

## Prerequisites for effective anti-corruption ombudsman's offices and anti-corruption agencies

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*Currently the Public Service Task Team on fighting corruption is devising a national strategy on how to fight corruption in the public sector in South Africa. The Public Service Commission has recently completed an audit report for cabinet on all agencies with an anti-corruption function and mandate in SA. Both these documents are about to be made public. It seems as if the proposal of a single agency approach, i.e. having a dedicated body to deal with all aspects of corruption from investigation to prevention, public education and even prosecution, may be on the cards. This paper examines how such an approach ties into an effective anti-corruption strategy and in particular what preconditions are necessary for such a body to function effectively.*

Does South Africa require or indeed can it afford a single agency approach to fighting corruption similar to the often cited models of Hong Kong, New South Wales or closer to home Botswana, Malawi or Tanzania? This paper looks what such a home-grown model might look like and examines the preconditions for its establishment as a credible alternative to the status quo.

Doig et al (2001) in a working paper identifies the structural and organisational factors on which a successful and effective anti-corruption agency can be "embedded". These factors as well as arguments for and against a single agency approach emerging from De Speville's paper "Why do anti-corruption agencies fail?", a research paper from Eastern Europe on "Independent Anti-Corruption Agencies: Basic Trends and Implementation in International practice," and some findings from a recent expert panel survey completed by the ISS on the causes and controls of corruption in South Africa, form the primary reference material for this paper.

The PSC's audit report documents the current situation amongst agencies with an anti-corruption role in terms of mandate, jurisdiction, resources, cases and outcomes. A primary aim of the report is to attempt to evaluate the effectiveness of these bodies. How does one measure effectiveness, a question in this instance directly related to a prior problem of not really knowing the extent of the corruption problem.

Anti-corruption literature notes that arguments for the establishment of an independent anti-corruption institution internationally signal a dramatic inability of existing government institutions to effectively fight and curb corruption and that one of the main reasons that necessitates the implementation of an independent anti-corruption agency is a markedly low efficiency of the existing state institutions, especially supervisory, law-enforcement and court structures, and lack of public trust in them. Is this the case in South Africa? Can we honestly and accurately say that the existing agencies are ineffective in terms of fighting corruption?

What we do know is that respondents in an ISS panel survey were able to differentiate between the effectiveness of a number of agencies with an anti-corruption mandate. Unfortunately their reasons for making these choices were not recorded but one can speculate based on the findings.

In the experts' opinion, the Special Investigating Unit stood out by a significant margin as the anti-corruption agency perceived to be the most effective (84%). This is followed by the Auditor-General (74%), the office of the Public Protector (62%), The Special Investigating Directorate on Corruption (47%) and the Public Service Commission (34%).

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What is certain is that there is definite confusion amongst the general public and policy-makers when it comes to who is doing what in the fight against corruption, something that the audit report demystifies.

## **Confusion**

Widespread confusion exists in the general public's view on who to go to when wanting to report a specific case of corruption, whether this be an allegation of bribery, extortion, nepotism, conflict of interest, misappropriation of public money or undue influence in a tender procedure. For the individual complainant the range of possibilities seem endless and confusing. Should he/she go to the police, and then which branch of the police or is the Independent Complaints Directorate the right place to go to? Is the Public Protector able to investigate this complaint or is it something that the Auditor-General should look into? And what about the Special Investigating Unit? Maybe they would be an appropriate body to look into a particular case?

Not only are the range of options confusing for a public which has seemingly not received, or possibly absorbed, public information on who does what when it comes to fighting misconduct and fraud on the public service, it also appears that heads of departments within the public service are themselves floundering when it comes to dealing with allegations of misconduct and impropriety and potential corruption internally. Oh how simple it would be, one can hear them sigh, if all cases of alleged corruption could be referred to the ANTI-CORRUPTION AGENCY. The Henning report into the Heath Commission found that the SIU was cast into this role as a dumping ground for cases of corruption and that bad management of these cases was one of the factors that lead to Judge Heath's demise from the public realm.

But what would such an agency look like and what would it do?

This paper considers the unique structural and organisational factors that need to be in place for a single agency approach to be effective. These ten factors are:

1. Context,
2. Information,
3. Strategy,
4. Political will
5. Resources,
6. Expertise
7. Powers
8. Independence,
9. Oversight
10. Public interaction.

Unfortunately in the space of this paper it is not possible to draw on comparative experience in any comprehensive way, however, where relevant some reference is made to other jurisdictions which have attempted, some more successfully than others, to institute the single agency approach to fighting corruption.

### **1: Context**

Anti-corruption literature on establishing a single agency unanimously points to the importance of context. Doig et al (2001) notes that anti-corruption agencies can only be effective organisations in combating corruption in a limited number of contexts, because the variables behind their success are complex, and often specific to individual countries. In this regard the oft-cited Hong Kong model of the Independent Commission Against Corruption comes to mind. However, how far the 'Hong-Kong model' is transferable to a context such as South Africa is problematic since it is very much a product of a particular social environment and polity – a small 'city-state' with a distinctive culture and highly efficient administrative machine operating in a society characterized by sustained high economic growth. The South African anti-corruption landscape and architecture

is unique and any policy proposals to fight corruption need to reflect the particular context and culture to which they can be applied. Policies, which fail to take into account both the unique historical context, as well as current fiscal environment are doomed to failure and the anti-corruption project is too important to fall into these policy potholes.

## **2: Information**

In order to decide whether there is a need to set up an independent anti-corruption agency in any country, it is necessary to find out whether in fact systemic corruption exists in that particular country, how widespread is corruption in government sectors, is it deeply rooted in the society and does the government lack ability to fight corruption with traditional institutions and mechanisms. Doig et al (2001) notes that many countries have established anti-corruption agencies without proper evaluation and in a context where the appropriate structural factors and organisations features are absent, thus adversely affecting their development and operational effectiveness.

Doig asks that the following questions be taken into account: What is the problem to be addressed, and how should it be addressed?: is the corruption high-volume (such as traffic police or licence clerks) or high value (such as procurement contracts) or politically sensitive (involving government ministers) or sophisticated (such as money laundering with overseas and organised crime dimensions) or a permutation of all of these? What are the strengths and weaknesses of existing institutions and should or could they be resolved by a new institution, by merger, by inter-agency co-ordination or co-operation, or by segmented responsibilities?

It is clear that the necessary evaluation of various characteristics of the South African context in relation to corruption, its causes and controls, is only beginning. Other than opinion and elite panel research on corruption in South Africa very little empirical information exists on the nature or extent of corruption in the country. Whilst daily press reports seem to suggest that corruption has increased with the advent of democracy, this is unverifiable since the measure to which the press is now able to report on cases as well as the constitutional commitments to openness, transparency and accountability mean one cannot compare this context with pre-94.

The expert panel survey found in its section in relative regime evaluations regarding corruption that when questioned on their perceptions of whether the current government, in general, was more, just as, or less corrupt than under apartheid, and whether they thought corruption had increased, the following results emerged: Respondents were most likely (37%) to believe that the current government was less corrupt than the apartheid government, although this was followed closely by those who considered it to be about the same (34%). Nearly 15% did not know and close on 14% thought there was more corruption now than under apartheid. This means that almost half of the respondents felt that there was about the same degree of, or more corruption than under the apartheid government. Not surprisingly black respondents were the most likely to think that the government was less corrupt now 60% holding this opinion. Whites were most likely to think that corruption was about the same (45%).

Under the UN Global Programme Against Corruption the South African government has entered a two year agreement which includes a dedicated research project into what is known about corruption in South Africa as well as conducting a base-line integrity survey. It is important that any strategy adopted to fight corruption takes into account the findings from the UN study which will need to provide information on the following areas:

1. Types of corruption (high level, low level, political, economic)
2. Areas of corruption (govt, executive, legislature, judiciary, central bureaucracy, local government, private sector, financial system)
3. Effects (political system, democratic development, law and order, economic growth, civil rights)

## **3: Strategy**

Important strategic decisions need to be taken early on as to what functions and focus the agency will adopt since this will determine key operational issues. Consideration needs to be given to the following questions: Along the lines of the Hong Kong model will such an agency adopt a three-pronged approach which includes prevention, investigation and community relations? What is the balance between investigation and prevention? Will there be a role for community relations? What is the inter-relationship between all three in terms of a focused and integrated approach? And what types of corruption cases will the agency be able to investigate? Are we talking petty or high-level corruption? Criminal or civil matters? Individual or organised corruption? Corruption in the public as well as private sector? Should the focus be on raising public awareness of the costs of fraud and corruption and creating sufficient ground swell of opinion to start having an effect? Should the agency be investigating the systems and procedures within governmental and parastatal organisations and, where necessary, for example, developing, implementing and administering secure and corruption-proof tendering procedures? These decisions will influence the type of resources, expertise as well as powers required by the agency and require careful strategic consideration.

#### **4: Political Will**

Establishing an anti-corruption agency needs high level political support as well as the necessary political conditions under which it can operate successfully. Even if the determination to tackle corruption is strong it often diminishes as the realities of office, the vested interests in the status quo and the pressure of more immediate tasks bear on the actions of government. Doig et al (2001) argues that the presence of a favourable political climate, state capacity and support, combined with a functioning and credible rule of law and legal system and financial/administrative governance implies a certain level of political stability and at the least a system of 'liberal authoritarian' rule

More than public statements and conferences condemning corruption, political will relates to the commitment of political leaders to institute action around a specific policy objective – in this case fighting corruption - and to ensure that the necessary elements for such a policy to succeed have been catered for. Without the necessary political support to provide for the resources, powers, independence or accountability mechanisms required for such an agency, it will not materialise.

It is encouraging that during 2000, respondents interviewed in the ISS expert panel survey when asked their perceptions on the level of government commitment to fight corruption were largely positive. Almost half (49%) thought that the government was committed to fight corruption, and more than one third (34%) said that the government was very committed.

#### **5: Resources**

Setting up anti-corruption agencies with the ability to investigate as well as prevent corruption clearly costs money and will require substantial funding to be effective. Corruption cannot be fought effectively without an investment of scarce national resources, and political resolve is required to keep this national problem on the agenda and be translated into voted public funds. The anti-corruption initiative will however, inevitably compete with other even more demanding causes and in South Africa the pressing problems of job creation, poverty, HIV/AIDS as well as crime and security come to mind.

Respondents perceptions of the most important problems facing government in South Africa in general were:

Crime and Security	23%
Job Creation	21%
Corruption	17%
Poverty/inequality	14%

The Hong Kong ICAC stands out by its level of funding and resources, which other agencies will find difficult to replicate. During 1997/1998 the ICAC employed 1225 staff members and had a budget of over HK\$600million. Other than the Directorate of Special Operations (aka Scorpions) with R272million budgeted for 2002/2003 many of the agencies, in particular the constitutional and oversight bodies, are struggling to fulfil their existing mandates with current resources. Competition for resources in this field is real and therefore the proposal of a single agency is likely to cause resistance from existing agencies fearful for their own institutional survival.

During the expert panel survey respondents were asked specifically whether they thought the government had sufficient resources to fight corruption. Over half (51%) of the respondents believed that they did not and needed a lot more. This was echoed across race groups, sector and ideological orientation. Slightly less than a quarter (24%) believed government did have enough and 22% thought that it needed a little more. In total, almost three quarters (73%) of the experts thought that more resources were required to fight corruption.

## **6: Expertise**

The fight against corruption needs to be approached on numerous levels, using specific knowledge and skills from a variety of fields (law, finance, economics, accounting, etc.) If such an agency were to adopt the three-pronged approach to fight corruption that has proved successful internationally, specific skills and expertise in terms of corruption prevention, investigation and community relations would be required. It is a fact that particularly with regards to complicated forensic and legal investigations that surround corruption cases, such skills are much sought after in South Africa. There is a fear once again that a new agency could strip the police of their limited capacity for dealing with criminal investigations and compete with an agency like the Scorpions for trained staff.

## **7: Powers**

Special legal powers are required to fight corruption effectively because of the nature of corruption. It is often a consensual, subtle relationship, protected by a culture of silence and loyalty, and in many countries involves sophisticated financial dealings, or at least financial dealings more sophisticated than the experience and training of existing investigating officials. Special powers of inspection, questioning and the confiscation of evidence, and resources for cross-border investigations may be required. If special powers are required such as placing the burden of explanation on the suspect such as 'unexplained assets' offences, or facilitating extensive search and seizure, not only of the suspects records but those of his or her relatives, then there must be valid reasons for such requirements and a recognition of the need for robust procedures that stand up to judicial and courtroom scrutiny. A draft prevention of Corruption Bill with unclear status, greatly expands the current definitional framework for corruption offences in South Africa.

Some of these powers may not be palatable in the South African human rights context. For example, one of the reasons for the success of the Hong Kong has been legislation such as the Prevention of Bribery Ordinance where unexplained wealth on the part of public servants is a potential crime. Powers of search and seizure as well as compelling witnesses to testify do already exist in various forms in the South Africa's laws (for example under the SIU) but a specific law to create an anti-corruption body would need to draw such powers together and ensure sufficient safe-guards, checks and balances that such powers will not be abused. It is a very real concern that in certain contexts an anti-corruption agency could become the political police of a corrupt regime. How can one ensure that such an agency is truly independent and accountable?

## **8: Independence**

In proposing a single agency approach the commitment needs to be in place to ensure that such an agency is operationally independent and can function without fear favour, along the lines of

the Chapter 9 bodies enshrined in the constitution. All officers responsible for the fight against corruption must be shielded from political, economic or personal pressures. In particular, the operational independence of an agency - within its specific parameters - must be guaranteed. The concern is that in certain contexts, if not independent, such an agency could be dictated to from above that it for example not investigate certain cases or individuals, i.e. there could be political interference.

In order to maintain public trust and credibility the independence of such an agency would need to be enshrined in national legislation, if not the constitution, and it would need to be a criminal offence to interfere with its operational independence. A suitable candidate, preferably a non-partisan individual of high standing, would be required to head the agency and provide sufficient leadership to resist potential interference and protect the agency's operational independence. Similar to the head of chapter 9 institutions, a parliamentary process might inform the nomination of the candidate to be appointed by the President in his/her capacity of Head of State. The period of tenure would be sufficient to allow the head of the agency to operate with confidence and his/her dismissal would have to be based on sound reasons and subject to public scrutiny.

If independence is curtailed the agency may be restricted to pursuing low level corruption offences, which may still be effective depending upon the pattern of corruption in the country. However in all likelihood such restrictions would largely defeat the purpose of the agency. Interesting to note, despite a public commitment to impartiality, and the guaranteed independence of such agencies, anti-corruption activities in Hong Kong, Singapore and even New South Wales have been constrained on occasion by powerful political and economic groups. How independent would such an agency be in South Africa?

## **9: Oversight**

Establishing an anti-corruption agency with extensive legal powers in the absence of effective oversight is a risky procedure. One of the major planks of oversight is the rule of law and a professional legal system, which would provide the space to supervise the special powers of the agency and challenge its operations in the courts.

In terms of accountability, such an agency would ideally be accountable to the public of South Africa, reporting to a special parliamentary committee set up for this purpose (as in the New South Wales experience). This committee would be made up from members of all political parties and would exercise oversight over the operations of the agency, similar to the role played by the committee on intelligence oversight. The head of the agency would need to report to parliament on an annual basis and when required to by the committee. The Hong Kong model's various committees which oversee the work and functioning of the agency might be another route to follow, although in the South African context of constitutional democracy it would seem appropriate that the legislature is able to exercise a primary oversight role. The experience of other committees with oversight roles in parliament, such as SCOPA, is instructive as to the limitations of constitutional democracy in a context of a strong majority party.

## **10: Public Interaction**

Anti-corruption agencies require substantial and effective links with civil society, both to utilise citizen reports as a major part of their strategy and to build up public support. If little has been done to involve the community in the work of the agency, the inevitable result is that the public comes to distrust the agency and provides no information about what is going on. Without that information the agency's investigative powers are useless. Furthermore, its preventive and educational work is likely to be ignored.

The audit report revealed that very few of the agencies have a conscious strategy for interacting with the public and even fewer have polled the public in relation to their views of the organisation

and its work. Any new agency would need to build in public interaction links from the start, which is not a bad thing.

### **On Effectiveness**

The above variables demonstrate the complexities involved in establishing an effective anti-corruption agency. Rather than quick fixes to the problem of corruption such agencies require a specific context and sustained governmental (or donor agency) support, a coherent strategy and organisational capacity. It is, simply, much easier to recommend and establish an anti-corruption agency than it is to ensure that it is an effective anti-corruption organisation.

Doig et al (2001) notes that whilst such agencies can be effective anti-corruption organisations, at their worst they can:

- Add another layer of (ineffective) bureaucracy to the law enforcement sector.
- Divert resources from existing organisations involved in anti-corruption work.
- Function inefficiently if unable to target serious/high level corruption cases.
- Function as a 'shield' to satisfy donors and public opinion (as codes of conduct often have in relation to private sector companies, public sector organisations, and government departments).
- Delay the reform of other areas.
- Function as a political police.

The substantial costs in both setting up as well sustaining such an agency will need to be balanced with measurable benefits and tangible effectiveness indicators that those in policy-making decision positions are persuaded by, as well as the general public.

Should the decision to establish such an agency be taken, a methodology will need to be devised upfront for assessing its effectiveness. The capabilities of the agency to deliver its targets is fundamental to its success and how it will be judged externally. When it comes to measuring the effectiveness of such an agency what indicators should be used? Number of cases reported to the body? Cases resulting in a conviction? Public awareness about the agency?

For a range of effectiveness indicators, the experience from the Hong Kong and New South Wales Commissions Against Corruption is informative:

#### **Hong Kong**

- Between 1974 and 1975, the ICAC Operations Department investigated 2466 corruption complaints out of 6368 received. The number of cases brought to trial increased from 108 in 1974 to 218 in 1975.
- By the end of 1981, ICAC Corruption Prevention Department had carried out almost 500 studies on various policies and practices in government agencies. It had followed up many of these studies with full-scale monitoring reports on how well the recommendations were being implemented.
- ICAC training seminars on the prevention of corruption had been attended by over 10,000 officials.
- By the end of 1981, the Community Relations Department had set up ten local offices, received more than 10,000 reports of corrupt activities, and held more than 19,000 special events such as seminars, camps, exhibitions, and competitions.

#### **New South Wales**

- In New South Wales during the last ten years the Commission's investigation reports have found 360 people to have acted corruptly and criminal charges have been laid against 140 people. Over 110 public sector employees have been dismissed or disciplined as a result of reports.
- 70 percent of the Commission's recommendations for improved operating systems or policies had been adopted.

- Chief Executive Officers and General Managers had increased their requests for ICAC assistance from less than 200 in 1992/93 to nearly 500 in 1997/98.
- The Commission made significant contributions to improvements in public sector legislation and operating procedures, for instance, managing relationships between the police and criminals, unauthorized release of governmental information, driver licenses, etc.
- As a result of the investigations carried out by the Commission sweeping changes were made in the public sector. These changes tightened specific requirements for public procurement, and established the code of conduct for local councils and public agencies.

The above conditions and preconditions for a single agency approach are quite daunting. In this respect it may be useful to reconsider Doig's question when he asks:

- Is the agency being recommended for the "wrong" reasons, for example to merely solve a problem of co-ordinating existing anti-corruption organisations?

### **Strategic Co-ordination**

Based on the audit report it would seem that there is a real problem of co-ordinating existing anti-corruption organisations. These challenges regarding co-ordination were identified almost three years ago at the November 1998 public sector anti-corruption conference. Proposal to improve the situation then included:

- determining clear lines of responsibility for different agencies, particularly in relation to who should deal with particular cases of corruption;
- ensuring informed decision-taking at an early stage to determine whether criminal sanctions, civil sanctions or internal disciplinary measures will apply, since different procedures involve different rules, standards of evidence and rapidity of reactions;
- improving the relationship between internal agencies in the public sector which apply internal regulations in the context of the employer-employee relationship, as distinct from external agencies that apply the law;
- developing an easily understandable regulatory framework to avoid overlap; and
- improving more rapid and effective measures to fight corruption.

In mid-January 1999 at a follow up meeting it was decided that a co-ordinating committee of representative anti-corruption bodies would meet monthly, but that individual agencies would meet to share information on specific cases whenever necessary.

To a large extent the idea of this co-ordinating forum (whose memorandum of understanding was never signed) was overtaken by events, both political and organisational, flowing from the resolutions of the April 1999 National Anti-corruption summit. It is however clear that the same co-ordination needs apply which both the audit report and the strategic plan for fighting corruption in the public sector recognise. Now is the time to make sure that these co-ordinating mechanisms are effectively operationalised as well as regularly assessed and evaluated.

### **Beyond co-ordination**

Beyond the co-ordination function around investigations to prevent duplication of limited resources, it does appear that there needs to be some type of dedicated capacity, whether this becomes the anti-corruption agency in the future, which acts as a clearing house for corruption-related cases and has as proposed in the Public Service Task Team document the following mandate: to prevent (through building disciplinary capacity, education, awareness, systemic action, research and the promotion of ethics), monitor, detect, investigate and facilitate the application of the appropriate corrective action including, where appropriate, prosecution of corruption. In addition the agency may refer allegations or incidents to other institutions and agencies.

What has emerged from the audit report is the lack of an integrated holistic approach to fighting corruption amongst existing agencies and an almost non-existent preventative strategy around

corruption. Only once the anti-corruption capacities of the existing agencies are optimally utilised as part of an holistic and strategic approach to fighting corruption in the public sector in South Africa can the next step, namely that of having a single independent anti-corruption agency which deals with all aspects of corruption be seriously considered.

An interesting book on Measuring and Fighting Corruption in the region (Matsheza & Kunaka 2000), notes how the general trend in Southern Africa has been to establish new separate agencies or coordinated approaches to combating corruption. In reality, anti-corruption institutions require the support of other structures to implement their tasks effectively. Despite the establishment of anti-corruption bureaus and commissions in several Southern African countries "most respondents did not regard the anti-corruption bureaus as effective mechanisms for preventing corruption in their respective countries." This is because of what the authors term a general "crisis of expectations" on the effectiveness of such anti-corruption institutions. They often have neither the capacity nor the political clout initially to take effective steps in terms of prosecuting corrupt officials, As a result the public becomes frustrated by the slow pace of the new institutions. This has been the case in Swaziland and Malawi where apparently there have been no successful prosecutions completed by the anti-corruption institution since inception.

In the end it is not an either or situation whether or not to replace existing agencies with a single agency to fight corruption. In the audit report it has been starkly demonstrated that institutions in the report which have an anti-corruption mandate have been borne out of specific needs and it is unlikely that all of these, from revenue collection to auditing public money, will be replaced by a single agency. As such both strategic co-ordination of existing bodies and a proposal to consider a single agency are required in the South African context.

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