print for the office of the Public Protector. A concern has been raised that the lack of adequate resources could impact on the independence of the Office.

**Human Resources:** National and Provincial staff (included from 1999)

Years	Investigators	Administration	TOTAL
1995	3	5	8
1996	7	9	16
1997	13	11	24
1998	13	13	26
1999	40	42	82
2000	51	44	95
2001	62	52	114

There is a blueprint in place of about 200 staff but there is insufficient funding to acquire the necessary staff.

4. Strategic issues facing the agency

**Training:** There is ongoing training occurring. It was noted however, that it is “very difficult to find training opportunities for ombudsmen officers.” However the International Ombudsman Institute and the Commonwealth Secretariat have assisted the office with training opportunities and the Office has been called