



**UNODC**

United Nations Office on Drugs and Crime

## Country Review Report of South Africa

Review by Niger and the Cook Islands of the implementation by  
South Africa of articles 5-14 and 51-59 of the United Nations  
Convention against Corruption for the review cycle 2016-2021

## I. Introduction

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1. The Conference of the States Parties to the United Nations Convention against Corruption was established pursuant to article 63 of the Convention to, inter alia, promote and review the implementation of the Convention.
2. In accordance with article 63, paragraph 7, of the Convention, the Conference established at its third session, held in Doha from 9 to 13 November 2009, the Mechanism for the Review of Implementation of the Convention. The Mechanism was established also pursuant to article 4, paragraph 1, of the Convention, which states that States parties shall carry out their obligations under the Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and of non-intervention in the domestic affairs of other States.
3. The Review Mechanism is an intergovernmental process whose overall goal is to assist States parties in implementing the Convention.
4. The review process is based on the terms of reference of the Review Mechanism.

## II. Process

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5. The following review of the implementation by South Africa of the Convention is based on the completed response to the comprehensive self-assessment checklist received from South Africa, and any supplementary information provided in accordance with paragraph 27 of the terms of reference of the Review Mechanism and the outcome of the constructive dialogue between the governmental experts from Niger, the Cook Islands and South Africa, by means of telephone conferences, e-mail exchanges or any further means of direct dialogue in accordance with the terms of reference and involving, principally:

### **From South Africa:**

- Ms. Pleasure Matshego, Director, Ethics, Integrity and Conduct Management, Department of Public Service and Administration;
- Advocate Priya Biseswar, Deputy Director of Public Prosecutions, Asset Forfeiture Unit, Pretoria;
- Mr. Peter Sekgothe, Senior Legal and Policy Advisor (Financial Intelligence Centre);

### **From Niger:**

- Mrs. Bibita Boubacar Amadou, Secretary-General of the Ministry of Justice, President of the group of governmental experts of Niger;
- M. Amadou Morou, Coordinator of the National Unit for Criminal Mutual Assistance and Judicial Cooperation, Ministry of Justice.

### **From Cook Islands:**

- Russell Thomas, Public Service Commissioner, Office of the Public Service Commissioner

### **From the United Nations Office on Drugs and Crime:**

- Ms. Tanja Santucci, Crime Prevention and Criminal Justice Officer
- Mr. Mohamed Abdelhak Cherbal, Crime Prevention and Criminal Justice Officer

6. A country visit, agreed to by South Africa, was conducted on 27 October 2020 in a virtual format.

## **III. Executive summary**

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### **1. Introduction: overview of the legal and institutional framework of South Africa in the context of implementation of the United Nations Convention against Corruption**

*South Africa signed the United Nations Convention against Corruption on 9 December 2003 and ratified it on 22 November 2004.*

*The implementation by South Africa of chapters III and IV of the Convention was reviewed in the second year of the first review cycle, and the executive summary of that review was issued on 16 November 2012 (CAC/COSP/IRG/I/2/1/Add.9).*

*South Africa follows a dualist approach with respect to the domestic effect of international treaties. According to section 231 (4) of the Constitution of South Africa, any international agreement becomes law in South Africa when it is enacted into law through national legislation, excluding any self-executing provision of an agreement, unless it is inconsistent with the Constitution or an act of parliament.*

*Relevant implementing legislation includes the following: Prevention and Combating of Corrupt Activities Act, Protected Disclosures Act, Promotion of Access to Information Act, Promotion of Administrative Justice Act, Public Service Act, Public Administration Management Act, Public Finance Management Act, Prevention of Organized Crime Act, Financial Intelligence Centre Act and International Cooperation in Criminal Matters Act.*

*Entities with mandates relevant to the prevention and countering of corruption include: Department of Public Service and Administration (DPSA), Public Service Commission (PSC), National Treasury, Office of the Chief Procurement Officer (OCPO), Special Investigating Unit (SIU), Financial Intelligence Centre (FIC) and other agencies. Coordination is exercised through the Anti-Corruption Task Team (ACTT).*

### **2. Chapter II: preventive measures**

#### **2.1. Observations on the implementation of the articles under review**

*Preventive anti-corruption policies and practices; preventive anti-corruption body or bodies (arts. 5 and 6)*

*There are several anti-corruption strategies, policies and laws at the sectoral and governmental levels, principally the Public Service Anti-Corruption Strategy of 2002, the Local Government Anti-Corruption Strategy of 2016 and the country's national development plans, the Medium-Term Strategic Framework 2014–2019 (containing deliverables relating to combating corruption in the public and private sectors) and the Medium-Term Strategic Framework 2019–2024 (containing priorities geared towards fighting corruption and promoting integrity and good governance in public institutions). Other relevant policies include public service*

*directives governing remunerative work outside of the public service and business activities with the State.*

*The development of a national anti-corruption strategy is being undertaken under the auspices of the Anti-Corruption Task Team. The national strategy recognizes the need to coordinate anti-corruption activities and create effective implementation structures and monitoring measures. The strategy was adopted by the Cabinet on 18 November 2020, following the country visit.*

*The participation of society is promoted through the National Anti-Corruption Forum, a coalition formed by representatives of the public, business and civil society sectors aimed at driving the national anti-corruption campaign, and various partnerships. The Forum was not active at the time of review. The national anti-corruption strategy supports the creation of a reformed multisectoral body to replace the Forum.*

*ACTT<sup>1</sup> coordinates the work of State organs aimed at preventing and combating corruption in the public and private sectors.*

*Corruption prevention functions include the annual disclosure of financial interests by designated employees (eDisclosure system); the national anti-corruption hotline; ethics and anti-corruption training programmes for public service employees and local government officials; ethics and anti-corruption functions, including ethics officers and ethics committees, in government departments; the Ethics Officer Forum; and relevant public service policies.*

*South Africa assesses progress in the implementation of anti-corruption measures through various studies and assessments, including corruption assessments, audits of anti-corruption capacity requirements, diagnostic reports, public sector ethics surveys, government and audit reports, and reports published by civil society.*

*The Department of Justice and Constitutional Development plays a leading role in reviewing laws and regulations against corruption, together with the South African Law Reform Commission. Laws are reviewed on an ad hoc basis, whenever a need to review is identified.*

*South Africa is a member of and participates in the activities of the Group of 20 Anti-Corruption Working Group, the Working Group on Bribery in International Business Transactions of the Organization for Economic Cooperation and Development, the Southern African Development Community, the Southern African Forum against Corruption, the African Union, the Financial Action Task Force (FATF) and the Asset Recovery Inter-Agency Network for Southern Africa (ARINSA). In addition, national authorities have signed bilateral cooperation agreements and participate in trainings and information exchange with foreign counterparts.*

*Several bodies are tasked with preventing and countering corruption, including DPSA, PSC, the National Treasury, OCPO, SIU, FIC, the Auditor General, the Public Protector and other agencies. Among these entities, PSC has legal independence as established in the Constitution (sect. 196). None of the existing bodies is entrusted with a specialized mandate pertaining to corruption prevention, including education and awareness-raising. Furthermore, the anti-corruption strategy acknowledges weakness regarding coordination among government institutions involved in anti-corruption activities.*

*South Africa has dedicated significant efforts to continuously training employees to carry out prevention functions, although the capacity for prevention functions in*

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<sup>1</sup> ACTT is a subcommittee of the Justice, Crime Prevention and Security Cluster and is made up of government stakeholders tasked with preventing and combating corruption in the public and private sectors.

government institutions is not yet adequate. At the time of review, there were vacancies in a number of key agencies, including DPSA and the Public Protector.

South Africa was reminded of its obligation to notify the secretariat of its corruption prevention authority or authorities.

Public sector; codes of conduct; measures relating to the judiciary and prosecution services (arts. 7, 8 and 11)

The Public Service Act and the Public Service Regulations provide for the organization and administration of the public service and regulate, inter alia, conditions of employment, terms of office, disciplinary mechanisms, termination of employment, and specific provisions on countering corruption and on integrity management, including conflicts of interest.

The Public Service Act, section 11 (2), provides that the evaluation of persons for employment in the public service must be based on objective criteria, including training, skills, competence and knowledge. Vacancies are generally filled on a competitive basis, although open competition tends to be more frequent for entry-level positions. Vacant posts in departments must be advertised as efficiently and effectively as possible (regulation 65 (1), Public Service Regulations).

There are no procedures for the selection and training of individuals for public positions considered especially vulnerable to corruption and their rotation, where appropriate, to other positions.

PSC is mandated pursuant to section 196 (4) (b), (c) and (f) (iv) of the Constitution to investigate, monitor and evaluate adherence to applicable procedures, propose and advise the State on measures to ensure effective and efficient performance in the public service, and advise national and provincial organs of the State regarding personnel practices in the public service.

Training for public servants, conducted at the National School of Government (NSG), covers the Public Service Anti-Corruption Strategy and mandatory components on ethics and integrity for non-managerial positions. Training and support for the implementation of the Public Service Regulations for public servants and ethics officers is provided by DPSA to all national and provincial departments, in partnership with NSG and the Ethics Institute of South Africa.

The Constitution and Electoral Act establishes basic criteria for candidature for and election to public office. The Electoral Commission is tasked, inter alia, with the management of elections of national, provincial and municipal legislative bodies in accordance with national legislation.

The Political Party Funding Act regulates the public and private funding of political parties. The Act is aimed at promoting transparency in political party financing by regulating the disclosure of donations exceeding the prescribed threshold, including donations from foreign governments, foreign persons or entities, and organs of State or State-owned enterprises, and setting an upper limit for donations (sect. 8 (1) and (2)). The Commission must publish donations disclosed to it on a quarterly basis and in the prescribed form and manner (sect. 9 (3)). Political parties must further account for their income, as prescribed in section 12. However, the Act has not yet been implemented.<sup>2</sup> Furthermore, there are no regulations on private funding of political parties and independent candidates.

South Africa has adopted a comprehensive framework to enhance transparency and prevent conflicts of interest among public officials. The measures cover members of the National Assembly and the National Council of Provinces, members of the

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<sup>2</sup> At the time of review, the Electoral Commission had finalized the implementing regulations, to be published with the notice of implementation on a date to be determined by the President.

*executive, employees in the public service, local government councillors, and municipal staff members.*

*All public service employees are expected to comply with the Public Service Code of Conduct as contained in the Public Service Regulations. The regulations contain, inter alia, restrictions relating to conflicts of interest and ethical conduct, regulate the acceptance of gifts and benefits, regulate the performance of other remunerative work, prohibit employees from holding certain types of assets or official positions and from doing business with the State, require public servants to report suspected corruption, prohibit nepotism, and require all senior managers to disclose their financial and certain other interests to their respective heads of departments and executive authority (if the senior manager is the head of department) annually for submission to PSC. The executive authority is to engage with employees to ensure that conflicts are removed and, if they are not, it must institute disciplinary measures. Specialized staff or bodies (including heads of departments, ethics officers and ethics committees) are given responsibility and oversight, and sanctions for breaches apply. The Public Administration Management Act contains further provisions prohibiting public service employees and categories of municipal employees from conducting business with the State.*

*For members of parliament, the Code of Ethical Conduct and Disclosure of Members' Interest for Assembly and Permanent Council Members contains restrictions on members' outside activities and prohibited business activities (including gifts). The Code requires members to declare personal or private financial or business interests and to recuse themselves from any related decision-making process. The system for the disclosure of registrable interests includes specialized staff or bodies given responsibility and oversight, and sanctions for breaches.*

*For members of the executive (cabinet members, deputy ministers, premiers and members of executive councils) and members of parliament, the Executive Members' Ethics Act covers conflicts of interest (including the disclosure of financial interests) and requires, inter alia, the members to dispose of or put under administration, any interests that could give rise to a conflict of interest in performing their duties.*

*The financial disclosure requirements of South Africa encompass a comprehensive range of public officials as described under article 52, paragraph 5, of the Convention. The disclosure systems are guided by clearly defined objectives, clear reporting requirements and sanctions for non-compliance. Training and available guidelines have been issued for all but members of the executive.*

*While verification of disclosures by public service employees is done electronically, there is no systematic verification of disclosures by members of parliament and the executive. Moreover, the requirements pertaining to declarations for family members of public service employees are not yet operational (sect. 9, Public Administration Management Act).*

*It was confirmed that the disclosure requirements for members of the National Assembly and members of the executive are limited to financial interests and do not include non-financial, non-business interests from which a conflict of interest may arise.*

*Various mechanisms are in place to facilitate the reporting by public officials of acts of corruption and heads of department are required to establish systems and measures that encourage employees and citizens to report allegations of corruption and unethical conduct, including confidentially, and to address such reports (regulation 22, Public Service Regulations). Ethics officers and ethics committees in departments identify and report unethical behaviour and corrupt activities. Reporting requirements are included in the Public Service Code of Conduct and section 34 of the Prevention and Combating of Corrupt Activities Act.*

*Protections for reporting persons under the Protected Disclosures Act and the Witness Protection Act would be strengthened under the national anti-corruption strategy. Other relevant measures include the National Anti-Corruption Hotline and the SIU whistle-blower hotline. A need for continued awareness-raising of key measures and systems to facilitate the reporting by public officials of acts of corruption, and of available protection measures, has been noted.*

*In South Africa, judges are appointed by the President and have constitutionally protected independence. The Superior Court Act reaffirms the Chief Justice as the head of the judiciary, responsible for monitoring and evaluating the performance of judicial officers and the implementation of norms and standards for the exercise of leadership and judicial functions of all courts. The Code of Judicial Conduct contains provisions on conflicts of interest, association, extrajudicial activities, recusal and reporting of unprofessional or unethical conduct, among others. Any wilful or grossly negligent breach of the Code may amount to misconduct leading to disciplinary action in accordance with section 14 of the Act. The South African Judicial Education Institute is responsible for educating and training judicial officers and aspiring judicial officers, including in regard to ethics and integrity.*

*Each Head of Court must monitor and evaluate the performance of the judicial officers on a daily basis, to ensure optimal utilization and productivity. Judges are further required by law to disclose their registrable interests, which are captured in a register of judges' registrable interests. The Judicial Service Commission has established a Judicial Conduct Committee to deal with complaints of judicial conduct.*

*A Code of Conduct and disciplinary mechanisms are applicable to members of the prosecution service, in addition to the aforementioned Public Service Code of Conduct and Public Service Regulations. Breaches of the Code have led to the application of disciplinary measures. The Fraud and Corruption Directorate of the National Prosecuting Authority (NPA) identifies potential fraud and corruption risks, and investigates and reports on cases involving fraud and corruption.*

*The NPA Integrity Management Unit is responsible for managing the Code and creating a preventative environment. Induction and ongoing training for members of the prosecution service are offered by NPA in collaboration with NSG, and functional training covering corruption and fraud is offered by the Justice College.*

#### *Public procurement and management of public finances (art. 9)*

*Public procurement at the national and provincial levels and in public entities and State-owned enterprises is regulated principally by the Public Finance Management Act. The Act requires government departments to develop and implement fraud prevention plans, to be included in their risk management strategies; outlines the responsibilities of accounting officers, i.e., heads of departments, in the case of national and provincial governments, and chief executive officers, in the case of public entities; and provides for instances where the National Treasury may investigate and remedy non-compliance.*

*The Office of the Chief Procurement Officer in the National Treasury manages procurement reforms, maintains the procurement system and oversees government business with the private sector.*

*South Africa employs a decentralized procurement system. The Preferential Procurement Policy Framework Act sets out the framework for procuring entities to establish measurable specifications and objective conditions, determined in advance, according to which tenders can be evaluated and accepted. Information relating to procurement procedures and contracts is publicly distributed and available through the OCPO e-Tender portal and central supplier database.*

*All contracts above 500,000 rand are subject to competitive bidding. In exceptional cases, the accounting officer or accounting authority may use alternative methods,*

*provided that the reasons for deviating are recorded and approved by the accounting officer or accounting authority (regulation 16A6.4, Treasury Regulations). All cases where goods and services above the value of 1 million rand (inclusive of value added tax) are so procured must be reported within 10 working days to the relevant treasury authority and to the Auditor General.*

*Pursuant to Treasury and Public Finance Management Act regulations, bids are advertised in, at least, the Government Tender Bulletin for a minimum period of 21 days before closure, except in urgent cases, and on the website of OCPO. The processing of bids through the e-Tender portal is mandatory. Awards are published in the Government Tender Bulletin and other media.*

*Procedures, rules and regulations for the review and appeal of procurement decisions include section 33 of the Constitution and section 6 of the Promotion of Administrative Justice Act, or a judicial review may be conducted by the courts.*

*Pursuant to regulation 16A8.4 (a) and (b) of the Treasury Regulations, if a supply chain management official or procurement officer, or any close family member, partner or associate or other role player has any private or business interest in any contract, that person must disclose that interest and withdraw from participating in any manner in the process. Members of contracting authorities are also prohibited from holding private interests in contracts with the contracting authority (sect. 17 (1), Prevention and Combating of Corrupt Activities Act).*

*South Africa has initiated a number of reforms to the procurement system, with a view to strengthening monitoring, accountability and transparency.*

*South Africa has established procedures for the adoption of the national budget, which include public hearings on bills prior to adoption (sects. 26–28, Public Finance Management Act; Money Bills Amendment Procedure and Related Matters Act). The measures are supported by the Treasury Regulations on planning (sects. 5.1–5.3) and budgeting (sects. 6.1–6.7).*

*Measures are also in place to provide for timely reporting on revenue and expenditure (sects. 32 and 40 of the Public Finance Management Act). Accounting and auditing standards include provisions in the Public Finance Management Act, the Public Audit Act and the National Treasury Modified Cash Standard.*

*The Public Finance Management Act requires all State institutions to have effective, efficient and transparent systems of financial and risk management and internal control (sect. 38 (1) (a)). The Act further provides for accounting officers and officials to be charged with financial misconduct when they fail to comply with any requirement therein, including the provisions concerning risk management and internal control, and criminal charges are also applicable. The Public Sector Risk Management Framework issued by the National Treasury sets out guidance on implementing enterprise-wide risk management. Most State institutions have risk committees, which advise accounting officers on risk strategy and risk-related issues. External auditors review and report on systems of internal control and risk management. Accounting officers also attest to the effectiveness of risk management and internal control in annual reports, and such attestation is independently confirmed by the audit committees. The Department of Monitoring and Evaluation independently monitors the risk management and internal controls of national and provincial government agencies annually.*

*Accounting officers are required to keep full and proper records of financial affairs (sect. 40 (1), Public Finance Management Act) and to retain all financial information in its original form (chap. 17, Treasury Regulations). Corrective action may be taken in case of violations of public finance rules (sects. 81 and 83, Public Finance Management Act). External oversight is exercised by the Auditor-General.*

*Public reporting: participation of society (arts. 10 and 13)*



*The Promotion of Access to Information Act gives effect to provisions in the Constitution providing for access to information, including section 32 of the Bill of Rights, which establishes that everyone has a right of access to any information held by the State. The Act contains detailed provisions, including with regard to the publication of information held by government authorities and the procedures and rules surrounding requests for unpublished information. The provisions extend in substantial part to the private sector.*

*The Promotion of Administrative Justice Act gives effect to section 33 of the Constitution, which establishes the right to administrative action that is lawful, reasonable and procedurally fair, as well as the right to be provided with written reasons in circumstances where one's rights are adversely affected by administrative action. The Act extends, for example, to suspected corruption in tendering, allowing adversely affected parties to acquire information.*

*Reported challenges in the framework on access to information include cumbersome procedures, insufficient regulatory enforcement powers, a complex appeals mechanism and inadequate compliance. Furthermore, there is a need to establish the right to access information related to political party funding, and to promote awareness-raising.*

*The national anti-corruption strategy provides a framework for strengthening government administrative processes, with the aim of enhancing public service delivery. South Africa has undertaken some public administration and e-government reforms intended to simplify administrative procedures and facilitate services delivery.*

*Various measures are in place to promote the participation of individuals and groups outside the public sector, such as civil society, in the prevention of and fight against corruption. Key among them are the National Anti-Corruption Summits, the National Anti-Corruption Forum (not active at the time of review) and the Open Government Partnership Programme. Efforts in support of fiscal transparency, such as the publication of key budget documents prior to and following the enactment of the budget and public consultations in the legislative process, further enhance the involvement of the public.*

*South Africa implements anti-corruption-related public awareness programmes and civil society is actively engaged in anti-corruption efforts. South African authorities have expressed an interest in establishing anti-corruption education programmes in schools and universities.*

*Several institutions are mandated to receive corruption reports from the public, namely, PSC, through its national anti-corruption hotline, the Public Protector, SIU, the South African Police Service and the Directorate for Priority Crime Investigation (DPCI; also known as the Hawks). Reports can be made anonymously.*

#### Private sector (art. 12)

*South Africa has adopted legislation to prevent and combat corruption in the private sector and among State-owned enterprises. The Companies Act aligns the country's accounting standards with international financial reporting standards. The Act further requires State-owned enterprises, listed and public companies, as well as companies of a certain size, to take certain basic steps to enhance accountability and transparency. Chapter 3 of the Companies Regulations further prescribes enhanced accountability and transparency for South African companies. There are no specific efforts to raise awareness of anti-corruption requirements for companies, and there is a need to include State-owned enterprises in anti-corruption efforts.*

*Regarding governance provisions for companies and State-owned enterprises, the King IV Code on Corporate Governance provides guidance for improving the transparency and stability of the financial management of listed companies, including guidelines on risk management, the composition of boards of directors and*

the performance of board members). While the King IV Code is not enforceable, legislation such as the Companies Act incorporates some of its provisions. A corporate governance guideline on avoiding corruption was also issued to companies under Regulation 4 of the Companies Regulations.

Companies are required to maintain security registers of shareholders and holders of beneficial interests (sect. 50, Companies Act). The Act is being amended to allow for the implementation of a beneficial ownership register and to require companies to file information annually with the Companies and Intellectual Property Commission. As a member of the G20 Anti-Corruption Working Group, South Africa has adopted the G20 High-level Principles on Beneficial Ownership Transparency.

No specific measures are in place to prevent the misuse of procedures regulating private entities, including subsidies and licences for commercial activities.

There is no policy regarding post-employment restrictions for former public servants.

All public companies, State-owned enterprises and private companies above a certain size must be audited. However, there is no requirement for companies to have internal auditing controls to prevent and detect acts of corruption. South African accounting and auditing provisions in the companies legislation do not specifically prohibit the accounting practices listed under article 12, paragraph 3, of the Convention.

South Africa prohibits the tax deductibility of bribes and payments resulting from or incurred in furtherance of unlawful activity (sect. 23 (o), Income Tax Act).

#### Measures to prevent money-laundering (art. 14)

South Africa's legal regime to prevent money-laundering consists of the Prevention of Organized Crime Act, the Financial Intelligence Centre Act, and the Money Laundering and Terrorist Financing Control Regulations, as well as relevant guidance notes and directives issued by FIC.

Accountable institutions as defined in schedule 1 of the Financial Intelligence Centre Act include financial institutions and designated non-financial businesses and professions. Dealers in precious metals and stones, natural or legal persons that provide informal services for the transmission of money or value, as well as natural or legal persons who engage in the business of money and currency exchange, and other reporting persons (defined as persons dealing in motor vehicles and Kruger rand) are not covered. Supervisory bodies are listed in schedule 2 of the Financial Intelligence Centre Act and FIC assumes responsibility over any remaining sectors.

The Financial Intelligence Centre Act subjects all accountable institutions to customer due diligence requirements (chap. III), including the identification and verification of beneficial owners (sect. 21) and record-keeping measures (part 2, sects. 22–25).

In terms of enforcing anti-money-laundering measures, although on-site visits have been conducted for certain designated non-financial businesses and professions, most supervisors have not sanctioned the respective institutions they regulate, and sanctions were considered not to be sufficiently deterrent. At the time of review the Financial Intelligence Centre Act was under revision to address those deficiencies.

South Africa is in the process of conducting its first national risk assessment. Although the country has not developed a formal strategy to counter money-laundering and the financing of terrorism, relevant policy priorities were set out in a consultation paper issued by FIC and the National Treasury in 2017.

South Africa has extended the reporting obligations for suspicious transactions to all businesses, including accountable institutions. Failure to report is considered an offence (sect. 52). Financial supervisors undertake a range of outreach and training

activities for their supervised sectors to promote a clear understanding of obligations and risks in relation to money-laundering.

FIC is responsible for receiving, analysing and disseminating information pertaining to money-laundering, including suspicious transaction reports and cash transaction reports, and for collaborating with investigative and prosecution authorities (sect. 4, Financial Intelligence Centre Act). National coordination is also ensured through a number of joint task teams and joint operations. Internationally, competent authorities in South Africa exchange information with their foreign counterparts on a regular basis. FIC is operationally autonomous, and the Director of FIC reports directly to the Minister of Finance and to parliament (sects. 5 and 7, Financial Intelligence Centre Act).

South Africa has implemented a cross-border declaration system for all incoming and outgoing travellers, mail and cargo, while the incoming transfer of cash in an amount equivalent to or above 25,000 rand or 10,000 United States dollars in foreign currency must be declared orally. Section 15 of the Customs and Excise Act requires all persons entering or leaving the country to declare, inter alia, goods, including currency, that are restricted and controlled under any law. However, foreign currency must only be declared by outgoing travellers, and not by incoming travellers (sects. 3.3 and 3.6, Exchange Control Regulations). Furthermore, the Customs and Excise Act and the Exchange Control Regulations do not prohibit, restrict or control incoming bearer negotiable instruments or outgoing bearer negotiable instruments payable in foreign currency. Although customs officers of the South African Revenue Service may, under the Exchange Control Regulations, search for and seize currency, information on declarations and seized consignments of a suspicious nature is not notified to FIC.

Directive 1 of 2015 of the National Payment System Department requires that all wire transfers be carried out in line with FATF recommendation 16. However, there is no requirement to apply enhanced scrutiny to wire transfers that contain incomplete information on the originator.

South Africa has been a member of FATF and the Egmont Group of Financial Intelligence Units since 2003 and underwent a mutual evaluation by FATF in 2003 and a joint mutual evaluation by FATF and the Eastern and Southern Africa Anti-Money Laundering Group in 2009. The fourth-round evaluation by FATF initially scheduled for June 2020 has been postponed to a later date as a result of the coronavirus disease (COVID-19) pandemic.

FIC has signed 91 memorandums of understanding with its counterparts and has sponsored the admission of a number of African States to the Egmont Group.

## **2.2. Successes and good practices**

- Training and support provided to practitioners, senior managers and ethics officers on the implementation of the Public Service Regulations (art. 6, para. 1)
- The structured approach taken to promote transparency and prevent and manage conflicts of interest among different categories of public officials, including detailed disclosure requirements for public officials in high-risk areas, training and guidelines (art. 7, para. 4)
- Outreach activities undertaken to raise awareness in major cities and provinces of obligations to counter money-laundering and the financing of terrorism (art. 14, para. 1)

## **2.3. Challenges in implementation**

It is recommended that South Africa:

- *Continue its efforts to implement the national anti-corruption strategy, to create effective implementation structures and monitoring measures, and to strengthen coordination of anti-corruption activities (art. 5, para. 1).*
- *Continue efforts to review the governance model and arrangements for the future sustainability of the National Anti-Corruption Forum or an equivalent body (art. 5, para. 1, and art. 13, para. 1).*
- *Ensure the existence of one or more bodies with specialized mandates pertaining to the prevention of corruption, including education and awareness-raising, and implementing the prevention policies referred to in article 5 of the Convention (art. 6, para. 1).*
- *Adopt measures to strengthen the independence of anti-corruption bodies, enabling them to carry out their functions free from undue influence, and strengthen coordination among government institutions involved in anti-corruption efforts. Furthermore, continue to invest in the training and capacity-building of public officials carrying out prevention functions and ensure that anti-corruption bodies are fully and adequately staffed and equipped with the necessary material resources (art. 6, para. 2).*
- *Consider strengthening open recruitment to facilitate recruitment into entry-level jobs, occupations and trades in the public service, as recommended in a recent evaluation by PSC of the effectiveness of the recruitment and selection system (art. 7, para. 1).*
- *Endeavour to adopt procedures for the selection and training of individuals for public positions considered vulnerable to corruption and their rotation, where appropriate, to other positions, as provided in the national anti-corruption strategy (art. 7, para. 1 (b)).*
- *Take additional measures to enhance transparency in political party funding, including to regulate the private funding of political parties and independent candidates and the disclosure of private funding sources, and prioritize the implementation of the Political Party Financing Act and related regulations (art. 7, para. 3).*
- *Take further action to ensure that the financial disclosure requirements applicable to designated public officials are duly enforced, and strengthen follow-up action by executive authorities to take disciplinary or other action when conflicts of interest arise (art. 7, para. 4). Furthermore, endeavour to expand disclosure requirements for members of the National Assembly and members of the executive to include non-financial, non-business interests from which a conflict of interest may arise (arts. 7, para. 4, and 8, para. 5).*
- *Continue to promote awareness and knowledge of key measures and systems to facilitate the reporting by public officials of acts of corruption, and of available protection measures (art. 8, para. 4).*
- *Adopt the necessary regulations to implement section 9 of the Public Administration Management Act, pertaining to disclosures of interests of family members of public service employees; provide training and guidelines on disclosure requirements for members of the executive; and endeavour to establish a system for verification of disclosures by members of parliament and the executive (art. 8, para. 5).*
- *Continue to strengthen government procurement and administrative processes to allow for greater monitoring, accountability, transparency and cooperation with the private sector, and to hold public officials accountable for service delivery and enhance their professionalization, in line with the objectives of the national anti-corruption strategy (art. 9, para. 1).*

- *Strengthen the framework for access to information to ensure that necessary procedures do not impede the effective provision of information and to strengthen compliance. Such measures should include providing the regulator with effective enforcement powers, establishing a simplified appeals mechanism, specifying the right to access information related to the funding of political parties, and promoting awareness and knowledge of key measures and systems to facilitate access to information (art. 10 (a)).*
- *Continue to strengthen measures to prevent corruption involving the private sector, including by strengthening anti-corruption compliance requirements and providing sufficient guidance and awareness-raising to private entities, including State-owned enterprises, specifically on anti-corruption requirements; promoting rules on business integrity and good commercial practices; strengthening the transparency of beneficial ownership of legal entities; requiring companies to have sufficient internal auditing controls to prevent and detect acts of corruption; preventing the misuse of procedures regulating commercial activities; and considering the adoption of post-employment restrictions with a view to preventing conflicts of interest (art. 12, para. 2).*
- *Take such measures as may be necessary to prohibit the acts enumerated in article 12, paragraph 3, of the Convention.*
- *Consider establishing anti-corruption education programmes in schools and universities (art. 13, para. 1).*
- *(a) Ensure that all designated non-financial businesses and professions particularly susceptible to money-laundering are covered by the anti-money laundering requirements, including dealers in precious metals and stones, natural or legal persons that provide informal services for the transmission of money or value, as well as natural or legal persons that engage in the business of money and currency exchange; (b) consider including reporting institutions in the category of accountable institutions subject to anti-money laundering requirements, in particular with regard to customer due diligence and record-keeping; (c) strengthen the supervisory and sanctioning regime for designated non-financial businesses and professions at the operational level, including through the application of proportionate and dissuasive sanctions; and (d) finalize the national risk assessment and implement corresponding risk-based requirements (art. 14, para. 1).*
- *Consider extending the cross-border declaration system to cover: (a) foreign currency declarations by incoming travellers; (b) written declarations of cash transfers in amounts above prescribed thresholds; and (c) incoming bearer negotiable instruments and outgoing bearer negotiable instruments payable in foreign currency; and consider establishing a mechanism requiring FIC to be notified of declarations and seized consignments of a suspicious nature (art. 14, para. 2).*
- *Consider requiring financial institutions to apply enhanced scrutiny to transfers of funds that do not contain complete originator information (art. 14, para. 3 (c)).*

#### **2.4. Technical assistance needs identified to improve implementation of the Convention**

- *Support in the design of procedures for the selection and training of individuals for public positions considered vulnerable to corruption and their rotation (art. 7, para. 1 (b)).*
- *Assistance in the design of anti-corruption public education programmes, including school and university curricula (art. 13, para. 1 (c)).*

### **3. Chapter V: asset recovery**

#### **3.1. Observations on the implementation of the articles under review**

##### General provision: special cooperation; bilateral and multilateral agreements and arrangements (arts. 51, 56 and 59)

*South Africa has developed a comprehensive legal framework for asset recovery, which has allowed for effective international cooperation in that regard.*

*The International Cooperation in Criminal Matters Act and the Prevention of Organized Crime Act constitute the general framework for international legal assistance, including in asset recovery matters.*

*Institutionally, requests for mutual legal assistance are directed to the central authority, which is the Department of Justice and Constitutional Development. An Asset Forfeiture Unit (AFU) under NPA is in place to assist requesting States, as described below. The police have liaison officers in other jurisdictions to facilitate requests for mutual legal assistance.*

*Procedures for asset recovery through international cooperation are set out in the AFU internal policy guide, which also provides a mechanism for managing informal requests, and in the G20 step-by-step guide for asset recovery for South Africa, published in 2013.*

*South Africa has signed 19 bilateral agreements on mutual legal assistance in criminal matters that include asset recovery provisions and recognizes the Convention as a legal basis for international cooperation. The country has never refused a request for mutual legal assistance.*

*Under the Financial Intelligence Centre Act, section 40 (1) (b), FIC can spontaneously share information with foreign financial intelligence units or investigating authorities, pursuant to a written agreement between FIC and its foreign counterpart and subject to the formal approval of the Minister of Finance. Furthermore, as a member of the Egmont Group, FIC exchanges information through the Egmont Secure Web and through ARINSA and the Camden Asset Recovery Inter-Agency Network.*

##### Prevention and detection of transfers of proceeds of crime; financial intelligence unit (arts. 52 and 58)

*Under the Financial Intelligence Centre Act, accountable institutions are subject to customer due diligence measures as stipulated in chapter III of the Act. The measures include a prohibition on opening anonymous accounts, the establishment and verification of customer identities and the identity of any person acting on behalf of the customer or on whose behalf the customer is acting, the identification of beneficial owners in cases involving legal persons and arrangements, the continuous monitoring of transactions, maintaining records and continuously updating information, and reporting suspicious transactions. Accountable institutions are required to adopt a risk-based approach in implementing customer due diligence requirements (sect. 42). Enhanced due diligence is required for higher risk customers and transactions, including for “domestic prominent influential persons” and “foreign prominent public officials”, their family members and close associates (sects. 21G and H).*

*FIC has issued a number of guidance notes and directives, which are authoritative in nature, to facilitate the implementation of the Financial Intelligence Centre Act, including the enhanced due diligence requirements. However, no measures are in place for financial institutions to be notified at the request of foreign States regarding higher risk accounts or transactions.*

*Record-keeping is addressed in section 21 of the Financial Intelligence Centre Act and chapter 3 of FIC Guidance Note No. 7. All records of accounts, transactions and*

customer identities must be kept for at least five years from the date on which the business relationship is terminated or the transaction is concluded.

Bank licensing conditions established by virtue of the Banks Act prohibit the establishment of shell banks (sect. 11 (1)). Pursuant to the Regulations relating to Banks of 12 December 2012, financial institutions must guard against entering into or maintaining a correspondent banking relationship with a shell bank or with a respondent institution that permits its accounts to be used by a shell bank (sects. 36 (17) (b) (i) (C) and 36 (17) (b) (iii) (B)).

South Africa has implemented a financial interest disclosure system for designated public officials, who are selected on the basis of seniority and the level of risk associated with their positions. It covers members of the executive, members of parliament, municipal councillors, senior managers in municipalities and designated public service employees, including members of senior management (all employees graded 13 and above) and employees in supply chain management and finance units. Declarations are scrutinized by PSC and failure to file is a punishable act of misconduct. Declarations are submitted electronically in the case of public service employees, and implementation reports show that there is significant compliance by public officials with the filing requirements. There are no measures to permit the sharing of financial disclosure information with foreign competent authorities for purposes of investigation.

South Africa does not have any legal provisions that require appropriate public officials having an interest in or signature or other authority over foreign financial accounts to report that relationship to the authorities and to maintain appropriate records related thereto.

Measures for direct recovery of property; mechanisms for recovery of property through international cooperation in confiscation; international cooperation for purposes of confiscation (arts. 53, 54 and 55)

South Africa has no explicit provisions that allow a foreign State party to initiate a civil action before its courts. Although chapters 5 and 6 of the Prevention of Organized Crime Act provide grounds for a foreign party to claim an interest in property in civil or criminal proceedings, this is conceived solely within existing asset forfeiture proceedings instituted by the National Director of Public Prosecutions.

Section 300 of the Criminal Procedure Act allows the Court to order compensation or restitution against the accused convicted of an offence that has resulted in damage or loss of property.

With respect to the recognition of a foreign party's claim to property, section 30 (5) of the Prevention of Organized Crime Act permits the court to suspend the realization of property to satisfy the claim or judgment of a person who has suffered damage to or loss of property or injury as a result of an offence. Furthermore, section 39 of the Prevention of Organized Crime Act permits any person having an interest in property subject to a preservation order to apply for exclusion of their interest.

Foreign confiscation orders are given effect in South Africa subsequent to the registration process described in sections 19 and 20 of the International Cooperation in Criminal Matters Act.

Under the Prevention of Organized Crime Act, foreign offences count as predicate offences to the extent that they would constitute offences in South Africa. The definition of money-laundering in section 4 includes predicate offences committed abroad. The confiscation of proceeds of unlawful activities, including money-laundering, may be ordered against a defendant to compel the payment to the State of any amount the court considers appropriate (sect. 18).

*The provisions of chapter 5, more specifically section 24, of the Prevention of Organized Crime Act, allow for non-conviction-based confiscation, under certain circumstances, where a person absconds or dies.*

*Foreign restraint orders are given effect in South Africa subsequent to the registration process described in section 24 of the International Cooperation in Criminal Matters Act.*

*Section 38 (1) and (2), read together with section 25, of the Prevention of Organized Crime Act allows competent authorities in South Africa to freeze or seize property upon a request from a foreign State, by mandating the National Director of Public Prosecutions to apply for a property preservation order before the High Court. A registered foreign restraint order has the same effect as a restraint order made by the domestic court where it has been registered (sect. 25, International Cooperation in Criminal Matters Act).*

*Section 38 (1) and (2) may also be used by South Africa to apply for a preservation order on the basis of a criminal investigation having been started in another country.*

*AFU was established to focus on the implementation of chapters 5 and 6 of the Prevention of Organized Crime Act. AFU provides timely assistance to requesting States seeking to recover assets, irrespective of whether a formal request for mutual legal assistance has been submitted.*

*Apart from section 7 of the International Cooperation in Criminal Matters Act, the content requirements for incoming requests for mutual legal assistance are not specified in any law or regulation. However, the aforementioned G20 step-by-step asset recovery guide provides some guidance to requesting States.*

*South Africa provides assistance in asset recovery regardless of the offence and the value of the property involved and consults with requesting States as a matter of practice before taking a decision to lift provisional measures.*

*Under the Prevention of Organized Crime Act, sections 20 (5) and 39 (3), any person holding any interest in property is provided an opportunity to make representations in connection with the realization or preservation of that property.*

#### *Return and disposal of assets (art. 57)*

*The law of South Africa provides for the mandatory return and disposal of proceeds of unlawful activity to requesting States. Section 21 of the International Cooperation in Criminal Matters Act provides that South Africa will pay to the requesting State any amount recovered in terms of a foreign confiscation order, less expenses incurred, unless an agreement or arrangement provides otherwise. Case examples involving the successful return of assets to foreign countries have been provided. Apart from international treaties, South Africa has not entered into any other agreements or arrangements with foreign States related to asset return.*

### **3.2. Successes and good practices**

- The development of the AFU internal policy guide for handling asset recovery requests and managing requests received informally (art. 51)*
- The posting of South African Police Service liaison officers (focal points) in other jurisdictions to facilitate requests for mutual legal assistance, including asset recovery (art. 56)*
- The existence of specialized structures such as AFU and the Investigating Directorate and the Specialized Commercial Crime Unit of NPA in facilitating the recovery and return of assets (art. 55, para. 2)*



### 3.3. Challenges in implementation

*It is recommended that South Africa:*

- *Adopt measures as necessary for financial institutions to be notified at the request of a foreign State regarding higher risk accounts or transactions (art. 52, para. 2 (b)).*
- *Consider taking the necessary measures to permit its competent authorities to share financial disclosure information with foreign competent authorities when necessary to investigate, claim and recover criminal proceeds (art. 52, para. 5).*
- *Consider taking measures that would require appropriate public officials having an interest in or signature or other authority over a foreign financial account to report that relationship to appropriate authorities and to maintain appropriate records related thereto (art. 52, para. 6).*
- *Ensure that foreign States are explicitly granted locus standi to initiate civil action in its courts in order to establish title to or ownership of property acquired through the commission of an offence established in accordance with the Convention (art. 53 (a)).*
- *Continue the development by AFU of an up-to-date asset recovery guide, to be made available together with an updated version of the G20 step-by-step asset recovery guide (art. 55, para. 3).*
- *Consider expanding the powers of FIC to spontaneously share information, including also with financial intelligence units of countries with which no bilateral agreements are in place (art. 56).*

## IV. Implementation of the Convention

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### A. Ratification of the Convention

The Convention was ratified by Parliament on 22 November 2004 and signed by the President on 22 November 2004. South Africa deposited its instrument of ratification with the Secretary-General of the United Nations on 24 November 2004. In terms of section 231 (section 2 & 4) of the Constitution of 1996, an international agreement binds the Republic after it has been approved by resolution in both houses of Parliament and a self-executing provision of such an agreement is law in the Republic, unless it is inconsistent with the Constitution or an Act of Parliament.

### B. Legal system of South Africa

#### **Political and institutional systems of the Republic of South Africa**

The Republic of South Africa (RSA) is a constitutional democracy with the President as head of

state. The legal system is a hybrid of the following: Statutory Law (Constitution and Acts of Parliament), Precedents (Judicial and Court decisions) and Customary Law. Parliament passes laws with an independent judiciary.

After a long period of apartheid, the country became a fully multiracial democracy with the adoption of an interim Constitution in December 1993 and the April 1994 general election. The Constituent Assembly (Parliament) approved a revised version of the RSA's Constitution which came into force in February 1997. The Constitution is the supreme law of the RSA. It provides the legal foundation for the existence of the republic. It sets out the rights and duties of its citizens and defines the structure of government and it vests the various government bodies with their respective scopes of power and jurisdiction.

The Constitution guarantees judicial independence and explicitly recognises the separation of powers between the Executive, Legislature and the Judiciary. Structurally government is arranged at three levels namely, the national, provincial and local government. The country is divided into nine provinces each with its own provincial legislature. It is important to emphasise that all structures of government derive their authority from the Constitution. No law or government action can supersede or violate the provisions of the Constitution.

The Constitution provides for a strong central government headed by a President (currently Mr. Cyril Ramaphosa, elected in 2019) elected for a maximum of two five-year terms as chief of state and head of government. The bicameral Parliament consists of a 400-member National Assembly, elected by proportional representation, and a 90-seat National Council of Provinces, elected by the nine provincial legislatures. Legislators of both houses serve five-year terms.

### The Executive

The Executive consists of the President, the Deputy President and the Cabinet Ministers at national level, and the Premier and Members of the Executive Councils (MECs) at provincial level. The President is Head of State and is the head of the national Executive, also referred to as Cabinet. Ministers are responsible for different government departments as per their portfolios. As head of the Executive, the President is the Commander-in-Chief of the defence force. The President is elected by the National Assembly during the first sitting of the Assembly. Once elected as President, she/he ceases to be a Member of Parliament and must be sworn into office within five days.

The Executive in each province is called the Executive Council and is headed by the respective nine Premiers. Members of Executive Councils (MECs) are accountable to their Legislatures in the same way as the Cabinet is accountable to Parliament. The Premier is elected by the Members of that Provincial Legislature (MPLs) from amongst themselves at the first sitting of that legislature after the election. MECs are accountable to their Premiers. Like Ministers, MECs are responsible for departments. The competencies or matters over which provincial departments have exclusive control in some areas and joint control (with national government) in others, is clearly set out in Schedules to the Constitution. Schedule 4 provides for the functional areas of concurrent national and provincial legislative competence, whilst Schedule 5 provides for the functional areas of exclusive provincial legislative competence.

## The Legislature

The legislative authority of the national sphere of government is vested in Parliament. Parliament consists of two houses - the National Assembly (NA) and the National Council of Provinces (NCOP). The national legislative authority, as vested in Parliament, confers on the NA the power to, inter alia, amend the Constitution and to pass legislation with regard to any matter. The Constitution provides, in as far as constitutional amendments are concerned, special majorities for the passage of a bill amending the Constitution.

The NCOP ensures that the nine provinces and local government have a direct voice in Parliament when laws are made. The NCOP represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and providing a national forum for public consideration of issues affecting the provinces. The NCOP also has an important role to play in promoting national unity and good working relations between national, provincial and local government. While the delegates in the NCOP represent their political parties, they also have the important duty of representing their provinces as a whole. Each province has ten delegates, no matter how big or small the province, thus guaranteeing a balance of interests among the provinces. There are six permanent and four "special" non-permanent delegates in each delegation. Each is headed by the Premier (as one of the special delegates) or a substitute for him/her when the Premier is not available. The delegation must reflect the proportional strength of the various parties in the province.

Each province has a legislature, the size of which varies depending on the population levels in the province. According to the Constitution the minimum size of a Legislature is 30 members and the maximum size is 80 members. Members are elected from provincial lists on the basis of the number of votes received by a political party. A provincial legislature is responsible for passing the laws for its province as defined in the Constitution. These laws only apply in that particular province. Parliament may intervene and change these laws under certain conditions, for example, if they undermine national security, economic unity, national standards or the interests of another province. Like Parliament, provincial legislatures have the responsibility of calling their Members of their Executive to account for their actions.

The national Parliament retains exclusive legislative primacy over the provincial legislatures in all but a few areas of minor concern. In many cases, however, provincial governments are delegated authority and may exercise concurrent competence. In the end, any such legislative initiatives may be overturned by Parliament when they conflict with national law, thus limiting the federal character of the South African government structure. The legal system of the RSA is a hybrid of legal traditions from English common law and Roman-Dutch civil law, with an infusion of indigenous African customary law. Notwithstanding these historical roots, in matters of judicial procedure the common law tradition dominates, and there is firm adherence to the principle of *stare decisis*. Not only are decisions of higher courts binding on those below, but the Constitution also explicitly recognizes a certain measure of judicial activism in granting judges the —inherent power...to develop the common law.

## The Judiciary

South African courts enjoy a high level of constitutionally protected judicial independence. The doctrine of separation of powers, the independence of the judiciary and the supremacy of the

Constitution lie at the heart of South Africa's constitutional democracy. The doctrine of separation of powers constitutes one of the 34 Constitutional Principles which became the building blocks of the Constitution. The principle of an independent judiciary derives from the basic principles of the rule of law and the separation of powers. Judicial independence is recognised and protected in the Constitution in section 165. Judicial independence is internationally recognised through various declarations and international instruments such as the UN Basic Principles on the Independence of the Judiciary and the African Charter on Human and Peoples Rights.

The South African Constitution identifies four primary courts vested with the ultimate judicial authority of the state: the Constitutional Court, the Supreme Court of Appeals, the High Courts and the Magistrates' Courts. The Constitutional Court consists of the Chief Justice of South Africa, the Deputy Chief Justice, and nine other judges. It sits at the top of the hierarchical judicial structure and may pass final binding judgments on all cases of constitutional importance; it also possesses the jurisdiction to decide which cases fall under this classification. The Supreme Court of Appeals is the court of last instance in all other matters. One level down in the structure are 13 High Courts corresponding to South Africa's pre-constitutional regional divisions. These have first instance jurisdiction over high-profile civil and criminal matters and appellate jurisdiction over judgments of lower courts. Decisions of the High Courts may be appealed to the Supreme Court of Appeal or to the Constitutional Court if the subject matter is of an appropriate constitutional character. The Magistrates' Courts rest at the bottom of the structure and deal with the majority of cases. These lower courts can be formally divided into two distinct types: (i) District Magistrates' Courts are found in most South African towns and cities and have the jurisdiction necessary to hear low-value civil cases and low-severity criminal cases. (ii) Regional Magistrates' Courts are found in major population centers in order to serve a larger geographic area, and they exercise jurisdiction over a wider array of criminal provisions with a correspondingly increased sentencing discretion.

Judges are appointed by the President upon the recommendations of a peer-based Judicial Service Commission (JSC), and once appointed benefit from security of tenure and remuneration. The President after consulting the JSC and the leaders of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice, and after consulting the JSC, appoints the President and the Deputy President of the Supreme Court of Appeal. The other judges of the Constitutional Court are appointed by the President, after consulting the Chief Justice and the leaders of parties represented in the National Assembly, after perusing a list of nominees submitted by the JSC. The President appoints all other judges of the high courts on the advice of the JSC.

The appointment of Magistrates of lower courts is by the Minister of Justice and Correctional Services in terms of the Magistrates' Act, 1993 after consulting the Magistrates' Commission. The Magistrate's Commission is a statutory body established in terms of the Magistrate's Act. The Commission is chaired by a judge, designated by the President in consultation with the Chief Justice. The objects of the Commission are amongst others, to compile a code of conduct for judicial officers in the lower courts (District and Regional Courts) and to advise the Minister of Justice regarding the appointment of magistrates. It also advises or makes recommendations to, or reports to the Minister, for information of Parliament regarding any matter which is of interest for the independence in the dispensing of justice and the efficiency of the administration of justice in the Magistrates' Courts. It also carries out investigations and makes recommendations to the Minister regarding the suspension and removal from the office of magistrates. Any conduct by a magistrate that is alleged to be improper may be reported to the Judicial Head of the Court wherein the

magistrate concerned presides. The South African Judicial Education Institute Act, 2008 established a Judicial Education Institute in order to promote the independence, impartiality, dignity, accessibility and effectiveness of the courts by providing judicial training for all judicial officers (judges and magistrates). The Judicial Education Institute is governed by a Council comprising of 20 persons chaired by the Chief Justice.

### **Law enforcement and the administration of justice**

To ensure the safety of all in South Africa, the law enforcement agencies, together with the Department of Justice and Constitutional Development (DOJ&CD), the National Prosecuting Authority (NPA), the Department of Correctional Services (DCS), the Department of Social Development (DSD) and other departments, work together to achieve the NDP goal that “*All people in SA are and feel safe.*” To deal with this in a focused manner across the value chain, the Justice, Crime Prevention and Security (JCPS) Cluster was established at a Cabinet level. The focus of the JCPS Cluster is the fight against crime and corruption, to enable an integrated and coordinated approach to policy formulation and coordination, and to drive the implementation of the government’s Programmes of Action as mandated by Cabinet and informed by the NDP.

Chapter 11 of the Constitution stipulates that the South African Police Service (SAPS) has a responsibility to prevent, combat and investigate crime, maintain public order, protect and secure the inhabitants of the Republic and their property; and uphold and enforce the law. The SAPS must create a safe and secure environment for all people in South Africa, prevent anything that may threaten the safety or security of any community, must investigate any crimes that threaten the safety or security of any community, ensure criminals are brought to justice; and participate in efforts to address the causes of crime. The South African Police Service Act, 1995 provides for the establishment, organisation, regulation and control of the SAPS.

Since 1998, there is a single prosecuting authority in the Republic of South Africa, which was established by the authority of the 1996 Constitution and an act of parliament - the National Prosecuting Authority Act (1998). The National Director is the head of the National Prosecuting Authority (NPA) and is appointed by the President. Each province (9 of them) has a director of public prosecutions, who are also appointed by the President. In each office, there are also deputy directors of public prosecutions. The National Director determines general prosecution policy, in consultation with regional directors. The National Director will not interfere in the management of operations of the offices, but may review or intervene in one of the regional offices if there is a Constitutional basis for doing so, or if there may be a contravention of public policy. The National Director may also review a decision to prosecute or not to prosecute upon receipt of a complaint from the public or the government. Special Directors also operate in the NPA to serve specific tasks, and hold the same ranking as a Director in the province, but with a specific mandate, such as witness protection or priority crimes. These Special Directors will lead the investigation and prosecution of such crimes. Sexual offences and commercial crimes are also covered by a specialized unit and a director. Commercial crimes encompass both the private and public sectors, and include economic crimes as well as corruption. Special Directors receive their appointment and mandate from a proclamation of the President. The National Director can decide which cases will be handled by regional prosecutors, such as foreign bribery, for example. Special Directors have national jurisdiction, but regional prosecutors provide assistance to carry forward cases. Special Directors must coordinate with the Director of the provincial prosecutor office.

## **Public administration**

Section 40(1) of the Constitution of the Republic of South Africa, 1996 (Constitution) provides that government is constituted as national, provincial and local spheres which are distinctive, interdependent and interrelated. The Constitution further requires in section 41 (1) (b) and (c), all spheres of government to provide effective, efficient, transparent, accountable and coherent government for the Republic to secure the well-being of the people and the progressive realization of their constitutional rights.

Section 195 (5) and (6) permits legislation regulating public administration to differentiate between the different sectors, administrations, and institutions by taking into account their nature and functions. Public administration means the public service, municipalities and their employees (section 1 of the Public Administration Management Act, 2014).

Section 197(1) of the Constitution provides that within the public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation. In this regard, the Public Service Act, 1994, was promulgated to provide for the organisation and administration of the public service of the Republic, the regulation of the conditions of employment, terms of office, discipline, retirement and discharge of members of the public service, and matters connected therewith. The public service consists of persons who are employed in national departments, Offices of the Premier, provincial departments, national government components, and provincial government components.

Section 153 and 154(1) of the Constitution provide that a municipality must structure and manage its administration and that the national and provincial governments must, by legislative and other measures, support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions. Local Government: Municipal Systems Act, 2000 (chapter 7) provides for local public administration and human resources.

## **Legal system of the Republic of South Africa**

Section 231 of the Constitution of the Republic of South Africa (the RSA) of 1996 states that generally accepted rules of international law and international conventions when they have been ratified by an act and have come into effect shall form an integral part of the RSA's domestic law and shall override any other contrary provision of domestic law.

Accordingly, the UN Convention against Corruption has become an integral part of the RSA's domestic law following the ratification of the Convention by the Parliament on 22 November 2004 and entry into force on 14 December 2005 in accordance with Article 68 of the Convention. The Convention ranks high among statutory instruments, just below the Constitution but above other laws. Accordingly, the provisions of the Convention override any other contrary provision in domestic law.

## **Important legislation for the implementation of the Convention**

1. Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004):

The Prevention and Combating of Corrupt Activities Act, 2004 (PRECCA) is at the center of anti-corruption in South Africa. The PRECCA provides for: the offence of corruption and offences relating to corrupt activities, investigative measures in respect of corruption and related corrupt activities, the establishment and endorsement of a Register in order to place certain restrictions on persons and enterprises convicted of corrupt activities relating to tenders and contracts, and extraterritorial jurisdiction in respect of the offence of corruption and offences relating to corrupt activities. The PRECCA also places a duty on certain persons holding a position of authority to report certain corrupt transactions.

2. The Promotion of Access to Information Act, 2000 (Act No. 2 of 2000):

The Promotion of Access to Information Act, 2000 (PAIA) gives effect to Section 32 of the Constitution (access to information) by setting out how anyone can get access to information held by the state and any information held by private bodies that is required for the exercise and protection of any rights.

The Act was amended to provide for the training of presiding officers in the magistrates' courts and related matters (Promotion of Access to Information Amendment Act, 2002 (No. 54 of 2002)). Section 28 of the Judicial Matters Amendment Act, 2017 (Act No. 8 of 2017) has amended the provisions of PAIA regarding the training of judicial officers. For example, subsection 91A(5) provides that: The South African Judicial Education Institute established in terms of section 3 of the South African Judicial Education Institute Act, 2008 (Act 14 of 2008), must develop and implement training courses for presiding officers with the view to building a dedicated and experienced pool of trained and specialised presiding officers for purposes of presiding in court proceedings as contemplated in this Act.

3. The Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000):

The Promotion of Administrative Justice Act, 2000 (PAJA) gives effect to the right to administrative action that is lawful, reasonable and procedurally fair as well as to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996.

The Act was amended to provide for the training of presiding officers in the magistrates' courts and related matters (Promotion of Administrative Justice Amendment Act, 2002 (No. 53 of 2002)<sup>3</sup>.

4. The Protected Disclosures Act, 2000 (Act No. 26 of 2000):

The Protected Disclosures Act, 2000 (the PDA) provides for employees in both the private and public sector to report unlawful or irregular conduct by their employers or fellow employees and provides for the protection of such employees. The PDA was recently amended by Act 5 of 2017, to broaden its ambit and introduces several new provisions that place further obligations on whistleblowers and employers alike.

5. The Financial Intelligence Act, 2001 (Act No. 38 of 2001):

The Financial Intelligence Act, 2001 (FICA), is designed to assist in the combatting of money

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<sup>3</sup> Please refer to the comment in the preceding paragraph regarding the provision of section 28 of the Judicial Amendment Act, 2017 (Act No. 8 of 2017).

laundering and the financing of terrorism and establishes a Financial Intelligence Centre. The FICA was amended by Act 1 of 2017, to expand the objectives of the Financial Intelligence Centre, the list of agencies to which the Centre will make the information it collects available, and provides for further due diligence measures.

6. The Public Administration Management Act, 2014 (Act No. 11 of 2014):

The Public Administration Management Act, 2014 (PAMA) establishes the Public Administration Ethics, Integrity and Disciplinary Technical Assistance Unit. The functions of the Unit include:

- (i) providing technical assistance and support to institutions in all spheres of government regarding the management of ethics, integrity and disciplinary matters relating to misconduct in the public administration;
- (ii) developing norms and standards on integrity, ethics, conduct and discipline in the public administration; and
- (iii) promoting and enhance good ethics and integrity within the public administration.

The Act further prohibits employees in the public administration from conducting business with the State directly or as directors of companies.

7. Public Finance Management Act, 1999 (PFMA) (Act No. 1 of 1999):

The object of this Act is to secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities of the institutions to which this Act applies. Section 38(1)(a)(iii) prescribes that “the accounting officer must ensure that the department has and maintain an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective”.

8. Local Government: Municipal Finance Management Act, 2003 (Act No. 56, 2003)

The object of this Act is to secure sound and sustainable management of the fiscal and financial affairs of municipalities and municipal entities by establishing norms and standards and other requirements for-

- (a) ensuring transparency, accountability and appropriate lines of responsibility in the fiscal and financial affairs of municipalities and municipal entities;
- (b) the management of their revenues, expenditures, assets and liabilities and the handling of their financial dealings;
- (c) budgetary and financial planning processes and the co-ordination of those processes with the processes of organs of state in other spheres of government;
- (d) borrowing;
- (e) the handling of financial problems in municipalities;
- (f) supply chain management; and
- (g) other financial matters.



## **Institutions supporting good governance and the fight against corruption in the Public Service**

South Africa takes a partnership approach in the fight against corruption, involving various state entities as well as non-state actors and civil society. In 2014, Government reaffirmed its commitment to the fight against corruption and adopted a zero tolerance and “*whole of Government and societal approach*” (as depicted below) to combatting corruption and ensuring a resilient anti-corruption framework.

The following institutions play an important role in implementing the various provisions of the Convention:

### 1. Department of Public Service and Administration (DPSA)

The Department plays an important role in setting norms and standards on ethics, integrity and anti-corruption for the public service. The Department also provides implementation support and monitors compliance with the set norms and standards.

Individual governmental departments also play a role in anti-corruption efforts, and are required to maintain minimum anti-corruption capacity requirements in line with the Public Service Regulations, 2016, to prevent and detect corruption.

### 2. The National Prosecuting Authority (NPA)

The National Prosecuting Authority fulfills its constitutional mandate to institute criminal proceedings on behalf of the state and must exercise its functions without fear, favour or prejudice. The National Director of Public Prosecutions reports to Parliament through the Portfolio Committee on Justice and Constitutional Development.

### 3. The South African Police Service

The South African Police Service Act, 1995 established a Directorate for Priority Crime Investigation (DPCI) as an independent directorate within the South African Police Service. The DPCI is responsible for the combating, investigation and prevention of national priority crimes such as serious organized crime, serious commercial crime and serious corruption. Offences in terms the PRECCA must be reported to a member of the DPCI.

### 4. The Public Service Commission

The Public Service Commission derives its mandate from sections 195 and 196 of the Constitution, 1996. The PSC’s role is to provide oversight of the public service of South Africa through the powers and functions contained in section 196 of the Constitution. Its mandate is, inter alia, to promote excellence in governance, the delivery of quality services and a high standard of professional ethics. This mandate is exercised through the investigation, monitoring and evaluation of public administration. The Public Service Commission is also the custodian of the National Anti-Corruption Hotline, which the public uses to report allegations of corruption.

### 5. Auditor General

The Auditor-General has a constitutional mandate and, as the Supreme Audit Institution of South Africa, exists to strengthen the country’s democracy by enabling oversight, accountability and governance in the public sector, thereby building public confidence.

### 6. Public Protector

Public Protector Act, 1994 (Act no 23 of 1994) empowers the Public Protector to investigate any alleged improper or dishonest act, or omission or corruption with respect to public money. The Public Protector may investigate, on the basis of a complaint or on its own initiative, any level of

government (i.e. national, provincial and local government), any public office bearer, public entities and any statutory council. Other powers of the Public Protector include:

- Mediate, conciliate and negotiate;
- Recommend corrective action; and
- Issue reports.

The Public Protector is independent of government and political parties and reports directly to Parliament.

#### 7. The Special Investigating Unit

The Special Investigating Unit and Special Tribunals Act, 1996 (Act No.74 of 1996) provides for the establishment of a Special Investigating Unit (SIU) for the purpose of investigating serious malpractice or maladministration in connection with the administration of state institutions, state assets and public money as well as any conduct which may harm the interest of the public.

#### 8. The Financial Intelligence Centre

The Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001) establishes a Financial Intelligence Centre (FIC) in order to assist in the combatting of money laundering activities and the financing of terrorist and related activities, this include the identification of the proceeds of unlawful activities. The Financial Intelligence Centre is established as an institution outside the public service but within the public administration.

### **Laws cited in the response to the self-assessment checklist**

Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996): <https://www.gov.za/documents/constitution>

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South African Judicial Education Institute Act, 2008 (Act No. 14 of 2008):  
<https://www.judiciary.org.za/index.php/sajei/sajei-act>

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[http://www.dpsa.gov.za/dpsa2g/documents/iem/2017/iem\\_27\\_03\\_2017\\_directive.pdf](http://www.dpsa.gov.za/dpsa2g/documents/iem/2017/iem_27_03_2017_directive.pdf)

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Public Service Co-ordinating Bargaining Council resolution between organised labour (labour unions) and government: <http://www.dpsa.gov.za/dpsa2g/PSCBC.asp>

Public Service Anti-Corruption Strategy (copy provided)

Public Sector Risk Management Framework issued by the National Treasury sets out guidance on implementing enterprise wide risk management: <https://oag.treasury.gov.za/RMF>

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(<http://www.dpsa.gov.za/dpsa2g/documents/acts&regulations/frameworks/white-papers/pservicedec.pdf>);

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(<http://www.dpsa.gov.za/dpsa2g/documents/acts&regulations/frameworks/white-papers/affirmative.pdf>);

White Paper on the Transformation of the Public Service, 1995  
(<http://www.dpsa.gov.za/dpsa2g/documents/acts&regulations/frameworks/white-papers/wpstoc.pdf>)

### **Assessments of measures to combat corruption and mechanisms to review the implementation of such measures**

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2. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

<http://www.oecd.org/daf/anti-bribery/southafrica-oecdanti-briberyconvention.htm>

3. Financial Action Task Force Mutual Evaluation

<https://www.fatf-gafi.org/countries/#South%20Africa>; <https://www.fatf-gafi.org/countries/>

4. African Peer Review Mechanism

<https://www.aprmtoolkit.saiia.org.za/country-reports-and-experiences/south-africa>

### **Preparation of the responses to the self-assessment checklist**

A team of experts was established under the guidance of the Department of Public Service and Administration (which is the focal point for the implementation of the UNCAC in South Africa). The team consisted of experts from the Department of Public Service and Administration, Department of Justice and Constitutional Development, National Prosecuting Authority, National Treasury, Public Service Commission, and the Department of Trade and Industry. The focal person conducted a workshop for the team of experts to understand the requirements of the UNCAC and the Implementation Review Mechanism. The team then identified other stakeholders that needed to be consulted in completing the self-assessment checklist.

The following methods were employed to complete the self-assessment checklist:

- (i) The self-assessment checklist was distributed among the identified stakeholders requesting relevant responses;
- (ii) The team members conducted research on their allocated areas of responsibility and interviewed several stakeholders in order to complete the self-assessment checklist;
- (iii) Workshops were conducted with the team of experts to assess progress until all the articles were responded to;
- (iv) Email exchanges with the team of experts to validate the responses;
- (v) The focal person conducted further research, interviewed stakeholders where gaps were identified and consolidated the inputs.
- (vi) The completed self-assessment checklist was presented to the Minister for the Public Service and Administration for approval.
- (vii) After the virtual country visit, the Secretariat sent the draft report for review by South Africa. The draft report was circulated among the relevant institutions for review and approval. In those areas where there were multiple stakeholders e.g. articles 5, 6, 7 and 13, a virtual meeting was conducted by the focal point for the review and approval of the report. In other areas, email exchanges were done between the focal point and relevant institutions.

**Three practices considered by South Africa to be good practices in the implementation of the chapters of the Convention that are under review.**

### 1. The eDisclosure system

In April 2014, the Minister for the Public Service and Administration introduced the electronic system (eDisclosure system) for disclosing financial interests. The system is an online tool used by designated employees to disclose their financial interests and replaced the manual and paper-based system. It is managed and administered by the Department of Public Service and Administration.

The system maintains a database of the financial interests of designated employees in a form of an electronic register. The following are the benefits of the eDisclosure system:

Quick and easy to use;

Easy identification and management of conflict of interest; and

Easy generation of reports and statistics.

The use of the system among the members of the Senior Management Service (SMS members) has improved from 65% in 2014 to 96% in 2018. The use of the eDisclosure system was made compulsory through the Public Service Regulations, 2016. Since then compliance among SMS members improved from 95% in 2017 to 98% in 2019 and 2020.

### 2. Establishment of the Office of the Chief Procurement Officer

Office of the Chief Procurement Officer (OCPO) was established by the National Treasury to improve the transparency, fairness and cost-effectiveness of the procurement system in all spheres of government, and to support the proper utilization of financial and other public resources and state assets. The OCPO is responsible for the following functions:

Endorsement of particulars on the Register for Tender Defaulters in terms of Section 28 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004). The National Treasury is empowered to determine the period of restriction from doing business with the public sector for a period not less than 5 years and not more than 10 years;

Record keeping of restricted suppliers in accordance with the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000). The National Treasury maintains a Register of Restricted Suppliers prohibited from doing business with the public sector. This Act gives the Accounting Officer/Authority the power to restrict a supplier from doing business with the public sector if such a supplier obtained preferences fraudulently or if such supplier failed to perform on a contract based on the specific goals;

Management of the Central Supplier Database, where public servants, who own business are detected for the purpose of preventing them from doing business with organs of state;

Management of transversal tenders; and

Electronic procurement.

### 3. Prohibition of public service employees from conducting business with the state

- One risk that threatens good governance and the public's trust in government institutions from delivering proper services, is conflict of interest. To address this risk, the Code of Conduct for public service employees was revised to among other things prohibit employees in the public service from conducting business with an organ of State, whether in their own capacity as individuals or through companies in which they are directors. This prohibition is extended to the municipalities through section 8 of the Public Administration Management Act, 2014, which came into operation on 1 April 2019.



- To assist the monitoring of public service employees conducting business with an organ of state, National Treasury took stock of employees registered on the Central Supplier Database (CSD). Since 1 February 2017, the DPSA is monitoring the implementation of this prohibition by comparing the data on the CSD with that on PERSAL, requesting Departments to act on transgressions. The resultant reports were presented to Cabinet in August 2017 and August 2018. Executive Authorities were requested to act against offenders and to provide feedback to the MPSA.

## C. Implementation of selected articles

### II. Preventive measures

#### Article 5. Preventive anti-corruption policies and practices

##### *Paragraph 1 of article 5*

*1. Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.*

##### *(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

#### **1. Strategies**

##### **1.1 Public Service Anti-Corruption Strategy adopted in 2002**

In January 2002, Cabinet approved the Public Service Anti-Corruption Strategy. The Strategy contained nine considerations that were inter-related and mutually supportive. These were as follows:-

- a) Review and consolidation of the legislative framework
- b) Increased institutional capacity to prevent and combat corruption
- c) Improved access to report wrongdoing and protection of whistleblowers and witnesses
- d) Prohibition of corrupt individuals and businesses (blacklisting)

- e) Improved management policies and practices
- f) Managing professional ethics
- g) Partnerships with stakeholders
- h) Social analysis, research and policy advocacy
- i) Awareness, training and education.

The Public Service Anti-Corruption Strategy (copy provided).

South Africa adopted a National Anti-Corruption Strategy (NACS) on 18 November 2020<sup>4</sup>.

The review of the public service anti-corruption strategy was a **recommendation in the country's first cycle implementation review under the United Nations Convention against Corruption conducted in 2012**<sup>5</sup>, and the process was undertaken under the auspices of the Anti-Corruption Task Team (ACTT)<sup>6</sup>. The ACTT established a Steering Committee to develop the NACS. The Steering Committee responsible for the development of a NACS followed the UNODC Guidelines for developing national anti-corruption strategies, and the conceptual framework used to develop the NACS included extensive public participation and key stakeholder engagement. This ensured that the process was inclusive, collaborative, transparent and consultative, allowing for the inputs of various role-players and stakeholders to be considered and/or incorporated into the Strategy.

The process to develop the NACS commenced with corruption research undertaken by the Public Affairs Research Institute (PARI), which was commissioned by the Steering Committee. **All relevant local strategies were reviewed as part of this process.** The resultant Diagnostic Report: Corruption and Anti-Corruption Initiatives in South Africa (October 2016) and the National Anti-Corruption Strategy Discussion Document (December 2016) laid the basis for the development of this strategy and its Implementation Plan.

Prior to the commencement of the public participation process, an independent drafting team, the Renaissance Network, was appointed through an open tender process to work in collaboration with the Steering Committee. This was done to uphold the principle of transparency and to ensure a final product that is not perceived to be a government-drafted, government-owned strategy.

The Discussion Document, a framework for a national strategy, was the basis for the public participation workshops. Nine provincial public participation workshops were held, involving a range of participants from the public, private and civil society sectors, organised labour, traditional leaders, faith-based organisations, higher education institutions, as well as youth and community-based organisations. This wide range of stakeholders and role-players who were involved can be considered reflective of broader South African society nationally. Key aspects of the content of the abovementioned National Anti-Corruption Strategy Discussion Document were shared with workshop participants, leading to robust and informative discussions on the proposed strategic pillars of the National Anti-Corruption Strategy, programmes of action and monitoring measures to support its strategic intent. The participants at the public participation workshops provided important input to the drafting team on their observations and negative experiences related to corruption in their communities, workplaces and in their interactions with officials in the public service. In addition, they offered practical approaches and suggestions to be considered as anti-corruption measures in the strategy.

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<sup>4</sup> The adoption of the Strategy was done after the country visit conducted on 27 October 2020.

<sup>5</sup> The executive summary of the first cycle review of the implementation of the UNCAC is available at: <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/14-16November2012/V1257293e.pdf>

<sup>6</sup> Upon review, the country adopted a different approach which consists of developing a national anti-corruption strategy (NACS). The newly adopted strategy covers all the sectors and it is not limited only to the public service.

Separate consultations were also held with stakeholders from civil society organisations and the business sector to solicit their input and expectations regarding the content of the Strategy, which resulted in electronic submissions being received from Business Unity South Africa (BUSA), Corruption Watch and the Open Democracy Advice Centre (ODAC). Members of the public, business and civil society organisations were invited to submit electronic inputs to the drafting of the Strategy. Submissions with recommendations to combat corruption and promote ethical behaviour in society were received and taken into account in the drafting process.

Once all inputs were received, an additional literature review was conducted of international best practice, relevant domestic legislation as well as policies, strategies and international treaties and conventions signed and/or ratified by the government of the Republic of South Africa, and the drafting of the NACS began. After the first draft of the NACS was developed, a reference group comprising representatives from civil society organisations, business, academia, labour and government was formed to provide specialist input to the Strategy. Key recommendations of the reference group have been incorporated into the Strategy.

The NACS was developed to create a South Africa that is free from corruption and one that is based on the binding values of integrity, transparency and accountability, respect for the rule of law, improved public service delivery and zero tolerance for corruption, in keeping with the objectives of the National Development Plan (NDP) and South Africa's international and regional obligations. South Africa has many departmental and sectoral strategies to curb and combat corruption. The NACS recognises the need to coordinate anti-corruption activities and to create implementation structures and monitoring measures that can address the scourge of corruption holistically and at multiple levels.

Furthermore, there are various pieces of legislation, policies and regulations that expand upon the country's constitutional requirements and direct a broad range of role players on how to comply. South Africa's commitment to eradicate corruption and corrupt practices is buttressed by applicable domestic legislation, policies, strategies and documents. However, the implementation of policies and laws has not always been consistent. Enforcement of laws and policies and the imposition of sanctions, whether criminal or otherwise, on those involved in corruption will lead to increased public confidence and would significantly enhance the deterrent effects of the laws and policies that are in place. The current whistle-blowing legislation provides limited protection and is perceived to be inadequate.

The National Anti-Corruption Strategy provides a framework for the country as a whole. It seeks to create a society in which the public is empowered and educated about what constitutes corruption and whistle-blowers are encouraged to come forward to report corruption and are protected when doing so. Government procurement and administrative processes are also tightened to allow for greater monitoring, accountability and transparency. It aims to ensure that public officials are held accountable for service delivery or the lack thereof, and that the business sector and civil society organisations operate in a values-driven manner and are held accountable for corrupt practices. The strategy further aims to promote a societal culture of zero tolerance towards corruption in any sector and strict consequence management for those involved in corruption. It calls for all members of the public to take personal responsibility in preventing and addressing corruption and to work together, across political, socio-economic and ideological divides, to build our democracy and achieve a corruption-free South Africa, as envisaged in the National Development Plan 2030.

To this end, this Strategy is constructed around the following pillars that are expanded upon in section 4.

- *Strategic Pillar One* focuses on citizen empowerment, stakeholder partnerships and building collective values of integrity, transparency, service, collaboration and accountability.

- *Strategic Pillar Two* emphasises the central role of employees in all sectors and the need for professionalisation and effective performance management with the aim of combating corruption and unethical behaviour.
- *Strategic Pillar Three* broadens the perspective by centering on governance in the public, private and civil society sectors, with a particular focus on preventing corruption and ensuring that there are consequences for those found guilty of corrupt activities, maladministration and wrongdoing.
- *Strategic Pillar Four* centres on the public sector, with specific attention to the public procurement system and administrative processes and the efficient and effective harnessing of public resources for the delivery of services.
- *Strategic Pillar Five* focuses on the development, strengthening and independence of dedicated anti-corruption bodies.
- *Strategic Pillar Six* advocates for effective risk management, focusing on the development and implementation of anti-corruption strategies and programmes of action that target those sectors, industries, government departments at all three tiers and/or state-owned entities that are identified as being particularly vulnerable to corruption.

The NACS is comprised of the Strategy, Implementation Plan, and Monitoring and Evaluation Framework.

ACTT member departments such as the SIU have already begun implementation of certain recommendations contained in the NACS.

The NACS makes provision for a wide range of governmental and non-governmental role-players and stakeholders. Pillar 1, focusing on citizen empowerment, will require extensive collaboration with civil society groups and the business sector. The NACS makes proposals for radical changes to the manner in which anti-corruption work is coordinated and proposes greater participation for the civil society and business sectors in the anti-corruption work driven by government. The Strategy is, therefore, pushing for the establishment of **an inter-sectoral coordination mechanism**. Government institutions which have a role to play in the prevention and combating of corruption will continue to exist, because they have been established with different mandates in this regard.

The NACS acknowledges the weakness regarding coordination among government institutions involved in anti-corruption activities. The Steering Committee is finalising discussion on how coordination among government institutions should be strengthened.

A copy of the NACS was provided in the course of the review.

## 1.2 Local Government Anti-Corruption Strategy

The first Local Government Anti-Corruption Strategy was adopted in 2006. In 2011, the Department of Cooperative Governance (DCOG) in partnership with the Department of Public Service and Administration (DPSA) as well as the South African Local Government Association (SALGA) initiated a process to review the 2006 Local Government Anti-Corruption Strategy. The process culminated in the promulgation of the 2016 Local Government Anti-Corruption Strategy. The strategy is a product of collaborative efforts with the SA Local Government Association (SALGA), relevant national and provincial departments, municipalities, law enforcement agencies, labour, business, and civil society.

The Local Government Anti-Corruption Strategy 2016 provides a high-level road map to deal with fraud, maladministration and corruption in South Africa's municipalities as well as ensuring that there are serious consequences for such deeds. The strategy is premised on the following broad

strategic objectives:

- a) Promoting community ownership;
- b) Strengthening municipalities' resilience against corruption; and
- c) Building trust and accountability through effective investigation and resolution.

The Local Government Anti-Corruption Strategy (copy provided).

## **2. Plans**

### **2.1 National Development Plan**

Having acknowledged that South Africa needs to address the twin challenges of corruption and lack of accountability, Chapter 14 of the National Development Plan, adopted in 2011, is dedicated to - Promoting Accountability and fighting corruption. Chapter 14 of the NDP identifies policy areas requiring implementation to promote accountability and fight corruption within the State including: building a resilient anti-corruption system; strengthening accountability and responsibility of public servants; creating a transparent responsive and accountable public service; and strengthening judicial governance and the rule of law. These objectives were implemented through the Medium-Term Strategic Framework 2014 to 2019 - Outcomes 3 and 12. The 6<sup>th</sup> administration will continue work in this regard.

[https://www.nationalplanningcommission.org.za/assets/Documents/NDP\\_Chapters/devplan\\_ch14\\_0.pdf](https://www.nationalplanningcommission.org.za/assets/Documents/NDP_Chapters/devplan_ch14_0.pdf)

### **2.2 Medium Term Strategic Framework 2014 - 2019**

The Medium-Term Strategic Framework (MTSF) is a high-level strategic document to guide the five-year implementation and monitoring of the National Development Plan. The MTSF sets out actions that government will take and targets to be achieved towards realization of vision 2030, as contained in the National Development Plan. The following outcomes focused on the prevention and combating of corruption, as according to Chapter 14 of the National Development Plan:

(i) Outcome 3, Sub-Outcome 7 of the Justice, Crime Prevention and Security (JCPS) cluster Annual Plan outlined deliverables relating to combatting corruption in the public and private sectors by:

- Establishing a resilient system to coordinate all anti-corruption responsibilities and structures through a coherent and holistic anti-corruption policy framework.
- Strengthening anti-corruption legislation.
- International cooperation to enhance corruption investigations, assets recovery and money laundering.
- Improve perceptions on South Africa's and its international standing in relation to corruption.

(ii) Outcome 12, sub-outcome 4: Procurement systems that deliver value for money.

The state's ability to purchase what it needs on time, at the right quality and for the right price is central to its ability to deliver on its priorities. Procurement systems need to be robust, transparent and sufficiently intelligent to allow for the different approaches that are suited to different forms of procurement. The approach over the past five years focused on the following areas that were

designed to create a conducive environment for supply chain management that serves the priorities of the public service:

- ✓ procurement systems need to focus not just on procedural compliance but also on delivering value for money.
- ✓ Building capacity and professionalizing supply chain management and put in place effective and transparent mechanisms for oversight and support.
- ✓ establishment of a chief procurement officer, whose main functions are to check on pricing and cost-effectiveness and ensure transparency, adherence to procedures and fairness.
- ✓ A centre-led process, with stakeholder representation, will be established to adjudicate on major tenders. Attention will also need to be given to ensuring heads of departments oversee the effectiveness of their department's procurement system as required by the Public Finance Management Act.

(iii) Outcome 12, sub-outcome 7: Improved mechanisms to promote ethical behaviour in the public service

To strengthen the fight against corruption it is necessary to focus on limiting the scope for conflicts of interest among public service employees. Required actions to achieve this:

- ✓ prohibit public servants from doing business with the state;
- ✓ establishment of a Technical Assistance Unit in DPSA to develop specialist technical capacity in order to promote issues relating to ethics, integrity and discipline and provide an important source of support to other departments;
- ✓ Strengthen implementation of Financial Disclosure Framework; and
- ✓ Strengthen protection of whistle-blowers.

### 2.3 Medium Term Strategic Framework 2019 - 2024

The Medium-Term Strategic Framework has been revised to focus action on the priorities of the new administration which came into power after the May 2019 elections. So, the government is currently implementing the Medium Strategic Framework 2019 - 2024. Seven priorities have been identified in the current Medium Strategic Framework as follows:

- (i) Transform the economy and serve the people;
- (ii) Advance social transformation;
- (iii) Build safer communities, fight corruption and promote integrity;
- (iv) Strengthen governance and public institutions;
- (v) Build national unity and embrace diversity;
- (vi) South Africa, Africa and the world; and
- (vii) Preconditions for success: electricity, water, rail and ports, and climate change.

Priorities three and four are geared towards fighting corruption, promoting integrity and good governance in the public institutions. Sector departments identify interventions to implement these priorities.

### 3. Legislation

Important legislation for implementation of the Convention include the Prevention and Combating of Corrupt Activities Act, 2004 (PRECCA), Protected Disclosures Act, 2000, Promotion of Access to Information Act, 2000, and the Financial Intelligence Centre Act, 2001.

#### 3.1 Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004).

The Prevention and Combating of Corrupt Activities Act, 2004 (PRECCA) is at the center of the anti-corruption drive in South Africa. The PRECCA provides for: the offence of corruption and offences relating to corrupt activities, investigative measures in respect of corruption and related corrupt activities, the establishment and endorsement of a Register in order to place certain restrictions on persons and enterprises convicted of corrupt activities relating to tenders and contracts, and extraterritorial jurisdiction in respect of the offence of corruption and offences relating to corrupt activities. The PRECCA also places a duty on certain persons holding a position of authority to report certain corrupt transactions.

#### 3.2 The Promotion of Access to Information Act, 2000 (Act No. 2 of 2000)

The Promotion of Access to Information Act, 2000 (PAIA) gives effect to Section 32 of the Constitution (access to information) by setting out how anyone can get access to information held by the state and any information held by private bodies that is required for the exercise and protection of any rights. The Act was amended to provide for the training of presiding officers in the magistrates' courts and related matters (Promotion of Access to Information Amendment Act, 2002 (No. 54 of 2002)). Section 28 of the Judicial Matters Amendment Act, 2017 (Act No. 8 of 2017) has amended the provisions of PAIA regarding the training of judicial officers. For example subsection 91A(5) provides that: The South African Judicial Education Institute established in terms of section 3 of the South African Judicial Education Institute Act, 2008 (Act 14 of 2008), must develop and implement training courses for presiding officers with the view to building a dedicated and experienced pool of trained and specialised presiding officers for purposes of presiding in court proceedings as contemplated in this Act. In terms of the new provision, all presiding officers and not only magistrates should be trained.

#### 3.3 The Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000)

The Promotion of Administrative Justice Act, 2000 (PAJA) gives effect to the right to administrative action that is lawful, reasonable and procedurally fair as well as to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996. The Act was amended to provide for the training of presiding officers in the magistrates' courts and related matters (Promotion of Administrative Justice Amendment Act, 2002 (No. 53 of 2002)). Section 28 of the Judicial Matters Amendment Act, 2017 (Act No. 8 of 2017) has amended the provisions of PAIA regarding the training of judicial officers. For example subsection 91A(5) provides that: The South African Judicial Education Institute established in terms of section 3 of the South African Judicial Education Institute Act, 2008 (Act 14 of 2008), must develop and implement training courses for presiding officers with the view to building a dedicated and experienced pool of trained and specialised presiding officers for purposes of presiding in court proceedings as contemplated in this Act. In terms of the new provision, all presiding officers and not only magistrates should be trained.

### 3.4 The Protected Disclosures Act, 2000 (Act No. 26 of 2000)

The Protected Disclosures Act, 2000 (the PDA) provides for employees in both the private and public sector to report unlawful or irregular conduct by their employers or fellow employees and provides for the protection of such employees. The PDA was recently amended by Act 5 of 2017, to broaden its ambit and introduces several new provisions that place further obligations on whistleblowers and employers alike.

### 3.5 The Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001)

The Financial Intelligence Centre Act, 2001 (FICA), is designed to combat money laundering and the financing of terrorism and establishes a Financial Intelligence Centre. The FICA was amended by Act 1 of 2017, to expand the objectives of the Financial Intelligence Centre, the list of institutions to which the Centre will make information it collects available, and imposes rules on customer identification and due diligence.

### 3.6 The Public Administration Management Act, 2014 (Act No. 11 of 2014)

The Public Administration Management Act, 2014 (PAMA) establishes the Public Administration Ethics, Integrity and Disciplinary Technical Assistance Unit. The functions of the Unit include:

- (i) providing technical assistance and support to institutions in all spheres of government regarding the management of ethics, integrity and disciplinary matters relating to misconduct in the public administration;
- (ii) developing norms and standards on integrity, ethics, conduct and discipline in the public administration; and
- (iii) promoting and enhance good ethics and integrity within the public administration.

The Unit is incubated in the DPSA as a Chief Directorate.

The Act further prohibits employees in both the public service and municipalities from conducting business with the State (section 8) and prescribes sanctions for the breach of this provision. The definition of an employee in sections 8 and 9 of the Act, is expanded to include special advisors to executive authorities.

### 3.7 Public Finance Management Act, 1999 (Act No. 1 of 1999) (PFMA):

Section 38(1)(a)(iii) of the PFMA prescribes that “the accounting officer must ensure that the department has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective”.

### 3.8 Local Government: Municipal Finance Management Act, 2003 (Act No 56 of 2003)

The object of the Act is among other things, to secure sound and sustainable management of the financial affairs of municipalities and other institutions in the local sphere of government. To this end section 61 of the Act outlines the fiduciary responsibilities of accounting officers as follows:

- (1) The accounting officer of a municipality must-
  - (a) act with fidelity, honesty, integrity and in the best interests of the municipality in managing its financial affairs;



- (b) disclose to the municipal council and the mayor all material facts which are available to the accounting officer or reasonably discoverable, and which in any way might influence the decisions or actions of the council or the mayor; and
  - (c) seek, within the sphere of influence of the accounting officer, to prevent any prejudice to the financial interests of the municipality.
- (2) An accounting officer may not-
- (a) act in a way that is inconsistent with the duties assigned to accounting officers of municipalities in terms of this Act; or
  - (b) use the position or privileges of, or confidential information obtained as, accounting officer for personal gain or to improperly benefit another person.

#### **4. Policies**

##### **4.1 Minimum Anti-Corruption Capacity Requirements**

In 2003, Cabinet took a decision that all government departments should have certain Minimum Anti-corruption Capacity (MACC) requirements, as part of the implementation of the Public Service Anti-Corruption Strategy. The minimum anti-corruption capacity to be established in departments entailed the following:

- (a) That a specified minimum anti-corruption capacity be established in all departments and public entities that fall under the jurisdiction of departments;
- (b) Guidelines on structures to accommodate the minimum functions;
- (c) National functions with regard to coordination and reporting on corruption in departments; and
- (d) An implementation plan and implementation support to departments.

These capacity requirements are now incorporated in Chapter 2 of the Public Service Regulations, 2016, to ensure that they are enforceable. Regulations 23 and 24, establishes ethics and anti-corruption capacity requirements for departments.

##### **4.2 Public Service Regulations, 2016**

Chapter 2 of the Public Service Regulations (PSR), 2016, stipulates the code of conduct for employees in the public service, provides for the disclosure of financial interests by designated employees and sets standards for anti-corruption and ethics management in the public service. The PSR, 2016, further provides for the management of gifts, the performance of other remunerative work and prohibits employees in the public service to conduct business with an organ of the State. Public Service Regulations, 2016, are available at:

<http://www.dpsa.gov.za/dpsa2g/documents/acts&regulations/regulations2016/Government%20Gazette%2029%20July%202016.pdf>

##### **4.3 Directive on other remunerative work outside the employee's employment in the relevant department as contemplated in section 30 of the Public Service Act, 1994 (2016)**

Section 30 of the Public Service Act, 1994, allows for public service employees to perform other remunerative work under certain conditions. To provide clarity on the process for employees to apply for performance of other remunerative work outside the employment in a relevant department,

the Directive on Other Remunerative Work outside the Employee's Employment in the Relevant Department as Contemplated in Section 30 of the Public Service Act, 1994, was adopted in November 2016. The Directive standardises the application process, outlines the criteria to be considered when approving an application and envisaged a monitoring role for ethics officers. The Directive also provides for a certificate to be issued upon approval of other remunerative work, which have to be attached to the public service employee's Financial Disclosure Form, to facilitate quick verification. The Directive also prohibits the use of the application process for conducting business with organs of the state.

[http://www.dpsa.gov.za/dpsa2g/documents/iem/2016/directive\\_rwops\\_30\\_09\\_2016.pdf](http://www.dpsa.gov.za/dpsa2g/documents/iem/2016/directive_rwops_30_09_2016.pdf)

#### 4.4 Directive on conducting business with an organ of state, 2017

One of the risks that threatens good governance and the public's trust in government institutions from delivering proper services, is conflict of interest. To address this risk, the Code of Conduct for public service employees was revised to among other things prohibit employees in the public service from conducting business with an organ of State, whether in their own capacity as individuals or through companies in which they are directors (regulation 13(c)). This provision emanates from Section 8 of the Public Administration Management Act, 2014. The Minister for the Public Service and Administration issued a Directive to guide implementation of regulation 13(c).

The Directive is available at:  
[http://www.dpsa.gov.za/dpsa2g/documents/iem/2017/27\\_01\\_2017.pdf](http://www.dpsa.gov.za/dpsa2g/documents/iem/2017/27_01_2017.pdf).

Section 8 of the Public Administration Management Act, 2014, which prohibits employees in the public administration to conduct business with the state came into effect on 01 April 2019. This section covers employees in the public service, municipalities and special advisors to the executive authorities (political heads of government institutions). Section 8(3) of the Act further provides penalties for non-compliance as follows:

- (i) a fine or imprisonment for a period not exceeding 5 years or both such fine and imprisonment; and
- (ii) as non-compliance constitutes a serious misconduct it may result in the termination of employment by the employer.

The Act is available at:  
<http://www.dpsa.gov.za/dpsa2g/documents%5Cacts&regulations%5Cpamact2014%5CPAM%20Act2014.pdf>.

## 5. Participation of society

### 5.1 National Anti-Corruption Forum

Fundamental to the fight against corruption is the involvement of all stakeholders. In April 1999, the government convened a National Anti-Corruption Summit involving government leaders, organized business, organised religious bodies, the non-government organizations (NGO) sector, donor countries, the media, and labour unions, academic and professional bodies. The Summit which was the first of its kind created a platform for the national campaign against corruption which recognised that corruption is a societal challenge and requires national consensus and coordination of activities. The summit resulted in the establishment of the National Anti-Corruption Forum (NACF) which is comprised of three sectors, namely civil society <https://www.nacf.org.za/civil->

[society/index.html](https://www.nacf.org.za/society/index.html), business <https://www.nacf.org.za/business/index.html> and government <https://www.nacf.org.za/government/index.html> ([www.nacf.org.za](http://www.nacf.org.za)).

The NACF adopted a National Anti-Corruption programme which was a - two-year programme to be jointly implemented by the government, civil society and private sector (members of the NACF). The National Anti-Corruption Forum (NACF) hosted the biennial National Anti-Corruption Summits. The primary function of the Summits was to report back on the implementation of resolutions and to pass new ones for further implementation. The NACF also used the Summit to reflect on the nature and state of corruption in the country and the initiatives and efforts needed to be put in place to deal with corruption. Consequently, it passed resolutions (which will be translated into a two-year national anti-corruption programme) to address these concerns. The last summit was held in 2011 (<https://www.nacf.org.za/anti-corruption-summits/index.html>).

The NACF served as a broader coordination structure for joint programmes between government, civil society and business. The Public Service Commission served as a Secretariat for the NACF. Although the NACF role somehow weakened over the years, efforts are underway to revive the structure.

The NACF was not active at the time of review. The National Anti-Corruption strategy proposes an interim National Anti-Corruption Advisory Council as a structural arrangement to ensure greater monitoring, accountability, transparency and multi-sectoral participation in the fight against corruption. This interim structure will conceptualise an independent overarching statutory anti-corruption body that will report to Parliament.

## 5.2 Process to develop the National Anti-Corruption Strategy

The Anti-Corruption Task Team (ACTT) established a Steering Committee under its supervision and direction of the Anti-Corruption Inter-Ministerial Committee. The Steering Committee consists of officials from the following government institutions: Departments of Cooperative Governance, Public Service and Administration, and Planning, Monitoring and Evaluation, Government Communication and Information Systems, Office of the Public Service Commission, National Intelligence Coordinating Committee, South African Local Government Association and State Security Agency. The Steering Committee reported to the ACTT during their monthly meetings.

The process to develop the NACS included public participation and key stakeholder engagements as foreseen under article 5 of the Convention. This ensured that the process was transparent, inclusive, consultative, and that implementation will be collaborative. The process included the following:

- A literature review on corruption and international best practices in addressing the problem was undertaken to determine the scope and extent of the problem and to set a baseline of knowledge about historic and existing interventions. This is reflected in a diagnostic report that was released in December 2016;
- A conceptual framework, that initially proposed nine strategic pillars, was developed and launched as the NACS Discussion Document in May 2017. This launched the public consultation process and the discussion document formed the basis for the development of the strategy;
- Public consultation was organized through national and nine (9) provincial public participation workshops, which concluded in 2019;

- A process of quality assurance and content refinement was undertaken through a multi-sectoral reference group that was constituted in September 2019;
- Separate consultations were also held with stakeholders from civil society organisations and the business sector to solicit their input and expectations regarding the content of this strategy;
- Public inputs were encouraged through a communication campaign run by the Government Communication and Information Service (GCIS). Members of the public, business and civil society were invited to submit electronic inputs using a central e-mail address located at the Department of Planning, Monitoring and Evaluation (DPME);
- The formal approval process commenced in June 2020 after the reference group recommended the elevation of the strategy for processing through government channels. A special Anti-Corruption Task Team (ACTT) meeting on the NACS was convened on 29 July 2020 and involved participation by representatives from the NACS Reference Group and NACS Steering Committee. The draft of the NACS was presented to the JCPS Directors General (DGs) and Ministerial Cluster meetings in August 2020 and these forums recommended submission to Cabinet. In parallel, the Economic Sectors, Investment, Employment and Infrastructure Development Cluster (ESIEID) incorporated anti-corruption as one of the key aspects in the NEDLAC processes on the development of the national Economic Recovery Plan for South Africa. Other clusters of government and principals were also briefed, and their comments incorporated.
- The NACS was approved on 18 November 2020.

### 5.3 Partnership with the Ethics Institute of South Africa

The DPSA has established partnership with the Ethics Institute of South Africa. The Ethics Institute of South Africa (EthicsSA) is a non-profit and public benefit organisation which offers a wide range of ethics-related services to organisations and individuals in the public and private sectors. Their services include training, advisory services, assessments, certification, project management and thought leadership.

The DPSA has contributed towards the development of a Public Sector Ethics Course run by the EthicsSA. On a regular basis, the two institutions discuss development in the public service and administration to ensure that training provided to officials in the public service remain relevant and up to date. The EthicsSA in partnership with the DPSA, South African Local Government Association and the Department of Cooperative Governance have undertaken two Ethics Surveys in the Public Administration to assess the ethics climate in the Public Administration.

### 5.4 Partnerships established by the PSC

The PSC has also established partnerships with other institutions and concluded memoranda of understanding (MoUs) with them. Examples of these institutions are:

- The Moral Regeneration Movement MRM. The primary mandate of the MRM is to be a networking platform for enhancing all existing initiatives and processes aimed at combating moral decay. In partnership with the MRM, the PSC aims to host public lecture series, seminars and workshops aimed at promoting ethical leadership in the Public Service.
- UNISA. Through the MoU with UNISA the parties aim to jointly host public lecture series, seminars and workshops. Where necessary, the PSC will contract UNISA to provide training and conduct research on its behalf.

- Financial and Fiscal Commission (FFC). Through the MoU with the PSC aims to promote good governance and development in the Public Service.

## **6. Coordination structures**

### 6.1 Anti-Corruption Task Team

The ACTT was established in 2010 through collaboration between the Directorate of Priority Crime Investigations (DPCI), the Special Investigating Unit (SIU) and the National Prosecuting Authority (NPA) represented by the Special Commercial Crimes Unit (SCCU) and the Asset Forfeiture Unit (AFU). The primary mandate of the ACTT was to successfully detect, investigate and prosecute cases of alleged corruption.

In 2014, the ACTT's mandate was revised to include the following broad focus areas which are translated into five programmes:

- Ensuring communication and public awareness.
- Intelligence coordination, integrated policy and strategy development.
- Public sector capacity development.
- Management of vulnerable sectors.
- Resolution of corruption cases in both the public and private sectors.

The ACTT mandate is premised on mutual cooperation, coordination, accountability and alignment of priorities to ensure the realisation of government's objective to effectively address corruption. The ACTT oversees the coordination and implementation of Government's anti-corruption initiatives to effectively detect and investigate cases of corruption and speedily prosecute, convict and incarcerate perpetrators.

### 6.2 Anti-Corruption Inter-Ministerial Committee

**Inter-Ministerial Committees** are special purpose and sometimes temporary structures that are established by the President and Cabinet to attend to emergent issues and interventions that will not be suitable for processing via the regular meetings of the Clusters. The Anti-Corruption Inter-Ministerial Committee (ACIMC), which functioned between 2014 and 2017, was mandated to coordinate and oversee the work of state organs aimed at combating corruption in the public and private sectors. It was convened by the Minister in the Presidency for Planning, Monitoring and Evaluation. The ACIMC mandated the development of the NACS. In August 2020, the Cabinet established a new Inter-Ministerial Committee (IMC) to expedite consequence management for the COVID-19 procurement corruption allegations, led by the Minister of Justice and Correctional Services to 'look into all COVID-19-related procurements made during the lockdown period and strengthen current procurement systems'. The work of this IMC will feed into the broader anti-corruption measures contained in the strategy.

## **7. Application of principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability**

It is important for the government to ensure that the strategies, plans and policies cited above must comply with the democratic values and principles outlined in the Constitution of the Republic of South Africa, 1996 (Constitution). Any law, policy or strategy that is not compliant with Constitutional values and principles is regarded as invalid. In its preamble, the Constitution outlines

the fundamental values on which nation-building and social cohesion should firmly rest, including redressing imbalances of the past. These values include human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism and non-sexism, supremacy of the Constitution, the rule of law, democracy, social justice, equity and respect.

The Constitution furthermore states in section 195(1) that public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained.
- (b) Efficient, economic and effective use of resources must be promoted.
- (c) Public administration must be development-oriented.
- (d) Services must be provided impartially, fairly, equitably and without bias.
- (e) People's needs must be responded to, and the public must be encouraged to participate in policymaking.
- (f) Public administration must be accountable.
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
- (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
- (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

In terms of section 195(2), these principles apply to-

- (a) administration in every sphere of government;
- (b) organs of state; and
- (c) public enterprises.

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

- (b) Examples of implementation
  - (i) Assessment of implementation of the Public Service Anti-Corruption Strategy

Various studies were conducted by government and other institutions to assess progress in the implementation of the Public Service Anti-Corruption strategy, 2002. As indicated under article 5, paragraph 3, these include two country corruption assessment were conducted by the government of South Africa in partnership with the United Nations Office on Drugs and Crime in 2003 and 2008 respectively. Details are indicated as a response to article 5, paragraph 3, below.

- ✓ Country Corruption Assessment Report by the Department of Public Service and Administration (South Africa) in partnership with the United Nations Office on Drugs and Crime (April 2003)
- ✓ Country Corruption Assessment Report by the Department of Public Service and Administration (South Africa) in partnership with the United Nations Office on Drugs and Crime

(April 2008)

- ✓ Towards a fifteen-year review - Assessing the effectiveness of the National Anti-Corruption Framework: Prepared by Department of Public Service and Administration (July 2008)
- ✓ Assessing the Efficiency and Impact of National Anti-Corruption Institutions in Africa by Governance and Public Administration Division of the Economic Commission for Africa (December 2010)
- ✓ As indicated above, the Anti-Corruption Strategy is under review. Before this review was initiated, a diagnostic assessment of the anti-corruption measures in the country was commissioned (Report entitled: National Anti-Corruption Strategy - Diagnostic Report (2016) available).

(ii) Minimum Anti-Corruption Requirements (MACC) Audit

In 2009/10 financial year, the Department of Public Service and Administration in partnership with the Ethics Institute of South Africa (supported by the *Deutsche Gesellschaft für Internationale Zusammenarbeit* (GIZ)) conducted an audit to assess levels of compliance with the MACC requirements. The Audit was conducted in all national and provincial departments (142 departments).

(i) Auditor-General's reports on supply chain processes

When auditing supply chain processes in government, Auditor-General of South Africa pays attention to the management of conflict of interest by public officials. A recent example of findings in this regard is contained in the 2016/17 Consolidated General Report on National and Provincial Audit Outcomes. As indicated in paragraph 4.2 and 4.4, regulation 13(c) of the PSR, 2016, prohibits employees from conducting business with an organ of state. Transitional measures built into the regulations required that within a period of six months, employees who were conducting business with organs of state stop the business with the state or resign as employees in the public service.

In the first year of auditing this regulation, the Auditor-General of South Africa found the following at 44 departments:

- “Overall, 698 employees at 24 departments took no action in this transitional period and continued doing business with the state. Of these employees, 32 were doing business with the department that employs them (at five departments, awards to the value of R16 million were secured) and 666 were doing business with other organs of the State (at 21 departments, awards to the value of R120 million were secured).
- In addition, 649 employees at 32 departments secured new awards after 1 August 2016, even though it is prohibited. Of these employees, 132 found new business with the department that employs them (at 15 departments, awards to the value of R18 million were secured) and 517 with other organs of the State (at 23 departments, awards to the value of R108 million were secured).
- These findings were most common in national government (12 departments) and North West (eight departments). The sectors that had the most of these findings were education (seven auditees) and public works (three auditees).
- The onus of complying with these regulations is on the employees of departments, but departments have a responsibility to enable and monitor such compliance. Based on the findings

in just the first six months of implementation, it seems that this responsibility is not being given the attention it deserves.”

The report is available at: <http://www.agsa.co.za/Portals/0/Reports/PFMA/201617/GR/AG%20PFMA%202017%20Web%20SMALL.pdf> (page 103 - 104).

(i) Assessment of professional ethics and ethics surveys

- The Public Service Commission issued reports on the state of professional ethics in three provinces:
  - ✓ Kwa-Zulu Natal: An Assessment of Professional Ethics in the Kwa-Zulu Natal Provincial Government <http://www.psc.gov.za/documents/2008/KZN%20Report.pdf>
  - ✓ Limpopo: Assessment of State of Ethics in Limpopo Provincial Government [https://www.gov.za/sites/default/files/gcis\\_document/201409/pscprofessional-ethics-limpopomarch2009.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/pscprofessional-ethics-limpopomarch2009.pdf)
  - ✓ North West: An Assessment of the State of Professional Ethics in the North West Provincial Government <http://www.psc.gov.za/documents/2012/Ethics%20in%20the%20North%20West.pdf>
- The Department of Public Service and Administration (DPSA), the Department of Cooperative Governance (DCoG), and the South African Local Government Association (SALGA) in partnership with the Ethics Institute of South Africa (EthicsSA) conducted Public Sector Ethics Surveys in 2015 and 2018. The surveys assessed organisational ethics at national, provincial and local government levels. The results gave a view of the state of ethics in the public sector, and were useful in informing national, provincial and organisation initiatives to build an ethical public sector.

*(b) Observations on the implementation of the article*

In addition to the national anti-corruption strategy described below, several strategies, policies and laws exist at sectoral and government levels, principally the 2002 Public Service Anti-Corruption Strategy, 2016 Local Government Anti-Corruption Strategy, as well as the country's National Development Plans, Medium Term Strategic Framework 2014-2019 (containing deliverables relating to combatting corruption in the public and private sectors) and Medium Term Strategic Framework 2019-2024 (containing priorities are geared towards fighting corruption, promoting integrity and good governance in the public institutions). Legislation for the implementation of the Convention includes the Prevention and Combating of Corrupt Activities Act (PRECCA), Protected Disclosures Act, Promotion of Access to Information Act, and the Financial Intelligence Centre Act. Other relevant policies include public service directives governing outside remunerative work and business activities with the State.

The participation of society is promoted through the National Anti-Corruption Forum (not active at the time of review) and various partnerships. The national anti-corruption strategy supports the creation of a reformed multi-sectoral body to replace the Forum.

Coordination is exercised through the Anti-Corruption Task Team (ACTT), which is a sub-committee of the Justice, Crime Prevention and Security Cluster and is made up of government



stakeholders tasked with preventing and combating corruption in the public and private sectors. It oversees the coordination and implementation of Government's anti-corruption initiatives. During the country visit, the Chairperson of the ACTT and other representatives provided additional information on the operation of the ACTT in practice.

The development of a national anti-corruption strategy (NACS) for South Africa was undertaken under the auspices of the Anti-Corruption Task Team. The NACS recognizes the need to coordinate anti-corruption activities and to create implementation structures and monitoring measures that can address the problem of corruption holistically and at multiple levels. The Strategy acknowledges weakness regarding coordination among government institutions involved in anti-corruption. The Steering Committee held discussions on how coordination among government institutions should be strengthened, including through the establishment of an inter-sectoral coordination mechanism, to supplement the work of existing government institutions with different mandates in the prevention and combating of corruption. Additional information is provided under article 6 below. During the country visit, the Chairperson of the Steering Committee for the development of the NACS and other representatives provided further details on the process and timeframe for the development of the NACS. The authorities reported that the projected timeframe for the implementation of NACS was 2020 to 2030, with the immediate term expected to run from 2020 to 31 March 2022. Furthermore, the country would develop an implementation plan to address the conclusions and recommendations of the review process under the Convention, and the review findings were expected to be taken into account in the implementation of the NACS.

The strategy was adopted by the Cabinet on 18 November 2020, after the country visit.

**Based on the information provided, it is recommended that South Africa continue its efforts to implement the national anti-corruption strategy, to create effective implementation structures and monitoring measures, and to strengthen coordination of anti-corruption activities.**

**Furthermore, it is recommended that South Africa continue efforts to review the governance model and arrangements for the future sustainability of the National Anti-Corruption Forum or an equivalent body (art. 5, para 1; art. 13, para. 1).**

*Paragraph 2 of article 5*

*2. Each State Party shall endeavour to establish and promote effective practices aimed at the prevention of corruption.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

1. eDisclosure system

The practice of the annual disclosure of financial interests by designated employees was established in the year 2000, when heads of departments were required to disclose their financial interests. In 2001, Public Service Regulations required all senior managers in the public service to disclose their financial interests. In 2016, the Minister for Public Service and Administration issued Public Service Regulations, 2016, which bestowed upon the MPSA power to designate other categories of employees to disclose their financial interests. Currently, beside senior managers, there are four other categories of employees who are required to disclose their financial interests. The designated categories are Middle Management Service members (MMS level 11 and 12), employees earning the equivalent of salary level 11, 12 or higher through the Occupation Specific Dispensation (OSD), employees in Supply Chain Management (SCM) and Finance units, irrespective of their salary level, and employees who are designated for purposes of record-keeping and effective implementation of Part 2 of Chapter 2 of the PSR, 2016.

In April 2014, the Minister for Public Service and Administration introduced the electronic system (eDisclosure system) for disclosing financial interests. The system is an on-line tool used by designated employees to disclose their financial interests and replaced the manual and paper-based system. It is managed and administered by the Department of Public Service and Administration. The system maintains a database of the financial interests of designated employees in a form of an electronic register. It is compulsory for all designated employees to use the eDisclosure system to disclose their financial interests.

The following are the benefits of the eDisclosure system:

Quick and easy to use;

Easy identification and management of conflicts of interest; and

Easy generation of reports and statistics.

## 2. The National Anti-Corruption Hotline System

The Public Service Commission (the PSC) which is responsible for investigating, monitoring and evaluating the organisation and administration, and personnel practices of the public service, manages the National Anti-Corruption System (NACH). It is a national system designed to enable members of the public and employees in the public service to report any form of corruption by using a toll free number (0800 701 701).



Callers or whistle-blowers are guaranteed anonymity. Most importantly, the NACH is also regarded

as a “tip-off” tool in terms of reporting allegations of corruption. A “tip-off” is regarded as an incident where the caller calls the NACH whilst an act of corruption is occurring so that necessary investigations can take place. Furthermore, the allegations reported are immediately brought to the attention of the relevant Law Enforcement Agency or department, and on various occasions in the past, the perpetrators were caught “red-handed”.

The NACH is a national whistle blowing system that allows individuals to blow the whistle against corruption in the public sector. Cases received from the NACH are referred to departments (both national and provinces), agencies and public bodies in accordance with agreed protocols. These departments, agencies and public bodies are required to investigate the cases and provide feedback to the PSC. Feedback on the cases investigated is recorded on the Case Management System (CMS) of the NACH on a regular basis.

### 3. Education and Training Programme

The National School of government is offering the following Ethics and Anti-Corruption courses for officials in the public service and local government:

- Ethics in the public service which is an online course available to all employees in the public service. The purpose of the course is to promote ethical behaviour in the public service as envisaged in Chapter 2 of the Public Service Regulations, 2016.
- Ethics management for local government: The course provides a basic overview of ethics management within municipalities.
- Investigation of corrupt activities and related offences (NQF level 6): The goal of this training programme is to build capacity of internal investigation components within the Public Service.
- Anti-Corruption training for practitioners (NQF level 5): The purpose of this learning programme is to build the capacity of anti-corruption practitioners within the Public Service.
- Promoting anti-corruption in the public service (NQF level 4): This course is intended for capacity building of all employees in the public sector, including those who perform anti-corruption duties in senior, middle and junior management positions.
- Ethics and integrity management: workshop on ethics: The purpose of this workshop is to promote ethical behaviour in the Public Sector, to prevent unethical conduct, fraud and corruption, and to support ethics and integrity management and anti-corruption.

There are no anti-corruption education programmes in schools and universities.

### 4. Office of the Chief Procurement Officer

Office of the Chief Procurement Officer (OCPO) was established by the National Treasury to improve the transparency, fairness and cost-effectiveness of the procurement system in all spheres of government, and to support the proper utilization of financial and other public resources and state assets. The OCPO is responsible for the following functions:

- Endorsement of particulars on the Register for Tender Defaulters in terms of Section 28 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004). The National Treasury is empowered to determine the period of restriction from doing business with the public sector for a period not less than 5 years and not more than 10 years.

- Record keeping of restricted suppliers in accordance with the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000). The National Treasury maintains a Register of Restricted Suppliers prohibited from doing business with the public sector. This Act gives the Accounting Officer/Authority the power to restrict a supplier from doing business with the public sector if such a supplier obtained preferences fraudulently or if such supplier failed to perform on a contract based on the specific goals;
- Management of the Central Supplier Database, where public servants, who own business are detected for the purpose of preventing them from doing business with organs of state.
- Management of transversal tenders.
- Electronic procurement.

#### 5. Management of performance of other remunerative work

- Section 30 of the Public Service Act, 1994 allows for public service employees to perform other remunerative work outside employment in their own departments. To improve on the management of other remunerative work, the MPSA issued a Directive on Other Remunerative Work outside the Employee's Employment in the Relevant Department as Contemplated in Section 30 of the Public Service Act, 1994 was adopted. The directive standardises the application process, outlines the criteria to be considered when approving an application and envisaged a monitoring role for ethics officers. The directive also provides for a certificate to be issued upon approval, which has to be attached to the public service employee's Financial Disclosure Form, to facilitate quick verification. This directive also prohibits the use of the application process for conducting business with organs of the state.
- To support the implementation of this directive, the Personnel Salary System (PERSAL) was amended to provide for the capturing of information on public service employees performing other remunerative work. This provided the necessary monitoring mechanism for ethics officers in departments to manage conflicts of interest.

#### 6. Prohibition of public service employees from conducting business with the state

- One risk that threatens good governance and the public's trust in government institutions from delivering proper services, is conflict of interest. To address this risk, the Code of Conduct for public service employees was revised to among other things prohibit employees in the public service from conducting business with an organ of State, whether in their own capacity as individuals or through companies in which they are directors. This prohibition is extended to the municipalities through the Public Administration Management Act, 2014.
- To assist the monitoring of public service employees conducting business with an organ of state, National Treasury took stock of employees registered on the Central Supplier Database (CSD). Since 1 February 2017, the DPSA is monitoring implementation of this prohibition by comparing the data on the CSD with that on PERSAL, requesting Departments to act on transgressions. The resultant reports were presented to Cabinet in August 2017 and August 2018. Executive Authorities were requested to act against offenders and to provide feedback to the MPSA.

#### 7. Ethics Officer Forum

The DPSA established a National Ethics Officer Forum. The Forum acts as a support structure to

capacitate ethics officers to manage the ethics performance of their departments. Since April 2015 the DPSA hosted five National Ethics Officer Forum meetings for the designated ethics officers designated under the PSR, 2016.

#### Establishment of ethics and anti-corruption functions in government departments:

All government departments have an ethics and anti-corruption function, either as a shared function or specifically for a department. Not all departments have ethics committees at this point, but a Guide was released in 2019 to support this process.

Departments are required to report on their implementation of the anti-corruption requirements of the Public Service Regulations.

#### 8. Other stakeholders involved in the prevention of corruption:

There are a number of other stakeholders that are engaged in corruption prevention activities: The Black Sash, Corruption Watch, Organisation Undoing Tax Abuse (OUTA), The Ethics Institute of South Africa, Public Information and Monitoring Services (PIMS), Institute for Security Studies (ISS), Centre for Study of Violence & Reconciliation (CSVR), Transparency South Africa, Moral Regeneration Movement (MRM), Accountability Lab, and Democracy Works Foundation, Nelson Mandela Foundation, LifeCo UnLtd, and Democracy Works Foundation.

The coordination of prevention functions across the public and private sector was coordinated in the National Anti-Corruption Forum ([www.nacf.org.za](http://www.nacf.org.za)). The NACF is not active and the functioning of this body is currently being assessed so as to provide for an effective structure in the newly contemplated National Anti-Corruption Strategy.

#### 9. Anti-Corruption Task Team (ACTT)

Coordination of corruption prevention functions across agencies in the Public Sector is performed by the Anti-Corruption Task Team (ACTT). The ACTT has been established as the central body to implement the government's anti-corruption strategy. The ACTT has developed a number of inter-related programmes aimed at ensuring a structured, consolidated and coordinated governmental and societal approach to fight corruption. The government departments with anti-corruption portfolios form part of the ACTT structure.

The Government Communication Information System, which forms part of the ACTT, is entrusted to focus on prevention by providing feedback on the fight against corruption and communicating information needed for prevention.

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

##### (a) Examples of implementation

###### 1. Financial disclosure

- Members of the Senior Management System (SMS members)

When the eDisclosure system was introduced in the public service, only SMS members were required to disclose their financial interests. It should further be noted that for the disclosure periods: 2013/14, 2014/15 and 2015/16, it was not compulsory for SMS members to use the eDisclosure system to submit their financial disclosure forms. The use of the eDisclosure system

became compulsory after the MPSA issued the PSR, 2016, and subsequently a Directive on the form to be used by SMS members and HODs to submit their financial disclosure forms. The use of the eDisclosure system increased over the years as illustrated by the diagram below.

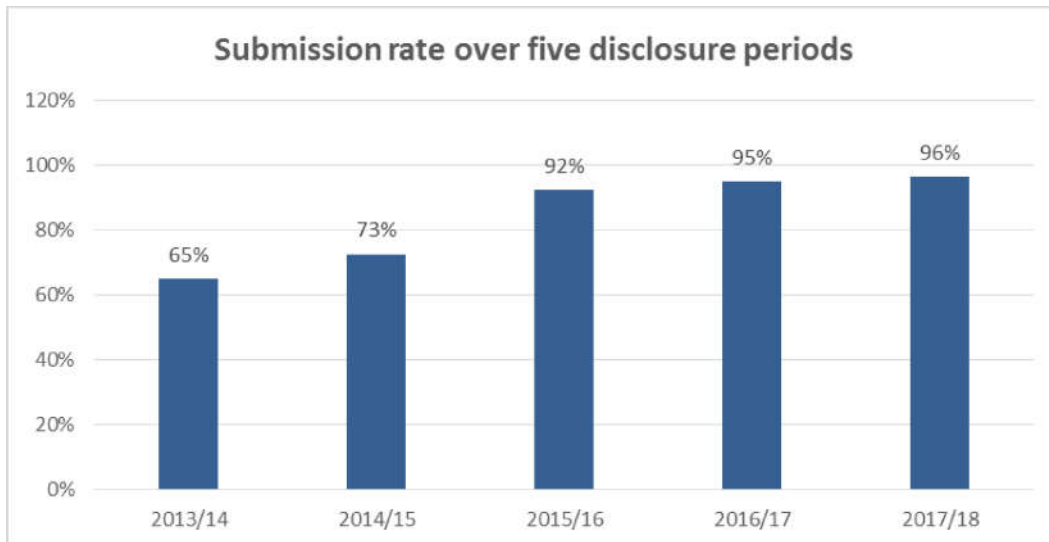


Figure 1: The number of SMS members over the years was 9961 (2013/14), 10441 (2014/15), 9681 (2015/16), 9942 (2016/17) and 10414 (2017/18).

- Other Categories of designated employees

Table 1 on the next page provides an overview of the compliance rate by the different categories of employees below the SMS level who are designated to disclose their financial interests in line with the Determination and Directive. The total number of employees in these categories during the 2017/18 disclosure period was 105 951. Employees in SCM/Finance comprise the highest number of employees in this category. They form 47% of designated employees below the SMS level. They are followed by employees in the OSD category with 33%. Compliance rate in these categories, therefore, affect the general compliance for designated employees below the SMS level.

Out of the total number of designated employees below the SMS level, 53 374 of them disclosed their financial interests in compliance with the Determination and Directive. This means only 50% of designated employees below the SMS level complied with the Determination and Directive. The highest compliance rate was with the MMS category with 74%, and the lowest was the OSD category with 30%.

	MMS			OSD			PSR			SCM/FINANCE		
	Number of employees	Number disclosed	% disclosed	Number of employees	Number disclosed	% disclosed	Number of employees	Number disclosed	% disclosed	Number of employees	Number disclosed	% disclosed
National	10270	7851	76%	1682	1817	51%	118	61	52%	27916	15377	55%
National Government components	664	413	62%	422	257	61%	9	6	67%	1248	874	70%
NPA	146	131	90%	1682	1532	91%	4	4	100%	81	75	93%
Eastern Cape	1579	847	54%	3462	1043	30%	16	5	31%	3844	1763	46%
Free State	660	499	76%	1879	229	12%	9	4	44%	1908	767	40%
Gauteng Province	1601	1045	65%	7399	579	8%	18	12	67%	3468	1803	52%
KZN	1390	790	57%	6552	872	13%	18	9	50%	3705	1604	43%
Limpopo	1063	844	79%	3721	1569	42%	20	14	70%	1738	978	56%
Mpumalanga	813	731	90%	1615	396	25%	15	14	93%	1475	988	67%
North West	748	671	90%	1503	274	18%	26	13	50%	1589	1052	66%
Northern Cape	480	363	76%	976	437	45%	11	5	45%	634	401	63%
Western Cape	913	774	85%	4208	1544	37%	31	13	42%	2519	2024	80%
TOTAL	20327	14959	74%	35204	10549	30%	295	160	54%	50125	27706	55%
Total number of employees below the SMS level										105951	53374	50%
Representation per category	19%			33%			1%			47%		

Table 1: Summary of the compliance rate of other categories of designated employees below the SMS level 2017/18 disclosure period

## 2. National Anti-Corruption Hotline system

The following statistics highlight the achievements of the system:

NACH STATS AS AT 30 JUNE 2019

NATIONAL/ PROVINCE	CASES REFERRED	FEEDBACK RECEIVED	% FEEDBACK RECEIVED	CASES CLOSED	% CASES CLOSED	OUTSTANDING CASES
National	7620	6642	87%	6424	84%	1196
Eastern Cape	849	676	80%	672	79%	177
Free State	387	351	91%	351	91%	36
Gauteng	2113	1836	87%	1831	87%	282
KwaZulu- Natal	871	685	79%	676	78%	195
Limpopo	621	485	79%	484	78%	137
Mpumalanga	1196	1153	96%	1153	96%	43
North West	474	406	86%	402	85%	72
Northern Cape	143	126	88%	126	88%	17
Western Cape	692	663	96%	647	93%	45
Public Entities	6589	6563	100%	6559	100%	30
<b>TOTAL</b>	<b>21555</b>	<b>19586</b>	<b>91%</b>	<b>19325</b>	<b>90%</b>	<b>2230</b>

Table 2: National Anti-Corruption Hotline statistics

## 3. Ethics and Anti-Corruption Training Programmes

Table 3, below provides the number of trained officials per category of courses available through the National School of Government.

Course	No. Trained
Ethics in the public service (online)	10802
Ethics management for local government	807
Investigation of corrupt activities and related offences	539
Ethics in National and Provincial Department	344
Promoting anti-corruption in the public service	2362
Anti-corruption training for Practitioners	2852
Ethics and integrity management: workshop on ethics	821

Table 3: Number of officials trained, per course

## 4. Management of other remunerative work applications using PERSAL system

As from April 2017, after the function for capturing other remunerative work was introduced on the PERSAL system, departments started to capture their information relating to other remunerative



work. This information is extracted on a monthly basis from the PERSAL system by the DPSA, and is used to analyze public service employee’s involvement in other remunerative work, and departments’ management of possible and real conflicts of interests emanating from this involvement.

Figure 1 below, depicts an increasing trend (based on cumulative statistics) in the number of requests made by employees to perform other remunerative work being captured on PERSAL. After three months of a relatively slow response to capture data, the number of requests received by the Executive Authorities from various departments increased immensely. Thereafter, the number of requests received and captured on PERSAL continued to increase. In July 2017, 1914 requests were received. By end of January 2018, 4014 requests were received.

The increased capturing of applications is positive and indicates a willingness to implement the Directive. The DPSA’s initiated PERSAL training to departments (which started in May 2017), and awareness raised by the Chief Directorate: Ethics and Integrity Management among designated ethics officers (using a group email address) on the specific issue, contributed to this increase.

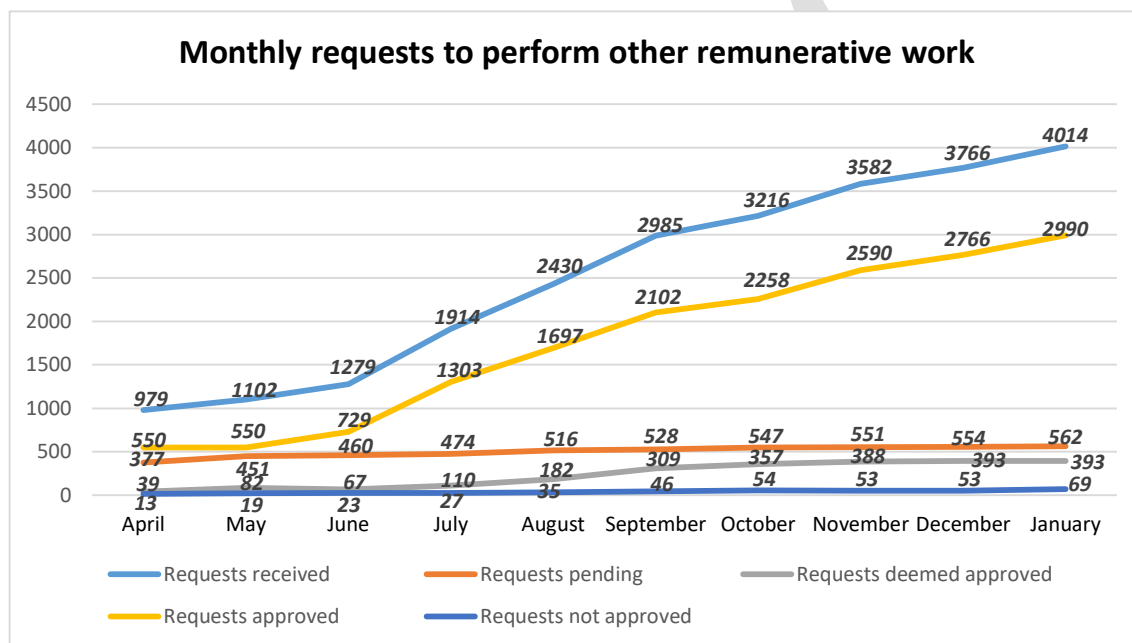


Figure 2: Monthly requests to perform other remunerative work (Source: PERSAL system)

*(b) Observations on the implementation of the article*

The response highlights a number of prevention functions, specifically: the annual disclosure of financial interests by designated employees (eDisclosure system), the national anti-corruption hotline, ethics and anti-corruption training programmes for public service employees and local government officials; ethics and anti-corruption functions, including ethics officers and ethics committees, in government departments; the Ethics Officer Forum; and relevant public service policies.

Several bodies exercise functions relevant to preventing and countering corruption, as described under article 6 below.

Regarding the established ethics infrastructure under the PSR 2016 (regulations 22-24), it was

confirmed that all government departments have designated ethics officers or have entrusted ethics responsibilities to other officers. However, not all departments have established ethics committees. It was further confirmed that departments are required to report on progress in implementing the PSR anti-corruption measures, and that DPSA established a directorate under the newly established Public Administration Ethics, Integrity and Disciplinary Technical Assistance Unit that will be tasked to perform monitoring and evaluation on the implementation of the PSR ethics and anti-corruption requirements. This will also include lifestyle audits to be performed on all public administration employees.

### *Paragraph 3 of article 5*

*3. Each State Party shall endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption.*

#### *(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

#### (a) Response

A number of studies, some as recent as 2016, have been conducted to assess progress regarding the implementation of the anti-corruption measures in South Africa. Furthermore, two surveys have been conducted to assess organisational ethics in the public sector.

#### **1. Country Corruption Assessment Reports: South Africa**

Two Country Corruption Assessment studies have been conducted by the government of South Africa and the United Nations Office on Drugs and Crime in 2003 and 2008 respectively.

The CCA 2003: Prior to the Country Corruption Assessment (CCA) 2003, much of the work which had been done on the quantification of corruption had been based on mere perceptions and the information was fragmented. The CCA 2003 focused on consolidating data and information relating perceptions to quantifiable experience in order to provide measurements that are more objective and therefore more meaningful. In addition, the assessment provided a comprehensive status of anti-corruption measures in place and recommendations on how to improve the national anti-corruption framework.

The CCA 2003 included an analysis of media articles, previous surveys conducted by a number of institutions, criminal justice and disciplinary data, as well as a study of the South African legislative framework relevant to fighting corruption in South Africa. The CCA 2003 Report highlighted some areas of concern including that although South Africa had a comprehensive anti-corruption legal framework, it was found to be fragmented, providing overlapping mandates for certain public institutions and lack of coordination. In addition, the assessment also highlighted that the anti-corruption framework was not effectively implemented due to lack of capacity.

[https://www.gov.za/sites/default/files/gcis\\_document/201409/corruption1.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/corruption1.pdf)

The CCA 2008: It focused on perceptions, actual experiences, and records of cases reported and processed by law-enforcement agencies. The report revealed the progress and impact of South Africa's anti-corruption framework since the CCA of April 2003. The following were the objectives of the study:

- Understanding corruption in South Africa, and providing a realistic map of its trends.
- Enhancing existing anti-corruption measures, and enabling the development of a sound, effective national anti-corruption strategy (which includes legislation).
- Strengthening the capacity of the Public Administration so that its departments can better the timeliness, quality, cost, and coverage of the services they deliver to the public.
- Deepening understanding of corruption in the selected provinces through comprehensive data collection and analysis of the extent of corruption, as well as the forms it takes and the trends discernible in it - in addition to gaining insight into the efficiency and effectiveness of anti-corruption measures, so as to enable adjustment of these, where necessary.
- Evaluating the development, since the 2003 CCA, of South Africa's National Anti-Corruption Initiative.
- Developing proposals for a national anti-corruption research agenda.

## **2. Minimum Anti-Corruption Capacity Requirements Audit, 2010**

In January 2002 Cabinet approved that, as part of the implementation of the Public Service Anti-Corruption Strategy, a minimum anti-corruption capacity be established in departments. In September 2003, Cabinet approved the minimum anti-corruption capacity (MACC) requirements for departments and organisational components in the public service.

In the 2009/10 financial year, the Department of Public Service and Administration in partnership with the Ethics Institute of South Africa (supported by GIZ) conducted an audit to assess levels of compliance with the MACC requirements. The Audit was conducted in all national and provincial departments (142 departments).

The audit findings indicated that in the overall 47% of the departments in the public service complied with the MACC requirements. There was also a considerable improvement in the number and quality of anti-corruption policies and plans since the previous audit. However, significant challenges remained in the implementation of such policies and plans. This was largely attributed to departments not taking a structured approach to implementing their initiatives, and lack of senior-level oversight and involvement, which signalled a low priority regarding anti-corruption interventions in departments.

Recommendations to improve the situation included improved leadership involvement and oversight, information management and more support to provincial departments since they performed lower than national departments.

Further, the main challenges identified in the MACC audits were included as requirements when the PSR was reviewed in 2016. This improved reporting on MACC requirements and provided a structured manner to manage ethics and anti-corruption programmes. Audits are now yearly performed on employees conducting business with the State, employees performing other

remunerative work, and submission of financial disclosures of public service employees for conflicts of interest.

*Hard copy of the report available.*

### **3. Diagnostic Report of the National Planning Commission, 2011.**

In April 2010, President Jacob Zuma appointed the National Planning Commission (NPC) to develop the country's long term vision and national strategic plan. The Commission was an advisory body tasked with preparing recommendations for the Cabinet on issues affecting South Africa's long-term development. In 2011, the NPC released a diagnostic report which set out the key challenges that confronted South Africa in fighting poverty and inequality and in achieving the objectives set out in the Constitution.

The following challenges regarding corruption were identified:

- Weak legislative and municipal oversight;
- Fragmented efforts to fight corruption and weak institutions;
- Disintegration of social ethics and values; and
- Corruption in infrastructure procurement. Page 25 of the diagnostic report

[https://www.gov.za/sites/default/files/gcis\\_document/201409/npcdiagnosticoverview1.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/npcdiagnosticoverview1.pdf)

### **4. Public Sector Ethics Surveys (2015 and 2018)**

2015: The Department of Public Service and Administration (DPSA), the Department of Cooperative Governance (DCoG), and the South African Local Government Association (SALGA) partnered with the Ethics Institute of South Africa (EthicsSA) to conduct the first ever Public Sector Ethics Survey in South Africa. The survey assessed organisational ethics at national, provincial and local government levels. A number of focus groups and individual interviews were conducted to determine which themes to include in the survey and thereafter the online survey ran from 27 July to 21 August 2015. This study provided the DPSA with a baseline against which implementation progress on ethics and anti-corruption measured can be measured and identified issues that required immediate intervention. These issues were addressed when the PSR, 2016 were drafted.

2018: The second round of the survey, was conducted by means of an online questionnaire, from 20 June to 31 August 2018. The results gave a view of the state of ethics in the public sector, and were useful in informing national, provincial and organisation initiatives to build an ethical public sector.

### **5. National Anti-Corruption Strategy Diagnostic Report: Corruption and Anti-Corruption Initiatives in South Africa (2016)**

The document, commissioned by the interdepartmental National Anti-Corruption Strategy Steering Committee, outlines the corruption problem the country faces and sets a point of departure to start the discussions towards a solution. The Public Affairs Research Institute was contracted to compile the document on behalf of the government. The link on which this was published is: <https://www.gov.za/anticorruption> and <https://www.gov.za/speeches/minister-jeff-radebe-launch->

## **6. Reports by the Public Service Commission**

In carrying out its mandate of promoting excellence in governance, the delivery of quality services and a high standard of professional ethics, the Public Service Commission (PSC) has over the years conducted studies relating to the ethics and anti-corruption in the public service. The following reports are published on the PSC website ([www.psc.gov.za](http://www.psc.gov.za)) (select the relevant year to get to the report):

2001: A review of South Africa's National Anti-Corruption Agencies;

2002: Public Service Commission Report on Anti-Corruption Hotlines;

2004: Remunerative Work outside the Public Service;

2006: Measuring Efficacy of the Code of Conduct for public servants;

2007: Measuring the effectiveness of the National Anti-Corruption Hotline. The assessment was conducted again in 2009 and 2012;

Report on Managing Conflict of Interest in the Public Service;

2008: Report on management of gifts in the public service;

2009: Overview of the implementation of the financial disclosure framework: financial year 2008/09 (the PSC issues the fact sheet on compliance with the financial disclosure framework on annual basis);

2011: Profiling and analysis of the most common manifestation of corruption and its related risks in the public service;

2014: Report on actions taken by Executive Authorities with regard to identified cases of potential conflict of interest and compliance with the financial disclosure framework; and

2020: PSC Overview of the Implementation of the Financial Disclosure Framework for the 2018/2019 Financial Year.

The Public Service Commission also conducted an assessment of the professional ethics in the Kwa-Zulu Natal (2008), Limpopo (2009) and North West (2012) Provincial Administrations.

**7. Reports by Auditor-General:** The Auditor General of South Africa conducts periodic performance audits of various policies implemented by the Government of South Africa. For example, in 2008, the Auditor-General performed a transversal performance audit of all national departments to determine the extent of employee conflict of interest in the procurement process. The 2016/17 report has been cited in response to Article 5, paragraph 1 and is available at:

<http://www.agsa.co.za/Portals/0/Reports/PFMA/201617/GR/AG%20PFMA%202017%20Web%20SMALL.pdf%20> (page 103 - 104).

**8. "Report on Protected Disclosures"** by the South African Law Reform Commission, November 2007: [http://www.justice.gov.za/salrc/reports/r\\_pr123\\_protected-disclosures\\_2007.pdf](http://www.justice.gov.za/salrc/reports/r_pr123_protected-disclosures_2007.pdf)

**9. "The Status of Whistleblowing in South Africa"** - report published in 2010 by Open

Democracy Advice Centre (ODAC):  
[https://openjournalismworkshop.files.wordpress.com/2013/03/odac\\_whistleblowing\\_report\\_web.pdf](https://openjournalismworkshop.files.wordpress.com/2013/03/odac_whistleblowing_report_web.pdf)

**10. “Empowering our Whistleblowers”** report commissioned by the Right to Know Campaign - authored by ODAC, and published in 2014: <https://www.corruptionwatch.org.za/wp-content/uploads/migrated/WhistleblowingBook.pdf>

### **On the review of laws and regulations to fight corruption:**

The Department of Justice and Constitutional Development (DOJ) plays a leading role in reviewing laws and regulations to fight corruption. This process, among others, involves comparative research and wide consultation with interested parties and the preparation of various papers, including discussion papers and issue papers. The South African Law Reform Commission (SALRC), at the conclusion of an investigation, submits a report to the responsible Minister for consideration and, in the case of legislation dealing with the administration of justice, to the Minister of Justice and Correctional Services.

Legislation emanating from a report by the SALRC is then processed further by the DOJ, which involves preparing a draft Bill, with or without amendments, available for public comment, approaching the Office of the President for approval of the Socio-Economic Impact Assessment Report which is compiled, submitting the Bill to the relevant Minister for approval to approach Cabinet for permission to introduce the Bill into Parliament, and submission of the Bill to the Office of the Chief State Law Adviser for certification before introduction thereof into Parliament.

There are two stages in the promotion of a Bill through the parliamentary process. A Bill must be approved by both the National Assembly and the National Council of Provinces. The respective committees of the two Houses of Parliament consider a Bill which, among others, entails providing the opportunity to interested parties to make submissions, including public hearings, in respect of a Bill.

A Bill that has been approved by Parliament is referred to the President for the President to assent to and sign. A Bill that has been signed by the President must be published in the Gazette and becomes an Act of Parliament and takes effect when published or on a date determined in terms of the Act.

The process outlined above was followed to review the Protected Disclosures Act.

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

The reports provided will serve this purpose.

### *(b) Observations on the implementation of the article*

The response is focused on studies to assess progress in the implementation of anti-corruption measures. The number of studies and assessments cited is commendable, including corruption assessment reports, anti-corruption capacity requirement audits, diagnostic reports, public sector ethics surveys, government and audit reports, as well as those published by civil society.

Additional information was provided on the review of laws and regulations to fight corruption.

The Department of Justice and Constitutional Development plays a leading role in reviewing laws and regulations against corruption, together with the South African Law Reform Commission.

Authorities explained that the practice in South Africa is to review legislation on an *ad hoc* basis, whenever a need to review is identified. This allows for the necessary flexibility to review the laws when a lacuna or the need for amendment is identified, which would otherwise not be available if the review of legislation was done on a periodic basis.

#### *Paragraph 4 of article 5*

*4. States Parties shall, as appropriate and in accordance with the fundamental principles of their legal system, collaborate with each other and with relevant international and regional organizations in promoting and developing the measures referred to in this article. That collaboration may include participation in international programmes and projects aimed at the prevention of corruption.*

#### *(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

##### (a) Response

##### 1. International Anti-Corruption Instruments

South Africa is a signatory to the following regional anti-corruption instruments:

- South African Development Community (SADC) Protocol Against Corruption: <http://www.dpsa.gov.za/dpsa2g/documents/acc/SADC%20Protocol%20against%20Corruption.pdf>
- African Union (AU) Convention on Preventing and Combating Corruption: <http://www.dpsa.gov.za/dpsa2g/documents/acc/African%20Union%20Convention%20on%20Preventing%20and%20Combating%20Corruption.pdf>

##### 2. International Fora

South Africa:

- was a Member of the Pan-African National Anti-Corruption Bodies established in February 2007 (now defunct);
- convened and hosted the Africa Forum on Fighting Corruption (AFFC) in February 2007;
- hosted the Global Forum on Fighting Corruption and Safeguarding Integrity in April 2007;
- is a member of and participates in the G20 Anti-Corruption Working Group since 2010; the OECD Working Group on Bribery in International Business Transactions, the Southern African

Development Community (SADC), the and Southern African Forum against Corruption (SAFAC);

- is a member of the Financial Action Task Force (FATF) and the Asset Recovery Inter-Agency Network for Southern Africa (ARINSA); and
- is a member of the BRICS Working Group on Anti-Corruption Cooperation.

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

(a) Examples of implementation

- MOU on Anti-corruption between the Government of the Republic of South Africa and the Government of the Democratic Republic of Congo and the United Nations Office on Drugs and Crime, signed 2008;
- MOU between the Government of South Africa and Government of the Republic of India and Government of Federative Republic of Brazil on Cooperation on Public Administration and Governance signed 17 October 2007.
- Report on the implementation of the AU Convention on preventing and combating corruption (hard copy available). South Africa is to undergo a review this year (2019).
- During the year 2019, as a member of the BRICS Countries, South Africa participates in the International Youth Contest on Social Anti-Corruption Advertising, which is the initiation of the Russian Federation.

*(b) Observations on the implementation of the article*

South Africa promotes regional and international cooperation, primarily through its membership in the aforementioned fora and participation in relevant conferences, meetings, programmes and review bodies. In addition, national authorities have signed bilateral cooperation agreements and participate in trainings and information exchange with foreign counterparts.

South Africa is a member of and participates in the activities of the G20 Anti-Corruption Working Group, OECD Working Group on Bribery in International Business Transactions, Southern African Development Community (SADC), Southern African Forum against Corruption (SAFAC), African Union, Financial Action Task Force (FATF) and Asset Recovery Inter-Agency Network for Southern Africa (ARINSA).

A review of the implementation of the AU Convention on preventing and combating corruption began in 2019. South Africa submitted its self-assessment checklist to the African Union Advisory Board on Corruption. The Board undertook a country visit to South Africa from 24 to 28 February 2020. The review report is yet to be released.

*(c) Challenges, where applicable*

**Please outline actions required to ensure or improve the implementation of the article under review and describe any specific challenges you might be facing in this respect.**

None required.

*(d) Technical assistance needs*



No assistance would be required

**Is any technical assistance already being provided to you? If so, please provide a general description of the nature of the assistance, including donor information.**

No.

## Article 6. Preventive anti-corruption body or bodies

### *Paragraph 1 of article 6*

*1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as:*

*(a) Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;*

*(b) Increasing and disseminating knowledge about the prevention of corruption.*

### *(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

Response

#### **1. Approach to fighting corruption in South Africa**

South Africa takes a partnership approach in the fight against corruption, involving various state entities as well as non-state actors and civil society. In 2014, Government reaffirmed its commitment to the fight against corruption and adopted a zero tolerance and “*whole of Government and societal approach*” (as depicted below) to combatting corruption and ensuring a resilient anti-corruption framework.

# Whole of Government and Societal Approach to combat Corruption

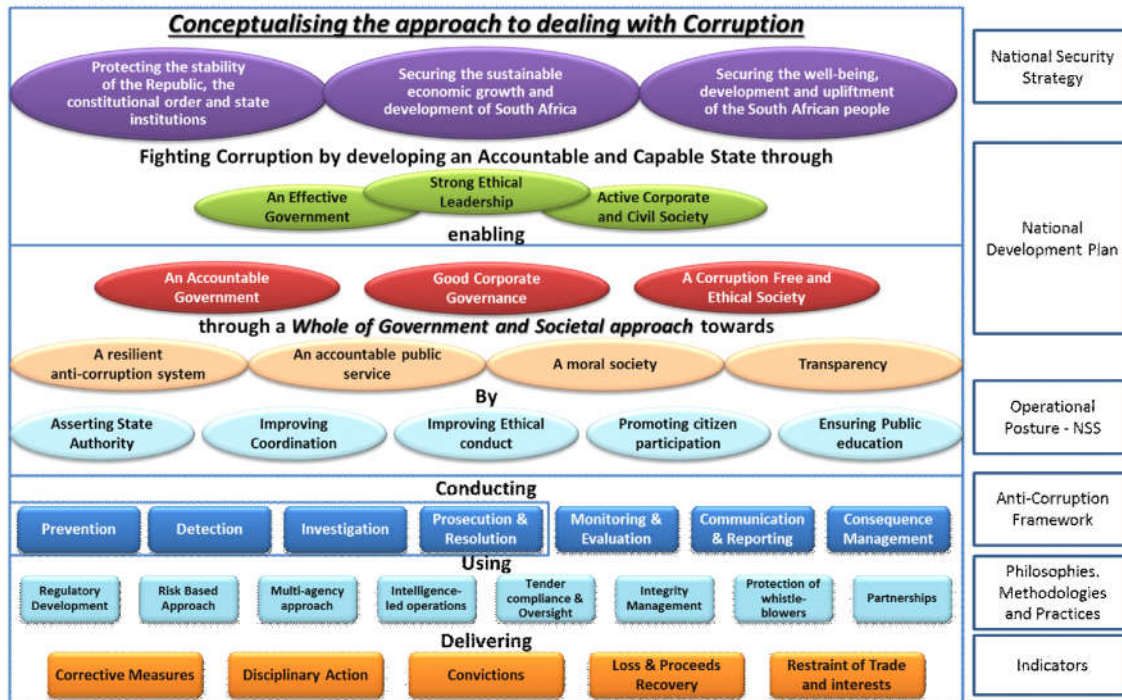


Figure 3: Depiction of the government approach to fighting corruption

## 2. Institutions responsible for preventing corruption

The following institutions are responsible for preventing corruption in South Africa:

### Statutory Institutions

Statutory institutions include constitutional bodies, specialized agencies and government departments. The following are institutions tasked with the responsibility of preventing corruption in South Africa:

#### 2.1 Department of Public Service and Administration (DPSA):

Section 3 (1)(h) of the Public Service Act, 1994 provides the Minister for the Public Service and Administration (MPSA) with the responsibility to for establish norms and standards relating to integrity, ethics, conduct and anti-corruption in the public service. The DPSA is the focal point for South Africa's commitment on international treaties aimed at preventing and combatting corruption.

The structure of the DPSA makes provision for a Chief Directorate: Ethics and Integrity Management. The purpose of the Ethics and Integrity Management Unit (the Unit) is to manage the provision of norms and standards relating to integrity, ethics, conduct and anti-corruption in the Public Service as contemplated in section 3(h) of the Public Service Act, 1994.

#### 2.2 Public Administration Ethics, Integrity and Disciplinary Technical Assistance Unit

The Public Administration Management Act, 2014, provides for the establishment of the Public Administration Ethics, Integrity and Disciplinary Technical Assistance Unit (PAEIDTAU). In March 2019, the President of the Republic of South Africa proclaimed the establishment of the Public Administration Ethics, Integrity and Disciplinary Technical Assistance Unit. The Ethics and Integrity Management Unit (as described above) is to form an embryo of the PAEIDTAU. The PAEIDTAU, incubated within the DPSA as a chief directorate, has the following functions:

- (a) provide technical assistance and support to institutions in all spheres of government regarding the management of ethics, integrity and disciplinary matters relating to misconduct in the public administration;
- (b) develop the norms and standards on integrity, ethics, conduct and discipline in the public administration;
- (c) build capacity within institutions to initiate and institute disciplinary proceedings into misconduct;
- (d) strengthen government oversight of ethics, integrity and discipline, and where necessary, in cases where systemic weaknesses are identified, to intervene;
- (e) promote and enhance good ethics and integrity within the public administration; and
- (f) cooperate with other institutions and organs of state to fulfil its functions under this section.

### **2.3 The Public Service Commission (PSC / Commission).**

The Public Service Commission (PSC/Commission) derives its mandate from sections 195 and 196 of the Constitution, 1996. The PSC's role is to provide oversight of the public service of South Africa through the powers and functions contained in section 196 of the Constitution. Its mandate is, inter alia, to promote excellence in governance, the delivery of quality services and promote values and principles set out in section 195 of the Constitution of the Republic of South Africa, 1996, in the public service. This mandate is exercised through the functions of investigation, monitoring and evaluating the organisation and administration, and personnel practices of the public service.

In giving effect to the constitutional and legislative mandate, the PSC established a dedicated Branch (Integrity and Anti-Corruption Branch [IAC]), which is responsible for ensuring integrity and devising strategies to prevent corruption in the public service. The IAC Branch also has the following responsibilities:

- Management of conflicts of interests.
- Ethics promotion and research.
- Management of the National Anti-Corruption Hotline.
- Investigation of public administration related complaints, which include procurement irregularities and irregularities relating to appointment of personnel in the public service.

The PSC also manages the National Anti-Corruption Hotline (NACH). The NACH is a national system designed to enable members of the public and employees in the public service to report allegations of corruption and maladministration in the public service by using a toll free number (0800 701 701).

### **2.4 National Treasury**

The National Treasury has a constitutional mandate to prescribe measures to ensure both transparency and expenditure control in each sphere of government. The National Treasury is required to enforce, monitor and assess the implementation of the Public Finance Management Act, 1991 (PFMA) in the public sector and the Municipal Finance Management Act, 2003 (MFMA) at local government level. The National Treasury also has the authority to investigate any system of financial management and internal control in any sphere of government. It can also intervene by taking appropriate steps, which may include steps in terms of section 100 of the constitution or withholding of funds in terms of section 216 (2) of the Constitution, to address a serious or persistent material breach of the PFMA and MFMA by any organ of state in any spheres of government.

## **2.5 The Office of the Chief Procurement Officer**

Within the National Treasury, there is an Office of the Chief Procurement Officer (OCPO) which was established to improve the transparency, fairness and cost-effectiveness of the procurement system in all spheres of government, and to support the proper utilization of financial and other public resources and state assets. The OCPO is responsible for the following functions:

- Endorsement of particulars on the Register for Tender Defaulters in terms of Section 28 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004). The National Treasury is empowered to determine the period of restriction from doing business with the public sector for a period not less than 5 years and not more than 10 years.
- Record keeping of restricted suppliers in accordance with the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000). The National Treasury maintains a Register of Restricted Suppliers prohibited from doing business with the organs of state. This Act gives the Accounting Officer/Authority the power to restrict a supplier from doing business with the public sector if such a supplier obtained preferences fraudulently or if such supplier failed to perform on a contract based on the specific goals;
- Management of the Central Supplier Database, where public servants, who own business are detected for the purpose of preventing them from doing business with the state;
- Management of transversal tenders; and
- Electronic procurement.

## **2.6 Financial Intelligence Centre**

The Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001) establishes a Financial Intelligence Centre (FIC) in order to combat money laundering activities and the financing of terrorist and related activities, this include the identification of the proceeds of unlawful activities. A Financial Intelligence Centre is established as an institution outside the public service but within the public administration as envisaged in section 195 of the Constitution.

More about the FIC under articles 14 and 58.

## **2.7 Special Investigating Unit (SIU)**

The Special Investigating Unit and Special Tribunals Act, 1996 (Act No.74 of 1996) provides for the establishment of Special Investigating Unit (SIU) for the purpose of investigating serious malpractice or maladministration in connection with the administration of state institutions, state assets and public money as well as any conduct which may harm the interest of the public.

The SIU has made a case for a revised operating model to ensure that the organisation tackles corruption on three further fronts (in addition to reactive investigations), Deterrence, Prevention and Education and that there are collaboration and coordination with other agencies with a similar mandate. The SIU's revised operating model and value chain includes awareness, outreach and advisory services to state institutions as well as civil society. This initiative is aimed at taking a proactive, co-ordinated approach to the prevention of corruption and maladministration and also speaks to the obligations imposed by the NACS on institutions such as the SIU.

In terms of the SIU's Prevention-Awareness conceptual model, the SIU aims to take a leading role in South Africa to prevent fraud and corruption by focusing on societal values and systems that make it difficult to engage in acts of corruption. In order to achieve this the SIU must increase public awareness about targeted anti-corruption behaviour through awareness and outreach activities. Methodologically sound approaches to raising awareness have been shown to have an effect on knowledge, attitudes and behaviour. The SIU aims to:

- Educate the public against the evils of corruption and enlist public support in combating corruption;
- Advises on measures to foster public support in combating corruption and promote education;
- Host preventative education programmes for Public Sector and Youth;
- Improve the rate at which allegations are centrally reported;
- Share market data analytics information publicly with citizens;
- Help people understand the likelihood of getting caught and the associated consequences;
- Improve citizens' awareness of their rights and responsibilities relevant to the fight against corruption; and
- Help people channel frustration at corruption into energy for change.

Awareness initiatives include events, poster campaigns, social media or the internet, education programmes, newspaper articles, radio, TV, or creative, innovative ways of sharing information with the public.

Continuous feedback mechanisms and tools will be utilised to determine the impact of the awareness and outreach initiatives. These feedback tools can include surveys, questionnaires or interviews which can be conducted during the course of or after the initiatives.

In terms of the SIU's Prevention-Advisory conceptual model, the SIU aims to take a leading role in South Africa to prevent fraud and corruption by focusing on societal values and systems that make it difficult to engage in acts of corruption. In order to rid society of corruption, the SIU must direct strategic decision making processes and drive prevention activities in state institutions through providing advisory services.

During investigations, certain systemic or generic improvements are identified that can be implemented across similar state institutions. The implementation of these improvements will ensure that similar instances do not reoccur, at that state institutions or any other similar institution. In order to assist the State with ensuring that this process is managed accordingly, the SIU provides the following services to state institutions:

- Improvement services;
- Training; and
- Consulting services.

According to the SIU's 2019/20 annual report, as of September 2018, the SIU had a headcount of

523 employees. The organisational structure, which has undergone a review, makes provision for a headcount of 673 as of 31 March 2020.

## **2.9 Auditor-General and Public Protector**

The role of the Auditor-General and the Public Protector in combating corruption in South Africa is acknowledged. The two institutions' mandate is not necessarily on the prevention of corruption but their role in investigating and recommending action to deal with corruption is taken in high regard. The Public Protector's constitutional powers have been affirmed by the Constitutional Court, which found that remedial action outlined in the Public Protector's reports must be complied with (Constitutional Court, 2015).

The Public Audit Act was amended in 2018 to extend the powers of the Auditor-General beyond auditing and reporting. The Public Audit Amendment Act, 2018 (Act No. 5 of 2018) gives the Auditor-General the power not only to refer material irregularities uncovered during audits to law enforcement agencies, but also to issue certificates of debt to personally hold accounting officers and executive authorities responsible for the amounts involved if they fail to recover losses from the responsible persons.

These events confirm the role of the two institutions in fostering clean governance in public institutions.

## **2.10 Department of Cooperative Governance**

The Department of Cooperative Governance established an Anti-Corruption Unit in the Branch: Institutional Development. The Anti-Corruption Unit derives its mandate from Section 106 of the Local Government Municipal Systems Act No. 32 of 2000. The Strategic objective of the Unit is to promote good governance through the strengthening of anti-corruption measures in local government. The Unit conducts anti-corruption campaigns to improve ethical conduct at the local sphere of government. It also strengthens and implements preventative measures for corruption and creates a conducive environment for the expeditious resolution of corruption cases.

The Department is rolling out a training programme to municipalities on the revised Local Government Anti-Corruption Strategy and the Municipal Integrity Management Framework. Further, allegations of corruption and related offences are reported to the Department through letters, e-mails, text messages and telephone calls to the office of the Minister and the Director-General. Some of the allegations are reported directly to law enforcement agencies and also through the National Anti-Corruption Hotline (NACH). Such allegations are referred to provinces in line with Section 106 of the Municipal Systems Act, 2001, for further investigations. Some of the complex matters are referred directly to law enforcement agencies for further processing.

## **3. Coordinating structures**

In addition, the following coordinating or non-statutory bodies are of significance in the Public Sector:

**3.1 Anti-Corruption Task Team (ACTT):** The ACTT was established in 2010 through collaboration between the Directorate of Priority Crime Investigations (DPCI), the Special Investigating Unit (SIU) and the National Prosecuting Authority (NPA) represented by the Special Commercial Crimes Unit (SCCU) and the Asset Forfeiture Unit (AFU). The primary mandate of the ACTT was to successfully detect, investigate and prosecute cases of alleged corruption.

In 2014, Government reaffirmed its commitment to the fight against corruption and adopted a zero tolerance and “*whole of Government and societal approach*” to combatting corruption and ensuring a resilient anti-corruption framework. This culminated in the extension of the ACTT mandate and focus to include improving multi-agency and integrated operational approaches and inter-sectoral cooperation.

The revised mandate of the ACTT includes the following broad focus areas which are translated into five programmes:

- Ensuring communication and public awareness.
- Intelligence coordination, integrated policy and strategy development.
- Public sector capacity development.
- Management of vulnerable sectors.
- Resolution of corruption cases in both the public and private sectors.

#### Programme 3 of the ACTT: Public Sector Policy and Capacity Development

This programme was convened by the Department of Public Service and Administration (DPSA) focuses on:

- Public Sector Policy and Strategy development
- Public Service Integrity Management Framework
- Minimum Anti-Corruption Capacity development, Cluster Coordination and Support
- Peer-Review Mechanisms
- Monitoring and Evaluation
- Provincial and Local Government

#### Programme 4 of the ACTT: Vulnerable Sector Management

This programme was convened by the Special Investigating Unit (SIU) focused on

- Sector based national priority risk and threats
- serious maladministration, improper or unlawful conduct, unlawful appropriation or expenditure etc. impacting on any State Institution or Public, monies and property or interests
- offences of the Prevention and Combating of Corrupt Activities Act, 2004, and which offences was committed in connection with the affairs of any State institution;
- Conduct Investigations
- Institute and Conduct Civil Proceedings

The mandate of the ACTT was expanded to address challenges in terms of overlapping responsibilities and to ensure coordination in this regard. The ACTT developed various programmes and allocated responsibility to various institutions with an overall coordinator of each programme to report on progress made. In this way, the mandate of each institution is affirmed and recognised by other role players. It has to be acknowledged, however, that in practice challenges are still experienced because the ACTT is not a statutory body and therefore, institutions are still expected to report formally about how it discharges its mandate on a day to day basis. There is,

therefore, pressure to function independently of other players and account for its budget and activities committed through its strategic plans and budget. In this way challenges regarding duplication of cost and dilution of messages may also be experienced. However, the positive thing is that government belonging to the ACTT structure recognised its coordinating functions and, in most cases, respects this structure. Government institutions, therefore, largely remain committed to the ACTT programme and this has an impact in terms of coordinated messages to the public.

**3.2 Anti-Corruption Inter-Ministerial Committee (ACIMC)** In 2010 the President established the Anti-Corruption Inter-Ministerial Committee (IMC) to coordinate anti-corruption initiatives. The main thrust of the IMC includes: ensuring coordinated anti-corruption efforts, promoting policy coherence and alignment on cross-cutting anti-corruption programmes of government, reviewing procurement practices and addressing weaknesses in the criminal justice system so as to ensure that efficient prosecution takes place. ACIMC is no longer in operation. See information under article 5.

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

Examples of implementation

3. Department of Public Service and Administration (DPSA):

- Policies developed by the DPSA

3.1 Public Service Regulations, 2016 (PSR)

Public Service Regulations, 2016, (PSR) amended the Public Service Regulations, 2001. Chapter 2 of the PSR, 2016 seeks to align the regulations to the Public Sector Integrity Management Framework adopted by Cabinet in 2013, the Minimum Anti-Corruption Capacity Requirements adopted in 2002, and address some of the risks identified during the 2015 Public Sector Ethics Survey. Of importance to note is the amendment to the Code of Conduct (which was contained in Chapter 2 of the PSR, 2001), the Financial Disclosure Framework (which was contained in Chapter 3 of the PSR, 2001, and introduction of the obligations to departments to establish ethics infrastructure. The PSR, 2016, came into effect on 01 August 2016.

(a) The Public Service Code of Conduct (Chapter 2, Part 1) was revised to:

- ✓ prohibit employees from conducting business with any organ of state or to be a director of a public or private company conducting business with an organ of state;
- ✓ include special focus on what constitutes ethical conduct that is expected from employees including a regulation on receipt and acceptance of gifts, dealing with conflict of interest situations, and prohibition of “name-dropping” in order to coerce other employees to do certain things. Public service employees are prohibited from accepting “gifts” from any employee or any person in return for performing or not performing his or her official duties (Regulation 13 (a)). This is considered a bribe and as such is a criminal offence under the Prevention and Combating of Corrupt Activities Act, 2004. In terms of regulation 13 (e), this conduct must be reported when observed.
- ✓ include specific provisions on obligations on employees who have been granted permission to engage in other remunerative work outside their departments, in terms of section 30 of the Public Service Act, 1994; and



✓ Include requirements for employees in the public service to report unethical conduct, corruption and non-compliance to the Public Service Act, 1994 and the Public Service Regulations, 2016.

(b) Financial disclosure (Chapter 2, Part 2)

In terms of the Public Service Regulations, 2001, only employees in the Senior Management Service were required to disclose their financial interests. The PSR, 2016:

✓ gave the Minister for the Public Service and Administration (MPSA) powers to designate other categories of employees to disclose their financial interests;

✓ made the use of an electronic system (eDisclosure system) by designated employees to disclose their financial interests compulsory, so as to create a database for the management of conflicts of interest; and

✓ introduced other categories of financial disclosures namely, participation in trusts, disclosure of vehicles and loans from financial institutions.

(c) Establishment of ethics infrastructure in departments (Chapter 2, Part 3):

The PSR, 2016,

✓ Places certain anti-corruption functions on a Head of Department; including analyzing corruption risks, developing and implementing an anti-corruption plan, establishing systems that allow employees to report corruption confidentially, referring allegations of corruption to relevant law enforcement authorities, and establishing educational and awareness programmes; and

✓ Requires Executive Authorities to designate Ethics Officers to promote integrity and ethical behavior, advise employees on ethical matters and identify and report unethical behavior and corrupt activities. The PSR, 2016, further stipulates the functions of ethics officers in the departments.

✓ Regulation 23 (2) requires a Head of Department to establish an ethics committee or designate an existing committee to provide oversight of ethics management in the department.

### 3.2 Directive on other remunerative work outside of an employee's employment in a relevant department as contemplated in section 30 of the PSA, 1994

Section 30 of the Public Service Act, 1994 (PSA) allows for public service employees to perform other remunerative work. In November 2016, the MPSA issued a Directive on other remunerative work outside the employee's employment in a relevant department as contemplated in section 30 of the PSA, 1994 to introduce and standardise a process for application and approval of other remunerative work. Regulation 13(i) makes it clear that if an employee has permission in terms of section 30 of the PSA, 1994, to perform outside remunerative work, the employee shall not-

(i) perform such work during official work hours; and

(ii) use official equipment or state resources for such work.

Furthermore, permission to perform other remunerative work does not entitle the employee to conduct business with the state.

To support the implementation of this directive, the Personnel Salary System (PERSAL) was amended to provide for the capturing of information on public service employees performing other remunerative work. This provided the necessary monitoring mechanism for ethics officers in departments to manage conflicts of interest.

In May 2017, the DPSA in partnership with SITA and National Treasury started training of officials in human resources management in government departments and ethics officers. By the end of July 2019, 207 officials were trained to capture applications for approval of other remunerative work on PERSAL.

### 3.3 Prohibiting employees from conducting business with an organ of state

One risk that threatens good governance and the public's trust in government institutions from delivering proper services, is public service employees conducting business with their employers (which includes all state institutions). To address this risk, the DPSA revised the Code of Conduct for public service employees, to prohibit them from conducting business with an organ of State, whether in their own capacity as individuals or through companies in which they are directors.

To manage the prohibition process, Public Service Regulations, 2016 contained transitional arrangements, ensuring that from 1 February 2017 no Public Service employee will have business interests involving an organ of State. In terms of these transitional arrangements, by 1 January 2017, those who were conducting business with an organ of State should have relinquished that specific business interest or opted to resign from the government. In February 2017, those affected by the prohibition had to provide proof to their respective heads that they have resigned from those interests involving an organ of State.

To assist the monitoring of public service employees conducting business with an organ of state, National Treasury took stock of employees registered on the Central Supplier Database (CSD). Since 1 February 2017, the DPSA is monitoring implementation of this prohibition by comparing the data on the CSD with that on PERSAL, requesting departments to act on transgressions. In June 2019, the DPSA handed over a list of 20 employees to the South African Police Service and the National Prosecuting Authority to investigate transgression of section 8 of the Public Administration Management Act, 2014 (Conducting business with the state).

### 3.4 Determination on Other Categories of Designated Employees to Disclose their Financial Interests and Directive on the Form, Date and Financial Interests to be Disclosed (Determination and Directive)

On 16 March 2017, the Minister for the Public Service and Administration issued a Determination on Other Categories of Designated Employees to disclose their Financial Interests and Directive on the Form, Date and Financial Interests to be disclosed. In addition to employees in the Senior Management Service, the following categories of employees were designated to disclose their financial interests:

(a) Employees earning an equivalent of salary level 13 and above through the Occupation Specific Dispensation (OSD);

While providing professional services, many of these employees are also managing their area of work.

(b) Employees appointed and / or remunerated at salary level 11 and 12

The majority of employees appointed at salary levels 11 and 12 are middle managers with a range of functions and assigned responsibilities. This category includes all other employees who are remunerated at these salary levels through the Occupation Specific Dispensation (OSD) or personal notches.

(c) Employees in Supply Chain Management and Finance Units

Public procurement function generally presents a high risk of a potential and actual conflict of interest. Employees handling public funds should also display a high level of ethical conduct in the discharge of their duties and responsibilities. Their integrity must be beyond question. All employees in Supply Chain and Finance Units irrespective of their salary level should be directed to disclose their financial interests to ensure that their decision-making processes are not affected by conflicts of interest.

(d) Any employee who is authorised by the Minister, Executive Authority, Head of Department or the chairperson of the Public Service Commission for purposes of record-keeping and the effective implementation of Part 2 of Chapter 2 of the PSR:

This category includes ethics officers, officials with delegated authority on the eDisclosure system and officials who perform verification functions. It is important that employees whose functions include assessment of a conflict of interest, are themselves cleared of such conflict. The 2017/18 disclosure statistics by these categories were presented as an example of implementation of article 5, paragraph 2.

### 3.5 Guides and explanatory manuals

The DPSA has issued the following guides and explanatory manuals to make it easier for departments to implement the PSR, 2016:

- (a) Explanatory manual on the disclosure of financial interests;
- (b) Guide on verification of financial interests by designated employees;
- (c) Guide on managing gifts in the public service; and
- (d) Guide on the reporting of unethical conduct, corruption and non-compliance to the Public Service Act, 1994, and the Public Service Regulations, 2016.

### 3.6 Ethics Officer Forum

The DPSA established a National Ethics Officer Forum. The Forum acts as a support structure to capacitate ethics officers to manage the ethics performance of their departments. Since April 2015 the DPSA has hosted five National Ethics Officer Forum meetings for the designated ethics officers designated under the PSR, 2016.

### 3.7 Training and workshops to support the implementation of the PSR, 2016

✓ The DPSA hosted workshops for all the national and provincial departments to support the implementation of the PSR, 2016. Furthermore, on regular basis departments invite the DPSA to address specific issues relating to ethics in their departments.

✓ The DPSA has also partnered with the National School of Government (NSG) and the Ethics Institute of South Africa (EthicsSA) to develop training courses to support the implementation of the PSR, 2016. The EthicsSA has developed the following courses:

- (i) Public Sector Ethics Management; and
- (ii) Public Sector Ethics Committee Workshop.

The NSG has developed among other courses, the following:

- (i) Online Ethics Course;

- (ii) Ethics in Local Government;
- (iii) Ethics in National and Provincial departments; and
- (iv) Anti-Corruption Course for Practitioners.

The NSG also developed an Ethics Module to use in senior management induction and an Ethics Module to use in Compulsory Induction Programme for Public Service. The NSG is currently working with National Treasury and the DPSA to develop an Ethics support tool for Internal Auditors in the form of an eLearning micro lesson.

### 3.8 The Public Service Commission

As a Constitutional body, the Public Service Commission (PSC) initiated and supported implementation of various programmes in the public service to ensure adherence to the constitutional values and principles of public administration as outlined in section 195 of the Constitution of South Africa, 1996. The PSC publishes its reports on their website: [www.psc.gov.za](http://www.psc.gov.za) <<http://www.psc.gov.za>>

The PSC developed an explanatory manual of the initial code of conduct for the public service to provide a practical guide to apply the code and to generate a better understanding of the code and its implications. Workshops were also held with officials at both national and provincial departments to promote the code. The code has now been replaced by the one contained in Chapter 2 of the Public Service Regulations, 2016.

- Before the adoption of the PSR, 2016, the PSC was the custodian of the implementation of the Financial Disclosure Framework as was contained in Chapter 3 of the Public Service Regulations, 2001. Part 2, of Chapter 2, of the PSR, 2016, replaced this Framework; however, the PSC still plays a major role in this regard. The PSC is responsible for verification of financial interests disclosed by members of the Senior Management Services to assess completeness and accuracy of such disclosures and whether the disclosures pose a potential or actual conflict of interest. Furthermore, the PSC monitors how departments manage conflict of interest as identified during the verification process. In this regard, the PSC issues reports annually including a fact sheet on Actions Taken by Executive Authorities with regard to identified cases of potential Conflicts of Interests and Compliance with the Financial Disclosure Framework (reports available on the PSC website) e.g.

- (i) Fact Sheet on Monitoring Compliance with the Financial Disclosure Framework for the 2012/2013 Financial Year

[http://www.psc.gov.za/documents/reports/2014/Fact%20Sheet%20on%20Monitoring%20Compliance%20with%20the%20Financial%20Disclosure%20Framework%20for%20the%202012\\_2013%20Financial%20YearF98F.PDF](http://www.psc.gov.za/documents/reports/2014/Fact%20Sheet%20on%20Monitoring%20Compliance%20with%20the%20Financial%20Disclosure%20Framework%20for%20the%202012_2013%20Financial%20YearF98F.PDF)

- (ii) Overview of the implementation of the financial disclosure framework for the financial year 2015/16:

<http://www.psc.gov.za/documents/reports/2017/Overview%20of%20the%20Implementation%20of%20theFinancial%20Disclosure%20Framework%20Financial%20Year%202015%202016%202.pdf>

- (iii) Fact Sheet on Actions Taken by the Executive Authorities with regard to Identified Cases of

## Potential Conflicts of Interests and Compliance with the Financial Disclosure Framework

<http://www.psc.gov.za/documents/reports/2014/Report%20on%20Actions-LR.pdf>

(iv) PSC “*Overview of the Implementation of the Financial Disclosure Framework for the 2018/2019 Financial Year*” (March 2020) (copy provided)

- The PSC is also a custodian of the National Anti-Corruption Hotline. The PSC periodically assesses the effectiveness of the Hotline and issues reports in this regard (see responses to Article 5 (paragraph 3). Example:

Measuring the effectiveness of the National Anti-Corruption Hotline. The assessment was conducted again in 2009 and 2012;

[http://www.psc.gov.za/documents/2007/73155\\_Inside.pdf](http://www.psc.gov.za/documents/2007/73155_Inside.pdf)

<http://www.psc.gov.za/documents/2012/NACH3%20REPORT.pdf>

- In 2016, the PSC launched an advocacy programme to promote values and principles as set out in section 195 of the Constitution and all other values enshrined in the Constitution. The programme involved an intensive drive to engage with government departments, key societal stakeholders and the citizenry at large. These engagements focused on ensuring that the values and principles are understood, adhered to and find expression in practical public administration. They entailed a useful discussion of contextual location of the Constitutional Values and Principles (CVPs) within the different government sectors. The programme also involved running a promotional campaign through the radio in partnership with the South African Broadcasting Corporation (SABC).

(i) Report on constitutional values and principles advocacy campaign in terms of section 196(4) (a) of the Constitution, Limpopo Province, 2018

[http://www.psc.gov.za/documents/reports/2018/LIMPOPO\\_REPORT\\_ON\\_CONSTITUTIONAL\\_VALUES\\_AND\\_PRINCIPLES\\_ADVOCACY\\_CAMPAIGN-2018\(final\).pdf](http://www.psc.gov.za/documents/reports/2018/LIMPOPO_REPORT_ON_CONSTITUTIONAL_VALUES_AND_PRINCIPLES_ADVOCACY_CAMPAIGN-2018(final).pdf)

(ii) Systematic review and development of the CVP evaluation tool: Lessons learnt from engagements with departments and pilot evaluations

<http://www.psc.gov.za/documents/reports/2018/Tag%20C%20-%20Preliminary%20results%20of%20the%20review%20of%20the%20ME%20System.pdf>

- On an annual basis, the PSC in partnership with the United Nations Office on Drugs and Crime in South Africa, hosts the commemoration of the International Anti-Corruption day.

- The PSC holds roundtables on specific issues e.g. round table on the professionalization of the public service in South Africa in 2018, a round table on understanding the causes of and ending unfair treatment in the workplace.

(i) Report on the roundtable on the professionalisation of the public service in South Africa  
[http://www.psc.gov.za/documents/reports/2018/Final\\_Report\\_on\\_the\\_Roundtable\\_on\\_the%20Professionalisation\\_PSC.pdf](http://www.psc.gov.za/documents/reports/2018/Final_Report_on_the_Roundtable_on_the%20Professionalisation_PSC.pdf)

(ii) Report of the roundtable session on understanding the causes of and ending unfair treatment in

the

workplace

<http://www.psc.gov.za/documents/reports/2018/Report%20of%20the%20Roundtable.pdf>

- Refer also to examples of implementation of Article 5, paragraph 3. For more reports: [www.psc.gov.za](http://www.psc.gov.za). Reports are organised per year.

### 3.9 Office of the Chief Procurement Officer

- Section 8 of the Public Administration and Management Act, 2014, prohibits employees in the public administration and advisors to executive authorities from conducting business with the state, in order to prevent conflict of interest. The Central Supplier Database, managed by the CPO, flags directors of companies and individuals who are employees in the public administration, as such are also prohibited from conducting business with the state.
- Information relating to procurement procedures and contracts are publicly distributed and available including through the Office of the Chief Procurement Officer (OCPO) e-tender portal: <http://www.etenders.gov.za/> and Central Supplier Database: <https://secure.csd.gov.za/>.
- The list of restricted suppliers is accessible at [www.treasury.gov.za](http://www.treasury.gov.za). The Restricted Suppliers database contains the names of companies and individuals banned from doing business in the public sector because of failure to perform in previous contracts, corruption, fraud, tender irregularities etc. Treasury Regulation 16A9.1c. requires all accounting officers to check the list of Restricted Suppliers prior to awarding any contract, to ensure that no recommended bidders or any of its directors are listed as companies or persons prohibited from doing business with the public sector. In addition, institutions can develop their own internal lists.

### 3.10 Department of Cooperative Governance

- In 2017/18, the Anti-Corruption Unit of the Department of Cooperative Governance rolled out training on the Local Government Anti-Corruption Strategy in 18 District Municipalities across the nine provinces. Furthermore, the Unit compiled an annual report 2017/18 highlighting the Forensic Reports, National Anti-Corruption hotline cases and other cases in municipalities (report not yet published). The database of cases has been updated with all the cases reported to the Department of Cooperative Governance and feedback received from provinces, municipalities and law enforcement agencies.
- The Department continues to collaborate with law enforcement agencies, provinces and municipalities to ensure the implementation of recommendations emanating from forensic reports. Most of the forensic reports made recommendations that certain remedial or other corrective measures should be taken.

#### *(b) Observations on the implementation of the article*

South Africa does not have a single body with primary responsibility for preventing corruption. A number of institutions carry out preventive tasks and contribute to implementing, overseeing, and disseminating information on the prevention of corruption. These include: the Department of Public Service and Administration, the Public Service Commission, the Public Administration Ethics,

Integrity and Disciplinary Technical Assistance Unit (PAEIDTAU, to be established), the National Treasury, Office of the Chief Procurement Officer, Special Investigating Unit, Financial Intelligence Centre, Auditor-General, Public Protector and other agencies. Coordination is exercised through the Anti-Corruption Task Team (ACTT). The mandate of the ACTT was expanded to address challenges in terms of overlapping responsibilities and to ensure coordination in this regard, as described in the response.

It was observed that coordinating efforts of preventing corruption among the different institutions involved remains a persistent challenge, in particular in the absence of a statutory organ clearly vested with such a mandate. The authorities confirmed such a need and reported that various institutional arrangements were being examined under the NACS<sup>7</sup>, including the establishment of an inter-sectoral coordination mechanism, which would oversee the implementation of the NACS by the different role players. Furthermore, authorities reported that the NACS will have an implementation and monitoring plan that would streamline processes and allocate responsibilities to different institutions in and outside government. The implementation of the plan will be monitored at the highest level, with the Department of Planning, Monitoring and Evaluation taking on this oversight role. The said plan will be openly available and could be evaluated by anti-corruption bodies outside the public sector to assess progress and impact.

In addition, it is observed that among the existing bodies carrying out preventive functions, none is entrusted with a specialized mandate pertaining to corruption prevention, including education and awareness-raising.

**Based on the information provided it is recommended that South Africa ensure the existence of one or more bodies with specialized mandates pertaining to the prevention of corruption, including education and awareness-raising, and implementing the prevention policies referred to in article 5 of the Convention.**

### *(c) Successes and good practices*

The Department of Public Service and Administration (DPSA) has hosted workshops for all national and provincial departments to support the implementation of the PSR, 2016. Furthermore, DPSA regularly addresses specific issues relating to ethics in government departments. DPSA has also partnered with the National School of Government (NSG) and the Ethics Institute of South Africa (EthicsSA) to develop training courses to support the implementation of the PSR, 2016.

The training and support provided to practitioners, senior managers and ethics officers on the implementation of the PSR were noted as a good practice.

### *Paragraph 2 of article 6*

*2. Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable*

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<sup>7</sup> The strategy was adopted by the Cabinet on 18 November 2020, after the country visit.

*the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

Response

## **1. The Public Service Commission**

### **1.1. Independence**

The Public Service Commission's independence is guaranteed in section 196 of the Constitution. Although the PSC should report specific cases investigated by the Commission to the relevant executive authority and legislature, the PSC is accountable to the National Assembly. The Commission must report at least once a year to the National Assembly and where applicable, to the relevant provincial legislatures, in respect of its activities and functions, including any finding, directions and advice it may give and to provide an evaluation of an extent to which the public service adheres to the values and principles governing public administration. The Constitution further provides that "no person or organ of state may interfere in the functioning of the Commission."

### **1.2 Structure of the Commission**

- The Commission comprises of 14 Commissioners as follows: 5 based in Pretoria and one Commissioner Resident in each province. The Commission is headed by a Chairperson.
- The Commission is supported by the Office of Public Service Commission (OPSC) headed by the Director-General. The OPSC has its Head Office in Pretoria and one Regional Office in each Province. The Regional Offices are headed by a Director who is an administrative head. The OPSC is structured into four Branches each headed by a Deputy-Director-General: Monitoring and Evaluation, Leadership and Management Practices, Integrity and Anti-Corruption and Corporate Services.
- The Branch: Integrity and Anti-Corruption is responsible for the promotion of high standards of ethical conduct among public servants and contributes to preventing and combating corruption in the public service (copy of the structure of the Branch provided).

### **1.3 Budget of the Public Service Commission (2018/19 Annual Report)**

The PSC's budget allocation over the past five years averages R238m. About 75% of the budget is allocated to the compensation of employees. The Commission's work is undertaken using internal human resources i.e. the Commission does not outsource its functions. The budget of the PSC is part of the overall budget vote of the Department of Public Service and Administration (it is a transfer from the DPSA). An average of R50m (21% of the total allocation of the PSC) of the total budget over the five year period is allocated to the Integrity and Anti-Corruption Unit.

## **2. Department of Public Service and Administration**



The Department of Public Service and Administration is a government department headed by a Director-General (who is the Accounting Officer). The Director-General reports to the Minister (who is a political head).

**The Department of Public Service and Administration is incubating the Public Administration Ethics, Integrity and Disciplinary Technical Assistance Unit**

The Head of the Unit and all its personnel are appointed in terms of the Public Service Act, 1994. The Head of the Unit reports to the Minister for the Public Service and Administration through the Director-General of the DPSA. The Minister is expected to report to Parliament twice a year on the activities of the Unit.

The structure of the PAEIDTAU was provided. Seven out of thirteen positions in the structure of the Unit are filled. At the time of writing the report, progress had been made in the recruitment of the Director – Discipline Management.

The Unit budget for the 2020/21 financial year is above R22m. The budget is equally divided between the compensation of employees and operational costs.

#### **4. National Treasury and Office of the Chief Procurement Officer**

The National Treasury is also a government department headed by a Director-General (who is the Accounting Officer). The Director-General reports to the political head (Minister). The office of the CPO falls directly under the Accounting Officer of the National Treasury and therefore, subject to National Treasury's reporting and accounting lines. Section 15(8) of the Public Administration Management Act, 2014, provides that the Minister must report to Parliament on the activities of the Unit. This means that the Unit Head will report to the Minister in terms of its activities. The Unit is part of the National Treasury organisational structure.

#### **5. Special Investigating Unit**

The Special Investigating Unit operates through Presidential Proclamations. The Unit is therefore, accountable to the President. The reports compiled after investigations are submitted to the President. Only the President can decide to release or publish the report.

##### **5.1 Organisational structure**

The organisational structure (copy provided).

##### **5.2 Budget allocation**

The SIU receives a government grant from the Department of Justice and Constitutional Development. In addition, the SIU submits invoices for forensic services rendered to State institutions, as per proclamations signed by the President. Whilst recovery has been slow, the SIU continues to remind State institutions that it is legislated to recover costs incurred in rendering such services.

Grant Revenue is projected to increase at an average annual rate of 4.2% over the MTEF period, from R 357 million (2018/19) to R403.9 million (2021/22) although the allocation is at the sole discretion of the National Treasury. Project Income (in terms of its enabling Act, the SIU is entitled to charge and recover fees and expenses from a State institution which is the subject of an investigation) is planned to increase from R271.3 million (2018/19) to R430.4 million (2021/22), at an average growth rate of 16.6 % over the period, although this depends on the number of active

Proclamations in a particular year. The number and timing of Proclamation approvals is not within our control and poses a challenge for the accurate prediction of this amount.

The SIU might also receive additional funds based on projects undertaken. For example, as the convener of Programme 4 of the Anti-Corruption Task Team (ACTT), in the 2017/18 financial year, the SIU received Criminal Assets Recovery Account (CARA) funds to support the anti-corruption activities of the government.

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

Example of implementation

Report to the National Assembly in terms of section 196(4) (e) of the Constitution, read with section 196(6): 1 April 2016 to 31 March 2017 (Public Service Commission, November 2017) [http://www.psc.gov.za/documents/reports/2018/Section%20196\(4\)\(e\)%20Report%20Final.pdf](http://www.psc.gov.za/documents/reports/2018/Section%20196(4)(e)%20Report%20Final.pdf)

*(b) Observations on the implementation of the article*

As noted above, South Africa does not have a single body with prime responsibility for preventing corruption. Several public institutions contribute to corruption prevention, such as the Department of Public Service and Administration, the Public Service Commission, the Public Administration Ethics, Integrity and Disciplinary Technical Assistance Unit (PAEIDTAU), the National Treasury, Office of the Chief Procurement Officer, Special Investigating Unit, Financial Intelligence Centre, Auditor-General, Public Protector and other agencies.

National authorities reported the PSC as the only entity among those listed that has legally established independence to carry out its functions free from undue influence (section 196 of the Constitution). The Auditor General and Public Protector are constitutional bodies established in accordance with chapter 9 of the Constitution.

South Africa has been dedicating significant efforts to continuously training employees to develop their capacity to carry out prevention functions, although authorities reported that the capacity for prevention functions in government institutions is not yet adequate.

In terms of staffing, it was confirmed that, at the time of review, the leadership positions in the PSC, FIC and SIU were fully staffed. However, there were vacancies in a number of key agencies, including the Public Administration Ethics, Integrity and Disciplinary Technical Assistance Unit of DPSA and the Public Protector. There was an official acting in the position of the Chief Procurement Officer after the incumbent resigned.

**Based on the information provided, it is recommended that South Africa adopt measures to strengthen the independence of anti-corruption bodies, enabling them to carry out their functions free from undue influence, and strengthen coordination among government institutions involved in anti-corruption efforts. It is further recommended that South Africa continue to invest in training and capacity building of public officials carrying out prevention functions and ensure that anti-corruption bodies are fully and adequately staffed and equipped with the necessary material resources.**

*Paragraph 3 of article 6*

3. Each State Party shall inform the Secretary-General of the United Nations of the name and address of the authority or authorities that may assist other States Parties in developing and implementing specific measures for the prevention of corruption.

*(a) Summary of information relevant to reviewing the implementation of the article*

**Has your country provided the information as prescribed above? If so, please also provide the appropriate reference.**

The information will be provided in due course.

*(b) Observations on the implementation of the article*

South Africa was reminded of its obligation to notify the secretariat of its corruption prevention authority or authorities, so the relevant contact information can be included in UNODC's directory of competent national authorities (SHERLOC).

*(c) Challenges, where applicable*

**Please outline actions required to ensure or improve the implementation of the article under review and describe any specific challenges you might be facing in this respect.**

None.

*(d) Technical assistance needs*

No assistance would be required

**Is any technical assistance already being provided to you? If so, please provide a general description of the nature of the assistance, including donor information.**

No.

**Article 7. Public sector**

*Paragraph 1 of article 7*

1. Each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, endeavour to adopt, maintain and strengthen systems for the recruitment, hiring,

*retention, promotion and retirement of civil servants and, where appropriate, other non-elected public officials:*

*(a) That are based on principles of efficiency, transparency and objective criteria such as merit, equity and aptitude;*

*(b) That include adequate procedures for the selection and training of individuals for public positions considered especially vulnerable to corruption and the rotation, where appropriate, of such individuals to other positions;*

*(c) That promote adequate remuneration and equitable pay scales, taking into account the level of economic development of the State Party;*

*(d) That promote education and training programmes to enable them to meet the requirements for the correct, honourable and proper performance of public functions and that provide them with specialized and appropriate training to enhance their awareness of the risks of corruption inherent in the performance of their functions. Such programmes may make reference to codes or standards of conduct in applicable areas.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

Response

Section 40(1) of the Constitution of the Republic of South Africa, 1996 (Constitution) provides that government is constituted as national, provincial and local spheres which are distinctive, interdependent and interrelated. The Constitution further requires in section 41 (1) (b) and (c), all spheres of government to provide an effective, efficient, transparent, accountable and coherent government for the Republic to secure the well-being of the people and the progressive realization of their constitutional rights.

Section 195 (5) and (6) permits legislation regulating public administration to differentiate between the different sectors, administrations, and institutions by taking into account their nature and functions. Public administration means the public service, municipalities and their employees (section 1 of the Public Administration Management Act, 2014).

Section 197(1) of the Constitution provides that within the public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation. In this regard, the Public Service Act, 1994, was promulgated to provide for the organisation and administration of the public service of the Republic, the regulation of the conditions of employment, terms of office, discipline, retirement and discharge of members of the public service, and matters connected therewith. The public service consists of persons who are employed in national departments, Offices of the Premier, provincial departments, national government components, and provincial government components.

Section 153 and 154(1) of the Constitution provide that a municipality must structure and manage its administration and that the national and provincial governments must, by legislative and other measures, support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions. Local Government: Municipal Systems Act,

2000 (chapter 7) provides for local public administration and human resources.

### **1. Measures applicable to both the public service and municipalities**

There are common measures that the public administration (in this case the public service and municipalities) must adhere to, to ensure proper human resources practices:

#### (i) The Constitution of South Africa, 1996

In its preamble, the Constitution of the Republic of South Africa (Constitution), 1996, outlines the fundamental values on which nation-building and social cohesion should firmly rest, including redressing imbalances of the past. These values include human dignity, the achievement of equality, the advancement of human rights and freedoms, non-racialism and non-sexism, supremacy of the Constitution, the rule of law, democracy, social justice, equity and respect.

The Constitution provides, in section 195(1), that Public Administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained.
- (b) Efficient, economic and effective use of resources must be promoted;
- (c) Public administration must be development-oriented;
- (d) Services must be provided impartially, fairly, equitably and without bias;
- (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making;
- (f) Public administration must be accountable;
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information;
- (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated; and
- (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

#### (ii) Labour Relations Act, 1995 (Act No. 66 of 1995)

The Labour Relations Act, 1995, regulates the organisational rights of trade unions and promotes and facilitates collective bargaining at the workplace and at the sectoral level. The purpose of the labour relations act is not only to protect everyone in the workplace but to also promote economic development, fair labour practices, peace, democracy and social development. The Act, which came into effect on 11 November 1996, intends to bring labour law into conformity with the Constitution and with international law. It guarantees trade union representatives access to the workplace and regulates the right of employers to lock workers out in certain situations. In addition, the Act requires employers and labour unions to work collaboratively in negotiating collective bargaining agreements that set out the terms and conditions of employment. The Labour Relations Act, 1997 outlaws discrimination in the work place and sets out measures for the protection and promotion of people who were previously disadvantaged.

(iii) The Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997)

The Basic Conditions of Employment Act, 1997 (BCEA) gives effect to the right to fair labour practices referred to in section 23(1) of the Constitution by establishing and making provision for the regulation of basic conditions of employment. The Act entitles employees to certain minimum rights as regards their terms and conditions of employment. These rights include amongst others, the right to be remunerated for work done, be given vacation leave, sick leave, maternity leave and family responsibility leave. Furthermore, the BCEA regulates overtime working hours and pay for such hours.

(iv) The Employment Equity Act, 1998 (Act No. 55 of 1998)

The Employment Equity Act, 1998, stipulates that all designated employers shall submit employment equity plans, which shall include targets for employment of people from the designated groups.

(v) The Promotion of Access to Information Act, 2000 (Act No. 2 of 2000)

The Promotion of Access to Information Act, 2000, gives effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights.

(vi) The Promotion of Administrative Justice Act, 2000 (Act No. 2 of 2000)

The Promotion of Administrative Justice Act, 2000, gives effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution.

(vii) Mechanism to file a complaint or appeal against a human resource decision

The Promotion of Administrative Justice Act, 2000, provides that an administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. An administrative action is any decision taken or failure to take a decision. Section 3 of the Act gives rights to adequate notice of the nature and purpose of an administrative action, a reasonable opportunity to make representations and adequate notice of any right of review or internal appeal, where applicable. The Act further provides a person with the right to request reasons for an administrative action.

Section 6 of the PAJA sets out a list of “grounds” on which courts can review administrative action which include: the administrator did not have authority to take such a decision or was biased in taking the decision, the procedure was not followed, the action was procedurally unfair, or the action was influenced by an error of law or ulterior motive.

The employer must set out a procedure to be followed in a case where a candidate would like to challenge a human resources decision taken against them (an administrative action). Internal candidates use the grievance procedure to file a complaint against the human resource decision taken against them.

Any person who is unhappy with an administrative decision can challenge the decision in court, within 180 days of the date on which all internal remedies were exhausted or within 180 days of the date on which the applicant became aware of the decision (or could reasonably be expected to have become aware of the decision). Judicial review should be taken as a last option. The candidate should exhaust all internal remedies before approaching a court to review an administrative action.

## **2. Measures specific to the Public Service**

- The Public Service Act, 1994 (Act No. 103 of 1994) (<http://www.dpsa.gov.za/legislation.php>);
- Public Service Regulations, 2016 (<http://www.dpsa.gov.za/legislation.php>);
- White Paper on Human Resource Management in the Public Service, 1997 (<http://www.dpsa.gov.za/dpsa2g/documents/acts&regulations/frameworks/white-papers/pservedec.pdf>);
- White Paper on Affirmative Action in the Public Service, 1998 (<http://www.dpsa.gov.za/dpsa2g/documents/acts&regulations/frameworks/white-papers/affirmative.pdf>);
- White Paper on the Transformation of the Public Service, 1995 (<http://www.dpsa.gov.za/dpsa2g/documents/acts&regulations/frameworks/white-papers/wpstoc.pdf>);
- The Executive Protocol: Principles and Procedures for the employment of Heads of Department (HODs) and Deputy Directors-General (DDGs) nationally.
- Public Service Co-ordinating Bargaining Council resolution between organised labour (labour unions) and government: <http://www.dpsa.gov.za/dpsa2g/PSCBC.asp>

## **3. Measures specific to Local Government**

- Local Government: Municipal Systems Act, 2000 (Chapter 7: Local Public Administration and Human Resources): <https://www.polity.org.za/article/local-government-municipal-systems-amendment-act-7-of-2011-2011-07-05>
- Procedures for the recruitment and hiring of senior managers at the local government level:
  - (i) Local Government: Municipal Systems Amendment Act, 2011 introduced section 54A and 56, to regulate the employment of the municipal manager, acting municipal manager and managers directly accountable to municipal managers;
  - (ii) Local Government: Regulations on appointment and conditions of employment for senior managers, 2014 (chapter 3) (copy provided);
  - (iii) Local Government: Disciplinary Regulations for Senior Managers, 2010 (copy provided); and
  - (iv) Local Government: Municipal Performance Regulations for Municipal Managers and Managers directly accounting to Municipal Managers (attached), 2006.
- South African Local Government Bargaining Council agreements between organised labour (labour unions) and municipalities (SALGA): <https://www.salgbc.org.za/>
- South African Local Government Bargaining Council Main Collective Agreement entered into by and between the South African Local Government Association and Independent Municipal and

Allied Trade Union and South African Municipal Workers' Union - 2015-2020. The objectives of the Agreement are to:

- (i) establish common and uniform conditions of service for employees covered by this agreement;
  - (ii) establish common and uniform procedures for employer and employees covered by this agreement;
  - (iii) endeavour to ensure effective and efficient employment relations that will enhance service delivery;
  - (v) promote fair treatment of employees; and
  - (vi) promote and maintain industrial peace.
- South African Local Government Bargaining Council Circular Number 01/2018 - Disciplinary Procedure Collective Agreement.

*Article 7, paragraph 1 (a): Each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, endeavour to adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of civil servants and, where appropriate, other non-elected public officials that are based on principles of efficiency, transparency and objective criteria such as merit, equity and aptitude.*

#### A. Public service

A.1: Methods used to ensure that principles of efficiency, transparency, and objective criteria such as merit, equity and aptitude:

The Public Service Act, 1994, section 11(2) provides that in the making of any appointment in terms of section 9 of the PSA, in the public service:

- (a) All persons who applied and qualify for the appointment concerned shall be considered; and
- (b) The evaluation of persons shall be based on training, skills, competence, knowledge and the need to redress, in accordance with the Employment Equity Act, 1998 (Act No. 55 of 1998), the imbalances of the past to achieve a public service broadly representative of the South African people, including representation according to race, gender, and disability.

A.2: Principles that underpin recruitment and employment in the Public Service:

(a) Open employment system - Vacancies are generally filled on the basis of competition, the aim being to-

- make the Public Service as employer more accessible to the people of South Africa;
- achieve and maintain employment equity;
- provide equal opportunities for advancement to serving employees; and
- effect the recruitment of the most suitable person from the widest possible pool of talent.

(b) Selection on merit - The selection process is based on criteria derived from the inherent requirements of the post to be filled as well as the competencies of candidates, without an undue focus on academic qualifications. Selection on merit is fundamental to ensure that the person selected must be the applicant best suited. The selection of applicants is based on the following:

- information based on valid methods, criteria or instruments for selection that are free from any bias or discrimination;



- the training, skills, competence and knowledge necessary to meet the inherent requirements of the post;
- the needs of the department for developing human resources;
- the representativeness of the component where the post is located; and
- the department's affirmative action programme.

(c) Efficiency - Employment practices should maximise flexibility, minimise administrative burdens on both employer and employee, and generally prevent waste and inefficiency.

With regard to the above principles, the Public Service Regulations, 2016, set national norms in respect of recruitment through inter alia the following measures:

A.3: Systems for Recruitment, hiring, retention, promotion and retirement of Civil Servants.

1. The recruitment process in the Public Service draws directly from the employment policies adopted by Government as contained in the White Paper on Human Resource Management in the Public Service, 1997 and the White Paper on Affirmative Action in the Public Service, 1998. The direction set in the White Paper on the Transformation of the Public Service, 1995 and especially section 195 of the Constitution 1996, in turn, inform these policy documents.

2. Additionally, employment in the Public Service is also subject to national legislation such as the Labour Relations Act, 1998, the Basic Conditions of Employment Act, 1997, the Employment Equity Act, 1998 and the Public Service Act, 1994 to name a few.

3. The principles of efficiency, transparency and objective criteria such as merit, equity and aptitude are embedded in the provisions of the Public Service Act, 1994 and the Public Service Regulations 2016, issued in terms of the provisions of the Public Service Act. In this regard, the Public Service Act, 1994 determines in section 11(2) as follows:

*“(2) In the making of any appointment in terms of section 9 in the public service-*

- (a) all persons who applied and qualify for the appointment concerned shall be considered; and*
- (b) the evaluation of persons shall be based on training, skills, competence, knowledge and the need to redress, in accordance with the Employment Equity Act, 1998 (Act No. 55 of 1998), the imbalances of the past to achieve a public service broadly representative of the South African people, including representation according to race, gender and disability.”*

**4. The principles that underpin recruitment and employment in the Public Service, as they relate to the context of this paper are as follows:**

(a) Open employment system - Vacancies are generally filled on the basis of competition, the aim being to-

- make the Public Service as employer more accessible to the people of South Africa;
- achieve and maintain employment equity;
- provide equal opportunities for advancement to serving employees; and
- effect the recruitment of the most suitable person from the widest possible pool of talent.

(b) Selection on merit - The selection process is based on criteria derived from the inherent

requirements of the post to be filled as well as the competencies of candidates, without an undue focus on academic qualifications. Selection on merit is fundamental to ensure that the person selected must be the applicant best suited. The selection of applicants is based on the following:

- information based on valid methods, criteria or instruments for selection that are free from any bias or discrimination;
- the training, skills, competence and knowledge necessary to meet the inherent requirements of the post;
- the needs of the department for developing human resources;
- the representativeness of the component where the post is located; and
- the department's affirmative action programme.

(b) Efficiency - Employment practices should maximise flexibility, minimise administrative burdens on both employer and employee, and generally prevent waste and inefficiency.

**5. With regard to the above principles, the Public Service Regulations 2016, set national norms in respect of recruitment through inter alia the following measures:**

(a) Chapter 3

*Subject to Regulation 25(2), an executive authority shall, based on the strategic plan of the department-*

*(a) determine, after consultation with the Minister and National Treasury (in the case of a national department) and/or Minister and the relevant Premier and relevant provincial treasury (in the case of a provincial department), the department's organisational structure in terms of its core and support functions;*

*(b) define the posts necessary to perform the relevant functions while remaining within the current budget and medium-term expenditure framework of the department, the norms and standards determined by the MPSA in relation to posts provisioning and the posts so defined shall constitute the department's approved establishment;*

*(c) grade proposed new jobs according to the job evaluation system referred to in Regulation 41(1), except in the case where the grade of a post has been determined or directed by the Minister; and*

*(d) engage in human resource planning in accordance with Regulation 26 with a view to meeting the resulting human resource needs.*

(b) Chapter 4, Part 1, Regulation 39:

*For each post or group of posts, an executive authority shall establish a job description and job title that indicate, with appropriate emphasis on service delivery-*

*(a) the main objectives, activities and functions of the post or posts in question; and*

*(b) the inherent requirements of the job.*

*To assist and Executive Authority in designing a job and career path linked to a salary scale the Minister shall determine a system of remuneration for an occupational category for which an OSD has not been determined and an occupational classification system. An Executive Authority shall link all posts contained in such a remuneration system to an occupation listed in the occupational classification system referred to.*

(c) Chapter 4, Part 4, Regulation 64(1): Requirements for employment

*An executive authority shall determine and record composite requirements for employment in any post on the basis of the main objectives, core functions and the inherent requirements of the job.*

A.4: Advertisement of a post

(d) Chapter 4, Part 4, Regulation 65(1):

*An executive authority shall ensure that vacant posts in the department are advertised, as efficiently and effectively as possible, to reach the entire pool of potential applicants, including designated groups. The Executive Authority must further ensure that the requirements for employment do not unfairly discriminate against any person and that any statutory requirement for the appointment of employees are complied with.*

(e) Chapter 4, Part 4, Regulation 65(2):

*An advertisement for a post shall as a minimum specify the job title, salary scale, core functions, place of work, inherent requirements of the job, including any other requirements prescribed in the Regulations.*

Regulation 65 of the Public Service Regulations stipulates that an advertisement for a post shall at a minimum specify the job title, salary scale, core functions, place of work, and inherent requirements of the job, including any other requirements specified in the Regulations. In addition, all posts to be filled in terms of the Public Service Act that are advertised outside a Department must be advertised in the Public Service Vacancy Circular published on the website of the DPSA. A standard format for advertisements is used in this regard. The Public Service Regulations also stipulate that an advertisement for a post shall not unfairly discriminate against or prohibit any suitably qualified person or employee from applying.

(f) Chapter 4, Part 4, Regulation 67(9): Appointment or filling of a post

*Before making a decision on an appointment or the filling of a post, an Executive Authority shall-*

*(a) satisfy herself or himself that the candidate qualifies in all respects for the post and that her or his claims in her or his application for the post have been verified as directed by the Minister; and*

*(b) record that verification in writing."*

As a minimum, departments must conduct the following pre-employment verifications:

- Criminal records
- Citizenship
- Financial records
- Qualifications
- Reference checking / previous employment records.

A.5: Specific procedures for the recruitment and hiring of senior managers:

General principles for recruitment and selection as outlined above apply to the recruitment and selection of members of the Senior Management Service (SMS members), including Heads of Departments (HODs) and Deputy Directors-General (DDGs).

The following measures are specific to the recruitment and hiring of senior managers in the public service:

1. A directive on compulsory capacity development, mandatory training days and minimum entry requirements for members of the senior management service (SMS). The Directive provides for compulsory capacity development for SMS members and provides for pre-entry requirements for entry and movement within the SMS.

*1.1 Minimum educational qualifications for SMS members as follows:*

- Director and Chief Director - an undergraduate qualification (NQF level 7).
- Deputy Director-General and Head of Department - an undergraduate qualification (NQF level 7) and a post-graduate qualification (NQF level 8).

*1.2 Minimum years of experience*

- Level 13: 5 years of experience in the middle / senior management level;
- Level 14: 5 years of experience in the senior management level
- Level 15: 8 - 10 years of experience in the senior management level
- Level 16: 8 - 10 years of experience in the senior managerial level of which at least three years' experience must be within any organ of state.

*1.3 To improve the quality of appointments at the SMS level, all shortlisted candidates must undertake a pre-entry practical exercise as part of the interview process. The technical exercise will test relevant technical elements of the job. The technical exercise may take the form of a written response to a technical question or a presentation on a topical issue relevant to the technical functions of the post.*

*1.4 Pre-entry certificate for the SMS:*

To ensure that potential members of the SMS have a background in processes and procedures linked to the SMS, a further requirement for appointment at the SMS level is the successful completion of the Senior Management Pre-entry Programme, as endorsed by the National School of Government (NSG). This is a training programme specific to the public service, which is applicable to appointments at the SMS level. With effect from 1 April 2020, an individual may only qualify for appointment at the SMS level if they have successfully completed a Public Service Senior Management Leadership Programme.

The content of the Public Service Senior Management Leadership Programme prior to entry to the SMS is determined by the NSG in conjunction with the DPSA.

Paragraph 10.3 of the relevant government directive stipulates the conditions with regard to the pre-entry certificate into the SMS. The requirement took effect on 1 April 2020. The NSG in conjunction with the DPSA have finalised the design and development of the online course for the certificate for entry into the SMS.

## 2. A directive on the implementation of competency-based assessment for members of the senior management service (SMS)

- The Directive provides for the use of competency-based assessments and mandatory technical exercise as part of the recruitment process and identification of development gaps for new SMS members.
- Following the interview and technical exercise, a maximum of four candidates must be invited for the competency assessment. The competency assessment will test the generic managerial competencies using the mandated DPSA SMS competency assessment tools. The competency assessment tools are used to determine strengths, weaknesses, learning potential, current level of work and development gaps. The competency assessment determines an individual's training and development gaps and expected interventions should be reflected in a competency personal development plan.

## 3. Appointment and conditions of service

- A member of the SMS can either be appointed on a permanent basis or on contract, depending on the nature of the post. In both cases, the individual must enter into an employment contract.
- SMS members receive an all-inclusive flexible remuneration package, based on the cost to-company principle.
- The inclusive remuneration package consists of the basic salary, the state's contribution to the government employees' pension fund (GEPF) and a flexible portion. The structure and rules of the inclusive and flexible remuneration package are spelled out in Chapter 3 of the SMS Handbook. General conditions of service are also spelled out in Chapter 3 of the SMS Handbook and benefits may be amended by determinations issued by the MPSA in terms of the Public Service Act, 1994.

### A.6: Appointment of Heads of Departments and Deputy Directors-General

#### 1. Public Service Act, 1994 (Act No. 103 of 1994)

Section 12 (1) of the Public Service Act, 1994, entrusts the:

- President with the power to undertake and manage the appointment and other career incidents of Heads of Department and Government Component at National level. This power can be delegated to the Deputy President and Ministers in terms of section 42A(3) of the Public Service Act, 1994; and
- Premiers with the power to deal with the appointment and other career incidents of a Head of the Office of a Premier, Provincial Department or Provincial Government Component.

#### 2. Executive Protocol: Principles and Procedures for employment of Heads of Departments and Deputy Director-Generals nationally (<http://www.dpsa.gov.za/dpsa2g/documents/sms/2013/Executive%20Protocol%20Manual%202013.pdf>)

The Executive Protocol provides an overview of the procedural issues associated with effecting an appointment to a post at the level of a HoD or Deputy Director-General.

Preliminary selection pool and shortlisting / Appointment of HODs and DDGs

- The appointment of a HoD or Deputy Director-General at national level can only be effected after consultation with the MPSA and obtaining Cabinet's concurrence/approval.
- According to a Cabinet decision of 5 May 2010, HoDs of National Departments/National Government Components must be appointed for a term of five years.
- A serving employee who is appointed to the post of HoD, will automatically lose her or his status as a permanent employee. Her or his accrued pension and other benefits will, however, only be payable on the date that her or his term expires.
- Certain appointments are made only by the President. The President as head of the national executive:
  - (a) is Commander in Chief of the Defence Force and must therefore appoint the Military Command of the Defence Force (section 202(1) of the Constitution);
  - (b) must appoint the National Commissioner of the Police Service (Section 207(1) of the Constitution); and
  - (c) must appoint the head of each Intelligence Service established in terms of the Constitution (section 209(2) of the Constitution).
- Should any candidate require reasons why she or he was not appointed, it will be the responsibility of the relevant EA to provide such reasons.
- According to Section 12 (2) of the Public Service Act, all HoDs are appointed on contract for a period up to five years. Once Cabinet has decided on the contract period of a HoD, any extensions thereafter can only be effected with Cabinet approval.
- All DDG posts that are core to the mandate of the department and are part of the approved fixed establishment, should be permanent appointments.

A.7: Other non-elected positions in the public service and legislation that appoints them:

- (i) Employment of Educators Act, 1998 (Act No. 76 of 1998) provides for the employment of educators by the State, for the regulation of the conditions of service, discipline, retirement and discharge of educators and for matters connected therewith;
- (ii) South African Police Service Act, 1995 (Act No. 68 of 1995) provides for the establishment, organisation, regulation and control of the South African Police Service and to provide for matters in connection therewith. Chapter 9 of the Act deals with the appointment, terms and conditions of service, and termination of service;
- (iii) Correctional Services Act, 1998 (Act No.111 of 1998). Section 3 of the Act provides for the establishment, functions and control of Department. According to section 3, the Department of Correctional Services is established in terms of section 7 (2) of the Public Service Act, 1994, and is part of the Public Service. The National Commissioner of Correctional Services is appointed in terms of the Public Service Act, but the conditions of service of the National Commissioner are governed by this Act and he or she is also entitled to the privileges of a head of a department which are conferred by the Public Service Act.
- (iv) Defence Act, 2002 (Act No. 42 of 2002) provides for the composition of the Department of Defence. The Act provides for the establishment of the Defence Secretariat and personnel attached to the Defence Secretariat, composition of the South African National Defence Force, auxiliary services (as determined by the Minister of Defence). The Secretary for Defence and the Chief of the SANDF are equivalent to the Head of Department in the public service and are entitled to the

benefits and conditions of service as they apply to the Head of Department.

(v) Posts in Offices of Executive Authorities and Deputy Ministers are filled in terms of regulation 66 and 67 of the Public Service Regulations, 2016.

#### A.8: Pension benefits

- All public service employees appointed on permanent basis are required as a condition of service, to become members of the Government Employees Pension Fund (GEPF).

- Contribution rates

As at 1 April 2005, the State's contribution to the GEPF was set at 13% for civil servants and 16% for uniformed service employees. In return, members (employees) contribute 7.5% of their monthly pensionable salary to the GEPF

- Fund Benefits

The Fund provides benefits on retirement, resignation, death, or discharge. Years of pensionable service will be increased by 25 percent for each year of pensionable service after ten years for members of the Intelligence (NIA/SASS), Secret Service, uniformed members of the South African Police Service (SAPS), the South African National Defence Force (SANDF) and Correctional Services. Uniformed members of the SANDF under the age of 53 years, will receive a gratuity increased by an additional 12 percent at retirement

In terms of Resolution 1 of 2017, the following improvements have been effected.

- Funeral Benefits

The funeral benefit increased with effect from R7500 to R15000 for the main member, spouse and pensioner.

- Orphan's pension has been replaced with child pension and the minimum amount payable for each child is 10% where there are more than 4 children.

Further information on the pension benefits, is obtainable from the GEPF website: [www.gepf.co.za](http://www.gepf.co.za)

#### B. Local Government employees

##### B.1: Employees below senior management

- The Municipal Manager, acting within the framework developed by the municipal council, is responsible for the recruitment and hiring of employees below senior management.

- Section 66(1) of the Local Government: Municipal Systems Act, 2000, requires a municipal manager to determine a policy for recruitment, hiring, retention, promotion and retirement.

- Section 67(1) requires a municipal manager, in accordance with the Employment Equity Act, 1998, to develop and adopt appropriate systems and procedures to ensure fair, efficient, effective and transparent personnel administration, including-

- (a) the recruitment, selection and appointment of persons as staff members;

- (b) service conditions of staff;

- (c) the supervision and management of staff;
- (d) the monitoring, measuring and evaluating of performance of staff;
- (e) the promotion and demotion of staff;
- (f) the transfer of staff;
- (g) grievance procedures;
- (h) disciplinary procedures;
- (i) the investigation of allegations of misconduct and complaints against staff; and
- (j) the dismissal and retrenchment of staff.

- The Department of Cooperative Governance has drafted the Local Government Municipal Staff Regulations to set uniform norms and standards for the staff of municipalities below senior management echelons in line with sec 72 and 120 of the Municipal Systems Act, 2000. Once the regulations are gazetted into law, all the policies will be aligned to the norms and standards set by the Minister in the Regulations.

- All matters of mutual interest e.g. remuneration, conditions of service, housing allowance, medical allowance, pensions, etc. (sector-wide issues) are dealt with in terms of the collective agreement from the bargaining council designated for municipalities: South African Local Government Bargaining Council Main Collective Agreement entered into by and between the South African Local Government Association and Independent Municipal and Allied Trade Union and South African Municipal Workers' Union - 2015-2020.

- Discipline is carried out in terms of the South African Local Government Bargaining Council Circular Number 01/2018 - Disciplinary Procedure Collective Agreement.

#### B.2: Procedures for the recruitment and hiring of senior managers at local government level

- Local Government: Municipal Systems Amendment Act, 2011: sections 54A and 56, regulate the employment of the municipal manager, acting municipal manager and managers directly accountable to municipal managers. These categories of employees are appointed by the municipal council.

- Local Government: Regulations on appointment and conditions of employment for senior managers, 2014:

Chapter 3 of the Regulations deals with recruitment, selection, and appointment of senior managers at the local sphere of government. The regulations state that:

- ✓ A senior manager post must be filled through public advertising. Requirements for the advertisement are spelt out in regulation 10.

- ✓ Selection must be competency-based to enhance the quality of appointment decisions and to ensure the effective performance of the incumbent's functions. Regulation 8(1)(b) requires that a person should not be appointed as a senior manager unless he/she possesses the relevant competencies, qualifications, experience and knowledge. Annexure A of the regulations contains the competency framework for senior managers in the municipality and Annexure B contains minimum requirements for higher education, qualifications, work experience and knowledge.

- ✓ There is no integrity testing for senior managers however, senior managers undergo vetting



conducted by the State Security Agency of South Africa and a competency test. Screening for qualifications, criminal records, citizenship, financial records, and reference checking / previous employment records. The employee will also be checked against the database for municipal employees dismissed for serious misconduct (financial misconduct, fraud and corruption). The database is centrally held and maintained by the Department of Cooperative Government.

✓ These Regulations support measures to expeditiously address incidents of unethical conduct; breach of the Code of Conduct for Municipal Staff; substandard performance; and to strengthen enforcement measures.

✓ Therefore, before a municipal council decides to appoint a senior manager, it must satisfy itself that the candidate: meets the relevant competency requirements for the post; has been screened; and does not appear on the record of staff members dismissed for misconduct as set out in Schedule 2 to the Regulations.

✓ A person who has been dismissed for misconduct in a municipality may not be employed as a senior manager in any municipality before the expiry of a period (calculated from the date of dismissal), as set out in column 3, in respect of such category of misconduct as set out in column 2 of Schedule 2.

- Discipline of senior managers in local government

The Local Government: Disciplinary Regulations for Senior Managers, 2010, provides for, among other things:

- (i) an internal mechanism and standard procedures for management of misconduct by senior managers;
- (ii) establish standard procedures for the management of misconduct;
- (iii) support constructive labour relations;
- (iv) promote acceptable conduct; and
- (v) prevent arbitrary or discriminatory actions.

The Regulations further provides for a Disciplinary Code to ensure that senior managers:

- ✓ have a fair hearing in a formal or informal setting;
- ✓ are timeously informed of allegations of misconduct made against them; and
- ✓ receive written reasons for any decisions taken against them.

- Schedule 2 of the Local Government: Regulations on appointment and conditions of employment for senior managers, 2014, provides for categories of misconduct and time periods that must expire before a person may be re-employed in a municipality.

- Performance management

The Local Government: Municipal Performance Regulations for Municipal Managers and Managers Directly Accountable to Municipal Managers, 2006, deals with the measuring and evaluation of the performance of municipal managers and managers directly accountable to municipal managers.

These regulations seek to set out how the performance of municipal managers will be uniformly directed, monitored and improved. The regulations address both the employment contract of a municipal manager and managers directly accountable to municipal managers, as well as the Performance Agreement that is entered into between respective municipalities, municipal managers and managers directly accountable to municipal managers. These instruments will, in combination, ensure a basis for performance and continuous improvement in local government. The Performance Agreement provides assurance to the municipal council of what can and should be expected from their municipal managers and managers directly accountable to municipal managers.

- Pension: A senior manager must belong to a retirement or pension fund registered in terms of the Pensions Fund Act, 1956 and annually submit proof of such to the municipality.

*Article 7, paragraph 1 (b): Each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, endeavour to adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of civil servants and, where appropriate, other non-elected public officials that include adequate procedures for the selection and training of individuals for public positions considered especially vulnerable to corruption and the rotation, where appropriate, of such individuals to other positions (contact National Treasury about supply chain practitioners)*

There are no procedures for the selection and training of individuals for public positions considered especially vulnerable to corruption and the rotation, where appropriate, of such individuals to other positions.

Strategic Pillar 2 of the NACS highlights and commits the public sector to providing special training to employees in professions prone to corruption. There is no rotation system in the public service.

*Article 7, paragraph 1 (c): Each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, endeavour to adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of civil servants and, where appropriate, other non-elected public officials that promote adequate remuneration and equitable pay scales, taking into account the level of economic development of the State Party:*

#### 1. Public service

- The principles underpinning the remuneration of Public Service employees include the following:
  - (i) The spending priorities of government;
  - (ii) Contributing to improved quality of service delivery;
  - (iii) Preventing and fighting corruption; and
  - (iv) Growing the capacity of the State through job creation.
- Pay scales for public servants are determined as follows:
  - (i) Salaries and additional macro benefits (salary levels 1 - 10);
  - (ii) Guaranteed total package (salary levels 11 - 12 and certain Occupation Specific Dispensation

(OSD) personnel); and

(iii) Guaranteed total package for Senior Management Services (salary levels 13 - 16).

- The pay scales for salary levels 1 - 10 is a basic salary, and personnel qualify for the following macro benefits, provided they meet the payment criteria:

- (i) Service bonus;

- (ii) Employer contribution GEPF;

- (iii) Housing allowance; and

- (iv) Employer contribution to a registered medical aid scheme.

- Employees on salary levels 11 - 12 and identified OSD personnel are permitted to structure their packages within certain parameters i.e. they have a choice between 75/76 (set 1) or 70 (set 2) pensionable income. These packages already include the basic salary, employer contribution to the GEPF and a flexible portion. The flexible portion may be structured for the following allowances/benefits:

- (i) A maximum of 25% of the total package for car allowance;

- (ii) Medical contribution;

- (iii) 13<sup>th</sup> Cheque (calculated as 1/12 of the basic salary);

- (iv) Housing allowance - any amount; and/or

- (v) Non -pensionable cash allowance - any amount, normally the balance of the flexible portion that is not structured.

- Salaries in the public service are determined through a collective bargaining process for salary levels 1 - 12 and those covered by an Occupation Specific Dispensation (OSD). The employers endeavor to enter into multi-term wage agreements with organised labour.

- The package for employees who are members of SMS appointed on salary levels 13 - 16 consists of the following:

- (i) The basic salary consist of 70% of the inclusive flexible remuneration; and

- (ii) The state's contribution to the GEPF is calculated on the basic salary.

- The remaining portion of the remuneration package is the flexible portion and may be structured by the member for the following allowances/benefits:

- (i) A maximum of 25% of the total package for car allowance;

- (ii) Medical contribution;

- (iii) 13<sup>th</sup> Cheque (calculated as 1/12 of the basic salary);

- (iv) Housing allowance - any amount; and/or

- (v) Non -pensionable cash allowance - any amount, normally the balance of the flexible portion

that is not structured.

- The Minister for the Public Service and Administration after consultation with the Minister of Finance pronounce on the salary increases for salary levels 13 - 16 (Senior Management Services).

- Annual salary adjustments

The general annual salary adjustments include the cost-of-living adjustment, annual pay progression and grade progression. Employees qualify for pay progression based on satisfactory performance. Grade progression will be awarded to qualifying employees on salary levels 1 to 11 and to OSD personnel in terms of the specific OSD. The purpose of the annual cost-of-living adjustments is to preserve the buying power of the employees, in order to ensure that their salaries are not eroded by inflation.

## 2. Local government employees

### 2.1 Employees below senior management level:

- All matters of mutual interest e.g. remuneration, conditions of service, housing allowance, medical allowance, pensions, etc. (sector-wide issues) are dealt with in terms of collective agreement from the bargaining council designated for municipalities (South African Local Government Bargaining Council). South African Local Government Bargaining Council Main Collective Agreement entered into by and between the South African Local Government Association and Independent Municipal and Allied Trade Union and South African Municipal Workers' Union - 2015-2020.

- According to the Agreement, salary and wages are some of the matters which are subject to collective bargaining.

### 2.2 Senior Managers:

- The Minister responsible for Local Government must by notice in the Government Gazette annually determine the upper limit of the total remuneration package of senior managers according to different categories of municipalities. The Determination is called: Upper limits of total remuneration packages payable to municipal managers and managers directly accountable to municipal managers and is issued annually. The Determination takes into account 'core reward principles' and is aimed at ensuring that the remuneration of senior managers is 'cost-effective, consistent, internally balanced (equitable) and externally competitive'. The framework used allocates points to municipalities based on the total municipal income, total population sizes, and equitable share of individual municipalities. The total number of points allocated to a municipality is then categorized on a scale from one to ten, which determines remuneration levels. This is further split across a 'minimum', 'midpoint' and 'maximum' level based on the background, tenure and capabilities of individual managers (among other factors).

*Article 7, paragraph 1 (d): Each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, endeavour to adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of civil servants and, where appropriate, other non-elected public officials that promote education and training programmes to enable them to meet the requirements for the correct, honourable and proper performance of public functions and that provide them with specialized and appropriate training to enhance their*

*awareness of the risks of corruption inherent in the performance of their functions. Such programmes may make reference to codes or standards of conduct in applicable areas.*

- National School of Government (NSG) is responsible for training of public officials in the public service. The NSG has developed a suite of programmes in collaboration with DPSA, to create ethical organisational ethos in Departments as well as capacitate officials to implement the Public Service Anti-Corruption Strategy. All of South Africa's policy instruments/frameworks promoting ethics as well as the multi-lateral anti-corruption agreements and international instruments South Africa acceded to shape the programmes. The main objective of the Anti-Corruption training programmes is to create an ethical organisational ethos in Departments as well as the implementation of the Public Service Anti-Corruption Strategy.

**The suite of Ethics and Anti-Corruption training programmes are as follows:**

- Ethics in the public service is an online course available to all employees in the public service. The purpose of the course is to promote ethical behaviour in the public service as envisaged in Chapter 2 of the Public Service Regulations, 2016.

- Ethics Management for Local Government: The course provides a basic overview of ethics management within municipalities. It focuses on how to manage ethics. It is designed predominantly to assist those people in municipalities who will play a role in ethics management, corruption prevention and ensuring high standards of professionalism within their organisations. This is a non-credit bearing, 2 day course. To date his programme was rolled out to 1500 municipal employees.

- Investigation of corrupt activities and related offences (NQF level 6): The goal of this training programme is to build capacity of internal investigation components within the Public Service.

- Promoting anti-corruption in the public service (NQF level 4): This course is intended for capacity building of all employees in the public sector, including those who perform anti-corruption duties in senior, middle and junior management positions.

- Anti-Corruption for Practitioners: The purpose of this learning programme is to build the capacity of anti-corruption practitioners within the Public Service to implement an anti-corruption strategy at operational level. In addition, the design and development of customised anti-corruption programmes and implementation plans will take into account the transformation agenda and strategic objectives of the Public Service. This is a credit bearing course at NQF Level 5 (5 credits) and is 4 days.

- Ethics and integrity management: workshop on ethics: The purpose of this workshop is to promote ethical behaviour in the Public Sector, to prevent unethical conduct, fraud and corruption, and to support ethics and integrity management and anti-corruption.

- The induction course for public service employees includes a module on ethics (Module 3). It is made up of four modules as follows:

- (i) Professional ethics

- (ii) Lawful decision making

- (iii) Integrity

- (iv) Non-discrimination

Specific objectives of the course

To equip participants with the necessary knowledge, skills and attributes to develop:

- understanding of and apply the Public Service Code of Conduct, Batho Pele and Public Service values and attributes, to perform all aspects of administration and management in a professional manner.
  - knowledge and understanding of the legislative requirements of lawful administrative decision-making and access to information.
  - knowledge, skills and positive attributes to eradicate corruption and to implement anti-corruption measures.
  - knowledge, understanding of gender and diversity, as well as skills and positive attributes to eradicate discrimination against all people based on their diverse demographic and personal or group characteristics, to work towards a society free from racism and sexism
- 
- On 5 September 2018, Cabinet approved compulsory and mandatory programmes to be delivered by the NSG. The current suite of compulsory programmes to be delivered by the NSG consist of the:
    - (1) Compulsory Induction Programme (salary levels 1-14);
    - (2) Executive Induction Programme (salary levels 15-16);
    - (3) *Khaedu* training and deployment to service delivery sites (salary levels 13-16);
    - (4) Senior Management Service (SMS) Pre-entry Programme.
  - Given the status of the public service (as cited by institutions such as the Auditor-General South Africa, Public Service Commission and Department of Planning, monitoring and Evaluation), it is further proposed that the NSG also offers the following online programmes under its compulsory programme offerings:
    - (5) Ethics in the Public Service (all public servants);
    - (6) Managing Performance in the Public Service (salary levels 6 - 12);
    - (7) Supply Chain Management for the Public Service (salary levels 9-16);
    - (8) Financial Management Delegations of Authority (salary levels 9-16); and
    - (9) Re-orientation in the Public Service (salary levels 1-16).

*The competency framework for SMS provides an indication of the generic managerial competencies required for SMS members to effectively perform their duties.*

*(i) Compulsory capacity development*

- SMS members must undergo relevant training to close identified development gaps as determined by the competency assessment and/or technical skills. From a generic perspective, an SMS member is required to complete related courses over a three-year performance cycle. Technical training which is departmental specific must be included.
- Competency-based training comprises of the following generic managerial competencies as stipulated in the Competency Framework for SMS members:
  - (a) Strategic capability and Leadership;

- (b) People management and empowerment;
- (c) Programme and project management;
- (d) Financial management; and
- (e) Change management.

(ii) *Mandatory training days:*

- *Every SMS member must spend a minimum of 18 days on training over a three year performance cycle. Training can either be generic/technical or a combination of both.*
- *From April 2020, an individual may only qualify for appointment in an SMS level if he/she has successfully completed a Public Service Senior Management Leadership Programme.*

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

Article 7, paragraph 1

Examples of implementation (Public Service)

- Vacancy circular issued by the DPSA for advertisement of posts can be found at: <http://www.dpsa.gov.za/dpsa2g/vacancies>
- Evaluation of the effectiveness of the recruitment and selection system of the public service, published by the Public Service Commission, October 2018, <http://www.psc.gov.za/documents/reports/2018/V12%20Draft%20Report-Evaluation%20of%20Effectiveness%20of%20the%20RnS%20System%20of%20the%20PS.pdf>
- Recruitment, retention, career-pathing and utilisation of senior management service members' expertise and skills in the public service, published by the Public Service Commission, August 2017, <http://www.psc.gov.za/documents/reports/2017/V17%20Final%20RRCU%20DRAFT%20REPORT%20-%20Comm%20Comments.pdf>

Examples of implementation: Local Government

- Research Study into the lessons learnt from, and the impact of linking contracts of municipal managers to a municipal electoral term, 2013 (copy provided).
- Report on the appointment of senior managers concluded and corrective actions taken to enforce compliance with the municipal systems act during the second (July - September) of 2018/2019 financial year.
- Report on the current state of local government human resource practices and the impact it has on the developmental local government system, June 2010.

*Article 7, paragraph 1 (c):*

Examples of implementation (Public Service)

- (i) Salaries and Benefits in the public service:  
<http://www.dpsa.gov.za/dpsa2g/documents/rp/2009/salaries.pdf>
- (ii) Public Service Co-ordinating Bargaining Council Resolutions on adjustments and improvements on conditions of service in the public service for the period 2018/2019, 2019/2020 and 2020/2021 (PSCBC Resolution 1 of 2018):  
<http://www.phsdsbc.org.za/.../PSCBC-Resolution-1-of-2018-Agreement-on-the-salary-adjust>
- (iii) Improvement in conditions of service of members of the senior management service: 1 April 2019 [http://www.dpsa.gov.za/dpsa2g/documents/rp/2019/18\\_1\\_4\\_02\\_07\\_2019.pdf](http://www.dpsa.gov.za/dpsa2g/documents/rp/2019/18_1_4_02_07_2019.pdf)

Examples of implementation (Local Government)

- (i) Employees below senior management
- Circular No. 6/2018: Salary and Wage Collective Agreement 01 July - 30 June 2021  
<https://www.salgbc.org.za/wp-content/uploads/2018/08/CIRCULAR-6-OF-2018-SALARY-AND-WAGE-COLLECTIVE-AGREEMENT-2018.pdf>
- (ii) Senior Managers in Municipalities:
- Research Study into the lessons learnt from, and the impact of linking contracts of municipal managers to a municipal electoral term (attachment), 2013.
  - Report on the appointment of senior managers concluded and corrective actions taken to enforce compliance with the municipal systems act during the second (July - September) of 2018/2019 financial year.
  - Upper limits of total remuneration packages payable to municipal managers and managers directly accountable to municipal managers, 2018 (Determination by the Minister responsible for Local Government).

*Article 7, paragraph 1 (d):*

Examples of implementation

The National School of Government conducted the training programmes as indicated in response to article 5, paragraph 2 (table 3) (information repeated below).

Course	No. Trained
Ethics in the public service (online)	10802



Ethics management for local government	807
Investigation of corrupt activities and related offences	539
Ethics in National and Provincial Department	344
Promoting anti-corruption in the public service	2362
Anti-corruption training for Practitioners	2852
Ethics and integrity management: workshop on ethics	821

Table 3: Number of employees trained per course

- From 2008 to 2018, about 518 employees in the public sector have undergone ethics training course conducted by the Ethics Institute of South Africa. About 264 (51%) of them are certified as Ethics Officers.
- Pamphlet: Understanding Corruption in the public sector;
- Course outline: Investigate Corrupt Activities and Related Offences developed by Department of Public Service and Administration (DPSA);
- The report outlines the progress made regarding the roll-out of the Ethics and Anti-Corruption training programme in PALAMA, published by the Public Service Commission in September 2014: <http://www.psc.gov.za/documents/reports/2014/01%20October%202014%20PALAMA%20Report%20Draft%203.pdf>
- Ethics Survey 2015 and 2018 (reports attached).

*(b) Observations on the implementation of the article*

Comprehensive measures are in place.

The Public Service Act, 1994 and Public Service Regulations, 2016, applicable to employees of the national and provincial government, provide for the organisation and administration of the public service and regulate, among others, conditions of employment, terms of office, disciplinary mechanisms and termination of employment, as well as specific provisions on anti-corruption and integrity management, including conflicts of interest (see articles 7(4) and 8 of the Convention for further detail).

The Public Service Act, section 11(2) provides that the evaluation of persons for employment in the public service must be based on training, skills, competence, knowledge and the need for redress in accordance with the Employment Equity Act, 1998. Vacancies for recruitment and employment in the public service are generally filled on a competitive basis, although open competition tends to be more frequent for entry-level positions, while managerial positions require a combination of continuity, diversity and “disruptive innovation” in terms of experience and skills.<sup>8</sup> Vacant posts in departments must be advertised, in a standardized format, as efficiently and effectively as possible (Public Service Regulations 2016, Regulation 65(1)). Specific procedures apply for the recruitment and hiring of senior managers (members of the Senior Management Service (SMS), including Heads of Departments (HODs) and Deputy Directors-General (DDGs)), including through

<sup>8</sup> Public Service Commission, “Evaluation of the effectiveness of the recruitment and selection system of the public service”, October 2018 (page 41).

competency-based assessments and entry requirements which recognise prior years in service and possession of higher qualifications levels to determine competence. The staff of several government agencies, including educators, the South African Police Service, Correctional Services, are subject to separate legislation. Posts in the executive authorities and deputy ministers are filled in terms of the Public Service Regulations, 2016 (regulations 66 and 67).

The PSC is mandated in terms of sections 196 (4)(b) and (196) (f)(iv) of the Constitution to investigate, monitor and evaluate adherence to applicable procedures, propose measures to ensure effective and efficient performance, and advise national and provincial organs of the State regarding personnel practices in the public service. As part of its oversight mandate, the PSC is required to ensure that practices related to recruitment, selection, appointments and discharge, as well as other career-related matters regarding employees in the public service, are managed fairly. Informed by this mandate, the PSC has issued recommendations to address issues emanating from the recruitment and selection procedures, complaints and grievances.

The Constitution further requires, in section 195 (1), that a high standard of professional ethics in the public administration must be promoted and maintained.

It was confirmed that there are no procedures for the selection and training of individuals for public positions considered especially vulnerable to corruption and for the rotation, where appropriate, of such individuals to other positions. Strategic Pillar 2 of the NACS highlights and commits the public sector to providing special training to employees in professions prone to corruption.

The National School of Government (NSG) is responsible for training public officials in the public service. NSG has developed a suite of programmes in collaboration with DPSA, on ethics and integrity, and to capacitate officials to implement the Public Service Anti-Corruption Strategy, including mandatory components on ethics and integrity for non-managerial positions. Training and support for the implementation of the PSR for public servants and ethics officers is further provided by the Department of Public Service and Administration to all national and provincial departments in partnership with NSG and the Ethics Institute of South Africa.

**Based on the information provided, it is recommended that South Africa consider strengthening open recruitment to facilitate recruitment into entry-level jobs, occupations and trades in the public service, as recommended in a recent evaluation by PSC of the effectiveness of the recruitment and selection system.**

**It is further recommended that South Africa endeavour to adopt procedures for the selection and training of individuals for public positions considered vulnerable to corruption and their rotation, where appropriate, to other positions, as provided in the national anti-corruption strategy (art. 7(1)(b)).**

*Paragraph 2 of article 7*

*2. Each State Party shall also consider adopting appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to prescribe criteria concerning candidature for and election to public office.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

*1. Constitutional Framework for Elections*

The Constitution of the Republic of South Africa (Act 108 of 1996) provides the following:

The Republic of South Africa is one sovereign democratic state founded on the following values:

(a).....

(b).....

(c).....

(d) Universal adult suffrage, a national common voter's roll, regular elections and a multiparty system of democratic governance to ensure accountability, responsiveness and openness.

In chapter 2, which bears the Bill of Rights the pertinent provision is Section 19 which provides the following:

Every citizen is free to make political choices which include the right:

(a) to form a political party

(b) to participate in the activities of or recruit members for a political party and

(c) to campaign for a political party or cause.

Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.

Every adult citizen has a right-

(a) to vote in elections for any legislative body in terms of the Constitution, and to do so in secret and

(b) to stand for public office and, if elected to hold office.

*2. The Electoral Commission*

The Constitution further establishes an Electoral Commission whose duties include the management of elections of national, provincial and municipal legislative bodies in accordance with national legislation. The Electoral Commission must be independent and subject only to Constitution and the law. It must also be impartial and must exercise its power and perform its functions without fear, favour or prejudice.

The Electoral Commission must ensure that elections are free and fair and must declare results of those elections within a period that must be prescribed by national legislation and that is as short as reasonably possible.

The Electoral Commission Act (51 of 1996) provides for the mechanism for the appointments of the members of the Commission.

Section 5 provides the powers, duties and functions of the Commission. The pertinent provisions

in this regard are sub-sections (e) and (f):

(e) compile and maintain voters' rolls by means of a system of registering eligible voters by utilizing data available from government sources and information furnished by voters.

(f) compile and maintain a register of parties.

### *3. Common Voters' Roll*

As indicated above the Constitution of the Republic requires a political system that is based on universal adult suffrage and a national common voters' roll. The Electoral Commission as part of its functions is an independent elections management body is charged with the responsibility to compile and maintain a voters roll by means of a system of registering of eligible voters by utilizing data available from government sources and information furnished by voters.

The Chief Electoral Officer who is appointed by the Commission bears the statutory responsibility for the compilation and maintenance of the voters' roll.

In respect of the application for registration as a voter, any South African citizen in possession of an identity document may apply. Such applicants may apply for registration at age 16 but if the application is successful, the applicant's name may only be placed on the voters roll once the applicant reaches the age of 18 years. Furthermore, it is a legal requirement for an application to be done in person in the voting district in which the applicant is ordinarily resident.

*The table on the next page reflects the size of the voters rolls since 1999:*

Province	Elections 1999		Elections 2004		Elections 2009		Elections 2014	% Increase in registered voters from 1999
	1999 Voters' roll	Total Votes Cast (national ballot)	2004 Voters' roll	Total Votes Cast (national ballot)	2009 Voters' roll	Total Votes Cast (national ballot)	2014 Voters' roll	
Eastern Cape	2,454,543	2,188,184	2,849,486	2,277,391	3,056,559	2,344,098	3,240,059	24.53%
Free State	1,225,730	1,094,776	1,321,195	1,022,044	1,388,588	1,069,127	1,449,488	13.29%
Gauteng	4,154,087	3,704,449	4,650,594	3,504,363	5,461,972	4,391,699	6,063,739	31.48%
KwaZulu-Natal	3,443,978	2,958,963	3,819,864	2,765,203	4,475,217	3,574,326	5,117,131	29.94%
Limpopo	1,847,766	1,660,849	2,187,912	1,657,596	2,256,073	1,570,592	2,440,348	22.10%
Mpumalanga	1,277,783	1,132,517	1,442,472	1,134,092	1,696,705	1,363,836	1,860,834	32.79%
North West	1,527,672	1,307,532	1,749,529	1,323,761	1,657,544	1,135,701	1,669,349	8.50%
Northern Cape	377,173	327,950	433,591	323,201	554,900	421,490	601,080	47.12%
Western Cape	1,864,019	1,601,922	2,220,283	1,605,020	2,634,439	2,049,097	2,941,333	41.33%
Out of Country							6,789	
Total	18,172,751	15,977,142	20,674,926	15,612,671	23,181,997	17,919,966	25,390,150	39.72%
Registered %	80.00%		84.60%		84.07%		80.80%	
Voter turnout %	87.92%		75.52%		77.30%		7 May 2014	

Table 5: The size of the voters roll since it was compiled in 1999

#### *4. South Africa's Electoral System*

The Constitution of the Republic provides the foundation of the electoral system. It provides that it must in general result in proportional representation. It is a two-tier compensatory system of proportional representation based on closed party lists. The Electoral Act 73 of 1998, prescribes the electoral system which is based on a national common voters roll indicated above. It sets a minimum age of 18 years.

Municipal elections are conducted in terms of a mixed electoral system that combines closed proportional representation party lists with directly elected ward representatives.

#### *5. Minimum Age Requirements*

The Constitution guarantees that every adult citizen has a right to stand office and if elected to hold office. The Electoral Act provides that citizen who is 16 years may apply for registration but if successful will only be entered in the voters roll at age 18. Therefore the official voting age is 18 years. Furthermore, the requirements for registration as a voter is also requirements for candidature in that section 47 and 158 Constitution provides that those qualified to vote for specific legislative bodies are eligible for membership of that legislative body.

#### *6. Disqualification from Candidature*

The Constitution provides that every citizen who is qualified to vote for the National Assembly is eligible for membership of the Assembly as well except the following persons:

Anyone who is appointed by, or is in service of, the state and receives remuneration for that appointment or service other than the President, Deputy President, Ministers and Deputy Ministers as well as other office bearers whose functions are compatible with the functions of a member of the National Assembly and have been so declared compatible by national legislation.

Furthermore, exclusions to membership of the National Assembly include citizens who are permanent delegates to the National Council of Provinces, members of a provincial legislature or a municipal council.

Unrehabilitated insolvents, anyone declared to be of unsound mind by a court of the Republic and anyone who is convicted of an offence and sentenced to more than 12 months imprisonment without an option of a fine, either in the Republic or outside the Republic if the conduct constituting an offence would have been an offence in the Republic are also disqualified for membership of the National Assembly. However no one may be regarded as having been sentenced until an appeal against conviction or sentence has been determined, or until the time for an appeal has expired. This disqualification ends five years after the sentence has been completed.

Qualifying citizens lose membership of the Assembly if they cease to be eligible, or they are absent from the Assembly without permission in circumstances for which the rules and orders of the Assembly prescribe loss of membership or ceases to be a member of a party that nominated that person as a member of the Assembly.

Section 27 (2)(b) of the Electoral Act provides that the list of candidates must be accompanied by a prescribed declaration signed by the duly authorized representative of the party that each candidate on the list is qualified to stand for election in terms of the Constitution or national or provincial legislation.

The above provisions apply to the rest of provincial legislatures and municipal councils with appropriate contextual adjustments.

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

No examples provided.

*(b) Observations on the implementation of the article*

The Constitution and Electoral Act contain provisions establishing the basic criteria for candidature for and election to public office. Electoral Commission, established under the Constitution, is tasked with duties, including the management of elections of national, provincial and municipal legislative bodies in accordance with national legislation.

*Paragraph 3 of article 7*

*3. Each State Party shall also consider taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

**1. Political Party Funding Act, 2018 (Act No. 6 of 2018)**

In 2019, the President of South Africa signed into law the Political Party Funding Act, (6 of 2018) and its purpose is to provide for, and regulate, the public and private funding of political parties, in particular:

- (a) the establishment and management of Represented Political Parties Fund and the Multi-Party Democracy Fund to fund represented political parties sufficiently;
- (b) prohibit certain donations made directly to political parties;
- (c) regulate disclosure of donations accepted;
- (d) determine the duties of political parties in respect of funding;
- (e) provide for powers and duties of the Commission;
- (f) provide for administrative fines;
- (g) repeal the Public Funding of Represented Political Parties Act, 1997, and

(h) provide for transitional matters.

The Act changes the landscape for political party funding and promotes transparency by regulating the disclosure of donations exceeding the prescribed threshold.

## **2. A legal definition of what constitutes a donation or contribution to a political party**

In terms of section 1 of the Political Party Funding Act, 2018,

A “donation”-

(a) includes a donation in kind; but

(b) does not include-

(i) a membership fee of the political party or any levy imposed by the party on its elected representatives; or

(ii) any funds provided to the political party by the National Assembly and provincial legislatures respectively in terms of sections 57(2)(c) and 116(2)(c) of the Constitution;

“donation in kind”-

(a) includes-

(i) any money lent to the political party other than on commercial terms;

(ii) any money paid on behalf of the political party for any expenses incurred directly or indirectly by that political party;

(iii) the provision of assets, services or facilities for the use or benefit of a political party other than on commercial terms; or

(iv) a sponsorship provided to the political party; but

(b) does not include services rendered personally by a volunteer.

## **3. Measures that set forth the laws, rules, and regulations applicable to the funding of candidatures for elected public office**

Section 10 of the Political Party Funding Act, 2018, prohibits certain donations to a member of a political party as follows:

(1) No person or entity may deliver a donation to a member of a political party other than for political party purposes.

(2) A member of a political party may not receive a donation contemplated in subsection 1 on behalf of the party

(3) No person may circumvent subsections (1) or (2) or any of the provisions of this chapter

## **4. Measures that set forth, where applicable, the laws, rules and regulations relevant to the funding of political parties**

Section 8(1) prohibits certain donations to political parties:

Political parties may not accept a donation from any of the following sources:



- (a) foreign governments or foreign government agencies,
- (b) foreign persons or entities except for the purpose of training or skills development of a member of a political party or policy development by a political party.
- (c) organs of state; or
- (d) state-owned enterprises.

Section 8(2) prohibits a political party from accepting a donation from a person or entity in excess of the prescribed amount within a financial year.

Section 8(3) prohibits a political party from accepting a donation that it knows or ought reasonably to have known, or suspected, originates from the proceeds of crime and must report that knowledge or suspicion to the Commission.

## **5. Disclosure of donations to political party**

Section 9(1) A political party must disclose to the Commission all donations received-

- (a) above the prescribed threshold; and
- (b) in the prescribed form and manner.

Section 9(2) A juristic person or entity that makes a donation above the threshold prescribed in terms of subsection (1)(a) must disclose that donation to the Commission in the prescribed form and manner.

Section 9(3) The Commission must publish the donations disclosed to it in terms of subsections (1) and (2)-

- (a) on a quarterly basis; and
- (b) in the prescribed form and manner.

Section 9(4) Nothing in this section detracts from rights given effect to by the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).

In terms of the Act, a donation of less than R100,000 doesn't need to be declared and there is a cap of R15million that one person or entity can donate to a party per year.

The Commission has developed various prescribed forms, embedded in the regulations, which are to be completed by relevant key stakeholders such as political parties and donors. Donations above the threshold will be published by the Commission on a quarterly basis.

## **6. Political party to account for income**

Section 12(1) A political party must—

- (a) deposit all donations received by that political party, membership fees and levies imposed by the political party on its representatives into an account with a bank registered as a bank in terms of the Banks Act, 1990 (Act No. 94 of 1990), in that political party's name;
- (b) keep a separate account with a bank registered as a bank in terms of the Banks Act, 1990 (Act No. 94 of 1990), into which all money allocated to it from the Funds must be deposited;
- (c) appoint an office-bearer or official of that political party as its accounting officer; and
- (d) appoint an auditor registered and practising as such in terms of the Auditing Professions Act, 2005 (Act No. 26 of 2005), to audit its books and financial statements.

- (2) The accounting officer contemplated in subsection (1)(c) must—
- (a) account for all income received by the political party;
  - (b) ensure that—
    - (i) any money allocated from the Funds is not paid out for a purpose not authorised by this Act; and
    - (ii) the political party complies with this Act;
  - (c) keep separate books and records of account, in the prescribed manner, in respect of money allocated from the Funds and all transactions involving that money; and
  - (d) within the prescribed period—
    - (i) prepare a statement showing all money received by the represented political party from the Funds during the previous financial year, the application of that money and the purposes for which the money has been applied;
    - (ii) prepare a statement showing all donations and membership fees, and any levy imposed by the political party on its elected representatives during that financial year; and
    - (iii) submit those statements and the books and records of account to an auditor appointed in terms of subsection (1)(d).
- (3) On receipt of the statements, books and records contemplated in subsection (2)(d)(iii), the auditor must perform an audit of the financial statements and express an opinion on those statements—
- (a) indicating whether the donations received by the political party comply with section 8(1);
  - (b) listing the donations required to be disclosed in terms of section 9(1);
  - (c) listing the donations under the threshold prescribed in section 9(1);
  - (d) indicating whether any income was received by the political party other than provided for in terms of this Act;
  - (e) indicating whether the transactions in the financial statements related to the money allocated from the Funds are in accordance with this Act; and
  - (f) indicating whether any money lent to a political party is on commercial terms.

## **7. Sanctions for non-compliance**

The Electoral Court may impose an administrative fine in accordance with Schedule 1 of the Political Party Funding Act, 2018 in respect of a contravention or a repeated contravention of this Act. Political parties who contravene the Act could face a fine of up to R1m or 30% of the party's income - whichever is highest.

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

## **3. Example of implementation**

The Act is not yet implemented. The Electoral Commission of South Africa (IEC) has finalised the regulations relating to the Act. These will be published with the notice of implementation on the date to be determined by the President. The Commission will only implement the new legislation once the President has declared the date of implementation.

## Public Hearings

The public hearings on draft regulations were successfully held on 1-2 August 2019 in Cape Town. Following the receipt of around 4,300 written responses, a number of oral presentations were made by representatives of civil society organizations, political parties, business organizations, media organizations, trade union organizations and others to the Commission. The Commission is now processing the written and oral submissions with the view to finalizing the regulatory framework. Concomitantly, a web-based business application for the disclosure of donations is under development as well as other enablement aspects.

Although the commencement date of the Act is the statutory prerogative of the President, the intention of the Commission is to be ready to implement the Act ahead of 2021 Local Government Elections.

### *(b) Observations on the implementation of the article*

The Political Party Funding Act, 2018 (which has not yet entered into force) regulates the public and private funding of political parties, in particular the establishment and management of funds for represented political parties; prohibition of certain donations made directly to political parties; regulation of disclosure of donations; determination of duties of political parties in respect of funding; provision of powers and duties of the Commission; and establishment of offences, penalties and administrative fines. The Act is aimed at promoting transparency in political party funding by regulating the disclosure of donations exceeding the prescribed threshold.

Notably, political parties are prohibited from accepting donations from foreign governments or foreign government agencies, foreign persons or entities (except for the purpose of training, skills or policy development, up to a limit of R5 million within a financial year), and organs of state or state-owned enterprises (section 8(1)).

Section 8(2) sets an upper limit for donations, which prohibits political parties from accepting donations from any person or entity in excess of the prescribed amount within a financial year (R15 million, as per Schedule 2 of the Act).

Political parties and legal persons or entities making donations must disclose to the Commission all donations above the prescribed threshold (R100,000, according to Schedule 2 of the Act) in the prescribed form and manner (section 9(1), (2)). The Commission must publish the donations disclosed to it on a quarterly basis and in the prescribed form and manner (section 9(3)).

Political parties must further account for their income, as prescribed in section 12.

South African authorities confirmed that the PPF Act had not yet entered into force and that the Commission had finalised the related regulations, which would be published with the notice of implementation on a date determined by the President.

It was confirmed that the legislation provides for dual disclosure by both the donor and the political party. Donations above R100 000 but limited to R15 000 000 per annum must be disclosed by both parties.

However, it was reported that private funding of political parties was not currently regulated and would only be disclosable as provided in the draft regulations upon their entry into force. Moreover, independent candidates were not addressed in either the PPF Act or the related draft regulations.

In addition, PAIA is to be amended so that the right of access to information is extended to include access to information related to the funding of political parties. See article 10(a) of the Convention below.

While the primary aim of the PPF Act is to promote transparency and accountability, the authorities reported that new laws generally have gaps that are corrected over time.

**Based on the above, it is recommended that additional measures be taken to enhance transparency in political party funding, including to regulate the private funding of political parties and independent candidates and the disclosure of private funding sources, and prioritize the implementation of the PPF Act and related regulations.**

*Paragraph 4 of article 7*

*4. Each State Party shall, in accordance with the fundamental principles of its domestic law, endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

1. Members of the National Assembly and National Council of Provinces

The Code of Ethical Conduct and Disclosure of Members' Interest for Assembly and Permanent Council Members is a framework of reference for Members of Parliament when discharging their duties and responsibilities. The Code applies to all Members of Parliament including those Members who are Members of the Executive. However, Members of the Executive are also subject to the "Handbook for Members of the Executive and Presiding Officers".

Members' Code of Conduct is available at: <https://www.parliament.gov.za/code-conduct>

1.1 Regulation of outside activities

- A Member may only perform or undertake remunerated employment outside of Parliament unless such work is sanctioned by the political party to which the Member belongs and is compatible with that Member's function as a public representative; and
- In the event of a party agreeing to such employment of a Member outside of Parliament, the party must within 30 days provide the Registrar, in writing, with all the relevant details in this regard.

1.2 Prohibited business activities

A member may not:

- conduct business with an organ of state;
- use his or her influence as a public representative in his or her dealings with an organ of State in such a manner as to improperly advantage the direct personal or private financial or business interests of such Member or any immediate family of that Member or any business partner of that

Member or the immediate family of that Member;

- not accept any reward, benefit or gift from any person or body:
  - (i) that creates a direct conflict of financial or business interest for such Member or any immediate family of that Member or any business partner of that Member; or the immediate family of that Member;
  - (ii) that is intended or is an attempt to corruptly influence that Member in the exercise of his or her duties or responsibilities as a public representative;

### 1.3 Conflict of interest management

A member shall declare any direct personal or private financial or business interests that would benefit him-/herself or his/her immediate family and will recuse him-/herself from any decision-making process regarding that matter.

### 1.4 Disclosure of registrable interests (<https://www.parliament.gov.za/code-conduct-for-na-ncop-members>)

- Members must disclose to the Registrar, on the form prescribed for this purpose by the Committee, particulars of all their registrable interests.
- The first disclosure must be within 60 days of the opening of Parliament or appointment as a Member. If a Member has no registrable interests, a "nil" return must be submitted.
- After the first disclosure Members must disclose annually at a time determined by the Committee.
- Kinds of interests to be disclosed

The following kinds of financial interests are registrable interests:

- (a) shares and other financial interests in companies and other corporate entities;
  - (b) remunerated employment outside Parliament;
  - (c) directorships and partnerships;
  - (d) consultancies;
  - (e) sponsorships;
  - (f) gifts and hospitality from a source other than a family Member or permanent companion;
  - (g) any other benefit of a material nature;
  - (h) foreign travel (other than personal visits paid for by the Member, business visits unrelated to the Member's role as a public representative and official and formal visits paid for by the state or the Member's party);
  - (i) ownership and other interests in land and property; and
  - (j) pensions.
- Register of Members' Interests

The Members' Register of registrable interests consists of the confidential and public parts.

- (a) Confidential part of Register

- Only a Committee Member, the Registrar and staff assigned to the Committee has access to the confidential part of the Register.
- No person who has access to the confidential part of the Register may, except when a court so orders, disclose particulars of any entry in the confidential part to anyone other than the Member concerned or another person who has such access.
- A Committee Member who contravenes sub item (2) - (a) is liable to a reduction of up to 30 days' salary; and (b) becomes ineligible to continue as a Committee Member.
- The Registrar or a staff Member who contravenes sub item (2) is subject to disciplinary action applicable to parliamentary staff, including dismissal.

(b) Public part of Register

- Any person has access to the public part of the Register on a working day during office hours.
- The Registrar must publish the public part of the Register after adoption by the Committee in a manner determined by the Committee.
- Breaches relating to the disclosure of registrable interests and sanctions

Breaches

- (i) failure to comply with the requirements of the provisions for disclosing interests; or
- (ii) when disclosing registrable interests, wilfully or is grossly negligently, provides the Registrar with incorrect or misleading details.

Sanctions

After following due process and depending on the breach, the Committee must recommend the imposition of one or more of the following penalties:

- (i) a reprimand in the House;
- (ii) a fine not exceeding the value of 30 days' salary;
- (iii) a reduction of salary or allowances for a period not exceeding 15 days; or
- (iv) the suspension of certain privileges or a Member's right to a seat in Parliamentary debates or committees for a period not exceeding 15 days.

### 1.5 Specialized staff or bodies given the responsibility to strengthen transparency and prevent conflicts of interests

(a) Registrar of Members' Interests

- The Registrar of Members' Interests is a senior official, on the staff of Parliament, appointed by the Speaker and the Chairperson of the Council, acting jointly, after consulting the leaders of parties represented in the Assembly and the Council. The Registrar must be assisted by staff assigned by the Secretary for the work of the Committee.
- Registrar's functions
- open and keep a register for the purposes of this Code, called the Register of Members' Interests; and
- record in the Register particulars of Members' registrable interests;
- amend any entries in the Register when necessary;

- performs the duties in respect of investigations of breaches of the Code as prescribed in the Code; and
- perform the other duties in connection with the implementation of the Members' Code as required by the Committee.

The Registrar performs the functions of office in accordance with the directions of the Committee.

(b) The Joint Committee on Ethics and Member's Interests

The Joint Committee on Ethics and Members' Interests has the following functions -

- Implement the Code of Conduct for Assembly and permanent Council Members;
- Develop standards of ethical conduct for Assembly and Council Members;
- serve as an advisory and consultative body, both generally and to Members, concerning the implementation and interpretation of the Code;
- regularly review the Code and make recommendations for its amendment; and
- perform the other functions and exercise the other powers reasonably assigned to the Committee in the Code and in terms of resolutions adopted in both the Assembly and the Council.

The Committee must report to both Houses at least annually on the operation and effectiveness of the Code.

## 2. Members of the Executive

This information is contained in the:

- Executive Ethics Code published under Proclamation R41 in Government Gazette 21399 of 28 July 2000 (attached).
- Section 96 of the Constitution: Conduct of Cabinet Members and Deputy Ministers;
- Section 136: Premiers and members of the provincial executive council; and
- Executive Ethics Act, 1998 (Act No. 82 of 1998).

### 2.1 Conflict of interest management

- Members of the Executive may not use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person:
- A member must declare any personal or private financial or business interest that the member may have in a matter -
  - that is before the Cabinet or an Executive Council;
  - that is before a Cabinet Committee or Executive Council on which the member serves;
  - in relation to which the member is required to take a decision as a member of the Executive; and
  - Withdraw from proceedings of any committee which considers a matter in which a member has financial interests.
- Personal or private financial or business interest of a member includes any financial or business interest which, to the member's knowledge, the member's spouse, permanent companion or family member has.

- Where a member holds any financial or business interest in a company or corporate entity or profit-making enterprise which may give rise to a conflict of interest in the performance of that member's functions as a member of the Executive, the member is required to:

- (i) dispose of such interest: or

- (ii) place the administration of the interest under the control of an independent and professional person or agency.

## 2.2 Regulation of outside activities

Members of the Executive may not receive remuneration for any work or service other than for the performance of their functions as members of the Executive.

## 2.3 Gifts

- A member may not solicit or accept a gift or benefit which -

- (a) is in return for any benefit received from the member in the member's official capacity;

- (b) constitutes improper influence on the member, or

- (c) constitutes an attempt to influence the member in the performance of the member's duties.

- When a member, in the course of the member's duties, has received or has been offered a gift with a value of more than R1000,

- (i) the member may request permission from the President or Premier, as the case may be, to retain or accept the gift. If the permission is granted the member may retain or accept the gift, but must disclose particulars thereof when disclosing his/her financial interests.

- (ii) Where permission has not been requested or granted the member must either -

- (a) return the gift or decline the offer; or

- (b) donate the gift to the state.

- A gift for members of the executive does not include travel facilities or hospitality arising from attendance at meals, functions, meetings, cocktail parties, conventions, conferences or similar events attended by the member as part of the member's executive duties.

## 2.4 Disclosure of financial interests

Every member is required to disclose to the Secretary particulars of all their financial interests and that of the member's spouse, permanent companion or dependent children, to the extent that the member is aware of those interests within 60 days of his/her appointment and thereafter annually (end of May).

- Kinds of interests to be disclosed

The following kinds of financial interests should be disclosed:

- (a) shares and other financial interests in companies and other corporate entities;

- (b) sponsorships;

- (c) gifts and hospitality other than that received from a spouse or permanent companion or family member;



- (d) Benefits;
- (e) Foreign travel other than personal visits paid for by the member, or official travel paid for by the state, or travel paid for by the member's party;
- (f) Land and immovable property, including land or properly outside South Africa; and
- (g) Pensions.
- Register of Members' Interests
  - (i) The Members' Register of registrable interests consist of the confidential and public parts;
  - (ii) Only the President or Premier, as the case may be, the Public Protector have access to the confidential part of a register; and
  - (iii) Any person can have access to the public part of the Register during working office hours.

## 2.5 Specialized staff or bodies to promote integrity, honesty and responsibility among Members of the Executive

### (i) Secretary of Cabinet

- Each Secretary must keep a register of all financial interests disclosed by members;
- Members of Members of the Executive declare their interests within 60 days of appointment and thereafter every year at the end of May.
- The Secretary of the Cabinet conduct induction for all newly appointed members. The declaration of interests is a permanent item on the Induction Programme Agenda.
- The Office of the Secretary of the Cabinet provides administration and processes disclosure of gifts during the course of the years.

### (ii) Public Protector

- The Executive Members' Ethics Act, 1998, gives the Public Protector power to investigate breaches to the Ethics Code by Members of the Executive on receipt of a complaint. The Public Protector must submit a report on the alleged breach of the code of ethics within 30 days of receipt of the complaint to the relevant authority (the President or the Premier)
- The President must within a reasonable time, but not later than 14 days after receiving a report on:
  - (i) a Cabinet member or Deputy Minister, submit a copy of the report and any comments thereon together with a report on any action taken or to be taken in regard thereto, to the National Assembly.
  - (ii) the Premier must submit a copy of the report and any comments thereon to the National Council of Provinces.
- The Premier must within a reasonable time, but not later than 14 days after receiving a report on a member of the provincial executive, submit a copy of the report and any comments thereon, together with a report on any action taken or to be taken in regard thereto, to the provincial legislature.

### 3. Employees in the public service

#### 3.1 Conflict of Interest Management

The code of conduct for employees in the public service requires that an employee should:

- put the public interest first in the execution of his or her official duties (Regulation 11(b));
- not abuse his or her position in the public service to promote or prejudice the interest of any political party of interest group (Regulation 11(f));
- not engage in any transaction or action that is in conflict with or infringes on the execution of his or her official duties (Regulation 13(b)); and
- Regulation 13(d) - Ethical conduct: An employee shall-
- recuse herself or himself from any official action or decision-making process which may result in improper personal gain, and this shall immediately be properly declared by the employee.

#### 3.2 Measures that regulate the outside activities of public service employees in order to reduce the chance of conflicts of interests arising between their professional duties and private interests

##### (a) Public Service Act, 1994 (PSA)

The PSA, 1994, regulates outside activities of public service employees. Section 30 of the PSA, 1994 titled: Other Remunerative Work, provides that:

(1) No employee shall perform or engage himself or herself to perform remunerative work outside his or her employment in the relevant department, except with the written permission of the Executive Authority (EA) of the department.

(2) For the purposes of subsection (1), the executive authority shall at least take into account whether or not the outside work could reasonably be expected to interfere with or impede the effective or efficient performance of the employee's functions in the department or constitute a contravention of the code of conduct.

##### (b) Public Service Code of Conduct

The code of conduct stipulates the following regarding other remunerative work outside employee's employment in the relevant department: an employee who has permission to perform other remunerative work shall not:

- (i) perform such work during official work hours;
- (ii) use official equipment or state resources for such work; and
- (iii) is prohibited from conducting business with an organ of the state.

(c) Directive on other remunerative work outside the employee's employment in a relevant department as contemplated in section 30 of the PSA, 1994

In November 2016, the MPSA issued a Directive on other remunerative work outside the employee's employment in a relevant department as contemplated in section 30 of the PSA, 1994 to introduce and standardize a process for application and approval of other remunerative work. In considering the application and making recommendations to the EA, the Ethics Officer must consider among other things whether that work would present a conflict of interest or not.

Regulation 19(e) requires designated employees to disclose other remunerative work outside their

employment in their departments. Proof of approval to engage in such work is required as part of the employee's financial disclosure.

(d) Sanctions related to performing other remunerative work without permission to do so

In terms of section 31 of the PSA, 1994, if an employee performs other remunerative work without permission to do so, the remuneration received is deemed unauthorized. The PSA, 1994 (section 31) directs as follows in dealing with unauthorised remuneration:

If an employee receives remuneration contrary to section 30 of the PSA, 1994, that employee shall pay into revenue-

- (i) an amount equal to the amount of any such remuneration, allowance or reward; or
- (ii) if it does not consist of money, the value thereof as determined by the head of the department in which he or she was employed, at the time of the receipt thereof.
- (iii) If the employee fails to so pay into revenue the amount or value, the said head of the department shall recover it from him or her by way of legal proceedings and pay it into revenue.
- (iv) The employee concerned may appeal against the determination of the head of the department to the relevant executive authority.

3.3 Measures that prohibit public service employees from holding certain types of assets or official positions, such as an individual sitting on the board of a company while also holding a position in public administration, and from conducting business with an organ of state

(a) Public Administration and Management Act, 2014 (PAMA, 2014)

The PAMA, 2014 applies to both the public service and local government employees. In addition, Section 8 of the PAMA, 2014, applies to special advisors to EAs. This section prohibits employees from conducting business with the State as an individual or a director of a public or private company conducting business with the State.

(b) Public Service Code of Conduct

Regulation 13(c) of the PSR, 2016, prohibits public service employees from conducting business with an organ of state. Permission to engage in other remunerative work outside of employee's department does not entitle the employee to conduct business with an organ of state.

(c) Directive on conducting business with an organ of state

In January 2017, the MPSA issued a Directive on conducting business with an organ of state to strengthen the implementation of Regulation 13(c). The Directive clarifies the concept of conducting business with an organ of the State.

The Directive further exempts certain activities from the definition of conducting business with an organ of state. Such include participation in marking, training, teaching or lecturing in public institutions, appointment to an audit committee contemplated in section 77 of the Public Finance Management Act, 1999 or section 166 of the Municipal Finance Management Act, 2003, supporting the Independent Electoral Commission as voting staff during the election, and activities undertaken as part of continued professional development.

(d) Sanctions related to contravention of section 8 of the PAMA, 2014: Conducting business with an organ of state:

In terms of section 8(3) of the PAMA, 2014,

- (i) is an offence, and any person found guilty of the offence is liable to a fine or imprisonment for

a period not exceeding five years or both such fine and imprisonment; and

(ii) constitute serious misconduct which may result in the termination of employment by the employer.

(iii) Under the PSR, 2016: Disciplinary action will be instituted for non-compliance with the code of conduct which might result in a warning, suspension, dismissal or combination of any of these measures.

(e) Offence relating to the acquisition of a private interest in contract, agreement or investment of public body

Section 17(1) of the Prevention of Corrupt Activities Act, 2004 (PRECCA) provides that subject to conditions stated in section 17(2), 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. Section 17(2) excludes the following public officials:

(i) a public officer who acquires or holds such interest as a shareholder of a listed company;

(ii) a public officer, whose conditions of employment do not prohibit him or her from acquiring or holding such interest; or

(iii) in the case of a tender process, a public officer who acquires a contract agreement or investment through a tender process and whose conditions of employment do not prohibit him or her from acquiring or holding such interest and who acquires or holds such interest through an independent tender process.

3.4 Measures that regulate receipt of gifts and benefits by public service employees in the scope of their employment, including any minimum thresholds or additional required actions

(a) Prevention and Combatting of Corrupt Activities Act (PRECCA), 2004, classifies gifts as a form of gratification. In line with this definition of the PRECCA regulation 13(a) of the PSR, 2016, prohibits employees from receiving, soliciting or accepting any gratification, as defined in section 1 of the PRECCA, 2004, from any employee or any person in return for performing or not performing his or her official duties.

(b) Regulation 13(h) of the PSR, 2016, prevents an employee from receiving or accepting any gift from any person in the course and scope of his or her employment, to the cumulative value of R350 per year, unless prior approval is obtained from the relevant EA.

(c) Regulation 19(h) requires designated employees to disclose gifts from a source, other than a family member. Designated employees are also required to provide proof that they had permission to accept gifts to the value of R350 or more in a particular financial year.

3.5 Measures that introduce specialized laws or rules regulating the activities of public officials in high-risk areas of public administration

(a) Part 2 of Chapter 2 of the Public Service Regulations, 2016 provides that:

(i) All members of the senior management service (including Heads of Department) in the public service must disclose their financial interests on an annual basis (by 30 April of the year in question).

(ii) The Minister for the Public Service and Administration (MPSA) may designate any other employee or category of employees to disclose their financial interests. In that regard, the MPSA

issued a Determination and Directive as indicated in the paragraph below.

(b) Determination on other categories of employees to disclose their financial interests and Directive on the form, date and financial interests to be disclosed.

In 2017, the MPSA issued a Determination on other categories of employees to disclose their financial interests and Directive on the form, date and financial interests to be disclosed. The following employees are required to disclose their financial interests:

(i) Employees appointed at salary level 12 including professionals earning the equivalent of salary level 12 or above through the occupation specific dispensation (OSD);

(ii) Employees appointed at salary level 11 including employees earning the equivalent of salary level 11 through the OSD;

(iii) Employees who are authorised by the Minister, EA, HOD, or the chairperson of the Public Service Commission (PSC) for purposes of record-keeping and the effective implementation of Part 2 of Chapter 2 of the PSR, 2016; and

(iv) Employees in supply chain management and finance units, irrespective of their salary level.

(v) New appointees in any of the designated categories must disclose their financial interests within 30 days of assumption of duty.

(c) Financial interests to be disclosed

(i) Shares, loan accounts or any other form of equity in a registered private or public companies and other corporate entities recognised by law;

(ii) Income-generating assets;

(iii) Trusts;

(iv) Directorships and partnerships;

(v) Remunerated work outside the employee's employment in her or his department;

(vi) Consultancies and retainerships;

(vii) Sponsorships;

(viii) Gifts and hospitality from a source, other than a family member;

(ix) Ownership and other interests in immovable property; and

(x) Vehicles

(d) National Treasury Regulations 16A8.1 to 16A8.5

In 2003, the National Treasury issued a Code of Conduct for employees in Supply Chain Management (SCM), in line with the National Treasury Regulations 16A8.1 to 16A8.5), to promote fairness and integrity in the government procurement system. In relation to conflict of interest, employees in SCM are required to:

(i) Declare any business, commercial or financial interests or activities undertaken for financial gain that may raise a possible conflict of interest;

(ii) Not place themselves under any financial or other obligation to outside individuals or organisations that may seek to influence them in the performance of their duties; and

(iii) Not take improper advantage of their previous office after leaving their official position.

Practice Note: SCM 4 of 2003:

<http://www.treasury.gov.za/divisions/ocpo/sc/PracticeNotes/SCM-PracNote%2003%204.pdf>

(e) Public Administration and Management Act, 2014 (PAMA)

Section 9 of the PAMA extends the financial disclosure rules to:

(i) all employees in the public administration (public service, and municipalities) and that of their spouses, and a person living with such an employee as if they are married; and

(ii) Special advisors of Executive Authorities.

(f) Administrative sanctions for non-compliance with the financial disclosure regulations

Failure to disclose financial interest is a misconduct. The Executive Authorities and Heads of Departments have to take disciplinary action against such employees.

3.6 Assignment of responsibility to specialized staff or bodies in government to prevent and address transparency and conflicts of interest

(a) The Public Service Commission (PSC), which is a statutory body, is mandated to promote the constitutionally prescribed values and principles governing public administration in the public service.

The Public Service Commission (PSC) also has a responsibility to verify the financial interests of members of the SMS. Where potential or actual conflict of interest is identified, the PSC engages the Executive Authority to consult with the concerned employee and take appropriate steps to remove the conflict of interest or deal with the potential conflict situation. The Executive Authority should within 30 days after the referral, report to the PSC regarding the steps taken, or providing reasons if no steps were taken.

(b) Heads of Department have a responsibility to verify financial interests disclosed by SMS members who are not Heads of Department and other categories of designated employees.

(c) Ethics Officers

Regulation 23(1) of the Public Service Regulations, 2016, requires an executive authority of a department to designate ethics officers to-

(i) promote integrity and ethical behaviour in the department;

(ii) advise employees on ethical matters;

(iii) identify and report unethical behaviour and corrupt activities to the head of department;

(iv) manage the financial disclosure system; and

(v) manage the processes and systems relating to remunerative work performed by employees outside their employment in the relevant department.

(d) Ethics Committees

Regulation 23(2) of the Public Service Regulations, 2016, the head of department is required to establish an ethics committee or designate an existing committee, chaired by a Deputy Director-General, to provide oversight on ethics management in the department.

4. Local government councillors

4.1 Conflict of Interest Management

- Section 54 of the Local Government: Municipal Systems Act, 200, prescribes the code of

conduct for a member of a municipal council.

- The emphasis on the preamble of the code of conduct is important since it emphasises the role of a municipal council and the importance of good conduct while conducting municipal business. The preamble reads in part as follows: “Councillors are elected to represent local communities on municipal councils, to ensure that municipalities have structured mechanisms of accountability to local communities, and to meet the priority needs of communities by providing services equitably, effectively and sustainably within the means of the municipality. In fulfilling this role councillors must be accountable to local communities...”

- Section 2 of the code of conduct requires a councillor to-

- (a) perform the functions of office in good faith, honestly and a transparent manner; and

- (b) at all times act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised.

- A councillor must disclose to the municipal council, or to any committee of which that councillor is a member, any direct or indirect personal or private business interest that that councillor, or any spouse, partner or business associate of that councillor may have in any matter before the council or the committee and withdraw from the proceedings of the council or committee when that matter is considered by the council or committee, unless the council or committee decides that the councillor’s direct or indirect interest in the matter is trivial or irrelevant.

- A councillor who, or whose spouse, partner, business associate or close family member, acquired or stands to acquire any direct benefit from a contract concluded with the municipality, must disclose full particulars of the benefit of which the councillor is aware at the first meeting of the municipal council at which it is possible for the councillor to make the disclosure. This section does not apply to an interest or benefit which a council or, or a spouse, partner, business associate or close family member, has or acquires in common with other residents of the municipality.

- A councillor may not use the position or privileges of a councillor, or confidential information obtained as a councillor, for private gain or to improperly benefit another person.

- Except with the prior consent of the municipal council, a councillor may not-

- (a) be a party to or beneficiary under a contract for the provision of goods or services to the municipality; or

- (b) obtain a financial interest in any business of the municipality; or

- (c) for a fee or other consideration appear on behalf of any other person before the council or a committee.

- If more than one quarter of the councillors object to consent being given to a councillor in terms of the above, such consent may only be given to the councillor with the approval of the MEC for local government in the province.

4.2 Measures that regulate the outside activities in order to reduce the chance of conflicts of interests arising between their professional duties and private interests

- Municipal councillors may not undertake any other paid work, except with the consent of a municipal council which consent shall not unreasonably be withheld.

4.3 Measures that regulate receipt of gifts and benefits by local government councilors in the scope

of their employment, including any minimum thresholds or additional required actions

- A councillor may not request, solicitor accept any reward, gift or favour for-
  - (a) voting or not voting in a particular manner on any matter before the municipal council or before a committee of which that councillor is a member;
  - (b) persuading the council or any committee in regard to the exercise of any power, function or duty;
  - (c) making a representation to the council or any committee of the council; or
  - (d) disclosing privileged or confidential information.

#### 4.4 Declaration of interests

- When elected or appointed, a councillor must within 60 days declare in writing to the municipal manager the following financial interests held by that councillor:
  - (a) shares and securities in any company;
  - (b) membership of any close corporation;
  - (c) interest in any trust;
  - (d) directorships;
  - (e) partnerships;
  - (f) other financial interests in any business undertaking;
  - (g) employment and remuneration;
  - (h) interest in property;
  - (i) pension; and
  - (j) subsidies, grants and sponsorships by any organisation.
  - (k) Gifts received by a councillor above a prescribed amount
- Any change in the nature or detail of the financial interests of a councillor must be declared in writing to the municipal manager annually.
- The municipal council must determine which of the declared financial interests must be made public having regard to the need for confidentiality and the public interest for disclosure.

#### 4.5 Sanctions for breaching the code

If the council or a special committee finds that a councillor has breached a provision of a Code of conduct, the council may-

- (a) issue a formal warning to the councillor;
- (b) reprimand the councillor;
- (c) request the MEC for local government in the province to suspend the councillor for a period;
- (d) fine the councillor; and
- (e) request the MEC to remove the councillor from office.



#### 4.6 Assignment of responsibility to specialized staff or bodies government to prevent and address transparency and conflicts of interest

- A municipal council may-
  - (a) investigate and make a finding on any alleged breach of a provision of this Code; or
  - (b) establish a special committee to-
    - (i) investigate and make a finding on any alleged breach of this Code; and
    - (ii) make appropriate recommendations to the council.
- If the council or a special committee finds that a councillor has breached a provision of this Code, the council may institute sanctions as indicated above.
- MEC for local government

MEC for local government may:

- (a) consider an appeal against a sanction instituted by the Council
- (b) after having considered the appeal, confirm, set aside or vary the decision of the council and inform the councillor and the council of the outcome of the appeal.
- (c) appoint a person or a committee to investigate any alleged breach of a provision of this Code and to make a recommendation on whether the councillor should be suspended or removed from office.

### 5. Municipal Staff Members

#### 5.1 Conflict of Interest Management

- Employees of the municipality are required to, at all times-
  - (a) loyally execute the lawful policies of the municipal council;
  - (b) perform the functions of office in good faith, diligently, honestly and in a transparent manner;
  - (c) act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised;
  - (d) act impartially and treat all people, including other staff members equally without favour or prejudice; and
  - (e) promote and seek to implement the basic values and principles of public administration described in section 195 (1) of the Constitution.
- A staff member of a municipality may not-
  - (a) use the position or privileges of a staff member, or confidential information obtained as a staff member for private gain or to improperly benefit another person: or
  - (b) take a decision on behalf of the municipality concerning a matter in which that staff member or that staff member's spouse, partner or business associate, has a direct or indirect personal or private business interest.
- Except with the prior consent of the council of a municipality a staff member of the municipality may not-
  - (a) be a party to a contract for-

- (i) the provision of goods or services to the municipality; or
- (ii) the performance of any work for the municipality otherwise than as a staff member.
- (b) obtain a financial interest in any business of the municipality; or
- (c) be engaged in any business, trade or profession other than the work of the municipality.

- A staff member of a municipality who, or whose spouse, partner, business associate or close family member, acquired or stands to acquire any direct benefit from a contract concluded with the municipality, must disclose in writing full particulars of the benefit to the council. This item does not apply to a benefit which a staff member, or a spouse, partner, business associate or close family member, has or acquires in common with all other residents of the municipality.

#### 5.2 Measures that regulate receipt of gifts and benefits by a staff member of a municipality in the scope of their employment, including any minimum thresholds or additional required actions

- A staff member of a municipality may not request, solicit or accept any reward, gift or favour for-
  - (a) persuading the council of the municipality or any structure or functionary of the council, with regard to the exercise of any power or the performance of any duty;
  - (b) making a representation to the council, or any structure or functionary of the council;
  - (c) disclosing any privileged or confidential information; or
  - (d) doing or not doing anything within that staff member's power or duties.
- A staff member must without delay report to a superior official or to the speaker of the council any offer which, if accepted by the staff member would constitute a breach of the above-stated rules.

#### 5.3 Disclosure of benefits and interests by senior managers in the municipalities

A senior manager who enters into an employment contract should disclose his/her financial interests within 60 days after appointment and thereafter annually, after commencement of a new financial year of the municipality. Senior managers in the municipality are required to disclose the following:

- a) Shares, securities and other financial interests;
- b) Interest in a trust;
- c) Membership, directorships and partnerships;
- d) Remunerated work outside the Municipality;
- e) Consultancies, retainerships and relationships;
- f) Subsidies, grants and sponsorships by any organisation;
- g) Gifts and hospitality from a source other than a family member; and
- h) Land and property.

#### 5.4 Sanctions

Breaches of the Code of conduct must be dealt with in terms of the disciplinary procedures of the municipality envisaged in section 67(1)(h) of the Local Government: Municipal Systems Act, 2000.

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

1. Examples of implementation: Members of Parliament

- A guide on developing an understanding of ethical concepts <https://www.parliament.gov.za/ethical-concepts>
- Frequently asked questions: <https://www.parliament.gov.za/frequently-asked-questions-code>

2. Examples of implementation: Members of the Executive  
Public Protector Findings against Members of the Executive

(i) Violation of Paragraph 5.2 of the Code

- Twenty four (24) out of sixty four (64) members failed to comply with the first disclosure of their financial interests within 60 days of the last disclosure period.
- One of the declarations was not dated.
- The member's office incurred irregular, fruitless and wasteful expenditure by buying personal items for the member's spouse and later failed to comply with a constitutional obligation to cooperate properly with the Office of the Public Protector during the investigation.
- The Speaker of the National Assembly had to take appropriate steps to address the above failures.

(ii) Violation of Paragraph 2.3 of the Code

- A member misrepresented a person as a spouse, leading to the extension of benefits that would otherwise be entitled to a spouse. Travel expenses were incurred by the State.
- Conflict of interests occurred when a person, closely related to the member, benefited from the financial sponsorship contributed by a private company towards the hosting of a member's departmental event.

3. Examples of implementation: Public Service

(a) Other remunerative work:

The DPSA monitor and produces annual reports on the implementation of other remunerative work. Three reports on this subject are available. Below is an extract from one of the reports.

*Figure 1* below depicts an increasing trend (based on cumulative statistics) in the number of requests made by employees to perform other remunerative work, being captured on PERSAL as the end of January 2018. After three months of a relatively slow response to capture data, the number of requests received by the Executive Authorities from varied departments increased immensely. In July 2017, 1914 requests were received, compared to the 4014 requests received at the end of January 2018.

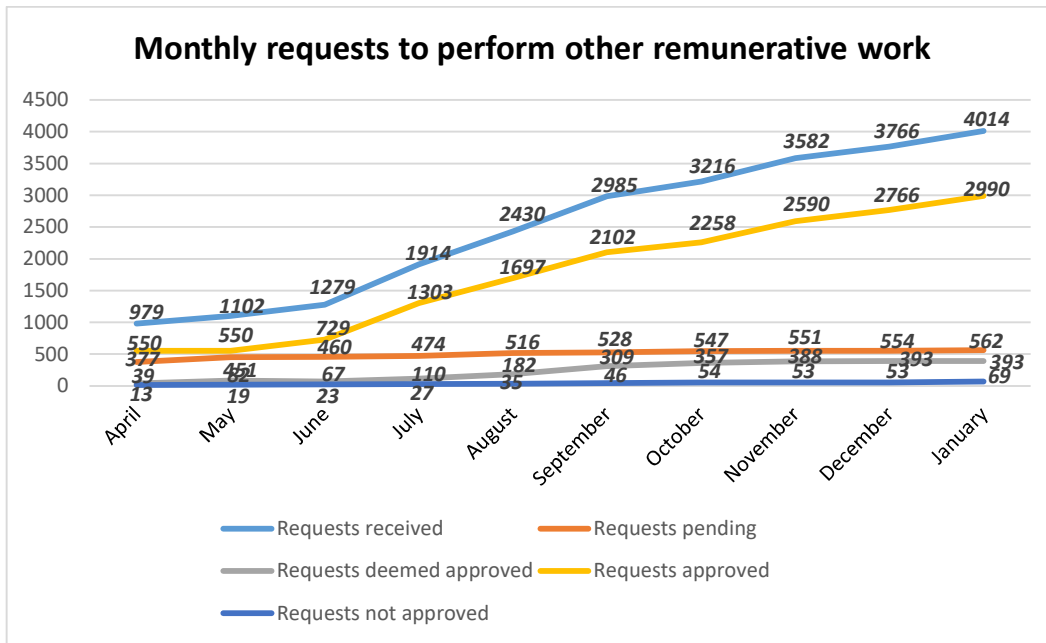


Figure 4: Monthly requests to perform other remunerative work (Source: PERSAL system)

It was also observed that together with an increase in applications, an increase of approvals followed, as would be expected. At the end of July 2017, 1303 applications were approved, which increased to 2990 at the end of January 2018. At the end of January 2018, 69 applications were not approved, because they would have been deemed to be of a conflicting nature. For the same period (end of January 2018), 562 applications were still pending a decision.

(b) Training of Ethics Officers to implement section 30 of the PSA, 1994

To assist departments, the Department of Public Service and Administration (DPSA), in partnership with the State Information Technology Agency (SITA), developed a course (PERSAL functionality 4.3.13) and since May 2017, conducted training on this functionality. The training aims to explain the Directive and to equip officials in the public service with the necessary skills to capture other remunerative work information on the PERSAL system. To this date, more than 100 officials have been trained since the introduction of the course in 2017.

The increased capturing of applications indicates a willingness to implement the Directive. The increased capturing can be accredited to the DPSA's initiated PERSAL training to departments (which started in May 2017), and to awareness raised by the Chief Directorate: Ethics and Integrity Management among designated ethics officers (using a group email address) on the specific issue.

(c) Conducting business with an organ of state

In June 2019, a name list of 20 employees who are suspected of conducting business with the State, was handed to the South African Police Service and the National Prosecuting Authority for investigations and possible prosecutions.

(d) Training offered to public service employees regarding relevant conflicts of interest regulations, codes of conduct and declaration systems

The National School of government is offering the following Ethics and Anti-Corruption courses for officials in the public service:

- Ethics in the public service which is an online course available to all employees in the public service. The purpose of the course is to promote ethical behaviour in the public service as envisaged

in Chapter 2 of the Public Service Regulations, 2016.

- Investigation of corrupt activities and related offences (NQF level 6): The goal of this training programme is to build the capacity of internal investigation components within the Public Service.
- Anti-Corruption training for practitioners (NQF level 5): The purpose of this learning programme is to build the capacity of anti-corruption practitioners within the Public Service.
- Promoting anti-corruption in the public service (NQF level 4): This course is intended for the capacity building of all employees in the public sector, including those who perform anti-corruption duties in senior, middle and junior management positions.
- Ethics and integrity management: workshop on ethics: The purpose of this workshop is to promote ethical behaviour in the Public Sector, to prevent unethical conduct, fraud and corruption, and to support ethics and integrity management and anti-corruption.

(e) Statistics on the disclosure of financial interests

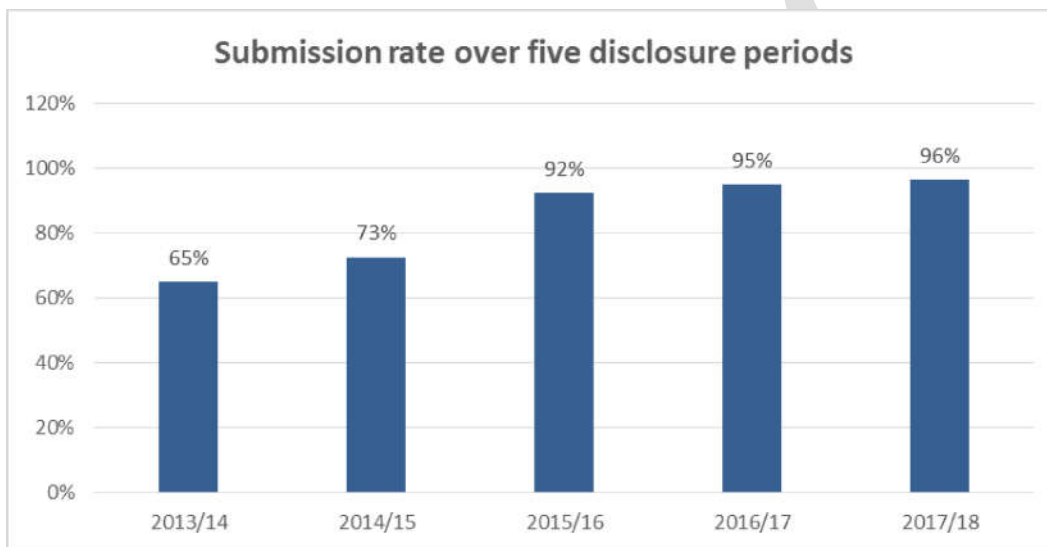


Figure 5: The number of SMS members over the years was 9961 (2013/14), 10441 (2014/15), 9681 (2015/16), 9942 (2016/17) and 10414 (2017/18).

- Action taken against SMS members who failed to disclose on time or did not disclose at all, range from written to final written warning.
- Report on actions taken by Executive Authorities with regard to identified cases of potential conflict of interest and compliance with the financial disclosure framework: <http://www.psc.gov.za/documents/reports/2014/Report%20on%20Actions-LR.pdf>

*(b) Observations on the implementation of the article*

South Africa has adopted a comprehensive framework to enhance transparency and prevent conflicts of interest among public officials. The measures cover (1) members of the National Assembly and National Council of Provinces; (2) members of the Executive; (3) employees in the public service; (4) local government councillors; and (5) municipal Staff Members.

All public service employees are expected to comply with the Public Service Code of Conduct as contained in the Public Service Regulations. The regulations contain restrictions relating to conflicts of interest and ethical conduct, regulate the acceptance of gifts and benefits, regulate the

performance of other remunerative work<sup>9</sup>, prohibit employees from holding certain types of assets or official positions and from doing business with the state<sup>10</sup>, make it mandatory for public servants to report suspected corruption (and for departments to establish systems to receive, manage and address allegations of corruption and unethical conduct – see article 8 below), prohibit nepotism in the conduct of their work, and require all members of the senior management service (SMS), as well as other designated employees, to disclose their financial and certain other interests to their respective heads of departments and executive authority (if the senior manager is the head of department) annually for submission to the PSC. The executive authority is then to engage with the employee to ensure these conflicts are removed, and if they are not, the executive authority must institute disciplinary measures. Sanctions for breaches apply and specialized staff or bodies (including heads of departments, ethics officers and ethics committees) are given responsibility and oversight.

The Public Administration Management Act, 2014 contains further provisions prohibiting publicservice employees (and categories of municipal employees) from conducting business with the state; establishes a Public Administration Ethics, Integrity and Disciplinary Technical Assistance Unit; provides for the establishment of the National School of Government; and provides for the Minister to set minimum norms and standards for public administration and to establish an Office of Standards and Compliance to ensure compliance.

For members of parliament, the “Code of Ethical Conduct and Disclosure of Members’ Interest for Assembly and Permanent Council Members” is a framework of reference for members of parliament when discharging their duties and responsibilities. The Code contains restrictions on members’ outside activities and prohibited business activities (including the receipt of gifts), and requires members to declare personal or private financial or business interests and to recuse themselves from any decision-making process regarding that matter. A system for the disclosure of registrable interests is in place, including sanctions for breaches and specialized staff or bodies given responsibility and oversight. During the country visit, a representative of the Office of the Executive Secretary, Joint Committee on Ethics and Members’ Interests, provided additional information on the application of these measures in practice. It was explained that non-compliance with the filing requirement by members of parliament was minimal (less than 2-4% of disclosures annually, most of which were duly filed within a few months of the deadline) and that cases of alleged conflict of interest violations were referred to the Ethics Committee for further inquiry and remedial action. The final results of such inquiries were further included in Committee reports and recommendations to Parliament.

For members of the executive (Cabinet members, deputy ministers, premiers and members of executive councils) and members of parliament, the Executive Members’ Ethics Act, 1998 covers conflicts of interest (including the disclosure of financial interests) and requires, inter alia, the members to dispose of or put under administration, any interests that could give rise to a conflict of interest in performing their duties. In terms of enforcement of the Code of Conduct for Members of the Executive, it was explained that the Presidency, in its capacity as custodian of the Executive Ethics Code, enforces compliance with the Code through different mechanisms, including verification of disclosed information public databases, access to declared interests by the public, powers of the public protector and sanctions for breach of the Code (e.g., a fine not exceeding 30 days’ salary and a reduction of salary or allowances for a period not exceeding 15 days).

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<sup>9</sup> Outside activities of public service employees are regulated in the PSA 1944, Public Service Code of Conduct and related government directive.

<sup>10</sup> Relevant rules are found in the Public Administration and Management Act, 2014 (PAMA), Public Service Code of Conduct and related government directive.

According to the Codes issued under the Executive Members' Ethics Act<sup>11</sup>, members are prohibited from doing business with the state, and the codes further regulate the conditions under which members' family members can benefit from business with the state.

South African authorities confirmed that the disclosure requirements for members of the National Assembly and members of the Executive are limited to financial interests and do not include non-financial, non-business interests from which a conflict of interest may arise. It was added that non-financial interests are disclosed in certain specific contexts where there is a potential for a conflict of interest, such as the procurement or recruitment process. Reference was made to the Executive Ethics Code, quoted above, which provides in paragraph 3.5 (Conflict of interest) that the personal or private financial or business interests of a member include any financial or business interest which, to the member's knowledge, the member's spouse, permanent companion or family member has. However, this section is also limited to financial and business interests.

During the country visit, authorities provided additional information on compliance with the aforementioned financial disclosure requirements. In particular, reference was made to the 2013 PSC study entitled, "*Fact Sheet on Actions Taken by the Executive Authorities with regard to Identified Cases of Potential Conflicts of Interests and Compliance with the Financial Disclosure Framework*", which noted significant enforcement gaps during the 3-year period under review (2008-2011). The study found that only a small number of executive authorities had complied with the requirement to inform the PSC of disciplinary and other action taken against employees involved in potential conflicts of interest, noting that almost all executive authorities were satisfied with the explanation provided by the affected officials. Also, compliance with the filing requirement by designated employees was not uniform. Accordingly, the study recommended further action to ensure that the disclosure and reporting requirements are duly enforced, and that disciplinary or other action is taken to address conflicts of interest when they arise. It was emphasized that compliance with the financial disclosure requirements is a sign of good governance and professional ethics, and helps ensure accountability and transparency by senior managers and other officials who are entrusted with public funds and need to demonstrate a high level of professional ethics. During the country visit authorities concurred with this assessment and the recommendations of the study and emphasized the need for greater enforcement of the existing measures. Authorities provided a copy of a more recent PSC study from March 2020 entitled, "*Overview of the Implementation of the Financial Disclosure Framework for the 2018/2019 Financial Year*", the findings of which broadly mirror the conclusions of the earlier study.

**Based on the information provided, it is recommended that South Africa take further action to ensure that the financial disclosure requirements applicable to designated public officials are duly enforced, and strengthen follow-up action by executive authorities to take disciplinary or other action when conflicts of interest arise (art. 7(4)). It is further recommended that South Africa endeavour to expand disclosure requirements for members of the National Assembly and members of the Executive to include non-financial, non-business interests from which a conflict of interest may arise (art. 7(4), 8(5)).**

### *(c) Successes and good practices*

The structured approach South Africa has taken to promote transparency and prevent and manage conflicts of interest among the different categories of public officials, including detailed disclosure

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<sup>11</sup> The "Code of Ethical Conduct and Disclosure of Members' Interest for Assembly and Permanent Council Members" applies to all Members of Parliament including those who are Members of the Executive. Members of the Executive are also subject to the "Handbook for Members of the Executive and Presiding Officers".

requirements for public officials in high-risk areas, training and guidelines, was noted as a good practice.

*(d) Challenges, where applicable*

**Please outline actions required to ensure or improve the implementation of the article under review and describe any specific challenges you might be facing in this respect.**

None.

*(e) Technical assistance needs*

Support in the design of procedures for the selection and training of individuals for public positions considered vulnerable to corruption and their rotation (art. 7, para. 1 (b)).

**Is any technical assistance already being provided to you? If so, please provide a general description of the nature of the assistance, including donor information.**

No.

## Article 8. Codes of conduct for public officials

### *Paragraph 1 of article 8*

*1. In order to fight corruption, each State Party shall promote, inter alia, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

1. Laws, policies, administrative regulations or instructions or other practices aimed at promoting integrity, honesty and responsibility among public officials

1.1 Constitution of the Republic of South Africa, 1996

Section 195 of the Constitution of the Republic of South Africa, 1996, outlines the basic values and



principles governing public administration. These principles apply to administration in all spheres of government (local provincial and national), organs of state and public enterprises.

<https://www.gov.za/documents/constitution-republic-south-africa-1996>

1.2 Codes of conduct have also been adopted for the following categories of public officials:

(a) Members of Parliament including those members who are members of the Executive and Presiding Officers: <https://www.parliament.gov.za/code-conduct>

(b) Members of the Executive:

(i) Section 2(1) and (2) of the Executive Members' Ethics Act, 1998 (No. 86 of 1998), provides for a code of ethics governing the conduct of members of the Cabinet, Deputy Ministers and members of provincial Executive Councils and sets out the minimum requirements of conduct that such a code should contain. <https://www.polity.org.za/article/executive-members-ethics-act-no-82-of-1998-1998-01-01>

(ii) Executive Ethics Code - Proclamation R41 in Government Gazette 21399 of 28 July 2000

(c) Local government councillors

The Code of conduct for local government councillors is contained in Schedule 1 of the Local Government: Municipal Systems Act, 2000.

<https://www.polity.org.za/article/local-government-municipal-systems-amendment-act-7-of-2011-2011-07-05>

(d) Employees in the public service

Chapter 2, Part 1, of the Public Service Regulations, 2016, provides for a code of conduct for employees in the public service.

[http://www.dpsa.gov.za/dpsa2g/documents/acts&regulations/regulations2016/Public Service Regulations, 2016](http://www.dpsa.gov.za/dpsa2g/documents/acts&regulations/regulations2016/Public%20Service%20Regulations,%202016)

(e) Municipal staff members

Schedule 2 of the Local Government: Municipal Systems Act, 2000, sets out a code of conduct for municipal staff members. <https://www.polity.org.za/article/local-government-municipal-systems-amendment-act-7-of-2011-2011-07-05>

(f) Supply Chain Management Practitioners

Practice Note Number SCM 4 of 2003 (referred to in response to article 7(4) - Code of Conduct for Supply Chain Management Practitioners that should be adhered to by all officials and other role players involved in supply chain management. <http://www.treasury.gov.za/divisions/ocpo/sc/PracticeNotes/SCM-PracNote%2003%2004.pdf>

1.3 Public service charter

A Service Charter in the form of a social contract, expressing commitment and agreement between the State and public servants was agreed to in 2013 (Resolution 1 of 2013 of the Public Service Coordinating Bargaining Council). The objectives of the Service Charter include: to professionalise and encourage excellence in the public service, to strengthen processes and initiatives that prevent and combat corruption and to ensure an effective, efficient and responsive public service. <http://www.dpsa.gov.za/documents/PUBLIC%20SERVICE%20CHARTER%202014.pdf>

1.4 Oath of office or other forms of assurances by public officials upon induction that address the values above

Members of Parliament take an oath of office as prescribed in Schedule 2 of the Constitution of the Republic of South Africa, 1996. The oath for MPs is as follows in English: "I, [Name of MP], swear/solemnly affirm that I will be faithful to the Republic of South Africa and will obey, respect and uphold the Constitution and all other law of the Republic; and I solemnly promise to perform my functions as a member of the National Assembly to the best of my ability."

[www.justice.gov.za/legislation/constitution/SACConstitution-web-eng-s02.pdf](http://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng-s02.pdf)

1.5 Responsibility of specialized staff or bodies in the public administration to promote integrity, honesty and responsibility among public officials.

(a) Members of Parliament

(i) Registrar of Members' Interests

- The Registrar of Members' Interests is a senior official, on the staff of Parliament, appointed by the Speaker and the Chairperson of the Council, acting jointly, after consulting the leaders of parties represented in the Assembly and the Council. The Registrar must be assisted by staff assigned by the Secretary for the work of the Committee.

(ii) Registrar's functions

- open and keep a register for the purposes of this Code, called the Register of Members' Interests; and
- record in the Register particulars of Members' registrable interests;
- amend any entries in the Register when necessary; and
- perform the other duties in connection with the implementation of the Members' Code as required by the Committee.

The Registrar performs the functions of office in accordance with the directions of the Committee.

(iii) The Joint Committee on Ethics and Member's Interests

The Joint Committee on Ethics and Members' Interests has the following functions -

- Implement the Code of Conduct for Assembly and permanent Council Members;
- Develop standards of ethical conduct for Assembly and Council Members;
- serve as an advisory and consultative body, both generally and to Members, concerning the implementation and interpretation of the Code;
- regularly review the Code and make recommendations for its amendment; and

- perform the other functions and exercise the other powers reasonably assigned to the Committee in the Code and in terms of resolutions adopted in both the Assembly and the Council.

The Committee must report to both Houses at least annually on the operation and effectiveness of the Code.

(b) Members of the Executive

(i) Secretary of Cabinet

- Each Secretary must keep a register of all financial interests disclosed by members.
- The Secretary of the Cabinet conduct induction for all newly appointed members. The Declaration of Interests is a permanent item on the Induction Programme Agenda.
- The Office of the Secretary of Cabinet provides administration and processes disclosure of gifts during the course of the years.

(ii) Public Protector

- The Executive Members' Ethics Act, 1998, gives the Public Protector power to investigate breaches to the Ethics Code by Members of the Executive on receipt of a complaint. The Public Protector must submit a report on the alleged breach of the code of ethics within 30 days of receipt of the complaint to the relevant authority (the President or the Premier)
- The President must within a reasonable time, but not later than 14 days after receiving a report on:
  - (i) a Cabinet member or Deputy Minister, submit a copy of the report and any comments thereon together with a report on any action taken or to be taken in regard thereto, to the National Assembly.
  - (ii) the Premier, must submit a copy of the report and any comments thereon to the National Council of Provinces.
- The Premier must within a reasonable time, but not later than 14 days after receiving a report on a member of the provincial executive, submit a copy of the report and any comments thereon, together with a report on any action taken or to be taken in regard thereto, to the provincial legislature.

(c) Local Government Councillors

- A municipal council may-
  - (a) investigate and make a finding on any alleged breach of a provision of this Code; or
  - (b) establish a special committee to-
    - (i) investigate and make a finding on any alleged breach of this Code; and
    - (ii) make appropriate recommendations to the council.
- If the council or a special committee finds that a councillor has breached a provision of this Code, the council may-
  - (a) issue a formal warning to the councillor;
  - (b) reprimand the councillor;
  - (c) request the MEC for local government in the province to suspend the councillor for a period;

- (d) fine the councillor; and
- (e) request the MEC to remove the councillor from office.
  - MEC for local government

MEC for local government may:

- (a) consider an appeal against a sanction instituted by the Council
- (b) after having considered the appeal, confirm, set aside or vary the decision of the council and inform the councillor and the council of the outcome of the appeal.
- (c) appoint a person or a committee to investigate any alleged breach of a provision of this Code and to make a recommendation on whether the councillor should be suspended or removed from office.

(d) Employees in the Public Service

(i) The Public Service Commission (PSC) has the responsibility to verify the financial interests of members of the SMS. Where potential or actual conflict of interest is identified, the PSC engages the Executive Authority to consult with the concerned employee and take appropriate steps to remove the conflict of interest or deal with the potential conflict situation. The Executive Authority should within 30 days after the referral, report to the PSC regarding the steps taken, or providing reasons if no steps were taken.

The Office of the Public Service Commission, which is a statutory body, is mandated to promote the constitutionally prescribed values and principles governing public administration in the public service.

(ii) Heads of Department have a responsibility to verify financial interests disclosed by SMS members who are not Heads of Department and other categories of designated employees.

(iii) Ethics Officers in a department have the following responsibilities:

- Promote integrity and ethical behaviour in the department;
- Advise employees on ethical matters;
- Identify and report unethical behaviour and corrupt activities to the head of department;
- Manage the financial disclosure system within their departments; and
- Manage the processes and systems relating to remunerative work performed by employees outside their employment in the relevant department.

(iv) The National School of Government (NSG) is responsible for training of public officials in the public administration. The NSG has developed a suite of programmes in collaboration with DPSA, to create ethical organisational ethos in Departments as well as capacitate officials to implement the Public Service Anti-Corruption Strategy. All of South Africa's policy instruments/frameworks promoting ethics as well as the multi-lateral anti-corruption agreements and international instruments we have acceded to shape the programmes. The main objective of the Anti-Corruption training programmes is to create an ethical organisational ethos in Departments as well as the implementation of the Public Service Anti-Corruption Strategy.

1.6 Training programmes for public officials regarding the promotion of integrity, honesty and responsibility in public service, including whether this training is mandatory or optional, online or

in-person.

- The following suite of courses is available from the National School of Government:
  - (i) Ethics in the public service (online);
  - (ii) Ethics management for local government;
  - (iii) Investigation of corrupt activities and related offences;
  - (iv) Ethics in National and Provincial Department;
  - (v) Promoting anti-corruption in the public service;
  - (vi) Anti-corruption training for Practitioners; and
  - (vii) Ethics and integrity management: workshop on ethics.
  
- On 5 September 2018, Cabinet approved compulsory and mandatory programmes to be delivered by the NSG. The current suite of compulsory programmes to be delivered by the NSG consist of the:
  - (1) Compulsory Induction Programme (salary levels 1-14);
  - (2) Executive Induction Programme (salary levels 15-16);
  - (3) *Khaedu* training and deployment to service delivery sites (salary levels 13-16); and
  - (4) Senior Management Service (SMS) Pre-entry Programme.
  
- Given the status of the public service (as cited by institutions such as the Auditor-General South Africa, Public Service Commission and Department of Planning, monitoring and Evaluation), it is further proposed that the NSG also offers the following online programmes under its compulsory programme offerings:
  - (5) Ethics in the Public Service (all public servants);
  - (6) Managing Performance in the Public Service (salary levels 6 - 12);
  - (7) Supply Chain Management for the Public Service (salary levels 9-16);
  - (8) Financial Management Delegations of Authority (salary levels 9-16); and
  - (9) Re-orientation in the Public Service (salary levels 1-16).
  
- Compulsory Induction Programme is conducted for all new entrants to the Public Service (additionally, departments have their own internal induction programmes that they roll out to new employees, employees must be inducted within a period of 12 months following their appointment. Permanent appointment is only confirmed after an employee has participated in the induction programme) by the National School of Government. The material covered include:

The induction programme is organised in five modules, which are listed below:

  - ✓ Understanding the Constitution and the government's mandate.
  - ✓ Working the service delivery system and public administration process.
  - ✓ Being an ethical, honest and considerate public servant.

- ✓ Building good people relationships.
- ✓ Understanding the financial processes of government
- Apart from national training conducted by the NSG, each institution of government (government department, government components and municipalities) is responsible for training of its own employees.
- Induction programmes are also run for Members of Parliament and Members of the Executive and Members of the Executive. The requirements provided for in the Executive Member's Ethics Act 82 of 1998 and the Code) are included in the induction programme of Members of the Executive.

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

Examples of implementation

- The table below provides statistics regarding the number of public service employees and employees of the municipalities who were trained by the National School of Government under per available courses.
- Information provided in response to article 5, paragraph 2, as table 3, is still applicable.

Course	No. Trained
Ethics in the public service (online)	10802
Ethics management for local government	807
Investigation of corrupt activities and related offences	539
Ethics in National and Provincial Department	344
Promoting anti-corruption in the public service	2362
Anti-corruption training for Practitioners	2852
Ethics and integrity management: workshop on ethics	821

Table 3: Number of officials trained, per course

*(b) Observations on the implementation of the article*

A clear set of rules and values articulated for guiding the conduct of public servants and members of parliament and the executive. The provision appears to be implemented.

*Paragraph 2 and 3 of article 8*

*2. In particular, each State Party shall endeavour to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions.*

3. For the purposes of implementing the provisions of this article, each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, take note of the relevant initiatives of regional, interregional and multilateral organizations, such as the International Code of Conduct for Public Officials contained in the annex to General Assembly resolution 51/59 of 12 December 1996.

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with these provisions of the Convention.**

Article 8, Paragraph 2:

(a) Response

1. Constitution of the Republic of South Africa, 1996

Section 195 of the Constitution of the Republic of South Africa, 1996 outlines the basic values and principles governing public administration. These principles apply to administration in all spheres of government (local provincial and national), organs of state and public enterprises. They are as follows:

Section 195(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principle:

- a) A high standard of professional ethics must be promoted and maintained;
- b) Efficient, economic and effective use of resources must be promoted;
- c) Public administration must be development-oriented;
- d) Services must be provided impartially, fairly, equitably and without bias;
- e) People's needs must be responded to, and the public must be encouraged to participate in policy-making;
- f) Public administration must be accountable;
- g) Transparency must be fostered by providing the public with timely, accessible and accurate information;
- h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated;
- i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness and the need to redress the imbalance of the past to achieve broad representation.

<https://www.gov.za/documents/constitution-republic-south-africa-1996>

2. Codes of conduct have also been adopted for the following:

2.1 Members of Parliament including those members who are members of the Executive and

Presiding Officers. The code sets out the following principles that members must adhere to:

- (a) Selflessness: take decisions solely in terms of public interest and without regard to personal financial or other material benefits for themselves, their immediate family, their business partners, or their friends;
- (b) Integrity: steadfastly avoid placing themselves under any financial or other obligation to any outside individual or organization where this creates a conflict or potential conflict of interest with his or her role as a Member;
- (c) Objectivity: in carrying out public business, including making public appointments, do so only on the basis of merit and in accordance with Constitutional imperatives;
- (d) Openness: Members should be as open as possible about all decisions and actions, bearing in mind the constitutional obligation for openness and transparency;
- (e) Honesty: Members must declare private interests relating to public duties and resolve any conflict arising in a way that protects public interest; and
- (f) Leadership: promote and support ethical conduct by leadership and example.

<https://www.parliament.gov.za/code-conduct>

## 2.2 Members of the Executive:

Section 2(1) and (2) of the Executive Members' Ethics Act, 1998 (No. 86 of 1998), provides for a code of ethics governing the conduct of members of the Cabinet, Deputy Ministers and members of provincial Executive Councils and sets out the minimum requirements of conduct that such a code should contain. The code of ethics must:

- (a) include provisions requiring Cabinet members, Deputy Ministers and MECs
  - (i) at all times to act in good faith and in the best interest of good governance; and
  - (ii) to meet all the obligations imposed on them by law; and
- (b) include provisions prohibiting Cabinet members, Deputy Ministers and MECs from:
  - (i) undertaking any other paid work;
  - (ii) acting in a way that is inconsistent with their office;
  - (iii) exposing themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests;
  - (iv) using their position or any information entrusted to them, to enrich themselves or improperly benefit any other person; and
  - (v) acting in a way that may compromise the credibility or integrity of their office or of the government.

<https://www.polity.org.za/article/executive-members-ethics-act-no-82-of-1998-1998-01-01>

Executive Ethics Code - Proclamation R41 in Government Gazette 21399 of 28 July 2000, provides for the following general standards of conduct:

- (a) perform their duties and exercise their powers diligently and honestly;
- (b) fulfil all the obligations imposed upon them by the Constitution and law;



- (c) act in good faith and in the best interest of good governance; and
- (d) act in all respects in a manner that is consistent with the integrity of their office or the government.

Members may not:

- (a) wilfully mislead the legislature to which they are accountable;
- (b) wilfully mislead the president or Premier, as the case may be;
- (c) act in a way that is inconsistent with their position;
- (d) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person;
- (e) use information received in confidence in the course of their duties otherwise than in connection with the discharge of their duties;
- (f) expose themselves to any situation involving the risk of a conflict between their official responsibilities and their private interests;
- (g) receive remuneration for any work or service other than for the performance of their functions as members of the Executive; or
- (h) make improper use of any allowance or payment properly made to them, or disregard the administrative rules which apply to such allowance or payments.

### 2.3 Municipal councillors

The Code of conduct for local government councillors is contained in Schedule 1 of the Local Government: Municipal Systems Act, 2000. It sets out the following standards for general conduct:

A councillor must-

- (a) perform the functions of office in good faith, honestly and a transparent manner; and
- (b) at all times act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised.

<https://www.polity.org.za/article/local-government-municipal-systems-amendment-act-7-of-2011-2011-07-05>

### 2.4 Code of conduct for employees in the public service

Chapter 2, Part 1, of the Public Service Regulations, 2016, provides for a code of conduct for employees in the public service.

- Employees are required to adhere to the Constitution of the Republic of South Africa and other laws of the Country while performing their duties;
- The Code sets out standards of conduct for employees when they:
  - (a) provide services to the public;
  - (b) perform their duties; and
  - (c) relate to each other.
- The Code further sets out ethical standards for employees, including rules regarding:

- (i) receipt and acceptance of gifts;
- (ii) conducting business with an organ of state (prohibition);
- (iii) conflict of interest management; and
- (iv) performance of other remunerative work.

Public Service Regulations, 2016  
<http://www.dpsa.gov.za/dpsa2g/documents/acts&regulations/regulations2016/Government%20Gazette%2029%20July%202016.pdf>

## 2.5 Code of conduct for municipal staff members

Schedule 2 of the Local Government: Municipal Systems Act, 2000, sets out a code of conduct for municipal staff members. It sets out the following standards for general conduct:

A staff member of a municipality must at all times-

- (a) loyally execute the lawful policies of the municipal council;
- (b) perform the functions of office in good faith, diligently, honestly and in a transparent manner;
- (c) act in such a way that the spirit, purpose and objects of section 50 are promoted;
- (d) act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised; and
- (e) act impartially and treat all people, including other staff members equally without favour or prejudice.

Other rules include:

- (i) Commitment to serving the public interest;
- (ii) refraining from using their position for personal gain;
- (iii) disclose benefits that his/her family and close associates stand to benefit from the municipality
- (iv) refrain from disclosing any privileged or confidential information for his / her benefits or benefits of his/her family or close associates; and
- (v) solicitation and acceptance of rewards, gifts and favours.

<https://www.polity.org.za/article/local-government-municipal-systems-amendment-act-7-of-2011-2011-07-05>

## 2.6 Code of conduct for Supply Chain Management Practitioners

The National Treasury has issued a Code of Conduct for Supply Chain Management Practitioners that should be adhered to by all officials and other role players involved in supply chain management (referenced under article 7, paragraph 4). Supply Chain Management Practitioners are required to:

- (a) Act in the public interest and not perform their duties to unlawfully gain any form of compensation, payment or gratuities from any person, supplier/contractor for themselves, their family or friends;
- (b) Perform their duties efficiently, effectively and with integrity;
- (c) Be fair and impartial in the performance of their duties;

- (d) Declare any business, commercial and financial interests or activities undertaken for financial gain that may raise a possible conflict of interest;
- (e) Be open about all the decisions and actions that they take; and
- (f) Protect confidential information even after separation from service.

<http://www.treasury.gov.za/divisions/ocpo/sc/PracticeNotes/SCM-PracNote%2003%204.pdf>

## 2.7 Public service charter

A Service Charter in the form of a social contract, expressing commitment and agreement between the State and public servants was agreed to in 2013 (Resolution 1 of 2013 of the Public Service Coordinating Bargaining Council). The objectives of the Service Charter include: to professionalise and encourage excellence in the public service, to strengthen processes and initiatives that prevent and combat corruption and to ensure an effective, efficient and responsive public service: <http://www.dpsa.gov.za/documents/PUBLIC%20SERVICE%20CHARTER%202014.pdf>

Article 8, Paragraph 3:

### (a) Response

Although not expressly stated, the Codes of conduct for different categories of public officials indicated in this article are in line with the African charter on values and principles of public service and administration adopted by the sixteenth ordinary session of the Assembly, held in Addis Ababa, Ethiopia, on 31 January 2011. <https://au.int/treaties/african-charter>

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

Please refer to the examples listed under article 7(4).

### *(b) Observations on the implementation of the article*

Good coverage.

### *Paragraph 4 of article 8*

*4. Each State Party shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.*

### *(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

### **1. Prevention and Combating of Corrupt Activities Act, 2004**

Section 18 of the Prevention and Combating of Corrupt Activities Act, 2004 (PRECCA) creates an offence of unacceptable conduct relating to a witness if any person directly or indirectly, intimidates or uses physical force, or improperly persuades or coerces another person with the intent to (a) influence, delay or prevent the testimony of that person or another person as a witness in a trial.

Section 34 of the PRECCA, requires any person who holds a position of authority to report any suspicion of corruption, theft, fraud, extortion, forgery involving an amount of R100 000.00 or more, to the police.

### **2. Public Service Regulations, 2016**

2.1 Regulation 13(e) requires employees to report to relevant authorities, acts of fraud, corruption, nepotism, maladministration, and any other act which constitutes a contravention of any law, (including but not limited to, a criminal offence) or which is prejudicial to the interest of the public, which comes to his/her during the course of his/her employment in the public service.

2.2 Regulation 22(c) requires a head of department to establish a system that encourages and allows employees and citizens to report allegations of corruption and other unethical conduct. Such system should provide for:

- (i) confidentiality of reporting; and
- (ii) the recording of all allegations of corruption and unethical conduct received through the system or systems.

2.3 Regulation 22(d) requires a head of department to establish an information system that:

- (i) records all allegations of corruption and other unethical conduct; and
- (ii) monitors the management of the allegations of corruption and other unethical conduct;
- (iii) identifies any systemic weaknesses and recurring risks;
- (iv) maintains records of the outcomes of the allegations of corruption and unethical conduct; and
- (v) refer allegations of corruption to the relevant law enforcement agencies and investigate whether disciplinary steps must be taken against any employee of the department and if so, institute such disciplinary action.

2.4 Regulation 23(1)(c) requires ethics officers to identify and report unethical behaviour and corrupt activities to the head of department.

### **3. Local Government: Municipal Systems Act, 2000**

Reporting duty of staff members

Section 13 of the Code of Conduct for Municipal staff members requires that whenever a staff member of a municipality has reasonable grounds for believing that there has been a breach of the

Code, the staff member must without delay report the matter to a superior officer or to the speaker of the council.

#### **4. Protected Disclosure Act, 2000 (No. 26 of 2000)**

The Protected Disclosures Act 2000 (Act No. 26 of 2000) provides protection for both public and private sector whistleblowers. The Act sets out procedures by which public and private sector employees may disclose information concerning unlawful or irregular conduct by an employer or an employee of that employer. The Act prohibits an employer from subjecting an employee to —occupational detriment| on account of having made a protected disclosure. The PDA defines —disclosure| as including —any information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show... that a criminal offence has been committed, is being committed or is likely to be committed.|| The definition also includes information that shows or tends to show that such conduct —has been, is being or is likely to be deliberately concealed.|| The disclosure of information concerning the act of corruption - being a criminal offence - would therefore be covered by the PDA. The Act protects whistleblowers from being subjected to —occupational detriment| which includes, inter alia, any disciplinary action; dismissal, suspension, demotion, harassment or intimidation; being transferred against his or her will; being refused a transfer or promotion or being threatened with any of such actions.

The **Protected Disclosures Amendment Act, 2017** was assented to and signed by the President on 31 July 2017. Highlights of the Protected Disclosures Amendment Act include:

- Extending protection to non-permanent employees and workers;
- Providing civil and criminal protection;
- Increasing legal obligations on employers to keep whistleblowers informed; and
- Extending the bodies to which people can make protected disclosures.

Various South African companies have implemented specific measures to encourage whistleblowing, including through the establishment of internal hotlines, many of which are monitored by third parties. Civil society has also been active in promoting whistleblowing and the establishment of whistle-blower protection mechanisms. In this regard work has been undertaken in conjunction with the National Anti-Corruption Forum (NACF) to raise awareness of whistle-blower protection through the dissemination of awareness-raising materials, including the provision of policy packs to businesses on implementation of the PDA. Approximately 25 per cent of businesses listed on the Johannesburg Stock Exchange have whistle-blower policies in place.

#### **5. National Anti-Corruption Hotline (0800 701 701)**

The National Anti-Corruption Hotline (NACH) is a national whistle blowing system that allows individuals to blow the whistle against corruption in the public sector. Callers can use a toll free number (0800 701 701) to report allegations of corruption and other unethical behaviour. Cases received from the NACH are referred to departments (both national and provinces), agencies and public bodies in accordance with agreed protocols. These departments, agencies and public bodies are required to investigate the cases and provide feedback to the PSC. Feedback on the cases investigated is recorded on the Case Management System (CMS) of the NACH on a regular basis. The NACH is managed by the Public Service Commission (the PSC) which is responsible for

investigating, monitoring and evaluating the organisation and administration, and personnel practices of the public service.

Callers or whistle-blowers are guaranteed anonymity. Most importantly, the NACH is also regarded as a “tip-off” tool in terms of reporting allegations of corruption. A “tip-off” is regarded as an incident where the caller calls the NACH whilst an act of corruption is occurring so that necessary investigations can take place. Furthermore, the allegations reported are immediately brought to the attention of the relevant Law Enforcement Agency or department, and on various occasions in the past, the perpetrators were caught “red-handed”.

A number of government departments have also implemented measures for whistleblowing and are prepared to direct employees to internal helplines.

## **6. The Witness Protection Act, 1998 (Act No. 112 of 1998)**

Witness protection is provided under the Witness Protection Act 1998 (Act No. 112 of 1998) (WPA) (Section 7). The WPA does not place a restriction on the type of offences that may justify witness protection, and could therefore protect witnesses in the context of corruption proceedings. Section 7 of the WPA provides that a witness —who has reason to believe that his or her safety or the safety of any related person is or may be threatened by any person or group or class of persons, whether known to him or her or not, by reason of his or her being a witness may make an application for protection to law enforcement officials or other designated bodies under the Act. The WPA also makes provision for, inter alia, the establishment of a designated Office for the Protection of Witnesses; the functions, powers and duties of the Director for Witness Protection; the temporary protection of witnesses pending placement under protection; the placement of witnesses and related persons under protection services related to the protection of witnesses and related persons, and; witness services at courts.

## **7. Special Investigating Unit whistleblower hotline**

The Special Investigating Unit has a whistleblower hotline for members of the public and employees to report suspected fraud, corruption or maladministration. This hotline offers a toll-free number 0800 037 774, toll-free facsimile 0800 212 689, SMS number 33490 or email address [siu@whistleblowing.co.za](mailto:siu@whistleblowing.co.za) <<mailto:siu@whistleblowing.co.za>>. An independent company, which does not record telephone calls, or track caller identity, or trace electronic communications, or otherwise attempt to determine the caller's identity operates this SIU whistleblower hotline. The report is anonymous, even if the caller is willing to make his/her identity available. The SIU whistleblower hotline is available 24 hours a day, seven days a week. Services are offered in the 11 official languages.

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

### **Examples of implementation**

1. The Department of Justice and Constitutional Development initiated the review of the Protected Disclosure Act, 2004, in 2009. The South African Law Reform Commission submitted a Report in 2010 on the review of the PDA. The Protected Disclosures Amendment Act, 2017 was assented to

and signed by the President on 31 July 2017.

2. The Open Democracy Advice Centre, commissioned by the Right2Know Campaign published a report in 2014 titled: Empowering our Whistleblowers. The report is the result of an extensive research and investigation of the state of whistleblowing in South Africa. The report provides an insight into the whistleblowing environment as well as steps necessary to take the whistleblowing agenda forward in South Africa (<https://www.opendemocracy.org.za/index.php/resources/publications>). For a full report: <https://www.opendemocracy.org.za/images/docs/WhistleblowingBook.pdf>

3. National Anti-Corruption Hotline statistics (refer to article 5, paragraph 2).

4. Measuring the effectiveness of the National Anti-Corruption Hotline:

2009: <http://www.psc.gov.za/documents/2009/23354-OPSC%20report.pdf>; and

2012: <http://www.psc.gov.za/documents/2012/NACH3%20REPORT.pdf>

5. South Africa was found to be in compliance with article 32 (Protection of witnesses, experts and victims) and 33 (Protection of reporting persons) of the UNCAC during the first cycle of implementation review.

*(b) Observations on the implementation of the article*

Various mechanisms are in place to facilitate the reporting by public officials of acts of corruption. The PSR, 2016 requires heads of department to establish systems that encourage employees and citizens to report allegations of corruption and other unethical conduct, including confidentially (regulation 22), and to establish information systems that monitor the management of allegations of corruption and unethical conduct and identify any systemic weaknesses and recurring risks; maintain records of the outcomes of the allegations of corruption and unethical conduct; and refer allegations of corruption to the relevant law enforcement agency and investigate whether disciplinary steps must be taken against any employee of the department and if so, institute such disciplinary action.

Ethics Officers should also be mentioned here. The PSR, 2016 requires departments to designate ethics officers to promote integrity and ethical behavior, advise employees on ethical matters and identify and report unethical behaviour and corrupt activities. The PSR, 2016 further stipulates the functions of ethics officers in the departments.

Department Heads must also establish ethics committees to provide oversight of ethics management in the department.

The Public Service Code of Conduct includes requirements for employees in the public service to report unethical conduct, corruption and non-compliance with the Public Service Act, 1994 and the Public Service Regulations, 2016. Section 34 of the PRECCA also contains a reporting requirement.

Protections for reporting persons under the Protected Disclosure Act, 2000 and Witness Protection Act, 1998 would be strengthened under the national anti-corruption strategy. Other relevant measures include the National Anti-Corruption Hotline (0800 701 701) and the Special

Investigating Unit whistleblower hotline.

In the response under article 5, South Africa states that one of the reasons for the adoption of the NACS was that “the current whistle-blowing legislation provides limited protection and is perceived to be inadequate.” It is noted in this context that the PDA deals with protection against occupational detriment, which means protection against victimization and reprisal in the work context. In terms of the Act, when a whistleblower is faced with occupational detriment, he can approach the court for protection. However, the PDA does not provide a specific role for any institution other than the court to provide protection against occupational detriment or to investigate cases of victimization. The Act does not make provisions for protection against physical harm. If a whistleblower experiences physical harm, the expectation is that he/she can approach the police for protection. The burden for obtaining protection is on the whistleblower. The NACS proposes for the establishment of a body to oversee the implementation of the PDA. The same body will be required to provide for protection against victimization. This proposal will require some amendment of PDA.

**It is recommended that South Africa continue to promote awareness and knowledge of key measures and systems to facilitate the reporting by public officials of acts of corruption, and of available protection measures.**

*Paragraph 5 of article 8*

*5. Each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

Various categories of public officials in the public sector are required to disclose their financial interests as follows:

Categories of public officials required to disclose their financial interests	Members of Parliament	Members of the Executive	Municipal Councillors	Public Service employees	Senior Managers in the municipalities
Objectives of the disclosure	<input type="checkbox"/> <input type="checkbox"/> Prevention of conflict of	<input type="checkbox"/> <input type="checkbox"/> Prevention of conflict of	<input type="checkbox"/> <input type="checkbox"/> Prevention of conflict of	Prevention of conflict of	Management of conflict of



systems	interests <input type="checkbox"/> <input type="checkbox"/> Promotion of transparency	interests <input type="checkbox"/> <input type="checkbox"/> Promotion of transparency	interests <input type="checkbox"/> <input type="checkbox"/> Promotion of transparency	interests	interest
Frequency of the declarations	<input type="checkbox"/> <input type="checkbox"/> The first disclosure must be within 60 days of the opening of Parliament or appointment as a Member. <input type="checkbox"/> <input type="checkbox"/> Thereafter annually or as determined by the Ethics Committee	<input type="checkbox"/> <input type="checkbox"/> The first disclosure must be within 60 days of the appointment as a Member. <input type="checkbox"/> <input type="checkbox"/> Thereafter annually	<input type="checkbox"/> <input type="checkbox"/> First disclosure must be made within 60 days of becoming a councillor <input type="checkbox"/> <input type="checkbox"/> Any change will be declared annually	<input type="checkbox"/> <input type="checkbox"/> The first disclosure must be done within 30 days of assumption of duty as a designated employee <input type="checkbox"/> <input type="checkbox"/> Thereafter annually	<input type="checkbox"/> <input type="checkbox"/> The first disclosure must be done within 60 days after appointment <input type="checkbox"/> <input type="checkbox"/> Thereafter annually after commencement of the new financial year of the municipality.
Method of disclosure	Paper (planning to move to an electronic system)	Paper - (planning to move to an electronic system)	Paper	Electronic, using the eDisclosure system	Paper
Declaration for family members	Yes. Information is filed on the confidential part of the register.	Yes. Information is filed on the confidential part of the register.	No.	Not at the moment. Section 9 of the Public Administration Management Act 2014 will require designated employees to disclose financial interests of their spouses and persons living with them as if they were married. The section is not yet in operation.	Municipal staff members are affected by the Public Administration Management Act, 2014. So, section 9 of this Act will apply to them. Section 9 will require designated employees to disclose financial interests of spouses and persons living with them as if they were married. The section is not yet in operation.
Information to be disclosed	(a) shares and other financial interests in companies and other corporate entities; (b) remunerated employment outside Parliament; (c) directorships and partnerships; (d) consultancies; (e) sponsorships; (f) gifts and hospitality from	1. shares and other financial interests in companies and other corporate entities; 2. sponsorships; 3. gifts and hospitality other than that received from a spouse or permanent companion or family member; 4. Benefits; 5.	(a) shares and securities in any company; (b) membership of any close corporation; (c) interest in any trust; (d) directorships; (e) partnerships; (f) other financial interests in any business undertaking; (g) employment and remuneration;	a) Shares, loan accounts or any other form of equity in a registered private or public companies and other corporate entities recognised by law b) Income-generating assets c) Trusts d) Directorships and partnerships: e) Remunerated	a) Shares, securities and other financial interests; b) Interest in a trust; c) Membership, directorships and partnerships; d) Remunerated work outside the Municipality; e) Consultancies, retainerships and relationships; f) Subsidies, grants

	<p>a source other than a family Member or permanent companion; (g) any other benefit of a material nature; (h) foreign travel (other than personal visits paid for by the Member, business visits unrelated to the Member's role as a public representative and official and formal visits paid for by the state or the Member's party); (i) ownership and other interests in land and property; and (j) pensions.</p>	<p>Foreign travel other than personal visits paid for by the member, or official travel paid for by the state, or travel paid for by the member's party; 6. Land and immovable property, including land or properly outside South Africa; and 7. Pensions.</p>	<p>(h) interest in property; (i) pension; and (j) subsidies, grants and sponsorships by any organisation. (k) Gifts received by a councillor above a prescribed amount</p>	<p>work outside the employee's employment in her or his department f) Consultancies and retainerships g) Sponsorships: h) Gifts and hospitality from a source, other than a family member i) Ownership and other interests in immovable property j) Vehicles.</p>	<p>and sponsorships by any organisation; g) Gifts and hospitality from a source other than a family member; and h) Land and property.</p>
Tools and advisory services	<p><input type="checkbox"/> <input type="checkbox"/> An electronic manual explaining ethical concepts  <input type="checkbox"/> <input type="checkbox"/> The Joint Committee on Ethics and Members' Interests serves as an advisory and consultative body, both generally and to Members, concerning the implementation and interpretation of the Code</p>			<p><input type="checkbox"/> <input type="checkbox"/> Explanatory manual on details of interests to be disclosed  <input type="checkbox"/> <input type="checkbox"/> Department Administrators  <input type="checkbox"/> <input type="checkbox"/> Ethics Officers in departments  <input type="checkbox"/> <input type="checkbox"/> Support from the Department of Public Service and Administration</p>	
Verification				<p><input type="checkbox"/> <input type="checkbox"/> The PSC is responsible for verification of the disclosed interests by SMS members  <input type="checkbox"/> <input type="checkbox"/> The HOD is responsible for verification of disclosed interests by other categories of</p>	

				designated employees <input type="checkbox"/> <input type="checkbox"/> Verification is done electronically against the companies register, Deeds register and vehicle register.	
Sanctions for non-compliance	(i) a reprimand; (ii) a fine not exceeding the value of 30 days' salary; (iii) a reduction of salary or allowances for a period not exceeding 15 days; or (iv) the suspension of privileges or a Member's right to a seat in Parliamentary debates or committees for a period not exceeding 15 days.	The Public Protector must investigate breach of the code of ethics on receipt of a complaint.	(a) a formal warning to the councillor; (b) reprimand the councillor; (c) request to the MEC for local government in the province to suspend the councillor for a period; (d) fine the councillor; and (e) request to the MEC to remove the councillor from office.	Failure to disclose financial interest is a misconduct. The Executive Authorities and Heads of Departments have to take disciplinary action against such employees. Depending on the severity of the transgression, sanctions include: <input type="checkbox"/> <input type="checkbox"/> A final written warning; <input type="checkbox"/> <input type="checkbox"/> Suspension without pay; <input type="checkbox"/> <input type="checkbox"/> Demotion as an alternative to dismissal; and <input type="checkbox"/> <input type="checkbox"/> Dismissal.	Failure to disclose benefits is a breach of contract and must be dealt with in terms of the Code of Conduct for Municipal Staff, read in conjunction with the Disciplinary Regulations.

Table 4: Categories of public officials and the requirements for financial disclosures

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

Examples of implementation

1. Electronic implementation of the eDisclosure system in the public service (refer to article 5, paragraph 2 (figure 1));
2. Fact sheets / reports by the Public Service Commission

The Public Service Commission issues fact sheets / reports on the implementation of the financial disclosure framework in the public service e.g.

Overview of the implementation of the financial disclosure framework: Financial year 2015/2016: <http://www.psc.gov.za/documents/reports/2017/Overview%20of%20the%20Implementation%20of%20theFinancial%20Disclosure%20Framework%20Financial%20Year%202015%202016%202.pdf>

Factsheet on actions taken by the Executive Authorities with regard to identified cases of potential conflict of interests and compliance with the financial disclosure framework, 2013:

<http://www.psc.gov.za/documents/reports/2014/Report%20on%20Actions-LR.pdf>

PSC “*Overview of the Implementation of the Financial Disclosure Framework for the 2018/2019 Financial Year*” (March 2020) (copy provided).

*(b) Observations on the implementation of the article*

South Africa’s financial disclosure requirements encompass a comprehensive range of public officials. The disclosure systems are guided by clearly defined objectives, clear reporting requirements and sanctions for non-compliance. Training and available guidelines have been issued for all but the members of the executive.

While the PSC and HOD are responsible for verification of the disclosed interests by public service employees – with verification done electronically against the companies register, Deeds register and vehicle register, there is no systematic verification of disclosures in the case of members of parliament and the executive.

It is noted that the method of disclosure for Members of Parliament and Members of the Executive is paper-based with plans to move to an electronic system, while public service employees are already using the Electronic eDisclosure system. In this context, the authorities reported that the eDisclosure system for Members of Parliament and Members of the Executive could not be implemented in 2020 given the reporting timeframe (disclosures by Members of the Executive are made in May), but progress has been made regarding the amendment of the Executive Ethics Code to allow the use of an electronic reporting system. Preparation of the eDisclosure system is almost complete, pending the finalisation of the reporting forms under the amended Executive Ethics Code.

A need for regulations to enable the implementation of section 9 of the PAMA pertaining to declarations for family members of public service employees was further reported. The Department of Public Service and Administration is in the process of developing the regulations to implement this section of the Act. Public consultations on the regulations have already taken place and the DPSA is currently considering the submissions to finalise the regulations.

**Based on the information provided, it is recommended that South Africa adopt the necessary regulations to implement section 9 of the PAMA pertaining to disclosures of interests of family members of public service employees; provide training and guidelines on disclosure requirements for members of the executive; and endeavour to establish a system for verification of disclosures by members of parliament and the executive.**

**It is further recommended, as noted under article 7(4) of the Convention, that South Africa endeavour to expand disclosure requirements for members of the National Assembly and members of the Executive to include non-financial, non-business interests from which a conflict of interest may arise.**

*Paragraph 6 of article 8*

*6. Each State Party shall consider taking, in accordance with the fundamental principles of its domestic law, disciplinary or other measures against public officials who violate the codes or standards established in accordance with this article.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

Category of public officials	Members of Parliament	Members of the Executive	Municipal Councillors	Public service employees	Municipal staff members
Outline of disciplinary process	<p>□□The Committee, acting on its own or on a complaint by any person through the Office of the Registrar, may investigate any alleged breach by a Member of this Code. □□The Committee may determine its own procedure when investigating any alleged breach but must at least hear the complainant and the Member against whom the complaint is lodged. □□If the matter concerns a registrable interest recorded in the confidential part of the Register or which is regarded as confidential by the Committee, the proceedings of the Committee may be held in closed session.</p>	<p>1. In terms of section 3 of the Executive Members' Ethics Act, 1998, the Public Protector must investigate alleged breach of the code of ethics on receipt of a complaint. 2. The Public Protector must submit a report on the alleged breach of the code of ethics within 30 days of receipt of the complaint to the relevant authority (the President or the Premier) □□The President must within a reasonable time, but not later than 14 days after receiving a report on: i) a Cabinet member or Deputy Minister, submit a copy of the report and any comments thereon together with a report on any action taken or to be taken in regard thereto, to the National Assembly. ii) the Premier, must submit a copy of the report and any comments</p>	<p>A municipal council may: a) investigate and make a finding on any alleged breach of a provision of the Code; or b) establish a special committee to- (i) investigate and make a finding on any alleged breach of the Code; and (ii) make appropriate recommendations to the council.</p>	<p>Any breach of a code is handled in accordance to the Public Service Disciplinary Code and procedures (see Annexure A to PSCBC Resolution 2 of 1999: Disciplinary Code and Procedures). As such, a person will be charged for misconduct and a disciplinary hearing will be conducted, and based on a scale of probability, a verdict will be given.</p>	<p>Breaches of the Code must be dealt with in terms of the disciplinary procedures of the municipality envisaged in section 67(1)(h) of this Act. Have municipalities adopted policies on disciplinary procedures?</p>

		<p>thereon to the National Council of Provinces.</p> <p><input type="checkbox"/><input type="checkbox"/>The Premier must within a reasonable time, but not later than 14 days after receiving a report on a member of the provincial executive, submit a copy of the report and any comments thereon, together with a report on any action taken or to be taken in regard thereto, to the provincial legislature.</p>			
Sanctions for non-compliance	<p>a) a reprimand; b) a fine not exceeding the value of 30 days' salary; c) a reduction of salary or allowances for a period not exceeding 15 days; or d) a suspension of privileges or a Member's right to a seat in Parliamentary debates or committees for a period not exceeding 15 days.</p>		<p>If the council or a special committee finds that a councillor has breached a provision of the Code, the council may-</p> <p>a) issue a formal warning to the councillor; b) reprimand the councillor; c) request the MEC for local government in the province to suspend the councillor for a period; d) fine the councillor; and e) request the MEC to remove the councillor from office.</p>	<p>Depending on the severity of the transgression, sanctions include:</p> <p><input type="checkbox"/><input type="checkbox"/>A final written warning;</p> <p><input type="checkbox"/><input type="checkbox"/>Suspension without pay for a period not exceeding 3 months;</p> <p><input type="checkbox"/><input type="checkbox"/>Demotion as an alternative to dismissal; and</p> <p><input type="checkbox"/><input type="checkbox"/>Dismissal.</p> <p>In terms of the Labour Law, an employee may appeal to the CCMA.</p>	Not indicated.

Table 5: Sanctions for non-compliance

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

Please refer to the examples listed under article 7(4).

*(b) Observations on the implementation of the article*

The provision is implemented.

*(c) Challenges, where applicable*

**Please outline actions required to ensure or improve the implementation of the article under review and describe any specific challenges you might be facing in this respect.**

None.

*(d) Technical assistance needs*

No assistance would be required

**Is any technical assistance already being provided to you? If so, please provide a general description of the nature of the assistance, including donor information.**

No.

## Article 9. Public procurement and management of public finances

### *Paragraph 1 of article 9*

*1. Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia:*

*(a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;*

*(b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;*

*(c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;*

*(d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed;*

*(e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Responses

*All Organs of State*

- Section 217(1) of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) (herein after referred to as the Constitution) requires that; “When an organ of state in the national provincial or local sphere of government or institution identified in national legislation, contracts for goods or services, it must do so with a system which is fair, equitable, transparent, competitive and cost-effective.” <https://www.gov.za/sites/default/files/images/a108-96.pdf>

*Department, trading entity or constitutional institution*

- Section 38(1)(a)(iii) of the Public Finance Management Act, 1999 (Act No.1 of 1999) (herein after referred to as the PFMA) places a duty on “the accounting officer for a department, trading entity or constitutional institution *must* ensure that that department, trading entity or constitutional institution has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective” <http://www.treasury.gov.za/legislation/PFMA/act.pdf>.
- Section 51(1)(a)(iii) of the PFMA further requires that “An accounting authority for a public entity *must* ensure that that public entity has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;” <http://www.treasury.gov.za/legislation/PFMA/act.pdf>.

*Municipalities and Municipal Entities*

- Section 65 (2)(i) of the Municipal Finance Management Act, 2003 (Act no. 56 of 2003). (Herein after referred to as the MFMA) “The accounting officer must for the purpose of subsection (1) take all reasonable steps to ensure that the municipality’s supply chain management policy referred to section 111 is implemented in a way that is fair, equitable, transparent, competitive and cost-effective” <http://mfma.treasury.gov.za/Pages/Default.aspx>

*Article 9(1) (a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenders sufficient time to prepare and submit their tenders*

Criteria for establishing sufficient time for potential tenders to prepare and submit their tenders:

MEANS BY WHICH INVITATIONS ARE PUBLISHED AND MANNER OF APPLICATION

- SCM Instruction Note 4A of 2016/2017 - Central Supplier Database - CSD.
- Treasury Regulation (“TR”) 16A.6.3(c) “Bids are advertised in at least the Government



Tender Bulletin for a minimum period of 21 days before closure, except in urgent cases when bids may be advertised for such shorter period as the accounting officer or accounting authority may determine;" Treasury Regulations Published under GNR 27388 of 15 March 2005, in terms of Section 76 of the Public Finance Management Act, 1999 (PFMA) (Act 1 of 1999).

- "A supply chain management policy of the municipality must determine the procedure for the procurement of goods or services through written or verbal quotations or formal written price quotations, and must stipulate that all requirements in excess of R30 000 (VAT included) that are to be procured by means of formal written price quotations must, in addition to the requirements of regulation 17, be advertised for at least seven days on the website and an official notice board of the municipality or municipal entity;" Municipal Supply Chain Management Regulations 18(a) GenN868 in GG 27636 Dated 30 May 2005, in terms of Section 168 of the Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003) (MFMA)

- "Bids are advertised in at least the Government Tender Bulletin for a minimum period of 21 days before closure, except in urgent cases when bids may be advertised for such shorter period as the accounting officer or accounting authority may determine;" Regulations 16A6.3(c), GNR 27388 dated March 2005, in terms of Section 76 of the Public Finance Management Act, 1999 (PFMA) (Act 1 of 1999).

- "A supply chain management policy must determine the procedure for the procurement of goods or services through written or verbal quotations or formal written price quotations, and must stipulate that all requirements in excess of R30 000 (VAT included) that are to be procured by means of formal written price quotations must, in addition to the requirements of regulation 17, be advertised for at least seven days on the website and an official notice board of the municipality or municipal entity;" Municipal Supply Chain Management Regulations 18(a) GenN868 in GG 27636 Dated 30 May 2005, in terms of Section 168 of the Local Government: Municipal Finance Management Act, 2003 (Act 56 of 2003) (MFMA)

- "Public invitation for competitive bids - A supply chain management policy must determine the procedure for the invitation of competitive bids, and must stipulate that any invitation to prospective providers to submit bids must be by means of a public advertisement in newspapers commonly circulating locally, the website of the municipality or municipal entity or any other appropriate ways (which may include an advertisement in the Government Tender Bulletin);

Municipal Supply Chain Management Regulations 22 (1)(b)(i) GenN in GG 27636 dated 30 May 2005, in terms of the Local Government: Municipal Finance Management Act, 2003 (Act 56 of 2003)

- Bid opportunities are also advertised on the Office of the Chief Procurement Officer website in line with SCM Instruction Note 2 of 2016/2017

- Information relating to procurement procedures and contracts are publicly distributed and available

- OCPO e-tender portal: <http://www.etenders.gov.za/>

- Central Supplier Database: <https://secure.csd.gov.za/>

The means by which procurement decisions are announced and published

- TR16A6.3(d), “Awards are published in the Government Tender Bulletin and other media by means of which the bids were advertised; “Regulations 16A6.3(d), GNR.225 in GG 27388 dated 15 March 2005, in terms of Section 76 of the PFMA.

- “The accounting officer of a municipality must place on the website referred to in section 21A of the Local Government: Municipal Systems Act, 2011, the following documents of the municipality:" Section 75(1)(g) of the Local Government: Municipal Finance Management Act, 2003.

*Article 9(1) (b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication*

The means by which procurement decisions are announced and published

- “Awards are published in the Government Tender Bulletin and other media by means of which the bids were advertised; “Regulations 16A6.3(d), GNR.225 in GG 27388 dated 15 March 2005, in terms of Section 76 of the PFMA.

- “The accounting officer of a municipality must place on the website referred to in section 21A of the Municipal Systems Act the following documents of the municipality:" Section 75(1)(g) of the Local Government: Municipal Finance Management Act, 2003.

Criteria used for determining conditions for participation in an invitation to tender, including selection and award criteria as well as tendering rules, and any weight given to a particular criterion (such as price)

- “Any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender; Any goals contemplated in subsection 1(e) must be measurable, quantifiable and monitored for compliance. Section 1 (1)(e) and section 2 of the Preferential Procurement Policy Framework Act, 2000 (Act 5 of 2000),” Regulations 3 of the Preferential Procurement Regulations, 2011

Permissible grounds for the rejection of tenders

- “The accounting officer or accounting authority must check the National Treasury’s database prior to awarding any contract to ensure that no recommended bidder, nor any of its directors, are listed as companies or persons prohibited from doing business with the public sector; reject any bid from a supplier who fails to provide written proof from the South African Revenue Service that that supplier either has no outstanding tax obligations or has made arrangements to meet outstanding

tax obligations; reject a proposal for the award of a contract if the recommended bidder has committed a corrupt or fraudulent act in competing for the particular contract;” Regulations 16A9.1(c)(d) and (e), GNR.225 in GG 27388 dated 15 March 2005, in terms of section 76 of the PFMA

- “The accounting officer or accounting authority -  
(a) may disregard the bid of any bidder if that bidder, or any of its directors -  
(i) have abused the institution’s supply chain management system  
(ii) have committed fraud or any other improper conduct in relation to such system; or  
(iii) have failed to perform on any previous contract;” Regulations 16A9.2(a), GNR.225 in GG 27388 dated 15 March 2005, in terms of section 76 of the PFMA
  
- “A supply chain management policy must provide measures for the combating of abuse of the supply chain management system, and must enable the accounting officer to reject any bid from a bidder (i) if any municipal rates and taxes or municipal service charges owed by that bidder or any of its directors to the municipality or municipal entity, or to any other municipality or municipal entity, are in arrears for more than three months; or who during the last five years has failed to perform satisfactorily on a previous contract with the municipality or municipal entity or any other organ of state after written notice was given to that bidder that performance was unsatisfactory; to reject a recommendation for the award of a contract if the recommended bidder, or any of its directors, has committed a corrupt or fraudulent act in competing for the particular contract;”
  
- “Reject the bid of any bidder if that bidder or any of its directors - (i) has abused the supply chain management system of the municipality or municipal entity or has committed any improper conduct in relation to such system; has been convicted for fraud or corruption during the past five years; has willfully neglected, reneged on or failed to comply with any government, municipal or other public sector contract during the past five years; or has been listed in the Register for Tender Defaulters In terms section 29 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004) (PRECCA). Municipal Supply Chain Management Regulations 38(1)(d),(e), and (g) GenN 868 in terms of section 168 of the MFMA.”
  
- “A court convicting a person of an offence contemplated in section 12 or 13 may, in addition to imposing any sentence contemplated in section 26, issue an order that- (i) the particulars of the convicted person; (ii) the conviction and sentence; and (iii) any other order of the court consequent thereupon, be endorsed on the Register.” Section 28(3)(a) of the PRECCA.

*Article 9(1) (c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures.*

Rules that allow for the use of procurement methods other than open tender procedures

- Section 79 of the PFMA: “The National Treasury may on good grounds approve a departure from a treasury regulation or instruction or any condition imposed in terms of this Act and must promptly inform the Auditor-General in writing when it does so.”

- TR16A.6.4: If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority. The accounting officer or accounting authority may opt to participate in transversal term contracts facilitated by the relevant treasury. Should the accounting officer or accounting authority opt to participate in a transversal contract facilitated by the relevant treasury, the accounting officer or accounting authority may not solicit bids for the same or similar product or service during the tenure of the transversal term contract.
- TR16A.6.5 “The accounting officer or accounting authority may opt to participate in transversal term contracts facilitated by the relevant treasury. Should the accounting officer or accounting authority opt to participate in a transversal contract facilitated by the relevant treasury, the accounting officer or accounting authority may not solicit bids for the same or similar product or service during the tenure of the transversal term contract.”
- TR16A.6.6: “The accounting officer or accounting authority may, on behalf the department, constitutional institution or public entity, participate in any contract arranged by means of a competitive bidding process by any other organ of state, subject to the written approval of such organ of state and the relevant contractors.” Regulations 16A6.4 - 6 GNR.225 in GG27388 dated 15 March 2005, in terms of section 76 of the PFMA.
- "A supply chain management policy may allow the accounting officer to procure goods or services for the municipality or municipal entity under a contract secured by another organ of state, but only if: (a) the contract has been secured by that other organ of state by means of a competitive bidding process applicable to that organ of state; (b) the municipality or entity has no reason to believe that such contract was not validly procured; (c) there are demonstrable discounts or benefits for the municipality or entity to do so; and (d) that other organ of state and the provider have consented to such procurement in writing" (Municipal Supply Chain Management Regulations 36, General Notice. N 868 in GG27636 (30 May 2005), in terms of the MFMA).
- “A supply chain management policy may allow the accounting officer: (a) to dispense with the official procurement processes established by the policy and to procure any required goods or services through any convenient process, which may include direct negotiations, but only - (i) in an emergency; (ii) if such goods or services are produced or available from a single provider only (iii) for the acquisition of special works of art or historical objects where specifications are difficult to compile; (iv) acquisition of animals for zoos; or (v) in any other exceptional case where it is impractical or impossible to follow the official procurement processes;” Municipal Supply Chain Management Regulations 36, GenN 868 in GG27636 (30 May 2005), in terms of the MFMA.
- “Should it be impractical to invite competitive bids for a specific procurement, eg. In urgent or emergency cases or in case of a sole supplier, the accounting officer / authority may procure the required goods or services by other means, such as price quotations or negotiations in accordance with Treasury Regulation 16A6.4.

The reasons for deviating from inviting competitive bids should be recorded and approved by the accounting officer / authority or his / her delegate.

The accounting officers / authorities are required to report within ten (10) working days to the relevant treasury and the Auditor-General all cases where goods and services above the value of R 1 million (VAT inclusive) were procured in terms of Treasury Regulation 16A6.4.

The report: goods and services, the names or the suppliers, the amounts involved and the reasons for dispensing with the prescribed competitive bidding process.” SCM Practice Note 8 of 2007/2008

- “An emergency procurement may occur when there is serious and unexpected situation that poses an immediate risk to health, life, property or environment which calls an agency to action and there is insufficient time to invite competitive bids” SCM Instruction Note 3 of 2016/2017

Procedures that allow for changes in the tendering rules and / or selection/award criteria during the procuring process

- No SCM rules allow for the changes in tendering rules; selection; award criteria during the procuring process.
- The Preferential Procurement Policy Framework Act, section 2(1)(f) and Regulation 2017, section (6)(9).
- Central Supplier Database an E-Tender portal were implemented in 2016 for ease of access and transparency, for publishing of bids and award to the public.

Appointment letters are issued to personnel responsible for evaluation and award of bids. Completion of documents including declaration of interest is mandatory to all bid committees

INDICATE WHETHER AND TO WHAT EXTENT THERE IS A THRESHOLD VALUE THAT MUST BE REACHED FOR THE PROCUREMENT SYSTEM TO APPLY

Procurement Thresholds

- TR16A.6.1: “Procurement of goods and services, either by way of quotations or through a bidding process, must be within the threshold values as determined by National Treasury” [http://www.treasury.gov.za/legislation/pfma/regulations/gazette\\_27388.pdf](http://www.treasury.gov.za/legislation/pfma/regulations/gazette_27388.pdf)
- National Treasury Practice Note 8 of 2007/2008 (Issued in terms of Section 76(4)(c) of the Public Finance Management Act, “PFMA”) [http://www.treasury.gov.za/divisions/ocpo/sc/PracticeNotes/Practice%20note%20SCM%208%20of%202007\\_8.pdf](http://www.treasury.gov.za/divisions/ocpo/sc/PracticeNotes/Practice%20note%20SCM%208%20of%202007_8.pdf)

*Up to Transactional Value of R 2000 (Vat Included)*

- Accounting Officer / Authority may procure without inviting competitive bids or price quotations from Petty Cash

*Above the Transactional Value of R 2000 But Not Exceeding R 10 000 (Vat Included)*

- Accounting Officer / Authority may procure by obtaining at least three (3) verbal or written quotations from, where applicable from list prospective suppliers.

*Above the Transactional Value of R 10 000 But Not Exceeding R 500 000 (Vat Included)*

- Accounting Officer / Authority should invite written quotations from as many suppliers as possible that are registered on the list prospective suppliers.

*Above the Transaction Value of R 500 000 (Vat Included)*

- Accounting Officer / Authority should invite competitive bids for all procurement above R 500 000

- Procurement Thresholds

Local Government: Municipal Finance Management Act, 2003 and Municipal Supply Chain Management Regulations. In terms of regulation 12, Range of procurement processes

<http://mfma.treasury.gov.za/RegulationsandGazettes/Gazette27636/Documents/Supply%20Chain%20Management%20Regulations%20%E2%80%93%20Gazette%2027636,%2030%20May%202005.pdf>

*Up to Transactional Value of R 2000 (Vat Included)*

- Accounting Officer / Authority may direct that verbal or written quotations be obtained for a transaction value lower than R2 000

*Above the Transactional Value of R 2000 But Not Exceeding R 10 000 (Vat Included)*

- Accounting Officer / Authority may direct that formal written quotations be obtained for a transaction value lower than R10 000

*Above the Transactional Value of R 10 000 But Not Exceeding R 200 000 (Vat Included)*

- Accounting Officer / Authority may direct that a competitive bidding process be flowed for a transaction value lower than R200 000

*Above the Transaction Value of R 200 000 (Vat Included)*

- No requirement for goods or services may deliberately be split into parts or items of a lesser value to dispense with competitive bidding process

SCM Practice Note 8 of 2007/2008

*Article 9(1) (d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed*

Procedures, rules and regulations for review of the procurement process, including the system of appeal and any available legal recourse or remedies

- Section 33 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) “Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. National legislation must be enacted to give effect to these rights, and must provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; impose a duty on the state to give effect to the rights in subsections (1) and (2); and promote an efficient administration.”

- Section 6 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) “Judicial review of administrative action. Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action”

- Section 62 of the Municipal Systems Act, 2000 (Act No. 32 of 2000), “Appeals. A person whose rights are affected by a decision taken by a political structure, political office bearer, councillor or staff member of a municipality in terms of a power or duty delegated or sub-delegated

by a delegating authority to the political structure, political office bearer, councillor or staff member, may appeal against that decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the date of the notification of the decision”

- Regulation 49, Municipal Supply Chain Management Regulations: “Objections and complaints. The supply chain management policy of a municipality or municipal entity must allow persons aggrieved by decisions or actions taken by the municipality or municipal entity in the implementation of its supply chain management system, to lodge within 14 days of the decision or action a written objection or complaint to the municipality or municipal entity against the decision or action.”

*Article 9(1) (e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements*

Selection of personnel responsible for procurement, including declarations of interest and potential conflicts in particular cases (manner and required disclosures), screening procedures and training requirements (at induction and ongoing) and curricula

- TR16A8.4(a)(b) “If a supply chain management official or other role player, or any close family member, partner or associate of such official or other role player, has any private or business interest in any contract to be awarded, that official or role player must - disclose that interest; and withdraw from participating in any manner whatsoever in the process relating to that contract”
- Regulation 46, Municipal Supply Chain Management Regulations:” An official or other role player involved in the implementation of the supply chain management policy of the municipality or municipal entity - must declare to the accounting officer details of any reward, gift, favor, hospitality or other benefit promised, offered or granted to that person or to any close family member, partner or associate of that person; must immediately withdraw from participating in any manner whatsoever in a procurement or disposal process or in the award of a contract in which that person, or any close family member, partner or associate, has any private or business interest;
- All officials who participate in the procurement policies have to declare their interests. This means that even those who do not have interests should declare such.
- Each State department and local government is responsible for training of its Procurement officials. National Treasury issues guidelines.

Departments and municipalities employ their own staff following their human resource policies and procedures.

#### Public Procurement Reform in South Africa:

In 2013, South Africa established the position of the Chief Procurement Officer within the National Treasury with the principal mission to monitor and evaluate public procurement performance in government and ensure greater efficiency and transparency, while modernizing the system.

The draft Procurement Bill has been published for comments up until 30 June 2020 ([https://www.gov.za/sites/default/files/gcis\\_document/202002/bill-b-2020-finance2.pdf](https://www.gov.za/sites/default/files/gcis_document/202002/bill-b-2020-finance2.pdf)). The draft Bill proposes a single regulatory framework for public procurement which will apply to national, provincial and local government, as well as state owned entities. The draft Bill further advocates for the establishment of a Public Procurement Regulator whose functions should include:

- (i) develop, promote and support the training and professional development of officials involved in procurement;
- (ii) encourage institutions to engage procurement professionals in their procurement units;
- (iii) promote and ensure the integrity of the procurement system and monitor and integrate revisions and learning in procurement from institutions with oversight of the procurement system; and
- (iv) develop and implement measures to ensure transparency in the procurement process and promote public involvement in the procurement policies of institutions.

The Regulator may require institutions to:

- (i) publish information on their procurement proceedings; and
- (ii) allow the public to observe institutions' adjudication processes for procurement above the prescribed threshold, unless for national security reasons the institution is permitted by the Regulator not to allow the public to observe in a specific matter.

Measures to ensure the integrity of the procurement process include sanctions in the form of debarment and criminal offences. Chapter 3 of the draft Bill prescribes measures for integrity in procurement, with which officials, bidders, suppliers, members of the Tribunal and any other person involved in procurement in terms of this Act must comply.

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

Examples of implementation

Cases that were reviewed

- Steenkamp No V Provincial Tender Board, Eastern Cape 2007 3 SA 121 CC
- Loliwe CC t/a Vusumuzi Environmental Services vs City of Cape Town, Chairperson of the BAC and three others (HCT) 2012 3791
- TEB Properties CC v MEC, Department of Health and Social Development, North West, Unreported Case (2011) ZASCA 243, 1 December 2011
- In Chief Executive Officer, SA Social Security Agency NO & others v Cash Paymaster Services (Pty) Ltd (2011) 3 All SA 23 (SCA)
- Viking Pony Africa Pumps (Pty) Ltd vs Hydro Tech Systems (Pty) Ltd and City of Cape Town (CC) 2010 21.
- Millenium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province, 2008(2) SA 481 (SCA)
- Tetra Mobile Radio (Pty)Ltd 2000 (4) SA 413 (SCA) 2006 482
- Premier, Free State v Firechem Free State (Pty) Ltd SA 413 (SCA)
- Example of a tender bulletin provided.

*(b) Observations on the implementation of the article*

Public finance management and procurement legislation in the public sector include the Public



Finance Management Act, 1999 (updated April 2010) (PFMA), which covers national and provincial departments and public entities and SOEs, and the Municipal Finance Management Act, 2003 (MFMA), which covers local government. The Acts provide for instances where the National Treasury may investigate non-compliance with the Acts, and in what way it may take steps to remedy such situations. The Acts also outline the responsibilities of “accounting officers”, i.e. the heads of departments in the case of national and provincial governments, the municipal managers in the case of local government, and the Chief Executive Officer in the case of a public entity.

The Office of the Chief Procurement Officer in the national Treasury manages procurement reforms, maintains the procurement system and oversees government business with the private sector.

The PFMA requires government departments to each develop and implement a Fraud Prevention Plan. According to the Act, fraud prevention plans have to be included in the risk management strategies of government bodies. The MFMA introduces risk management and fraud prevention as statutory requirements in local authorities.

South Africa employs a decentralised procurement system. The Preferential Procurement Policy Framework Act, 2000 sets out the framework for procuring entities to establish measurable specifications and conditions in accordance with which tenders can be evaluated and accepted. By requiring the use of objective criteria, the Act aims to limit discretion, strengthen controls and improve monitoring of areas or processes vulnerable to corruption. Any specific goal for which a point may be awarded must be clearly specified in the invitation to submit a tender, and any goals must be measurable, quantifiable and monitored for compliance. No SCM rules allow for the changes in tendering rules, selection, and award criteria during the procuring process.

All contracts above R500,000 are subject to a competitive bidding process.<sup>12</sup> Should it be impractical to invite competitive bids for a specific procurement, e.g. in urgent or emergency cases or in case of a sole supplier<sup>13</sup>, the accounting officer or accounting authority may procure the required goods or services by other means, such as price quotations or negotiations, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority, in accordance with Treasury Regulation 16A6.4. The accounting officers/authorities are required to report within ten (10) working days to the relevant treasury and the Auditor-General all cases where goods and services above the value of R 1 million (VAT inclusive) were procured in terms of Treasury Regulation 16A6.4. In accordance with Section 79 of the PFMA, “The National Treasury may on good grounds approve a departure from a treasury regulation or instruction or any condition imposed in terms of this Act and must promptly inform the Auditor-General in writing when it does so.”

PFMA Regulations provide that the accounting officer or accounting authority must check the National Treasury’s database prior to awarding any contract to ensure that no recommended bidder, nor any of its directors, are prohibited from doing business with the public sector; reject any bid from a supplier who fails to provide written proof from the South African Revenue Service of tax compliance; reject a proposal for the award of a contract if the recommended bidder has committed a corrupt or fraudulent act in competing for the particular contract. An organ of state may further terminate a contract if the supplier or official committed any corrupt or fraudulent act during the bidding process or the execution of the contract (TR 16A.9.1(f)).

Pursuant to Treasury and PFMA Regulations, bids are advertised in at least the Government Tender Bulletin for a minimum period of 21 days before closure, except in urgent cases, and on the website of the Office of the Chief Procurement Officer. The processing of bids through the e-Tender portal

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<sup>12</sup> National Treasury Practice Note No. 8 of 2007/2008.

<sup>13</sup> Regulation 36(1)(a) of the Municipal Supply Chain Management Regulations.

became mandatory with effect from 1 April 2016. Awards are published in the Government Tender Bulletin and other media by means of which the bids were advertised.

Information relating to procurement procedures and contracts are publicly distributed and available through the OCPO e-tender portal and Central Supplier Database.

Procedures, rules and regulations for review and appeal of procurement decisions include Section 33 of the Constitution, 1996, section 6 of the Promotion of Administrative Justice Act, 2000, section 62 of the Municipal Systems Act, 2000 and Regulation 49, Municipal Supply Chain Management Regulations. The courts may also be approached for judicial review.

Pursuant to Treasury Regulations TR16A8.4(a)(b), if a supply chain management official or other procurement officer, or any close family member, partner or associate of such official or other role player, has any private or business interest in any contract to be awarded, that official or role player must disclose that interest and withdraw from participating in any manner whatsoever in the process relating to that contract. All officials who participate in the procurement policies have to declare their interests. Members of contracting authorities are also prohibited from holding private interests in contracts with the contracting authority (Section 17(1), PRECCA).

Each State department and local government is responsible for training its procurement officials. National Treasury issues procurement guidelines.

- South Africa has initiated a number of reforms to the procurement system, which include: Monitoring procurement activity by departments and instituting mechanisms aimed at supporting greater transparency in the procurement process (improvements in the internal audit function, and supporting civil society's ability to monitor integrity in the SCM process).
- Supporting cooperation between the public and private sectors in support of more effective state procurement;
- Improving the professionalisation of the occupations in the SCM function, including the development of new training courses and qualifications.

Furthermore, the National Anti-Corruption Strategy provides a framework for strengthening government procurement and administrative processes to allow for greater monitoring, accountability and transparency, and to hold public officials accountable for service delivery.

South Africa is encouraged to continue these efforts, with a view to strengthening accountability and transparency and preventing corruption in the public procurement system.

**Accordingly, it is recommended that South Africa continue to strengthen government procurement and administrative processes to allow for greater monitoring, accountability, transparency and cooperation with the private sector, and to hold public officials accountable for service delivery and enhance their professionalization, in line with the objectives of the National Anti-Corruption Strategy.**

*Paragraph 2 of article 9*

*2. Each State Party shall, in accordance with the fundamental principles of its legal system, take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, inter alia:*

- (a) Procedures for the adoption of the national budget;*
- (b) Timely reporting on revenue and expenditure;*

- (c) *A system of accounting and auditing standards and related oversight;*
- (d) *Effective and efficient systems of risk management and internal control; and*
- (e) *Where appropriate, corrective action in the case of failure to comply with the requirements established in this paragraph.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Responses

*(a) Procedures for the adoption of the national budget.*

- Section 213(2) of the Constitution of the Republic of South Africa, 1996, provides that “*money may be withdrawn from the National Revenue Fund only in terms of an appropriation by an Act of Parliament or as a direct charge against that Fund, when it is provided for in the Constitution of the Republic of South Africa, 1996, or an Act of Parliament.*”
- Section 26 of the PFMA provides that “*Parliament must appropriate money for each financial year for the requirements of the State.*”
- Section 7(1) the Money Bills Amendment Procedure and Related Matters Act, 2018 (Act No. 13 of 2018), provides that “*the Minister of Finance must table the national annual budget, as set out in section 27 of the PFMA in the National Assembly at the same time as the Appropriation Bill.*”
- Section 27 of the PFMA augmented by section 7(2) of the Money Bills Amendment Procedure and Related Matters Act, 2009 sets out the minimum information that must be included in an annual budget.
- Section 4 and 5 of the Money Bills Procedure and Related Matters Act, 2009 sets out the procedure prior to the implementation of the national budget.
- Section 7, 8, 9, 10, 11, and 12 of the Money Bills Amendment Procedure and Related Matters Act, 2009 sets out the procedures for the passing of the money bills. These sections provide for the holding of public hearings on bills prior to their adoption.
- Section 28 of the PFMA sets provision for the multi-year budget. Currently RSA has a three year budget.
- The PFMA is supported by Treasury Regulations on planning (sections 5.1-5.3) and budgeting (sections 6.1-6.7) and the Money bill as stated above.
- Annually the National Treasury issues budgetary and documentary guidelines depicting what information needs to be provided to the National Treasury for the preparation of the budget and budget documentation.
- A collection tool and a guidelines are sent to the departments, which makes it possible for them to comply with budget requirements.
- The media are given access to budget documents the morning of the day that they are tabled by the Minister of Finance.

- All documents and data tables are published in the National Treasury website.
- National Treasury in conjunction with the South African Revenue Service publishes a people's guide on budget day, which brings the budget information to the general public in a simple format and in different languages.
- Relevant Treasury officials participate in discussion forums days immediately after tabling of the budget, including university outreach.
- The National budget speech is broadcast live through radio and television stations.
- The Public is invited to submit tips to the Minister of Finance in preparation for the budget speech.
- Further, engagements with Civil Society prior to the Medium Term Expenditure Committee proceedings in July/August are normally conducted.
- Municipal money and [vulekamali.gov.za](http://vulekamali.gov.za) portals launched in 2016 and 2018 respectively, provide information in a user friendly manner and enable active citizen participation.
- RSA Parliament announcements, tabling and committee reports No: 21 of 2015.

*(b) Timely reporting on revenue and expenditure.*

- Section 32(1) of the PFMA, provides “*within 30 days after the end of the month, the National Treasury must publish in the national Government Gazette a statement of actual revenue and expenditure with regard to the National Revenue Fund.*”
- Section 32(2) of the PFMA, provides “*after the prescribed period, but at least quarterly, every provincial treasury must submit to the National Treasury a statement of revenue and expenditure with regard to Revenue Fund for which that treasury is responsible, for publication in the national Government Gazette within 30 days after the end of each prescribed period.*”
- The above-mentioned publications specify the following amounts (for current and previous financial year) and compare these amounts in each instance with the corresponding budgeted amounts for the relevant financial year:
  - (i) Actual revenue for the relevant period and for the financial year up to the end of that period;
  - (ii) The actual expenditure per vote (distinguished from capital, current, transfer and subsidies and payment for financial assets) for that period and for the financial year up to the end of that period; and
  - (iii) Actual borrowings for that period and for the financial year up to the end of that period.
- The figures are provided by South African Revenue Service (SARS), Vulindlela system (that is a database of the National Departments' actual expenditure and actual departmental revenue collected). Actual borrowings are provided by National Treasury's asset & liability management division.
- These statements are submitted to Statistics South Africa (STATSSA), South African Reserve Bank (SARB), various Economists with the Country and the IMF. These statements are also available, within the prescribed timelines, on the website of the National Treasury at [www.treasury.gov.za](http://www.treasury.gov.za), click on the Communications & Media link and then Press Releases link.

Reporting Annual Financial Affairs in line with section 40 of the PFMA:

- Annual financial statements must be submitted for audit within two months after year end.
- Annual Financial Statements must be audited two months after submission and, in the case of municipalities, three months after submission.
- The annual report, audit annual financial statements and the auditor's report must be submitted to executive authority and relevant treasury within five months of year end.
- The annual report, audit annual financial statements and the auditor's report of Constitutional Institutions must be submitted to Parliament within one month of receipt by the Accounting Officer

*Responsibility for preparation:*

- Accounting Officer of the entity responsible for preparation and submission.

*Distribution of reports:*

- Auditor General for audit purposes.
- National or Provincial Treasury for consolidation.
- Subsequent to the audit, oversight such as Parliament and Legislature Available to the public on the entity's website
- Hard copy submitted to the relevant treasury and on entity website subsequent to audit.

*Applicable Accounting Frameworks:*

- Generally Recognised Accounting Practice (GRAP) issued by Accounting Standards Board (ASB) [www.asb.co.za](http://www.asb.co.za)
- Modified Cash Standard (MCS) issued by National Treasury <http://oag.treasury.gov.za/Publications/Forms/AllItems.aspx>
- International Financial Reporting Standards (IFRS) issued by International Accounting Standards Board (IASB) <https://www.ifrs.org/>

*(c) A system of accounting and auditing standards and related oversight.*

*Relevant Legislative Frameworks:*

- Section 40 of the PFMA
- National Treasury set accounting standards in modified cash environment [Modified Cash Standard (MCS)]. <https://oag.treasury.gov.za/Publications>
- Public Audit Act, 2004 (Act No. 25 of 2004). <https://www.gov.za/documents/public-audit-act>
- South African Institute of Chartered Accountants. <https://www.saica.co.za/>
- Institute of Internal Auditors. <https://www.iiasa.org.za/>
- Independent Regulatory Board for Auditors (IRBA). <https://www.irba.co.za/>
- Generally Recognised Accounting Practice (GRAP). <https://oag.treasury.gov.za/Publications>

### Capacity building

- Most Public Finance Management Practitioners are in possession of a Bachelor's degree / Diploma in Finance or Internal Audit from a recognised institution of higher learning in South Africa
- The MFMA compels municipal managers, CFOS, Heads of SCM and SCM managers to meet the competency levels. The Municipal Regulations on Minimum Competency Levels, Gazette 29967 of June 2007 as amended, prescribe the relevant minimum competency levels covering: minimum higher education qualification; minimum work related experiences; performance agreements to be signed where due; and the financial management and SCM competency levels for the respective position with a financial management responsibility, designed as a local government qualification.
- National Treasury in collaboration with the Association of Accounting Technicians (AAT) is addressing the skills shortage by developing and delivering qualifications designed for the public sector.
- A Public Sector Accounting Qualification (PSAQ) NQF level 3, is available for those individuals who do not possess the required tertiary qualifications.
- The NQF level 3 qualification is open access and does not require any specific education requirements to gain entrance to the qualification.
- The qualification progresses to NQF level 4 which requires the candidate to have grade 12 with mathematics or accounting to enrol.
- Qualifications are being developed to build on the competencies of each level and ensure sustainable progression to NQF level 7.
- The qualifications are developed in line with the Competency Framework for Financial Management (CFFM) which directs the relevant competencies of professional accountants in the public sector at each occupational role.
- The South African Qualifications Authority is the body that is responsible for the registration of qualifications, while professional bodies and Sector Education Training Authorities (SETAs) play the role quality assurance.
- The Accounting Technicians qualification is quality assured by the Finance, Accounting and other Services Sector Education and Training with the Association for Accounting playing the role of developing competencies for the occupation.

#### *Chartered Accountants:*

- National Treasury is accredited by the South African Institute of Chartered Accountants (SAICA) to train chartered accountants through its academy for the public sector.

#### *Postgraduate Accounting Qualification:*

- National Treasury with the accreditation support from the University developed a Postgraduate Qualification in Public Sector Accounting at NQF level 8. The qualification intends to equip existing finance official with advance accounting knowledge and skills in government

#### *Internal auditors:*

- Most internal Auditors employed in the public sector are registered with the Institute of Internal Auditors South Africa (IIASA).

- National Treasury is an accredited workplace provider by the IIASA to deliver the Internal Audit Technician learnership programme.
- The curriculum for internal Audit Technician and Professional Internal Auditors qualification has been revised to align with the competencies as directed by the CFFM for the public sector.

*(d) Effective and efficient systems of risk management and internal control*

Internal Audit Support

- The PFMA and MFMA require all state institutions to have effective and efficient systems of internal audit.

(i) Section 38 (1) (a) (ii) of the PFMA, provides that *“The accounting officer for a department, trading entity or constitutional institution must ensure that that department, trading entity or constitutional institution has and maintains a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77 of the PFMA.”*

(ii) Section 95 (c) (ii) of the MFMA, provides that *“The accounting officer for municipal entity is responsible for managing the financial administration of the entity, and must for this purpose take all reasonable steps to ensure that the entity has and maintains effective, efficient and transparent systems of internal audit complying with and operating in accordance with any prescribed norms and standards.”*

- The PFMA and MFMA provides for the Accounting Officer and /or officials to be charged with financial misconduct when they fail to comply with any requirement therein, including the provisions concerning risk management and internal control. Criminal charges are also applicable to Accounting Officers and Accounting Authorities.

- The time allowed for corrective actions depends on the risk identified or deficiency posed.
- Remediation progress is tracked by the executive committee of the entity in question and independently via internal audit and the audit committee.

Risk Management Support

- The PFMA and MFMA require all state institutions to have effective and efficient systems of risk management and internal control.

○ Section 38 (1) (a) (i) of the PFMA, provides that *“The accounting officer for a department, trading entity or constitutional institution must ensure that that department, trading entity or constitutional institution has and maintains effective, efficient and transparent systems of financial and risk management and internal control.”*

○ Section 95 (c) (i) of the MFMA, provides that *“The accounting officer for municipal entity is responsible for managing the financial administration of the entity, and must for this purpose take all reasonable steps to ensure that the entity has and maintains effective, efficient and transparent systems of financial and risk management and internal control.”*

- Each state institution must have a system of enterprise wide risk management, covering risks across the full spectrum of its strategy and operations.
- The Public Sector Risk Management Framework issued by the National Treasury sets out guidance on implementing enterprise wide risk management. <https://oag.treasury.gov.za/RMF>
- The majority of state institution have risk committees, operating under defined terms of

reference, which advise the Accounting Officer on risk strategy and a range of other risk related issues.

- The external auditor reviews and reports on the system of internal control and risk management.
- Accounting Officers also attest to the effectiveness of risk management and internal control in the annual report and such attestation is independently confirmed by the audit committee.
- The Department of Monitoring and Evaluation (DPME) independently monitors national and provincial government agencies' risk management and internal control maturity annually.

*(e) Where appropriate, corrective action in the case of failure to comply with the requirements established in this paragraph*

- Section 81(1)(a) of the PFMA provides that an Accounting Officer of a department shall commit an act of financial misconduct if he or she wilfully or negligently fails to comply with a requirement of:

- (i) Section 38 which deals with general responsibilities of the Accounting Officer;
- (ii) Section 39 that relates to the budgetary responsibilities of the Accounting Officer;
- (iii) Section 40 that deals with the reporting responsibilities of the Accounting Officer;
- (iv) Section 41 that requires the Accounting Officer to provide any information that the relevant treasury or the Auditor-General may so require; and
- (v) Section 42 that relates to the responsibilities of the Accounting Officer when assets and liabilities are transferred.

- In addition to the above, section 81(1)(b) of the PFMA provides that an Accounting Officer shall commit an act of financial misconduct if he or she makes or permits unauthorised, irregular or fruitless and wasteful expenditure.

- Section 81(2) of the PFMA provides that an official of the department to whom a power or duty is assigned commits an act of financial misconduct if that official wilfully or negligently fails to exercise that power or perform that duty. Section 83 of the PFMA has similar provisions related to accounting authorities of public entities.

- The type of corrective action taken against an Accounting Officer, Accounting Authority or an official is guided by the legislative prescripts in terms of which such a functionary is employed. Sanctions include the suspension, demotion or dismissal of the Accounting Officer, Accounting Authority or an official.

- There is no legislative prescript that regulates the time that is allowed for an auditee to rectify audit concerns that are raised by the Auditor-General. Notwithstanding this, the Auditor-General usually follows up on matters that arose in the prior year's audit approximately 7 months after the audit. This is usually arranged for in the management and engagement letters of the Auditor-General.

- Oversight over the improvement of audit outcomes takes place at an administrative, executive and political level. In order to ensure oversight and implementation of corrective action to improve audit outcomes, the National Treasury develops strategic support plans for all national departments that receive audit opinions that are qualified, adverse or disclaimed.

- These support plans provide an indication of the audit concerns raised by the Auditor-General



and the steps to be taken by the auditee to rectify such.

- These plans also indicate the type of support that the National Treasury will provide to assist departments in this regard.
- The National Treasury provides Cabinet, on annual basis, with a synopsis of the audit outcomes of all PFMA compliant institutions.
- Pursuant to the tabling of a Cabinet Memorandum in this regard, the Cabinet Minister responsible for a department shall be required to monitor the financial management improvement of all institutions that fall under his/her political control by closely monitoring the corrective measures to be taken to improve their audit outcomes.
- At a political level, the parliamentary committee responsible for exercising oversight over the public purse regularly engages with auditees on matters reported in their audit reports and on other matters identified during the review of their annual reports and financial statements.
- In addition, the National Treasury annually provides the Standing Committee on Public Accounts with a report on the improvement of financial management for a particular financial year. This report includes, amongst others, the audit trends that have occurred in the financial year that has passed as well as an indication of those departments that have improved or regressed in terms of the quality of their financial management.
- In terms of section 6(2)(b) of the PFMA, the National Treasury must monitor and enforce the prescripts of the legislation in all PFMA compliant institutions. To give effect to this provision, the National Treasury is in the process of developing electronic system to monitor implementation of the recommendations made by the Auditor-General to address concerns raised in the audit reports of PFMA compliant institutions.
- This system will provide for the audit concerns to be captured and where such is tracked and followed up until resolved, including providing oversight structures with progress related information.

For the local government sphere, the National Treasury is the custodian of the financial management framework.

- The MFMA is applicable to municipalities and municipal entities and contain the following provisions,
  - a) Chapter 8 on publication of in year financial information, contracts, etc. this is published on the municipal website as well as financial reports on NT website.
  - b) Chapter 11 on Supply Chain addresses procurement matters, and prohibits interference in SCM process by political office bearers
    - a. Regulations supporting Procurement issued 30 May 2005.
    - c) Chapter 12 on financial reporting, accounting and oversight reports - GRAP standards issued by the Accounting Standards Board, and other disclosure requirements issued by National Treasury.
    - d) Chapter 15 on financial misconduct, disciplinary proceedings, criminal proceedings and offences, penalties. - The Regulations on Financial Misconduct and Criminal Proceedings was issued on 30 May 2014. This is supported by MFMA Circular 76 with the above title further explaining the above - issued in 19 October 2015.
    - e) The Municipal Public Accounts Committee Guide and Toolkit issued in 2018 as well as MFMA Circular April 2018 assist with the process of Oversight and addressing the process to deal

with Unauthorised, Irregular Fruitless and Wasteful Expenditure as defined in the MFMA.

- With the exception of corrective steps to be taken in terms of the strategic support plans of national departments that received qualified, adverse, or disclaimed audit opinions, records of other corrective actions taken by the PFMA compliant institutions are not held centrally at the National Treasury but rather at institutional level.
- Information related to statistics of the time taken to implement corrective steps and sanctions imposed on transgressing employees are also maintained at institutional level in line with the ethos of the PFMA, which allows for managers to manage and to be held responsible.

Audit teams in the Office of the Auditor-General make recommendations in respect of weaknesses or the complete absence of preventative controls (including a culture of ethics and integrity) which, if not addressed appropriately and in time, could create fertile ground for corrupt practices. Although audits are not conducted with the intention to detect and report acts of corruption, the audit processes could identify indicators of corruption which are reported to the management of auditees for further investigation, in accordance with the Public Audit Amendment Act No. 5 of 2018. Failure to implement the Auditor-General's recommendations within a specified time period will lead to binding remedial action and may result in certificates of debt issued in the personal capacity of accounting officers or members of accounting authorities.

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

None.

*(b) Observations on the implementation of the article*

The provision is implemented.

South Africa has established procedures for the adoption of the national budget, which include holding public hearings on bills prior to adoption (Sections 26-28 of the PFMA; Money Bills Amendment Procedure and Related Matters Act, 2018). The measures are supported by Treasury Regulations on planning (sections 5.1-5.3) and budgeting (sections 6.1-6.7).

Measures are also in place to provide for timely reporting on revenue and expenditure (Sections 32, 40 of the PFMA). Figures are provided by South African Revenue Service and the National Treasury.

Accounting and auditing standards include provisions in the PFMA, Public Audit Act, 2004 and National Treasury Modified Cash Standards.

The PFMA and MFMA require all state institutions to have effect effective, efficient and transparent systems of financial and risk management and internal control (Section 38(1)(a) of PFMA and Section 95(c)(i) of MFMA). They further provide for accounting officers and officials to be charged with financial misconduct when they fail to comply with any requirement therein, including the provisions concerning risk management and internal control. Criminal charges are also applicable to accounting officers and accounting authorities, in particular through referrals that may be made by the Auditor General to the competent investigating authorities. The Public Sector

Risk Management Framework issued by the National Treasury sets out guidance on implementing enterprise wide risk management. The majority of state institutions have risk committees, operating under defined terms of reference, which advise accounting officers on risk strategy and other risk related issues. The external auditor reviews and reports on the system of internal control and risk management. Accounting officers also attest to the effectiveness of risk management and internal control in the annual report and such attestation is independently confirmed by the audit committee. The Department of Monitoring and Evaluation independently monitors the risk management and internal controls of national and provincial government agencies annually.

Corrective action may be taken in case of violations (Sections 81, 83 of the PFMA). External oversight is exercised by the Auditor-General.

*Paragraph 3 of article 9*

*3. Each State Party shall take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of its domestic law, to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

- In terms of section 40(1)(a) of the PFMA, the accounting officer of a department must keep full and proper records of the financial affairs of the department in accordance with any prescribed norms and standards. The prescribed norms and standards are contained in Chapter 17 of the Treasury Regulations, which provides that the accounting officer must, subject to the provisions of the relevant national or provincial legislation, retain all financial information in its original form, as follows:

(a) Information relating to one financial year - for one year after the audit reports for the financial year in question has been tabled in Parliament or the provincial legislature, or

(b) Information relating to more than one financial year - for one year after the date of the audit reports for the last of the financial years to which the information relates.

- The above regulation provides for the retention of financial information related to a specific audit period. After the expiry of the aforementioned retention periods, the information may, if required, be secured in an alternative form that ensures the integrity and reliability of the data and ensures that the information can be reproduced, if necessary, as permissible evidence in a court of law.

- The aforementioned alternate form includes the electronic preservation of records. The storage of financial information, both physically and electronically, is based on the premise that such must be stored in a manner that will ensure its integrity and to prevent any falsification of financial

information, including accounting books, records, financial statements or other documents.

- In addition to Treasury regulations, the National Archives Act, 1996 (Act No.43 of 1996) provides for, amongst others, the proper management and care of records related to governmental bodies. Paragraph 17.2.3 of the Treasury Regulations provides for the retention and disposal of financial information as follows (table 8, below):

Type of record	Year after which records can be disposed of
General ledger and cash books or similar records	15
Main transaction summary records, including general journals and transaction summaries Internal audit reports	10
System appraisal Primary evidentiary records, including copies of forms issued for value, vouchers to support payments made, pay sheet, returned warrant vouchers or cheques, invoices and similar records associated with the receipt or payment of money Subsidiary ledgers, including inventory cards and records relating to assets no longer held or liabilities that have been discharged	5
Supplementary accounting records, including, for example, cash register strips, bank statements and time sheets	5
General and incidental source documents not included above, including stock issue and receivable notes, copies of official orders (other than copies for substantiating payments or for unperformed contracts), bank deposits books and post registers	5

Table 6: Time frames for retention and disposal of financial information records

- To reiterate, the accounting officer is required to keep full and proper records of the financial affairs of the department in accordance with Chapter 17 of the Treasury Regulations. Section 81(1)(a) of the PFMA provides that the accounting officer shall commit and act of financial misconduct of he/she wilfully or negligently fails to comply with any provision of, amongst others, section 40 of the PFMA.
- The accounting officer is also required in terms of section 38(1)(a)(i) of the PFMA to ensure that his/her department has and maintain an effective, efficient and transparent system of financial and risk management and internal control.
- Any falsification of government accounting books, records, financial statements or other documents shall be the result of a breakdown in internal controls and negligence on the part of the accounting officer, both of which shall be grounds for financial misconduct in terms of section 81 of the PFMA.
- Information relating to statistics on the number of documents held in storage is not held centrally at the National Treasury but rather at institutional level.
- In addition, information related to the discovery or prevention of the falsification of financial information is also not held at the National Treasury but rather at institutional level. This is also in keeping with one of the objectives of the PFMA, that is, to allow managers to manage but to be held accountable for their decisions.
- In terms of Section 62 (1)(b) of the MFMA, the accounting officer of a municipality is responsible for managing the financial administration of the municipality, and must for this purpose take all reasonable steps to ensure— (b) that full and proper records of the financial affairs of the municipality are kept in accordance with any prescribed norms and standards;

- In terms of Section 173 (1)(a)(i), the accounting officer of a municipality is guilty of an offence if that accounting officer— (a) deliberately or in a grossly negligent way— (i) contravenes or fails to comply with a provision of section 62(1), (as above).

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

None.

*(b) Observations on the implementation of the article*

The provision is implemented.

*(c) Challenges, where applicable*

**Please outline actions required to ensure or improve the implementation of the article under review and describe any specific challenges you might be facing in this respect.**

None required

*(d) Technical assistance needs*

No assistance would be required

**Is any technical assistance already being provided to you? If so, please provide a general description of the nature of the assistance, including donor information.**

No.

## Article 10. Public reporting

### *Subparagraph (a) of article 10*

*Taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include, inter alia:*

*(a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public;*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

**1. The Promotion of Access to Information Act, 2000 (Act No. 2 of 2000) (PAIA)**

Section 195 of the Constitution provides that the public service must be governed by democratic values and principles and one of these principles is transparency, which must be fostered by providing the public with timely, accessible and accurate information. Section 32 of the Constitution provides for the right of access to information held by the state; and any information held by another person that is required for the exercise or protection of any rights.

The Republic of South Africa adopted the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000) (PAIA). The aim of this legislation is to encourage openness and to establish voluntary and mandatory mechanisms or procedures which give effect to the right of access to information in a speedy, inexpensive and effortless manner as reasonably possible. The objects of PAIA include the following: (section 9(a)(i); (b)(i) and (e)).

- (i) giving effect to Section 32 of the Constitution (access to information) by setting out how anyone can get access to information held by the state and any information held by private bodies that is required for the exercise and protection of any rights;
- (ii) giving effect to that right subject to justifiable limitations, including, but not limited to, limitations aimed at the reasonable protection of privacy....”; and
- (iii) generally to promote transparency, accountability and effective governance of all public and private bodies....”

PAIA gives a requester the right of access to a record of a public body if that requester complies with all the procedural requirements relating to a request for access to that record (section 11(1)(a)).

In order to enhance transparency of the public administration, PAIA provides that the information officer of a public body must compile a manual on functions of, and index of records held by that public body. The manual should include amongst others, a guide on how to use PAIA (section 14).

On 4 October 2019, new rules of procedure for applications to court under the PAIA were published by the Rules Board for Courts of Law, after approval by the Minister of Justice and Correctional Services. In terms of the Rules, legal proceedings in terms of the PAIA can now be instituted with Magistrate’s Courts in addition to High Courts.

The PAIA Amendment Act, 31 of 2019, was assented to in May 2020. The PAIA Amendment Act complements the Political Party Funding Act, and provides for information on the private funding of political parties and independent candidates to be recorded, preserved, and made available. The PAIA Amendment Act will come into operation on a date to be determined by the President.

**2. The Promotion of Administrative Justice Act (No. 3 of 2000)**

The Promotion of Administrative Justice Act, 2000 (PAJA) gives effect to the right to administrative action that is lawful, reasonable and procedurally fair as well as to the right to written

reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996.

### 3. Types of bodies required to publish information in terms of PAIA

- (i) Public body (government departments, government components, organs of state)
- (ii) Private bodies (including political parties once the PAIA Amendment Act comes into force)

PAIA requires every public body, as well as private bodies, to produce a manual which contains information on how to use PAIA to access their own records.

### 4. Type of information to be proactively made available and automatically published by the government scope of information to be published

Section 14 of PAIA requires all public bodies to publish a manual in at least three official languages that assists information requesters to make requests for information from the body concerned. At the very least, the manual must contain the following information:

REQUIREMENT	DESCRIPTION
Mandate	The structure and functions of the public body.
Contact details	The postal and street address, phone and fax number and, if available, the e-mail address of the Information Officer of the public body, as well as of every Deputy Information Officer of the public body.
PAIA Section 10 Guide	A description of this Guide compiled by the SAHRC and how to access it.
Categories of records held	Adequate information to assist in facilitating access to a record held by a public body. The public body must therefore describe the subjects on which it holds records, and the categories of records held on each subject.
Automatically available information	Some information is readily available without a person having to request access in terms of PAIA. The manual of the public body must indicate which information is readily available.
Services of the public body	A description of the services available to members of the public from the public body, and how to gain access to those services.
Public participation	A description of any arrangement or provision for a person to either consult, make representations or participate in or influence the formulation of policy; or the exercise of powers or performance of duties by the public body.
Recourse	The action you may take if the Information Officer of the public body refuses to give you access to information.
Making information available	Make a copy available at every office of that particular public body during office hours and on the website, if any, of the public body.

Table 9: Information to be automatically published by public bodies (source: PAIA Manual: SAHRC)

Section 15 of the PAIA provides for voluntary proactive disclosure. It is important to note that proactive disclosure is voluntary and not mandatory. In terms of section 15 of the PAIA:

- (i) the information officer of a public body, must, at least once a year, submit to the Minister a description of- (a) the categories of records of the public body that are automatically available without a person having to request access in terms of this Act, including such categories available- (i) for inspection in terms of legislation other than this Act; (ii) for purchase or copying from the body; and (iii) from the body free of charge; and (b) how to obtain access to such records.
- (ii) On a periodic basis not less frequently than once each year and at the cost of the relevant public

body, the Minister must, by notice in the Gazette- (a) publish every description submitted in terms of subsection (1); or (b) update every description so published, as the case may be.

Requirements for private bodies:

In terms of section 51 of the PAIA, private bodies are also required to compile a manual. However, the Minister of Justice and Correctional Services may exempt certain private bodies from this requirement. Therefore, at present, not all private bodies comply with this section, but this does not mean that the body is not subject to PAIA generally. When information is requested, this body is still required to process such a request. The procedure for making a request for information in terms of PAIA remains the same, even if the private body does not have a manual.

All private bodies that are required to compile a manual must make the manual easily available by making:

- (i) a copy available for inspection at every office of that particular private body during office hours. A private body may not charge a fee for inspection; and
- (ii) the manual available on their website.

The head of a private body must update any material changes in the manual on a regular basis and annex a request form (PAIA Form C) to the manual and also make request forms available on the website and at all company premises.

## **5. Types of information to be made available upon a request by a member of the public from a public body:**

The type of information to be made available upon request depends on the public body providing such information. Examples include:

- (i) Financial disclosures of designated employees and members of the Executive;
- (ii) Records that contain personal information of employees e.g. personnel records, employee health and wellness client files and labour and employee relation matters (Case Files);
- (iii) Financial records e.g. contracts, invoices, statements and payments, registers (includes salaries, invoices and payments);
- (iv) Procurement matters e.g. Bids (proposals, specifications, advertisements, awards and committees), Acquisition and Procurement Plans;
- (v) Fixed Asset Register, disposals, verification count sheets, assets and inventory lists, monthly reconciliations, asset.

## **6. Standards to protect privacy and personal data in the disclosure of such information**

PAIA seeks to strike a balance with other competing rights, including the rights to privacy and personal information (section 14 of the Constitution). In 2013, the Protection of Personal Information Act, 2013 (Act No. 4 of 2013) (POPIA) was adopted. Once fully operational, POPIA will amend certain sections of PAIA to ensure the protection of privacy and personal data of data subjects on one hand, whilst enhancing the transparency of the public administration on the other hand. For example, once POPIA is effective, the right of a requester to a record of a public body will exclude a request for access to a record containing personal information about the requester.



## **7. Awareness raising initiatives**

(i) South African Human Rights Commission developed a “Guide on how to use the Promotion of Access to Information Act, No. 2 of 2000” available at: <https://www.sahrc.org.za/home/21/files/Section%2010%20guide%202014.pdf>. The guide is published in all official languages. An updated English version of the Guide will be published before the end of 2020.<sup>14</sup>

(ii) The country (through the Department of Justice and Constitutional Development (DOJ&CD)) drafted the PAIA. However, its implementation lies with each institution, in both the public (government) and private (business) spheres. The DoJ&CD had, at the inception of the PAIA, held workshops with all relevant stakeholders on the implementation of PAIA and subsequently, on a regular basis, continues to train and provide guidance to these stakeholders on its implementation.

(iii) The DOJ&CD developed brochures on the PAIA and the frequently asked questions:

<http://www.justice.gov.za/paia/PAIA-brochure.pdf>

<http://www.justice.gov.za/paia/paia-faq.htm>

(iv) The DOJ&CD (through its Justice College) developed training courses on the application of the PAIA. Statistics on the number of officials trained since 2013 were provided.

(v) The Justice College also developed a training courses on the application of the Promotion of Administrative Justice Act, 2000. Since 2017, the College schedules three courses per annum but delivery of the course depends on whether a sufficient number of officials confirmed attendance. In 2017, twelve officials were trained while in 2018, 58 officials from the Limpopo Department of Agriculture and Rural Development attended the training.

## **8. Mechanisms to appeal against the denial of requests for access to information**

Appeal against public body:

(i) Internal appeal: a requester can file an internal appeal within the 60 days of his/her request was denied. Internal appeal involves a more senior person reviewing the decision of the information officer of the public body. Internal appeal is only applicable to national and provincial governments, and municipalities. There is a specific form prescribed for this purpose, namely Form B (always made available on the website of a relevant public body or office of the South African Human Rights Commission (SAHRC)).

(ii) Relief from courts: if a requester has been unsuccessful with the internal appeal process, he/she may approach the court for relief by filing an application within 180 days of receiving the decision. This is also applicable to certain public bodies that do not have a relevant authority to hear internal appeals e.g. institutions established in terms of Chapter 9 of the Constitution such as the Public Protector and the SAHRC, as well as State Owned Entities such as ESKOM, SASSA and SAA

Against private body:

There is no internal appeal process provided, therefore a requester may apply to court for relief within 180 days of receiving the decision. The court will review the decision and make a determination.

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<sup>14</sup> The Information Regulator has taken over all the PAIA related roles and responsibilities of the South African Human Rights Commission.

On 4 October 2019, new rules of procedure for applications to court under the PAIA were published by the Rules Board for Courts of Law, after approval by the Minister of Justice and Correctional Services. In terms of the Rules, legal proceedings can now be instituted with Magistrates' Courts in addition to High Courts. This makes litigation under the PAIA somewhat more accessible for ordinary members of the public.

Amendments brought about by the Protection of Personal Information Act provides for the Information Regulator to be another avenue to use for a requester who is not happy with any matter relating to the Promotion of Access to Information Act.

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

### **Examples of implementation**

Cases relating to PAIA requests:

(i) *My Vote Counts NPC v. Minister of Justice and Correctional Services and Another CCT 249/17*

Consultations in the form of public hearings and submissions are currently underway to extend the scope of the right of access to information to funders of political parties. The country, through its judiciary arm (in the case "*My Vote Counts NPC v. Minister of Justice and Correctional Services and Another CCT 249/17*") was made to realize that transparency through access to information relating to such funding would minimize corruption, because the public would be able to notice trends in public administration processes and actions that unfairly favour the funders.

In the above-mentioned case the Chief Justice indicated, amongst other things, that "*transparency in the area of private funding of political and independent candidates helps in the detection or discouragement of improper influence and the fight against corruption*". Consequently, PAIA is to be amended so that the right of access to information is extended to include access to information related to funding of political parties.

(ii) *Nolusizo Makhambi vs Eastern Cape Member of the Executive Committee for Health and the Chief Executive Officer of Butterworth Hospital* (Case number: 5031/2018, 5108/2018, and 5689/2018: [www.saflii.org/cases/ZAECMHC](http://www.saflii.org/cases/ZAECMHC))

(iii) *Boniwe Belwana* (case no. 306/16) and *Marlene Langeveldt* (case no. 349/16) versus The Eastern Cape MEC for Education First Respondent, and The Eastern Cape HOD for Education Second respondent: <http://www.saflii.org/za/cases/ZAECBHC/2017/3.pdf>

(iv) Litigation by Open Democracy Advice Centre.

Below is the list of active cases currently on ODAC's file. All the cases are at different legal stages.

#### **FORTUIN versus MINISTER OF SCIENCE & TECHNOLOGY**

○ To expose the Department's non-compliance with its own internal regulations and thereby expose corruption.

**PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS vs MAIL AND GUARDIAN MEDIA LTD** (CCT 03/11)[2011]ZACC 32; 2012(2) BCLR 181 (CC); 2012 (2) SA 50 (CC) (29 November 2011).

<http://www.saflii.org/za/cases/ZACC/2011/32.html>

#### MOJALEFA MURPHY versus NATIONAL RESEARCH FOUNDATION

- To obtain the report of an internal investigation conducted whilst client was employed with Respondent and in so doing clear his name and render him more employable.

#### MALCOLM LANGFORD & CALS versus JOHANNESBURG WATER PTY LTD

- To obtain research data in order to assist client with formulating policy for local government regarding water usage.

#### ROBERTSON ABATTOIR versus COMMERCIAL STEVEDORING AGRICULTURAL & ALLIED WORKERS UNION (CSAAWU)

- ODAC are representing CSAAWU in an application brought to interdict them from complaining about alleged unlawful labour practices at the abattoir.

Source of information: <http://www.odac.org.za/index.php/what-we-do/legal/litigation>

Example of PAIA reports from a public body:

[http://www.justice.gov.za/legislation/notices/2017/20170908-gg41100\\_gen697-paia-sec15.pdf](http://www.justice.gov.za/legislation/notices/2017/20170908-gg41100_gen697-paia-sec15.pdf)

However, despite various amendments, the Promotion of Access to Information Act (PAIA) remains a complex statute, which is perceived by some to impose cumbersome procedures on requesters in order to access information and to establish a culture of transparency conducive to exposing corruption. As noted above, the functions of the newly established Information Regulator alleviate some of the concerns of requesting persons in respect of matters relating to the PAIA.

One significant gap in the PAIA's legislative scheme was its failure to regulate information held by political parties. One reason for this oversight is that political parties do not fit comfortably into the definition of 'public' or 'private' bodies contained in the PAIA. Following an initial failed bid to the Constitutional Court, the Constitutional Court held in *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* [2018] ZACC 17 that the PAIA "is invalid to the extent of its inconsistency with the Constitution by failing to provide for the recordal, preservation and reasonable disclosure of information on the private funding of political parties and independent candidates". The Promotion of Access to Information Amendment Bill, 2019 seeks to provide for the recordal, preservation and disclosure of information on private funding of political parties. In its submission on the Bill, the South African Human Rights Commission (SAHRC) noted with concern that the amendment does not provide for access to other information held by political parties. The Bill only creates proactive disclosure in respect of funding received by political parties. It is not clear that the limited amendment of the PAIA will allow requesters to request other information from political parties. By restricting the right of the public to access information held by political parties, a key opportunity for legislative improvement will be missed whereas the amendment is under-inclusive and arguably unjustifiably limits the constitutional right of access to information. The Bill was passed by the National Assembly on 8 November 2019. It was passed by the National Council of Provinces and sent to the President for assent on 03 December 2019. It was assented to in May 2020 and is yet to take effect on a date determined by the President. Amendments on political funding were passed after the country visit.

Another major gap is the lack of enforcement powers bestowed on the South African Human Rights Commission, as custodian of the PAIA, by the Act. Currently, where an information request is refused, and an internal appeal is unsuccessful or not available, requesters must approach the courts

to access information. This is a costly process, which is out of reach of most members of the public. Once the Protection of Personal Information Act, 4 of 2013 (POPIA) is fully effective from July 2021, the Information Regulator will become the new custodian of the PAIA. Importantly, the POPIA will amend the PAIA to provide the Information Regulator with investigative and enforcement powers under the Act. This is a significant development, which may improve compliance with the PAIA. On 22 June 2020, President Cyril Ramaphosa announced the proclamation of various section of the Protection of Personal Information Act, 4 of 2013 (POPIA). In terms of this proclamation, sections 110 and 114(4) of POPIA will commence on 30 June 2021. These sections of POPIA will amend the PAIA and further enable the handover of PAIA functions from the Commission to the Information Regulator. The POPIA is in operation from 01 July 2020; however, section 114(1) has provided a one year “period of grace” for all entities i.e. they must be fully compliant by 01 July 2021.

Regarding compliance, as custodian of the PAIA for close to two decades, the SAHRC has noted endemic non-compliance with PAIA and, by implication, the infringement of the right of access to information enshrined in section 32 of the Constitution. Non-compliance is rife amongst all spheres and levels of government, whereas the SAHRC is particularly concerned about non-compliance by local government (municipalities) given that municipalities are situated at the face of service delivery. Most requests are met with deemed refusals, where information requests are simply ignored. Litigation is prohibitively expensive. Accessing information requires following cumbersome and technical procedures. Although everyone is entitled to information held by the State (or ‘public bodies’) as a right, public bodies often request the motive of the requester for responding to an information request. This paves the way for victimisation of whistleblowers and others attempting to enforce their rights, who do not fall within the ambit of legal protection. Where information is sought from a private body, a requester has to show that the information is required for the exercise or protection of ‘any right’ (except the right of access to information). Given the power asymmetry that exists between any information holder and requester, this is not always an easy requirement to meet.

Non-compliance with PAIA by public bodies has unfortunately increased over the years. Non-compliance is evident from the annual PAIA reports that the SAHRC submits to the National Assembly each year. Many public bodies do not comply with the requirement to produce manuals or to report to the Commission on an annual basis in terms of section 32 of the PAIA. No sphere of government is fully compliant: Chapter 9 constitutional bodies are not all compliant, whereas certain provinces and municipalities do not report to the Commission at all. Non-compliance at local government level is widespread and especially concerning, because local government constitutes the interface of service delivery. Without access to information, people are unable to hold government accountable for the realisation of rights, including the realisation of socio-economic rights, such as access to adequate housing or sufficient food and water.

Amendment of the PAIA to extend the right of access to information to include information related to funding of political parties (see art. 7(3) above):

The Promotion of Access to Information Amendment Act 31 of 2019 intends:

- to amend the Promotion of Access to Information Act, 2000, so as to provide for information on the private funding of political parties and independent candidates to be recorded, preserved and made available; and
- to provide for matters connected therewith.

<https://www.gov.za/documents/promotion-access-information-amendment-act-31-2019-english-afrikaans-3-jun-2020-0000>

Section 52A of the PAIA Amendment Act requires the head of a political party to create and keep records of any donation exceeding the prescribed threshold that has been made to that political party in any given financial year. Such records must include of the identity of the persons/ entities that made donations. The head of the political party must make these records available on a quarterly basis and retain the records for at least five years after their creation. The PAIA Amendment Act will take effect from a date determined by the President.

*(b) Observations on the implementation of the article*

The Promotion of Access to Information Act, 2000 (PAIA) gives effect to provisions in the Constitution providing for access to information, including Section 32 of the Bill of Rights which declares that “everyone has a right of access to any information held by the state”. PAIA contains detailed provisions, including with regard to the publication of information held by government authorities and the procedures and rules surrounding requests for unpublished information. The provisions extend in substantial part to the private sector.

The Promotion of Administrative Justice Act, 2000 (PAJA) gives effect to Section 33 of the Constitution, which establishes the right to administrative action that is lawful, reasonable and procedurally fair, as well as the right to be provided with written reasons in circumstances where one’s rights are adversely affected by administrative action. Administrative action in terms of the Act is action undertaken by national, provincial or local government, the police, army or parastatals that involves these entities making a decision (or failing to take a decision) that affects a person’s rights. The Act extends, for example, to suspected corruption in tendering, allowing adversely affected parties to acquire more information.

Regarding the effectiveness of the PAIA, in addition to the cumbersome procedure it imposes on requesting persons, the authorities referred to proposed amendments to regulate the right of access to information related to the funding of political parties, an area which remains not comprehensively addressed in the 2019 amendment bill, since the current draft is limited to the disclosure of funding received by political parties and does not cover other relevant information related to political party financing. Moreover, the authorities stressed the lack of enforcement powers of the SAHRC and the complex and costly appeals mechanism when information requests are refused. Overall, the authorities confirmed an increasing lack of compliance with the PAIA, especially at the local level, and insufficient protection of whistleblowers and requesting persons.

**Based on the above, it is recommended that South Africa strengthen the framework for access to information to ensure that necessary procedures do not impede the effective provision of information and to strengthen compliance. Such measures should include providing the regulator with effective enforcement powers, establishing a simplified appeals mechanism, specifying the right to access information related to the funding of political parties, and promoting awareness and knowledge of key measures and systems to facilitate access to information.**

*Subparagraph (b) of article 10*

*Taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include, inter alia:*

...

*(b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

The South African Human Rights Commission (SAHRC) developed a guide on PAIA to simplify understanding of the Act. This Guide is available in all official languages of South Africa: English, Afrikaans, isiNdebele, isiXhosa, isiZulu, Sepedi, Sesotho, Setswana, isiSwati, Tshivenda and Xitsonga. Copies of the Guide can be found at the head office of the SAHRC and all of its provincial offices (contact details of the offices can be found at the end of this Guide). In addition, an electronic copy is available on the SAHRC's website ([www.sahrc.org.za](http://www.sahrc.org.za)). An updated English version of the Guide will be published in 2020.

In addition, PAIA requires every public body, as well as private bodies, to produce a manual which contains information on how to use PAIA to access their own records.

As indicated in response to article 10, subparagraph (a), section 14 of PAIA requires all public bodies to publish a manual in at least three official languages that assists persons requesting information to make requests from the body concerned.

Regarding administrative reforms and enhanced public services delivery, reference is made to the National Anti-Corruption Strategy, which provides a framework for strengthening government administrative processes to allow for greater monitoring, accountability and transparency, with the aim to ensure that public officials are held accountable for service delivery or the lack thereof, and that the business sector and civil society organisations operate in a values-driven manner and are held accountable for corrupt practices.

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

Examples of implementation

SAHRC Annual PAIA Reports tabled with the National Assembly

<https://www.sahrc.org.za/index.php/sahrc-publications/paia-annual-reports>

Manuals published by public bodies on their websites:

<http://www.dpsa.gov.za/dpsa2g/documents/acts&regulations/infoAct2000/DPSAManualAccessToInformation.pdf>

[https://www.environment.gov.za/promotionaccess\\_informationact](https://www.environment.gov.za/promotionaccess_informationact)

[https://www.gov.za/sites/default/files/gcis\\_document/201811/42053gon1271.pdf](https://www.gov.za/sites/default/files/gcis_document/201811/42053gon1271.pdf)

<https://www.sars.gov.za/Legal/Primary-Legislation/Access-to-Information/Pages/PAIA.aspx>

<http://www.treasury.gov.za/PAIA/>

<http://www.justice.gov.za/paia/paia.htm>

<http://www.justice.gov.za/paia/PAIA-Sec32-Report-SAHRC.pdf> (Department of Justice sec 32 report to the SA Human Rights Commission).

## 2. Fiscal Transparency

South Africa's efforts to deepen transparency in budget processes have been recognised internationally. In the 2017 Open Budget Index (OBI) survey, out of 115 countries, South Africa has been ranked first alongside New Zealand. In this survey, South Africa achieved a score of 89 out of 100 in terms of transparency, an improvement from a score of 86 achieved in 2015. The OBI survey assesses the availability of eight key budget documents in each of the 115 countries evaluated, and considers the comprehensiveness of data in these documents. It also examines the extent of effective oversight provided by legislatures, the independent fiscal institutions and the supreme audit institutions, and the opportunities available to the public to participate in national budget processes.

South Africa has consistently been rated amongst the top three countries since it held the first position in the 2010 Open Budget Index. The rating of second in 2012 and third in 2015 coincided with a change in the OBI survey scoring which placed increased emphasis on budget participation.

<https://www.internationalbudget.org/open-budget-survey/results-by-country/country-info/?country=za>

## 3. Public Administration and e-government reforms

South Africa has undertaken some public administration and e-government reforms intended to simplify administrative procedures and facilitate services delivery. The following are a few examples of using electronic systems to simplify administrative procedures or facilitate service delivery:

- e-Recruitment,
- G-Commerce for procurement,
- Patient Administration and Bill system,
- e-Services for information
- some online transactions for government and public services.

### *(b) Observations on the implementation of the article*

South Africa has undertaken some public administration and e-government reforms intended to

simplify administrative procedures and facilitate services delivery.

*Subparagraph (c) of article 10*

*Taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include, inter alia:*

...

*(c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

Although there are no requirements to publish periodic reports on the risks of corruption in the public administration, there are numerous public documents that provide insight into how Government operates, including its decision-making processes e.g.

- All government departments publish their strategic plans and annual reports on their websites. Information includes leadership of the department, legislation, mandate and contact details.
- The Public Service Commission (PSC) publishes annual reports to citizens: <http://www.psc.gov.za/documents/reports.asp>
- The PSC further publishes all its reports relating to the public service: <http://www.psc.gov.za/documents/reports.asp>. Documents are catalogued annually.
- Reports issued by the Auditor-General of South Africa on Consolidated National and Provincial Audit outcomes provides information on the risk to corruption.

<http://www.agsa.co.za/Portals/0/Reports/PFMA/201617/GR/AG%20PFMA%202017%20Web%20SMALL.pdf>

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

Reference is also made to the information provided under paragraph 3 of article 5 in regard to corruption assessment reports, anti-corruption capacity requirement audits, diagnostic reports, public sector ethics surveys, government and audit reports, as well as those published by civil society.



*(b) Observations on the implementation of the article*

The provision appears to be implemented.

*(c) Challenges, where applicable*

**Please outline actions required to ensure or improve the implementation of the article under review and describe any specific challenges you might be facing in this respect.**

*(d) Technical assistance needs*

No assistance would be required

**Is any technical assistance already being provided to you? If so, please provide a general description of the nature of the assistance, including donor information.**

No.

## Article 11. Measures relating to the judiciary and prosecution services

*Paragraph 1 of article 11*

*1. Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Responses

A: JUDGES

1 Measures to ensure judicial independence

- The Judicial authority of the Republic of South Africa is vested in the courts. These provisions are contained in section 165 of the Constitution. Section 165 of the Constitution provides that the courts are independent and subject only to the Constitution and the law, which they must apply

impartially and without fear, favour or prejudice.

- The Constitution provides for the independence of the judiciary and protects judicial independence by prohibiting any interference with the functioning of the courts. It further imposes a duty on organs of state to assist and protect the courts to ensure, amongst other things, their independence, impartiality and efficiency. Furthermore, the Constitution as amended in 2013 formalises the Chief Justice as the head of the judiciary and entrusts him with the responsibility for the establishment and monitoring of norms and standards for the judicial functions of all courts. It also designates the Constitutional Court as the highest court in all constitutional matters.

- No person or organ of state may interfere with the functioning of the courts.

- The doctrine of separation of powers, the independence of the judiciary and the supremacy of the Constitution lie at the heart of South Africa's constitutional democracy. The doctrine of separation of powers constitutes one of the 34 Constitutional Principles, which became the building blocks of the Constitution. The principle of an independent judiciary derives from the basic principles of the rule of law and the separation of powers.

- Judicial independence is recognised and protected in the Constitution in section 165. Judicial independence is internationally recognised through various declarations and international instruments such as the UN Basic Principles on the Independence of the Judiciary and the African Charter on Human and Peoples Rights.

- Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

- The Superior Courts Act, 2013 (Act No. 10 of 2013) reaffirms the Chief Justice as the head of the Judiciary responsible for the establishment and monitoring of norms and standards for the judicial functions of all courts. The Act further empowers the Chief Justice to issue written protocols or directives, or give guidance or advice, to judicial officers - (i) in respect of norms and standards for the performance of the judicial functions; and (ii) regarding any matter affecting the dignity, accessibility, effectiveness, efficiency or functioning of the courts.

- The Superior Courts Act, 2013 makes provision for the administration of the judicial functions of all courts, must be read in conjunction with Chapter 8 of the Constitution, which contains the founding provisions for the structure and jurisdiction of the Superior Courts, the appointment of judges of the Superior Courts and matters related to the Superior Courts.

- Section 55 mandates the National Assembly to provide for mechanisms to maintain oversight of the exercise of Executive Authority, the implementation of legislation, and any organ of State. Section 239, the definitions section of the Constitution, in its definition of "organ of state" specifically stipulates that an organ of State does not include a court or a Judicial Officer. This clearly excludes the Judiciary from the National Assembly's oversight power.

- Section 8 of the Prevention and Combating of Corrupt Activities Act, 12 of 2004, among others provides that any person who, directly or indirectly, gives or agrees or offers to give any gratification to a judicial officer, in order to act in a manner designed to achieve an unjustified result, is guilty of the offence of corrupt activities relating to judicial officers.

- Article 4 of the Code of Judicial conduct requires judges to maintain independence at all times. It provides as follows:

*"Article 4: Judicial Independence*

*A judge must*

- (a) uphold the independence and integrity of the judiciary and the authority of the courts;*
- (b) maintain an independence of mind in the performance of judicial duties;*
- (c) take all reasonable steps to ensure that no person or organ of state interferes with the functioning of the courts; and*
- (d) not ask for nor accept any special favour or dispensation from the executive or any interest group.”*

## 2. Code of Judicial Conduct

- Section 174(8) of the Constitution provides that before judicial officers begin to perform their functions, they must take an oath, or affirm, in accordance with paragraph 6(1) of Schedule 2, that “they will protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.”

*“Oath or solemn affirmation of Judicial Officers*

*6. (1) Each judge or acting judge, before the Chief Justice or another judge designated by the Chief Justice, must swear or affirm as follows:*

*I, A.B., swear/solemnly affirm that, as a Judge of the Constitutional Court/Supreme Court of Appeal/High Court/E.F. Court, I will be faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.*

*(In the case of an oath: So help me God.)*

*(2) A person appointed to the office of the Chief Justice who is not already a judge at the time of that appointment must swear or affirm before the Deputy Chief Justice, or failing that judge, the next most senior available judge of the Constitutional Court.*

*(3) Judicial officers, and acting judicial officers, other than judges, must swear/affirm in terms of national legislation.”*

- Section 12 of the Judicial Service Commission Act, 1994 (Act No. 9 of 1994) (JSC Act) provides for the Chief Justice to compile a Code of Judicial Conduct which must be tabled in Parliament for approval. Pursuant to this provision, a Code of Judicial Conduct was adopted in 2012.
- It serves as the prevailing standard for judicial conduct, which judges must adhere to and that any wilful or grossly negligent breach of the Code may amount to misconduct, which will lead to disciplinary action in terms of section 14 of the Act.

- The Code of Conduct requires the following of a judge:

Conflict of interest:

*“Article 5: To act honourably*

*(1) A judge must always, and not only in the discharge of official duties, act honourably and in a manner befitting judicial office.*

*(2) All activities of a judge must be compatible with the status of judicial office.*

*Article 12: Association*

*A judge must not-*

- (a) belong to any political party or secret organization;*
  - (b) unless it is necessary for the discharge of judicial office, become involved in any political controversy or activity;*
  - (c) take part in any activities that practice discrimination inconsistent with the Constitution; and*
  - (d) use or lend the prestige of the judicial office to advance the private interests of the judge or others.*
- (2) A judge must, upon permanent appointment, immediately sever all professional links and recover speedily all fees and other amounts outstanding and organise his or her personal business affairs to minimise the potential for conflicts of interest.*
- (3) A judge previously in private practice must not sit in any case in which he or she, or his or her former firm, is or was involved before the judge's appointment, and a judge must not sit in any case in which the former firm is involved until all indebtedness between the judge and the firm has been settled.*
- (4) An acting judge who is a practising attorney does not sit in any case in which the acting judge's firm is or was involved as attorney of record or in any other capacity.*

*Article 13: Recusal*

*A judge must recuse him- or herself from a case if there is a-*

- (a) real or reasonably perceived conflict of interest; or*
- (b) reasonable suspicion of bias based upon objective facts and shall not recuse him- or herself on insubstantial grounds.”*

*Work outside the judiciary:*

*“Article 14: Extra-judicial activities of judges on active service*

- (1) A judge's judicial duties take precedence over all other duties and activities, statutory or otherwise.*
- (2) A judge may be involved in extra-judicial activities, including those embodied in their rights as citizens, if such activities-*
  - (a) are not incompatible with the confidence in, or the impartiality or the independence of the judge;*
  - or*
  - (b) do not affect or are not perceived to affect the judge's availability to deal attentively and within a reasonable time with his or her judicial obligations.*
- (3) A judge must not-*
  - (a) accept any appointment that is inconsistent with or which is likely to be seen to be inconsistent with an independent judiciary, or that could undermine the separation of powers or the status of the judiciary;*
  - (b) act as an advocate, attorney, or legal adviser but may give informal legal advice to family*

*members, friends, charitable organisations and the like without compensation;*

*(c) become involved in any undertaking, business, fundraising or other activity that affects the status, independence or impartiality of the judge or is incompatible with the judicial office;*

*(d) engage in financial and business dealings that may reasonably be perceived to exploit the judge's judicial position or are incompatible with the judicial office; and*

*(e) sit as a private arbitrator.*

*(4) A judge may-*

*(a) act as a trustee of a family or public benefit trust but is not entitled to receive any remuneration for such services;*

*(b) be a director of a private family company or member of a close corporation but if the company or close corporation conducts business the judge may not perform an executive function; and*

*(c) be a director of a non-profit company.*

#### *Article 15: Extra-judicial income*

*(1) In terms of section 11(1) of the Act, a judge performing active service may not receive in respect of any service any fees, emoluments, or other remuneration or allowances apart from his or her salary and any other amount which may be payable to him or her in his or her capacity as a judge, except insofar as the position with regard to royalties is regulated in the Act.*

*(2) A judge must not-*

*(a) receive any income or compensation that is incompatible with judicial office;*

*(b) directly or indirectly negotiate or accept remuneration, gifts, advantages or privileges which are incompatible with judicial office or which can reasonably be perceived as being intended to influence the judge in the performance of his or her judicial duties, or to serve as a reward for them; and*

*(c) accept, hold or perform any other office of profit, or receive in respect of any service any fees, emoluments or other remuneration apart from the salary and any allowances payable to the judge in a judicial capacity.”*

#### *Reporting unprofessional or unethical conduct*

##### *“Article 16: Reporting inappropriate conduct*

*(1) A judge with clear and reliable evidence of serious professional misconduct or gross incompetence on the part of a legal practitioner or public prosecutor must inform the relevant professional body or a Director of Public Prosecutions of such misconduct or professional incompetence.*

*(2) Before commenting adversely on the conduct of a particular practitioner or prosecutor in a judgment, the judge must give that person the opportunity to deal with the allegation.*

*(3) A judge who reasonably believes that a colleague has been acting in a manner which is unbecoming of judicial office must raise the matter with that colleague or with the head of the court concerned.”*

- According to item 7 of the Preamble to the Code, this Code was compiled to enable the Judiciary to conform to ethical standards that are internationally generally accepted, more particularly as set out in the Bangalore Principles of Judicial Conduct (2001) as revised at the Hague (2002).
- Judicial Code of conduct is available at: <http://www.justice.gov.za/legislation/notices/2012/20121018-gg35802-nor865-judicial-conduct.pdf>

### 3. Appointment of Judges in South Africa

- The appointment of Judges in South Africa is provided for in terms of section 174 of the Constitution which provides as follows:
  - 174(1) any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.
  - 174(2) the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.
  - 174(3) the President as head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal.
  - The Judicial Service Commission (JSC) is a constitutional body responsible for judicial appointments, headed by the Chief Justice as informed by the Constitution and the JSC Act.
  - The other judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly, in accordance with the following procedure:
    - (i) The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President.
    - (ii) The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made.
    - (iii) The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list.
  - 174(5) at all times, at least four members of the Constitutional Court must be persons who were judges at the time they were appointed to the Constitutional Court.
  - 174(6) The President must appoint the judges of all other courts on the advice of the Judicial Service Commission.
  - 174(7) other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice.
  - 174(8) before judicial officers begin to perform their functions, they must take an oath or affirm, in accordance with Schedule 2, that they will uphold and protect the Constitution.
  - Before a Judge is appointed, they go through rigorous interviews by the Judicial Service

Commission. The members of the Judicial Service Commission carry a significant constitutional obligation to recommend fit and proper candidates for judicial office. Further, section 174(8) of the Constitution provides that before judicial officers begin to perform their functions, they must take an oath, or affirm, in accordance with paragraph 6(1) of Schedule 2, that they “will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.” The above process of judicial appointment is stringently contingent upon the candidate being independent, impartial and fair, with a commitment to constitutional values.

- Before Judges are appointed by the President, the Judicial Service Commission established in terms of section 178 of the Constitution and chaired by the Chief Justice comprising of 22 other appointed members conducts public interviews of the candidates. Prior to the interviews, members of the public are allowed to make any comments on the suitability or otherwise of the candidates to be interviewed by the Judicial Service Commission. The media, both electronic and print, is allowed to attend the interviews.

#### 4. Removal of Judges

- Removal of Judges is governed by the provisions of section 16 of the Judicial Service Commission Act 9 of 1994, read with section 177 of the Constitution. Section 177 of the Constitution provides that a judge may be removed from office only if-

(i) The Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and

(ii) The National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members.

The President must remove a judge from office upon adoption of a resolution calling for that judge to be removed.

- The President, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of subsection (1).

### B: MAGISTRATES

#### 5. Appointment of Magistrates

a) The appointment and removal of Magistrates in South Africa is provided for in terms of Magistrates Act, 1993 (Act No. 90 of 1993). Appointment or promotion of a magistrate are only based on qualifications, level of education, relative merits, efficiency and competency for the office of persons who qualify for the relevant appointment or promotion.

#### 6. Code of conduct for Magistrates

- The Code of conduct for Magistrates maintains and promotes the independence of the office of magistrate as a judicial office. Magistrates as judicial officers are required to maintain high standards of conduct in both their professional, and personal capacities as adopted by the Magistrates Commission. The Code of Conduct for Magistrates has the following provisions:

*Acting honourably*

*Paragraph 6. “A magistrate does not associate with any individual or body to the extent that he/she*

*becomes obligated to such person or body in the execution of his/her official duties or creates the semblance thereof and does not use his/her office to further the interest of any individual or body or permit this to be done.*

*Paragraph 15. A magistrate shall refrain from express support for any political party or grouping.”*

*Gifts: Paragraph 7. “A magistrate does not accept any gift, favour or benefit of whatsoever nature which may possibly unduly influence him/her in the execution of his/her official duties or create the impression that this is the case.”*

*Conflict of interest: Paragraph 8. “A magistrate refrains from the execution of any duty in an official capacity in a matter wherein he/she has a direct or indirect interest.”*

*Reporting: Paragraph 14. “A magistrate shall report unprofessional conduct on the part of legal practitioners or public prosecutors of which he/she becomes aware in the course of court proceedings to the professional body concerned or, in the case of public prosecutors, to the attorney-general concerned.”*

- South Africa has established the Magistrates Commission as a statutory body established in terms of the Magistrates Act, 1993. The Commission is chaired by a judge, designated by the President of the country in consultation with the Chief Justice.
- The Commission is established to promote continuous training of magistrates appointed in the Magistrates’ Courts [District and Regional Courts], to advise the Minister of Justice and Correctional Services regarding the appointment of magistrates, to advise or to make recommendations to, or report to the Minister, for information of Parliament regarding any matter which is of interest for the independence in the dispensing of justice and the efficiency of the administration of justice in the Magistrates’ Courts, and to carry out investigations and make recommendations to the Minister regarding the suspension and removal from office of magistrates.
- Any conduct by a magistrate that is alleged to be improper may be reported to the Judicial Head of the Court wherein the magistrate concerned presides. A complaint against a magistrate must be reported by means of a written declaration under oath or affirmation. If the complainant is of the view, that his/her concerns have not been properly or adequately addressed by the Judicial Head of Court, the complainant may direct his/her complaint to the Secretary of the Magistrates Commission.
- Mechanisms are in place to report fraud and corruption, such as whistle blowing, which enables officials to make confidential disclosures on suspected fraud and corruption. Cases relating to fraud and corruption are reported through the National Fraud and Corruption hotline which is located at the Public Service Commission (PSC). Alleged cases of fraud and corruption are referred to the Forensic Unit, which investigates the allegations and recommends corrective action.
- With regard to performance management in the courts, section 165(6) of the Constitution read with section 8 of the Superior Courts Act, 2013 provides that the Chief Justice is the Head of the Judiciary and responsible for the establishment and monitoring of norms and standards for the exercise of judicial functions of all courts, and enjoins the Chief Justice to issue written protocols and directives to give guidance to Judicial Officers. Pursuant to this, the Chief Justice established the Norms and Standards for Judicial Officers, which were adopted by the Judiciary in 2014.

7. Induction and ongoing training requirements and curricula for members of the judiciary:

a) In recognition to the need for education and training of judicial officers and in line with section



180 of the Constitution which provides for national legislation to be enacted to provide for training programmes for Judicial Officers, Parliament enacted the South African Judicial Education Institute Act, 2008 (Act No. 14 of 2008), which established the South African Judicial Education Institute (SAJEI). The Institute is responsible for the judicial education and training of judicial officers and aspiring judicial officers.

b) In terms of terms of section 5 of the SAJEI Act the functions of the Institute are to:

(i) Establish, develop, maintain and provide judicial education and professional training for judicial officers;

(ii) Provide entry level education and training for aspiring Judicial Officers to enhance their suitability for appointment to judicial office;

(iii) Conduct research into judicial education and professional training and to liaise with other judicial education and professional training institutions, persons and organisations in connection with the performance of its functions;

(iv) Promote, through education and training, the quality and efficiency of services provided in the administration of justice in the Republic;

(v) Promote the independence, impartiality, dignity, accessibility and effectiveness of the courts; and

(vi) Render such assistance to foreign judicial institutions and courts as may be agreed upon by the council.

8. Standard for determining a potential conflict of interest for a judge and the steps that are required to be taken to address that conflict

- The JSC has established a Judicial Conduct Committee (JCC) to deal with complaints on Judicial Conduct. The Code of Judicial Conduct serves to assist every Judge in dealing with ethical and professional issues and to inform the public of the judicial ethos of the Republic.

- Disclosure of processes relating to complaints, is an example of the balance between judicial independence and dignity, and the overriding principles of transparency and accountability as required by the JSC Act.

- In terms of the JSC Act, complaints against members of the Judiciary must be based on, *inter alia*, the performance of a Judge, against set standards. These performance statistics and information on the performance of judicial functions can only occur through reporting and accountability.

9. Procedures on asset declarations by judges

- Judges are legislatively required to disclose their registrable interests to the Registrar of Judges' Registrable Interests, to enhance transparency, accountability of and public confidence in the Judiciary. The Registrar is the custodian of the register of Judges registrable interest.

- Section 6(2)(c) of the JSC Act requires the JSC to submit a written report to Parliament for tabling. The report must amongst others, include information regarding all matters relating to the Register of Judges' registrable interests as reported by the Registrar.

- Regulation 5 of the Regulations Relating to the JSC Act: Disclosure of Registrable Interests, requires the Registrar to furnish the JSC with the names of those Judges in active service who have disclosed interests of their immediate family members.

- Interests to be disclosed includes Immovable Property, Shares, Directorships or business interests, gifts of value more than R1500 and any other financial interests not derived from holding judicial office.
- Regulation 3 requires newly appointed Judges to disclose their registrable interests within 30 days of their appointment as Judges. In 2017/2018, a total of eighteen (18) Judges were appointed and they all disclosed their Registrable interests within the time prescribed by the Regulations.
- The disclosed interests have since been captured in the Register of Judge's Registrable Interests as per regulation 3(3) of the Regulations and Judges have been provided with individual entries to the register relating to them. After making the first disclosure, a Judge may at any time disclose to the Registrar or inform the Registrar of such amendments as may be required, as provided for in regulation 3(4). The JSC Act mandates the Minister of Justice and Correctional Services, acting in consultation with the Chief Justice, to appoint a senior official in the Office of the Chief Justice as the Registrar of Judges' Registrable Interests.

#### 10. Public and media access to court proceedings, facilitating access to court judgments and raising public awareness through information sharing and outreach programmes:

- As far as transparency in the court process is concerned, the public and the media are generally allowed to be present in court. However, in the Divisions of the High Court, permission has to be sought from the Presiding Judge for the electronic media to record the proceedings. Additionally, Article 8 of the Code of Judicial Conduct provides that a Judge must:
  - (i) Take reasonable steps to enhance the accessibility of the courts and to improve public understanding of judicial proceedings;
  - (ii) Unless special circumstances require otherwise;
  - (iii) Conduct judicial proceedings; and
  - (iv) Make known his or her decisions and supporting reasoning in open court.
- All superior court judgments are available on the websites of the various courts or upon request from the Registrar of the respective courts. For example, judgments by the Constitutional Court are found on <https://www.concourt.org.za/index.php/127-judgments> and <http://www.saflii.org/content/about-saflii-0>.

#### 11. Norms and Standards for the performance of judicial functions

- In February 2014, the Chief Justice, pursuant to the constitutional imperative contained in section 165 of the Constitution and in section 6 of Superior Courts Act, 2013 (Act No. 10 of 2013) (SuCA), enacted Norms and Standards for the performance of judicial functions with the unanimous support of the Heads of Court (copy provided).
- These Norms and Standards seek to achieve the enhancement of access to quality justice for all, and affirm the dignity of all users of the court system by ensuring the effective, efficient and expeditious adjudication and resolution of all disputes through the Courts, where applicable.
  - a) Section 6 (i - iii) of the Norms and Standards stipulates that:
    - i. The Chief Justice as the Head of the Judiciary shall exercise responsibility over the monitoring and evaluation of the performance of each Judicial Officer as well as the monitoring and implementation of Norms and Standards for the exercise of leadership and judicial functions of all courts;

ii. Everything reasonably possible should be done to ensure that Judicial Officers have all the resources and tools of trade available, to enable them to perform their judicial functions efficiently and effectively. Reporting is an essential and integral part of ensuring effective monitoring and implementation of the Norms and Standards. All Judicial Officers shall submit data on their performance and the workflow of cases for collation and analysis, after which a comprehensive report will be compiled by the Head of Court; and

iii. The report must be submitted to the Head of a Court who, in the case of Regional and District Courts, will submit it to the Judge President concerned for further submission to the Chief Justice, to assess the functioning and the efficiency of the courts. Each Head of Court must monitor and evaluate the performance of the Judicial Officers serving in his or her court on a daily basis, to ensure optimal utilization and productivity.

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

Examples of the implementation

1. Cases in which the violation of a judicial code of conduct has led to the application of disciplinary measures

a) There are several cases before the Judicial Conduct Tribunal, which are established to deal with impeachable complaints. For example, the Tribunals relating to Judge Motata, Judge President Hlophe, and Judge Jansen. There are no Judges who have been criminally charged for acts of corruption.

b) In 2016, the Constitutional Court dismissed an appeal from the Supreme Court of Appeal that ordered the continuance of an investigation by the Judicial Conduct Tribunal in relation to charges of misconduct against Western Cape Judge President John Hlophe. Judge Hlophe was accused of trying to influence two Constitutional Court judges in 2008. The matter remains unresolved.

c) Judge Mabel Jansen was accused of making racist remarks in 2015 on a Facebook post. The Judge resigned after the JSC decided that she would have to face the Tribunal.

d) In 2007, Judge Nkola Motata drove his car into a wall under the influence of alcohol. At the scene of the crime, the Judge began to hurl racist remarks at a state witness and two female Metro Police officers. Beyond this, the Judge was found to have conducted his defence at the trial dishonestly. In 2018, the Tribunal finally heard the case of two complaints of gross misconduct arising from the crash. The Tribunal's 12 April 2018 report held that the drunk driving conviction, for which Motata was charged, was not enough to trigger a finding of gross misconduct. The tribunal concluded that the Judge had conducted a defense, which he knew to lack integrity. The Tribunal has made the recommendation to the JSC that section 177(1)(a) of the Constitution be invoked, which would result in the Judge being impeached if the National Assembly so decides.

2. Statistics regarding case management systems, including trend analysis concerning increased efficiency in case management, particularly in the context of any reforms that have been taken in this area:

- Reserved judgments are monitored to measure the compliance with the set Judicial Norms and Standards and the Code of Judicial Conduct. The Judicial Norms and Standards stipulates that judgments in constitutional, criminal and civil matters should generally not be reserved without a fixed date for handing down.

- Refer to link for further information on statistics relating to compliance with Judicial Norms and Standards:

[https://www.judiciary.org.za/images/chief\\_justice\\_2017/Judiciary\\_Annual\\_Report\\_2017-18.pdf](https://www.judiciary.org.za/images/chief_justice_2017/Judiciary_Annual_Report_2017-18.pdf)  
(pg 044-050)

3. Statistics and case studies demonstrating the impact of educational and training programmes for members of the judiciary as regards their adherence to judicial codes or standards of conduct

- In the reporting period from 1 April 2017 - 31 March 2018 the seminars for Judges were convened to improve knowledge and ensure upholding of constitutionalism and the rule of law.

- Refer to link for information statistics on impactful seminars attended by Judges:

[https://www.judiciary.org.za/images/chief\\_justice\\_2017/Judiciary\\_Annual\\_Report\\_2017-18.pdf](https://www.judiciary.org.za/images/chief_justice_2017/Judiciary_Annual_Report_2017-18.pdf)  
(pg 051)

3.4 Information about the system of asset declarations of judges and how they are used to prevent conflicts of interest (particularly if related to the case assignment system in order to avoid assigning a judge who has to recuse him or herself from the case due to a conflict of interest)

## 2.2 Judgments and disclosures

Performance indicators		Performance target 2017/2018
2.1.1	Percentage of reserved judgments finalised in all Superior Courts	70%
2.1.2	Percentage of disclosures for serving Judges' Registrable Interests submitted by 31 March	100%
2.1.3	Percentage of disclosures for newly appointed Judges' Registrable Interests submitted within 30 days of appointment (if any)	100%

Source: The South African Judiciary Annual Report 2017/18

## 4. Case law involving judicial recusal

### **The King v Sussex Justices, 1924, 1K.B. 256**

“A long line of cases shows that is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”

**S v Malindi, 1990[1] SA 692 [AD] at 969 G-I**, where CORBETT, CJ said that

“The common law basis of the duty of a judicial officer in certain circumstances to recuse himself was fully examined in the cases of *S v RADEBE*, 1973[1] SA 796 [A] and *SOUTH AFRICAN MOTOR ACCEPTANCE CORPORATION [EDMS] BEPERK v OBERHOLZER*, 1974[4] 808 [T].

Broadly speaking, *the duty of recusal arises where it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there is a likelihood of bias on the part of the judicial officer: that is, that he will not adjudicate impartially.* The matter

must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test. *It is the reasonable perception of the parties as to his impartiality that is important.*" (Exclamation added).

**South African Sagar v Smith, 2001[3] SA 1004 [SCA] at 1009**, where MTHIYANE, AJA (as he then was) said:

*"What is said in respect of a Judge applies equally to a Magistrate..... In COMMERCIAL CATERING AND ALLIED WORKERS UNION AND OTHERS v IRVIN & JOHNSON LTD SEAFOODS DIVISION FISH PROCESSING, 2000[3] SA 705 [CC] ... The Constitutional Court further elaborated on that test. It follows that the test of 'a reasonable apprehension of bias' replaces that of 'a reasonable suspicion of bias' previously favoured by this court. ... The difference would appear to be one of semantics rather than substance."* (Exclamation added).

### *(b) Observations on the implementation of the article*

South African judges are appointed by the President and have constitutionally protected independence.

The Superior Courts Act reaffirms the Chief Justice as the head of the judiciary responsible for the establishment and monitoring of norms and standards for the judicial functions of all courts. The Code of Judicial Conduct serves as the prevailing standard for judicial conduct and Article 4 thereof requires judges to maintain independence at all times. The Code contains provisions on conflicts of interest, association, extrajudicial activities, recusal, and reporting of unprofessional or unethical conduct, among others. Any willful or grossly negligent breach of the Code may amount to misconduct, which will lead to disciplinary action in accordance with section 14 of the Act. The Code was compiled to enable the judiciary to conform to internationally generally accepted ethical standards, more particularly as set out in the Bangalore Principles of Judicial Conduct (2001) as revised. The Code of Conduct for Magistrates further maintains and promotes the independence of the office of the magistrate as a judicial office. Magistrates as judicial officers are required to maintain high standards of conduct in both their professional and personal capacities as adopted by the Magistrates Commission.

The South African Judicial Education Institute (SAJEI) is responsible for the judicial education and training of judicial officers and aspiring judicial officers. The training provided by the SAJEI for judicial officers includes both professional training (judicial education) as well as topics on ethics and integrity.

Pursuant to section 165 of the Constitution and section 8 of the Superior Courts Act, South Africa enacted Norms and Standards for the performance of judicial functions, which seek to achieve the effective, efficient and expeditious adjudication and resolution of all disputes through the Courts. Section 6 of the Norms and Standards stipulates that the Chief Justice as the Head of the judiciary shall exercise responsibility over the monitoring and evaluation of the performance of judicial officers, as well as the monitoring and implementation of Norms and Standards for the exercise of leadership and judicial functions of all courts. All judicial officers must submit data on their performance and case workflow, to assess the functioning and the efficiency of the courts. Each Head of Court must monitor and evaluate the performance of the judicial officers serving in his or her court on a daily basis, to ensure optimal utilization and productivity.

The Judicial Service Commission has established a Judicial Conduct Committee (JCC) to deal with

complaints on judicial conduct.

Judges are required by law to disclose their registrable interests to the Registrar of Judges' Registrable Interests, and the disclosed interests are captured in the Register of Judge's Registrable Interests as per section 3(3) of the Regulations.

As far as transparency in the court process is concerned, the public and the media are generally allowed to be present in court. However, in the Divisions of the High Court, permission has to be sought from the Presiding Judge for the electronic media to record the proceedings. Transparency of court proceedings is further specified in Article 8 of the Code of Judicial Conduct. All superior court judgments are available on the websites of the courts or upon request from the court registrar.

The provision is implemented.

### *Paragraph 2 of article 11*

*2. Measures to the same effect as those taken pursuant to paragraph 1 of this article may be introduced and applied within the prosecution service in those States Parties where it does not form part of the judiciary but enjoys independence similar to that of the judicial service.*

#### *(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

#### (a) Responses

1. The constitutional and legal framework applicable to ensure the independence and integrity of the prosecution service

- Section 179(4) of the Constitution requires that national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. The National Prosecuting Authority Act, (Act No. 32 of 1998) (NPA Act), regulates matters incidental to the establishment of a single national prosecuting authority. The Act, for example, deals with the appointment, remuneration and conditions of service of the members of the prosecuting authority and regulates the powers duties and functions of the members concerned.
- The NPA Act brought into being a single national prosecuting authority for the Republic of South Africa, headed by a National Director of Public Prosecutions. The primary mandate of the NPA is, however, provided for by the Constitution, which grants the NPA the power to institute criminal proceedings on behalf of the State, and also empowers it to carry out any other functions that are necessary and incidental to instituting criminal proceedings. Other matters concerning the prosecuting authority (including its structure, powers and functions) are dealt with by the NPA Act.
- Independence

The National Prosecuting Authority of South Africa (NPA) is established by section 179 of the Constitution. The NPA is guided by the Constitution and seeks to ensure justice for the victims of crime by prosecuting without fear, favour and prejudice and by working with its partners and the

public to solve and prevent crime.

The Code of Conduct for Prosecutors requires that:

The prosecutorial discretion to institute and to stop criminal proceedings should be exercised independently, in accordance with the Prosecution Policy and the Policy Directives, and be free from political, public and judicial interference.

The position and independence of the NPA in the broader South African legal system structure was set out by the Supreme Court of Appeal in: *The Minister for Justice and Constitutional Development v Moleko* [2008] 3 All SA 47 (SCA), at paragraph 18 thereof on page 52, as follows:

- The NPA Act provides that the Minister for Justice and Correctional Services exercises final responsibility over the NPA Authority but only in accordance with the provisions of the NPA Act (s 33(1)).
- The National Director of Public Prosecutions (NDPP) must, at the request of the Minister, inter alia furnish him with information in respect of any matter dealt with by the NDPP or any Director of Public Prosecutions (DPP), and with reasons for any decision taken by a DPP, 'in the exercise of their powers, the carrying out of their duties and the performance of their functions' (ss 33(2)(a) and (b)).
- The NDPP must furnish the Minister, at his request, with information regarding the prosecution policy and the policy directives determined and issued by the NDPP (ss 33(2)(c) and (d)).
- The NPA is only accountable 'to Parliament in respect of its powers, functions and duties under this Act, including decisions regarding the institution of prosecutions' (s 35(1)).

## 2. Code of conduct and disciplinary mechanisms applicable to members of the prosecution service

- The National Director of Public Prosecutions, acting under section 22(6) of the NPA Act, and in consultation with the Minister for Justice and Correctional Services and after consultation with the Deputy National Directors and Directors of Public Prosecutions, determines the code of conduct for members of the National Prosecuting Authority.
- The Code acknowledges the crucial role of prosecutors in the administration of criminal justice. It emphasises the essential need for prosecutions to be fair and effective and for prosecutors to act without fear, favour or prejudice. Furthermore, it serves to inform the public of what is expected of prosecutors and is aimed at ensuring public confidence in the integrity of the criminal justice process. Above all, the Code requires all prosecutors to respect human dignity and human rights, and to perform their professional duties with full recognition of the supremacy of the Constitution and the rule of law.
- The prosecutorial discretion to institute, and to stop criminal proceedings is exercised independently, in accordance with the Prosecution Policy and the Policy Directives. Prosecutors are expected to be free from political, public and judicial interference. All prosecutors are expected to respect and comply with the terms of this Code and report any instances of unprofessional conduct by colleagues (and also, as the case may be, other court officials) to the relevant supervising authority who should consider the appropriate steps to be taken, and do so. In the event of transgressions, appropriate disciplinary steps are taken in terms of the Public Service Regulations and NPA Act.
- A copy of this Code of Conduct for members of the National Prosecuting Authority is handed

to all prosecutors at the time of their taking the oath or making an affirmation as prescribed in section 32(2) of the NPA Act or as soon as possible thereafter, and signed for to denote acceptance thereof. Deputy Directors of Public Prosecutions and prosecutors, being civil servants, are also expected to comply with the Code of Conduct for the Public Service. The Code of Conduct for members of the National Prosecuting Authority can be found at: <https://www.npa.gov.za/sites/default/files/Library/Code%20of%20Conduct%20published%2029%20December%202010.pdf>

- Prosecution Policy Directives are issued in compliance with section 179(5)(b) of the Constitution, requiring that prosecutors perform their functions without fear, favour or prejudice and prescribing that the foreign bribery offence must be a High Court case (Part 12, para 3.p). In terms of section 179(5)(c) of the Constitution, the NDPP may intervene in any process which is in breach of the policy directives.

- The structure of the NPA provides for an Integrity Management Unit. Integrity Management Unit's primary responsibility is the creation of a preventive environment (i.e. an environment promoting ethical behaviour and compliance with professional norms and standards, regulations and policies), which will protect the NPA and its members. To achieve this environment and enhance integrity within the NPA, the Unit focuses on the following:

- i. Facilitating the establishment and implementation of standards and programmes to develop and enhance integrity in the NPA.

- ii. Advocacy, education and training to continuously raise the levels of awareness and consciousness about organisational standards, reputation and integrity issues, as well as constitutional obligations.

- iii. Monitoring and evaluation of compliance with standards, policies, procedures and constitutional requirements.

- Disciplinary process for prosecution service is implemented in terms of the following:

- i. PSCBC Resolution 1 of 2003 (Disciplinary Code and Procedure for the Public Service).

- ii. Chapter 7 of the SMS Handbook.

- iii. NPA Code of Ethics.

- iv. Prosecution Policy Directive.

- v. Code of Conduct for members of the NPA.

3. Measures aimed at increasing transparency and accountability in the selection, recruitment, training, performance management and removal of members of the prosecution service

- The NDPP is the head of the NPA and is appointed by the President, and serves a non-renewable term of ten (10) years. The President has a discretion to regulate the recruitment and appointment process for the NDPP. This was demonstrated with the appointment of the current NDPP in that the assistance of a panel of individual experts from the legal fraternity and 'State Institutions Supporting Constitutional Democracy' were invited in recommending suitable candidates. Candidates for the position of the NDPP were subjected to an interview process which was open to the public.

The NDPP has a range of powers, duties and functions that are detailed in section 22 of the NPA Act. Section 9 of the NPA Act prescribes the requisite qualifications and requirements that an NDPP, DNDPP or DPP, must possess in order to enable his/her appointment. The person to be



appointed as NDPP must be a South African citizen.

- The Deputy National Directors of Public Prosecutions are also appointed by the President, after consultation with the Minister for Justice and Correctional Services and the NDPP. The NPA Act allows for the appointment of a maximum of four Deputy National Directors. Deputy National Directors do not have a fixed term of office, but must vacate their office at the age of 65 years .
- Prosecutors are appointed on the recommendation of the National Director or a member of the prosecuting authority designated for that purpose by the National Director, and subject to the laws governing the public service in terms of section 16 of the NPA Act. Conditions of service of a Deputy Director or a prosecutor shall be determined in terms of the provisions of the Public Service Act, 1994.
- In terms of section 18 of the NPA Act any Deputy Director or prosecutors shall be paid a salary in accordance with the scale determined from time to time for his or her rank and grade by the Minister after consultation with the National Director and the Minister for the Public Service and Administration, and with the concurrence of the Minister of Finance, by notice in the Government Gazette. Different categories of salaries and salary scales may be determined in respect of different categories of Deputy Directors and prosecutors.
- A Prosecutor may appear in the High Court after obtaining a legal qualification and having at least three years' experience as a prosecutor of a magistrate's court of a regional division and in terms of the Right of Appearance in Courts Act (Act 62 of 1995).

4. Induction and ongoing training requirements and curricula for members of the prosecution service:

- The NPA in collaboration with the National School of Government (NSG) offers a Compulsory Induction Programme (CIP) and ongoing training to all new members. This training is offered to members of the prosecution services and others. Separate programmes relating to codes of conduct and integrity are also offered to the existing staff members. Induction formed 18% of the training offered by the NPA in 2017/2018 and 8% in the next year respectively.
- Justice College is a State Academy that is located within the Department of Justice and Constitutional Development (DoJ&CD). The focus of Justice College is on offering a high quality, relevant expanded programme, offering that is institutionalized to contribute to the DoJ&CD vision and strategic objectives. Programmes offered are designed to offer functional skills that enhance participant's knowledge, skill and behavioural competencies.
- Prosecutorial programmes offered by the Justice College are:
  - (i) Criminal Law: Basic Principles of Criminal Law - All Prosecutors in the NPA identified through the competency assessment, observation, and/or Performance Assessment Process. The purpose of the programme is to ensure that Prosecutors have a proper understanding of the basic principles of criminal law.
  - (ii) Criminal Law: Child Pornography and Related Offences - All Prosecutors in the NPA identified through the competency assessment, observation, and/or Performance Assessment Process and Prosecutors in the NPA who predominantly prosecute such offences and/or are currently prosecuting such matters relating to child pornography must be prioritized. The purpose of the programme is to ensure that Prosecutors have an understanding of offences relating to child pornography.
  - (iii) Criminal Law: Corruption and Fraud Offences - All Prosecutors in the NPA identified

through the competency assessment, observation, and/or Performance Assessment Process and Prosecutors in the NPA who predominantly prosecute such offences and/or are currently prosecuting such matters relating to Corruption and Fraud must be prioritized. The purpose of the programme is to ensure that Prosecutors know and are able to prove the elements of crimes applicable to corruption and fraud.

(iv) Criminal Law: Criminal Capacity - Psychiatry / Psychology and the Law - All Prosecutors in the NPA. The purpose of the programme is to ensure that Prosecutors have an understanding of psychology and psychiatry in general.

(v) Criminal Law: Cybercrimes - All Prosecutors in the NPA identified through the competency assessment, observation, and/or Performance Assessment Process and Prosecutors in the NPA who predominantly prosecute such offences and/or are currently prosecuting such matters relating to Cyber Crimes must be prioritized. The purpose of the programme is to ensure that Prosecutors have an understanding of cybercrimes and applicable legislation.

(vi) Criminal Law: Organised Crime - All Prosecutors in the NPA identified through the competency assessment, observation, and/or Performance Assessment Process and Prosecutors in the NPA who predominantly prosecute such offences and/or are currently prosecuting such matters relating to Organised Crime must be prioritized. The purpose of the programme is to ensure that Prosecutors have an understanding of the provisions of the Prevention of Organised Crime Act 121 of 1998.

(vii) Criminal Law: “Trio” Crimes and Related Matters - All Prosecutors in the NPA identified through the competency assessment, observation, and/or Performance Assessment Process and Prosecutors in the NPA who predominantly prosecute such offences and/or are currently prosecuting such matters relating to Trio Crimes must be prioritized. The purpose of the programme is to ensure that Prosecutors know and are able to prove the elements of the crime of robbery and matters pertaining to it and be aware of the relevant competent verdicts and minimum sentences.

(viii) Criminal Law: Stock Theft and Related Offences - All Prosecutors in the NPA identified through the competency assessment, observation, and/or Performance Assessment Process and Prosecutors in the NPA who predominantly prosecute such offences and/or are currently prosecuting such matters relating to Stock Theft must be prioritized. The purpose of the programme is to ensure that Prosecutors know and apply the applicable legislation relating to stock theft.

(ix) Criminal Law: Violent Protests and Industrial Action - All Prosecutors in the NPA identified through the competency assessment, observation, and/or Performance Assessment Process and Prosecutors in the NPA who predominantly prosecute such offences and/or are currently prosecuting such matters relating to Violent Protests and Industrial Actions must be prioritized. The purpose of the programme is to ensure that Prosecutors are able to effectively institute prosecution within the relevant courts in crimes involving and related to violent protests and industrial action.

(x) Environmental Crimes: Advanced Programme with Emphasis On “Green” Environmental Issues - All Prosecutors in the NPA identified through the competency assessment, observation, and/or Performance Assessment Process and Prosecutors in the NPA who predominantly prosecute such offences and/or are currently prosecuting such matters relating to “Green” Environmental issues must be prioritized. The purpose of the programme is to ensure that Prosecutors have an understanding of environmental crimes pertaining to “Green” issues and applicable legislation.

(xi) Environmental Crimes: Q Advanced Programme with Emphasis On “Brown” Environmental Issues - All Prosecutors in the NPA identified through the competency assessment, observation, and/or Performance Assessment Process and Prosecutors in the NPA who predominantly prosecute such offences and/or are currently prosecuting such matters relating to “Brown” Environmental issues must be prioritized. The purpose of the programme is to ensure that Prosecutors have an

overall knowledge of what environmental crimes pertaining to “Brown” issues entail Prospectus page 40.

(xii) Law of Evidence: Basic Principles of the Law of Evidence - All Prosecutors in the NPA identified through the competency assessment, observation, and/or Performance Assessment Process. The purpose of the programme is to ensure that Prosecutors know and can apply the basic principles of Law of Evidence.

(xiii) Law of Evidence: Confessions, Admissions and Pointing Out - All Prosecutors in the NPA identified through the competency assessment, observation, and/or Performance Assessment Process. The purpose of the programme is to ensure that Prosecutors know the difference between a confession, an admission and a pointing out, know when these statements are admissible and when they are not and effectively lead this evidence in court.

(xiv) Law of Evidence: Social Media Evidence - All Prosecutors in the NPA identified through the competency assessment, observation, and/or Performance Assessment Process and all Prosecutors in the NPA who are currently prosecuting matters where social media evidence forms part of the case must be prioritized. The purpose of the programme is to ensure that Prosecutors have a basic overview of how to lead police investigations and to present such evidence in a court of law.

(xv) Trial Advocacy: Trial Advocacy - All Prosecutors in the NPA All Prosecutors in the NPA identified through the competency assessment, observation, and/or Performance Assessment Process. The purpose of the programme is to ensure that Prosecutors are able to demonstrate all the important trial advocacy skills in an effective way.

(xvi) Trial Advocacy - Advanced Trial Advocacy - All Prosecutors in the NPA identified through the competency assessment, observation, and/or Performance Assessment Process and all District Court Prosecutors in the NPA will be prioritized. The purpose of the programme is to ensure that Prosecutors are prepared to prosecute in the Regional and High Court.

(xvii) Trial Advocacy: High Court Bridging - Prosecutors in the NPA who are about to progress to, or already have been prosecuting in the High Courts. The purpose of the programme is to ensure that Prosecutors are properly prepared to prosecute in the High Court.

(xviii) Witnesses: State Witnesses - General Principles - All Prosecutors in the NPA identified through the competency assessment, observation, and/or Performance Assessment Process and Prosecutors in the NPA who require upskilling and/or have to demonstrate an ability to consult and/or lead a state witness during legal proceedings having his/her best interests at heart. The purpose of the programme is to ensure that Prosecutors are capable of correctly dealing with State witnesses before and during Criminal trial.

(xix) Witnesses: The Child as A Witness - All Prosecutors in the NPA identified through the competency assessment, observation, and/or Performance Assessment Process and Regional Court Prosecutors who have to demonstrate an ability to regulate, control, direct, institute and conduct criminal proceedings within the Regional Court on behalf of the State in all matters where a child witness testifies and is required to prove the case beyond reasonable doubt. The purpose of the programme is to ensure that Prosecutors demonstrate the ability to consult and/or lead a witness during legal proceedings having his/her best interests at heart.

(xx) Witnesses: Expert Forensic Witness - DNA Evidence - All Prosecutors in the NPA identified through the competency assessment, observation, and/or Performance Assessment Process and Regional and High Court Prosecutors who are required to demonstrate an ability to regulate, control, direct, institute and conduct criminal proceedings in all matter where DNA evidence is required to prove the case beyond reasonable doubt. The purpose of the programme is to ensure that the

Prosecutors have a proper understanding of what DNA evidence entails and how to effectively present this evidence in court.

- Justice College has been presenting Corruption and Fraud workshops for prosecutors since 2006 to date. The purpose of the programme is to ensure that Prosecutors know and are able to prove the elements of crimes applicable to corruption and fraud. To date 1,581 prosecutors attended training on Corruption and Fraud facilitated by the Justice College.

5. Description of procedures governing case assignment and distribution in relation to the prosecution service:

- The National Prosecuting Authority (NPA) issued Policy Directives which are binding on all members of the NPA. These Directives are intended to set uniform norms and standards in prosecutorial practices. They deal with the professional duties of prosecutors.
- In terms of section 20(5) of the NPA Act, DPPs have been designated by the National Director to issue authorisations to prosecutors in their areas of jurisdiction to institute and conduct prosecutions and, where necessary, to prosecute appeals arising from these.
- In terms of section 24(2) of the NPA Act, DPP's of Investigating Directorates may issue authorisations to prosecutors in their Directorates to institute actions in court, including criminal prosecutions. In practice, provision is made for such prosecutors to be authorised to act in all jurisdictional areas and courts.
- The Head of the AFU has been designated by the National Director to issue authorisations to appear in any court in order to deal with any asset forfeiture litigation, especially those in terms of chapters 5 and 6 of POCA.
- Director of Public Prosecutions (DPP) issues circulars with general instructions to prosecutors under his or her authority relating to case assignments and distribution of services.
- The National Director has also excluded from the jurisdiction of all DPP and Special directors and authorised a Deputy Director within his/her office to institute and conduct proceedings in respect of offences connected with the Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions and section 5 of POCA.
- The National Director may, in terms of section 179(5)(d) of the Constitution review a decision to prosecute or not to prosecute, after consulting the relevant DPP and after taking representations from the accused, the complainant. In addition to their general power to institute and conduct criminal proceedings, prosecutors also have the right to appear in various other matters e.g. extraditions, maintenance inquiries, inquests and rehabilitation inquiries, and may also be designated to appear in civil confiscation enquiries as well restraint, preservation and forfeiture proceedings per person or party whom the National Director considers to be relevant.
- The essential requirements for the application of authorisation to act in terms of 22(8)(b) of the NPA Act are that the authorised person must be a competent person; this person must be in the employ of the public service or any local authority; he or she may conduct prosecutions in respect of such statutory offences, including municipal laws as the National Director has determined (in consultation with the Minister); and that he or she exercises or performs his or her powers or functions subject to the control and directions of the National Director or DPP.
- A person to be authorised in terms of section 22(8)(b) must be a person who is competent to be appointed as a prosecutor in terms of section 16 of the NPA Act, which includes having the

prescribed qualifications.

6. Procedures on providing information about asset declarations of prosecutors and how they are used to prevent conflicts of interest:

- Prosecutors are required to declare their financial interests including assets declaration in line with the requirements of Public Service Regulations, 2016, as designated employees through the electronic disclosure system referred to eDisclosure system.
- The eDisclosure system is an electronic system designed for designated employees in the Public Service to disclose their financial interests. The system maintains a database of financial disclosures known as the Register of Designated Employees' Interests. The system is used to monitor compliance and manage conflict of interest situations that could be identified through disclosure of financial interest(s). Information provided under article 7, paragraph (4) and article 8, paragraph (5) regarding disclosure of financial interests (in the public service) is applicable to the prosecutors who fall within the designated employees. The type of information to be disclosed and period of disclosure is the same as those prescribed for other designated employees in the public service.
- Statistics relating to disclosure of financial interests by designated employees at senior management level (SMS) in the NPA:

Year	No. of SMS members	No. disclosed	Percentage
2018/19	193	193	100%
2017/18	204	204	100%
2016/17	214	212	99%
2015/16	221	221	100%

Table 8: Disclosure of financial interests by designated at SMS level in the NPA

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

Examples of the implementation

1. Examples in which the breach of a prosecutorial code of conduct has led to the application of disciplinary measures:

- The Fraud and Corruption Directorate within the NPA was able to investigate and report on 75% of its investigation cases and was also able to identify potential fraud and corruption risks through its structured detection programme. More than 350 calls were received through the Anonymous Tip-Offs whistleblowing hotline, managed by a third party company, most of which warranted either an investigation or a referral to an appropriate agency for further investigation.
- The Integrity Management Unit (IMU) is responsible for managing the Code of Conduct for prosecutors on behalf of the National Director of Public Prosecutions.

**Table 49: Status of cases ethical breach matters that were dealt with in the period**

Status of case	No. in the State
Cases Finalised	68
Cases unsubstantiated	36
Cases referred	22
Pending	33

Source: Annual Report National Director of Public Prosecutions 2017/18

2. Cases in which members of the prosecution service have been subject to criminal proceedings as a result of alleged acts of corruption

a) During the period 01 April 2017 until 31 July 2019 the following number of cases relating to corruption and/or breach of prosecutorial duties are as follows:

i. Corruption - Eight (8) matters were reported on which there were four (4) dismissals, three (3) resignations and one (1) pending matter.

ii. Breach of prosecutorial code of conduct - One (1) matter was report and the official was dismissed.

<b>FNANCIAL YEAR</b>	<b>NPA ACCUSED CONVICTED</b>
<b>2014/2015</b>	<b>3</b>
<b>2015/2016</b>	<b>0</b>
<b>2016/2017</b>	<b>8</b>
<b>2017/2018</b>	<b>6</b>
<b>2018/2019</b>	<b>4</b>
<b>2019/2020</b>	<b>1</b>

Source: Annual Report National Director of Public Prosecutions 2017/18

3. Statistics regarding the number of reports of corruption in the prosecution service received, including mechanisms in place to facilitate such reporting, number of investigations that resulted and their outcomes:

Type of integrity breach	No. of reported cases	Nature of reporting	
		General cases	Hotline cases
Unethical conduct/misconduct	37	14	23
Corruption	9	5	4
Conflict of interest	3	2	1
Prosecutorial discretion	18	-	18
Defeating the ends of justice	1	-	1
Leakage of information	2	1	1
Loss of petty cash	1	1	-
Bank account scam	1	1	-
Abuse of SCM process	1	1	-
Loss of docket	2	1	1
Loss of laptop	1	1	-
Maladministration	1	1	-
Not IMU mandate	2	1	1
<b>TOTAL</b>	<b>79</b>	<b>29</b>	<b>50</b>

Source: Annual Report National Director of Public Prosecutions 2017/18

4. Statistics and case studies demonstrating the impact of educational and training programmes for members of the prosecution as regards their adherence to prosecutor codes or standards of conduct:

- The Integrity Management Unit (IMU) advocated for better compliance and integrity amongst officials, this was achieved through its numerous programmes facilitated through the Ethics Management and Advocacy Directorate. Formal training sessions were conducted with prosecutors and other officials and various ethics forums were held in all regions. These ethics conversations and training sessions serve to prick the conscience of officials and also act as the insurance against further ethical lapses of officials.

5. Information about the system of financial disclosures of prosecutors and how they are used in systems to prevent conflicts of interest:

- From a compliance perspective, the IMU was able to assist the NPA achieve 100% compliance with the Financial Disclosure of SMS members. Since the introduction of the financial disclosure obligations for levels 12 and below, the IMU attained an 86% compliance rate for the reporting period. In addition, the IMU was able to process 100% of all the requests for remunerative work from NPA officials, and also reported on the gifts, sponsorships and donations received by both the organisation and by individual officials.

- Lastly, since a significant part of the IMU mandate is to advocate for better compliance and integrity amongst officials, this was achieved through its numerous programmes facilitated through the Ethics Management and Advocacy Directorate. Formal training sessions were conducted with prosecutors and other officials and various ethics forums were held in all regions. These ethics

conversations and training sessions serve to prick the conscience of officials and act as the insurance against further ethical lapses of officials.

*(b) Observations on the implementation of the article*

The NPA Act regulates matters incidental to the establishment of a single national prosecuting authority, in accordance with Section 179(4) of the Constitution, and deals, for example, with the appointment, remuneration and conditions of service of the members of the prosecuting authority and regulates their powers, duties and functions. The NPA Act provides that the Minister for Justice and Correctional Services exercises final responsibility over the NPA Authority but only in accordance with the provisions of the NPA Act (s 33(1)).

The NDPP is the head of the NPA, appointed by the President, and serves a non-renewable term of ten (10) years. Section 9 of the NPA Act prescribes the requisite qualifications and requirements that an NDPP, DNDPP or DPP must have. Prosecutors are appointed on the recommendation of the National Director or a member of the prosecuting authority designated for that purpose by the National Director, and subject to the laws governing the public service in terms of section 16 of the NPA Act. Conditions of service of a Deputy Director or a prosecutor are determined in terms of the provisions of the Public Service Act, 1994.

A Code of Conduct and disciplinary mechanisms applicable to members of the prosecution service are in place. The Code *inter alia* requires that the prosecutorial discretion to institute and to stop criminal proceedings should be exercised independently, in accordance with the Prosecution Policy and the Policy Directives, and be free from political, public and judicial interference. The prosecutorial discretion to institute and to stop criminal proceedings is exercised in accordance with the Prosecution Policy and the Policy Directives.

The NPA's Integrity Management Unit (IMU) is responsible for managing the Code of Conduct for prosecutors and is primary responsible for the creation of a preventative environment (i.e. an environment promoting ethical behaviour and compliance with professional norms and standards, regulations and policies). Formal training sessions has been conducted with prosecutors and other officials and various ethics forums were held in all regions.

Breaches of the prosecutorial code of conduct have led to the application of disciplinary measures. The NPA's Fraud and Corruption Directorate identifies potential fraud and corruption risks through its structured detection programme and investigates and reports on cases involving fraud and corruption.

Induction and ongoing training requirements and curricula for members of the prosecution service are offered by the NPA in collaboration with the National School of Government (NSG) and functional training is offered by the Justice College. Justice College has offered Corruption and Fraud workshops for prosecutors since 2006. To date 1,581 prosecutors attended training on Corruption and Fraud facilitated by the Justice College.

NDPP issues circulars with general instructions to prosecutors under his or her authority relating to case assignments and distribution of services. The National Director has also authorised a Deputy Director within his office to institute and conduct proceedings in respect of offences connected with the Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions and section 5 of POCA.

Prosecutors are required to declare their financial interests including assets declaration in line with the requirements of Public Service Regulations, 2016, as designated employees through the electronic disclosure system referred to eDisclosure system.



The provision is implemented.

*(c) Challenges, where applicable*

**Please outline actions required to ensure or improve the implementation of the article under review and describe any specific challenges you might be facing in this respect.**

*(d) Technical assistance needs*

No assistance would be required

**Is any technical assistance already being provided to you? If so, please provide a general description of the nature of the assistance, including donor information.**

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## Article 12. Private sector

### *Paragraphs 1 and 2 of article 12*

*1. Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.*

*2. Measures to achieve these ends may include, inter alia:*

- (a) Promoting cooperation between law enforcement agencies and relevant private entities;*
- (b) Promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest, and for the promotion of the use of good commercial practices among businesses and in the contractual relations of businesses with the State;*
- (c) Promoting transparency among private entities, including, where appropriate, measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities;*
- (d) Preventing the misuse of procedures regulating private entities, including procedures regarding subsidies and licences granted by public authorities for commercial activities;*
- (e) Preventing conflicts of interest by imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure;*

*(f) Ensuring that private enterprises, taking into account their structure and size, have sufficient internal auditing controls to assist in preventing and detecting acts of corruption and that the accounts and required financial statements of such private enterprises are subject to appropriate auditing and certification procedures.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with these provisions of the Convention.**

(a) Responses

Description of applicable measures

1. Policies

1.1 Companies Act, 2008 (No. 71 of 2008)

The Companies Act, 2008 (Companies Act) was implemented on 1 May 2011. The following are the features of the Companies Act:

- Aligns South Africa's accounting standards with existing international accounting standards. The Companies Act has been designed to meet the International Financial Reporting Standards (IFRS).
- According to section 8, two categories of companies exist under the Act namely profit companies and non-profit companies. Profit companies can be state owned companies, private companies, personal liability companies and public companies. Companies, depending on the type and size, can be subjected to demanding and or less stringent accounting standards, e.g. private companies versus public companies. The Companies Act however, prescribes the requirement for companies to produce financial statements in a manner that satisfies prescribed financial reporting standards which should be consistent with the International Financial Reporting Standards (IFRS) of the International Accounting Standards Board (IASB). (This is to ensure that financial information is useful and comparable across international boundaries).
- Financial statements prepared by a company may not be false or misleading in any material respect, or incomplete in any material particular. Chapter 9 of the Companies Act includes all applicable offences and penalties for any non-compliance, viz. Section 214 states that a person is guilty of an offence if a person is party to the preparation, approval, dissemination or publication of statements that do not meet the requirements or are materially false and misleading. Section 216 and Section 217 includes applicable penalties that can be imposed if a person is convicted of such an offence. Such an offence can also result in the directors of the company being personally liable for any damage incurred by the third party who is misled by the information. It also highlights the Magistrate Court's jurisdiction to impose penalties. Section 171 of the Act allows for the issuance of a compliance notice of which failure to comply with may attract the imposition of an administrative fine in terms of section 175 of the Act.

- Section 30 prescribes which companies must be audited. Companies that fall below a threshold that has been prescribed may be independently reviewed which requirement is less stringent than an audit. The rest of the companies that fall below the independent review have to prepare their statements in accordance with basic accounting with International Standard on Review Engagements (ISRE) 2400 as prescribed by regulation 29 (3).

## 1.2 Companies Regulations, 2011

The Companies Regulations, 2011, are relevant in as far as the implementation of the Companies Act is concerned. Private Companies in general do not have to be audited unless they exceed certain thresholds in terms of the scope of their activities, number of employees and turnover. The determinations by way of Public Interest scores are prescribed by the Minister in the Regulations.

## 1.3 The King IV Code on Corporate Governance for companies

The King Code is the code that is binding to companies that list with the Johannesburg Stock Exchange. The DTI regulates, administers and monitors implementation of the Companies Act. The King Code is allowed to set a standard but not lower than the one set by the Companies Act. The King Code of Corporate Governance is available on the Institute of Directors website: <https://www.iodsa.co.za/page/KingIV>

### (a) Examples of Implementation

Matters dealt with by the Unit: Corporate Disclosure Regulation and Compliance, ranges from complaints lodged by individuals; to reportable irregularities reported by auditors, a snapshot of types of contraventions of included below.

	Q1 2018/9	Q2 2018/9	Q3 2018/9	Q4 2018/9
Opening Balance	123	165	181	238
Cases Received	85	74	99	135
Closed Cases	64	37	42	144
Closing Balance	165	181	238	229

### (i) Reportable Irregularities and Complaints volumes indicating closed cases:

Table 8: Reportable irregularities and complaints volumes indicating closed cases.

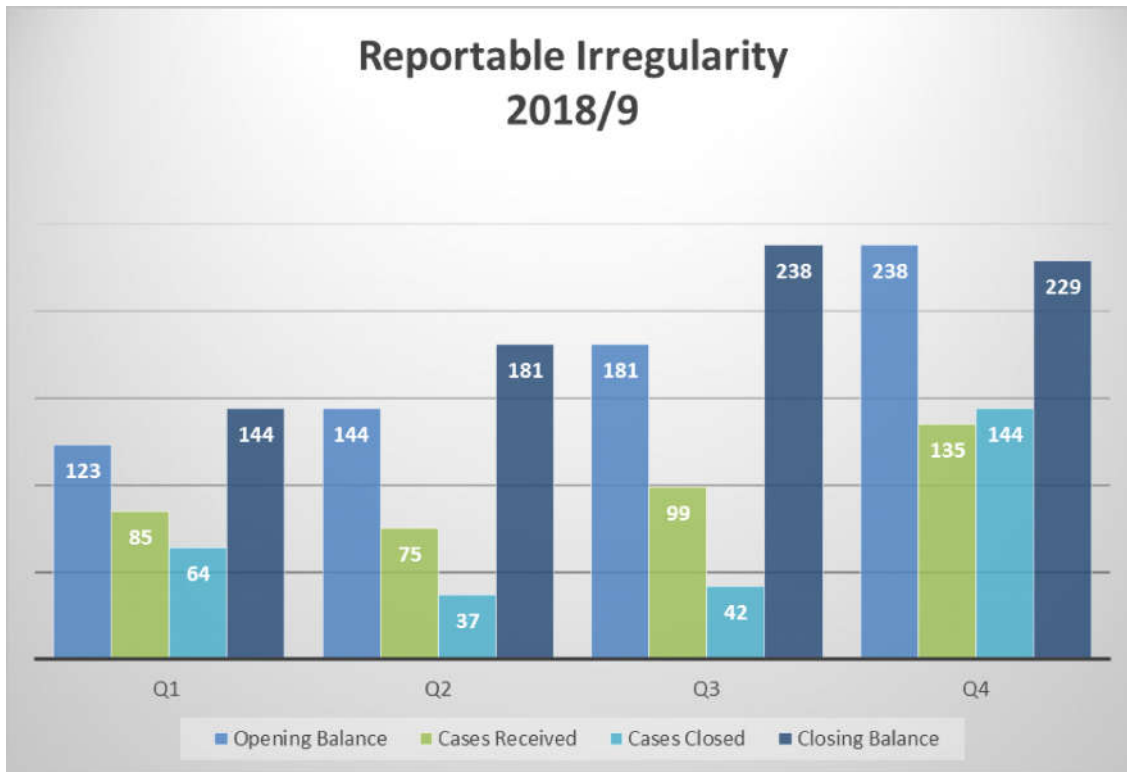


Figure 6: Reportable irregularities 2018/19

(ii) Types of complaints the Unit deals with and that gets investigated

Types of complaints received	Companies Act contravened
Failure to give access to company records	Sec 26
Failure to prepare Annual Financial Statements	Sec 30
Failure to convene Annual General Meeting	Sec 61
Loans or financial assistance to directors	Sec 45
Misstatement of Annual financial statements	Sec 29(6)
Non Compliance with IFRS	Sec 29 (4)
Trading recklessly - liabilities exceed assets	Sec 22
Failure to keep Accounting records	Sec 28
Trading Recklessly and Financial Assistance	Sec 22, Sec 45 & Sec 46

Table 9: Types of complaints the unit deals with and that gets investigated

## 2. Institutional Measures

### 2.1 Financial Reporting Standards Council (FRSC)

The Companies Act establishes the Financial Reporting Standards Council (FRSC) in terms of Chapter 8D (Section 203) of the Act. The main function of the FRSC is to issue financial reporting standards for the companies in South Africa.

### 2.2 The Companies and Intellectual Property Commission (CIPC)

The Companies and Intellectual Property Commission (CIPC) is also established through the Companies Act. It has the following functions:

- ✓ Registration of companies, co-operatives and intellectual property rights;
- ✓ Disclosure of information on its business registers;
- ✓ Promotion of compliance with relevant legislation (including education and awareness);
- ✓ Enforcement of relevant legislation;
- ✓ Monitoring compliance with and contravention of financial reporting standards, and making recommendations to the FRSC; and
- ✓ Licensing of business rescue practitioners.

The Commission has the following regulators as key and this assists in the execution of its functions; viz.

Regulator Name	Description
Independent Regulatory Board of Auditors	Administers, Enforces Auditing Profession Act
Financial Services Board (Capital Markets)	Financial Markets Act
Banking Regulator (Reserve Bank)	Disclosure regulations as required by Basel III
Johannesburg Stock Exchange	Administers Listing Requirements
STRATE (Shares Trading Totally Electronic)	Provide settlement services for Share Trades
Banking Association of South Africa	Membership enforces the FIC Act
South African Revenue Services	Annual Financial Statements
Department of Home Affairs	Provide Biometric Services for new registrations

Table 10: Regulators in terms of the Companies Act, 2008

#### Examples of implementation

- Guideline for Corporate Compliance Programme

The CIPC has issued a Guideline for Corporate Compliance Programme in terms of regulation 4 of the Companies Regulations, 2011, addressed to the Social and Ethics Committees of every state owned company, every listed company and any other company that has in any two of the previous years, scored above 500 points in terms of regulation 26(2).

- The Guideline can be found on the CIPC website at <http://www.cipc.co.za/index.php/news/guideline-corporate-compliance-programme/>
- The Guideline was also released on the Johannesburg Stock Exchange News Service (JSE SENS) on 21 November 2018 informing all publicly listed companies of the CIPC Guideline (A screenshot of the JSE SENS was provided).
- The CIPC also had a meeting with the King Committee on 29 April 2019, to discuss the CIPC Guideline 1 document and ways to use the Guideline document to strengthen Corporate Governance in South Africa.
- A copy of the Guideline has been forwarded to the Independent Regulatory Board for Auditors (IRBA) to circulate amongst its Registered Auditor members.

### 2.3 Independent Regulatory Board for Auditors (IRBA)

### 2.3.1 The IRBA's mandate, mission, vision and functions:

The IRBA is mandated by the Auditing Profession Act, 2005 (No. 26 of 2005) (APA) (<https://www.irba.co.za/library/legislation>) to regulate registered auditors (RAs) who perform statutory audits. Its mission is to protect the financial interests of the South African public as well as those of local and international investors through the effective and appropriate regulation of auditors in accordance with internationally and locally recognised standards, codes and laws. The IRBA's vision is to be an internationally recognised, comprehensive and independent regulator of the accounting and auditing profession in South Africa.

### 2.3.2 The IRBA's Inspections process per the APA:

The IRBA's annual inspection plan is drafted in accordance with the requirements of Section 47(1)(b) of the APA which provides that the practice of an RA that audits any public company as defined in Section 1 of the Companies Act 71 of 2008 must be inspected at least every three years.

Examples of implementation

#### IRBA inspection results:

For the results of the IRBA's last three inspection cycles, refer to the following links for access to the relevant Public Inspections Reports:

- o Fourth inspections cycle - 2016:

<https://www.irba.co.za/upload/IRBA%20Public%20Inspection%20Report%20Finalized.pdf>

- o Fifth inspections cycle - 2017:

<https://www.irba.co.za/upload/Public%20Inspections%202017.PDF>

- o Sixth inspections cycle - 2018:

<https://www.irba.co.za/upload/IRBA%20Inspections%20Report%202018.pdf>

### 2.3.3 The IRBA's investigations and disciplinary processes as per the APA:

- The IRBA is mandated to investigate alleged improper conduct by RAs.
- The IRBA's Investigations Committee makes recommendations to the Disciplinary Advisory Committee for appropriate action to be taken which includes non-prosecution, a consent order or referral to a disciplinary hearing.
- Section 51(3)(a)(i) to (iv) of the APA stipulates the following disciplinary measures:
  - o A caution or reprimand;
  - o Impose a fine as calculated with reference to the Adjustment of Fines Act (101 of 1999);
  - o Suspension of the right to practice as an RA for a specific period;
  - o Cancellation of the registration of the RA concerned - i.e. removal of his/her name from the register.

Examples of implementation

### IRBA investigations and disciplinary hearings:

For statistics on the investigations undertaken as well as the disciplinary hearings conducted by the IRBA, refer to the following links for access to the relevant Integrated Reports:

- 2018 Integrated Report:
  - Refer to Page 43 regarding investigations and to page 47 regarding disciplinary hearings;
  - <https://www.irba.co.za/upload/IRBA%20Integrated%20Report%202018.pdf>
- 2017 Integrated Report:
  - Refer to Page 47 regarding investigations and for the number of matter referred to the disciplinary committee for hearing - both for 2016 and for 2017;
  - <https://www.irba.co.za/upload/IRBA%20Integrated%20Report%202017.pdf>

### 2.3.4 Reporting of reportable irregularities (RIs) per Section 45 of the APA:

- Section 45 requires of registered auditors (RAs) to report to the IRBA instances where the management of their audit clients are suspected of having committed unlawful acts and/or omissions.
  - Should these acts and/or omissions be of a continuing nature, then the IRBA is obliged to onward report these matters to the most appropriate regulators who will be in a position to investigate the allegations reported on by the RAs concerned.

### Examples of implementation

#### Reportable irregularities (RIs):

Where RAs report RIs to the IRBA where they indicate their suspicions that their clients have committed acts and/or omissions that involve elements of criminality, these reports are then onwards reported by the IRBA to the relevant law enforcement agencies in cases where these acts/omissions are reported to be of an ongoing nature.

The number of RIs reported to the Financial Intelligence Centre (FIC) and to the Directorate for Priority Crime Investigations (DPCI) during the last three financial years are as follows:

(Note that in some instances, a single report would have been onwards reported to both the DPCI and to the FIC)

- 2016/2017 Financial year:
  - RIs referred to the DPCI: 12
  - RIs referred to the FIC: 8
- 2017/2018 Financial year:
  - RIs referred to the DPCI: 20
  - RIs referred to the FIC: 18
- 2018/2019 Financial year:
  - RIs referred to the DPCI: 23
  - RIs referred to the FIC: 25

### 2.3.5 The IRBA Code:

- The IRBA prescribes the *IRBA Code of Professional Conduct for Registered Auditors (Revised November 2018)* (the IRBA Code) for all RAs in South Africa.
- The IRBA Code is based on the International Ethics Standards Board for Accountant's Code, which was recently restructured and revised.
- This revised and restructured IRBA Code is effective as of 15 June 2019 (with some exceptions).

#### Examples of implementation

##### The IRBA Code:

- The IRBA Code is available here <https://www.irba.co.za/guidance-for-ras/ethics:-the-rules-and-the-code/the-irba-code-revised-2018>
- The IRBA Code sets out fundamental principles of ethics for RAs, reflecting the profession's recognition of its public interest responsibility. These principles establish the standard of behaviour expected of a registered auditor. The fundamental principles are: integrity, objectivity, professional competence and due care, confidentiality, and professional behavior.
- The IRBA Code applies to all registered auditors (firms and individuals), regardless of whether their status is recorded in the IRBA's register as assurance or non-assurance.
- RAs have a duty to consider reporting Non-Compliance with Laws and Regulations (NOCLAR) in terms of the IRBA Code. The NOCLAR requirement is a framework for registered auditors to act in the public interest against non-compliance with laws and regulations.

### 2.3.6 The Rules:

- The IRBA prescribes *Rules Regarding Improper Conduct* for all RAs and registered candidate auditors in South Africa.

#### Examples of implementation

##### The Rules:

- The Rules are available here <https://www.irba.co.za/guidance-to-ras/technical-guidance-for-auditors/ethics:-the-rules-and-the-code/the-rules-and-the-code>
- The Rules are currently in the process of being amended: [https://www.irba.co.za/upload/report\\_files/11.-Proposed-Amendments-IRBA-Rules-Regarding-Improper-Conduct.pdf](https://www.irba.co.za/upload/report_files/11.-Proposed-Amendments-IRBA-Rules-Regarding-Improper-Conduct.pdf)

### 2.3.7 The IRBA's standard setting processes:

- The IRBA prescribes auditing pronouncements for use by RAs in South Africa, per Section 4(1)(c) of the APA.
- Auditing pronouncements include auditing standards, guides and regulatory reports.



- The auditing pronouncements are developed by a statutory committee of the IRBA, the Committee for Auditing Standards (the CFAS). Refer to Section 22 of the APA.

#### Examples of implementation

##### The IRBA's standard setting processes:

- The auditing pronouncements, which are authoritative and therefore mandatory for RAs to apply, are available here <https://www.irba.co.za/guidance-to-ras/technical-guidance-for-auditors/auditing-standards-and-guides>

- The auditing standards include (among many others):

- International Standard on Auditing (SA) 240, *The Auditor's Responsibilities Relating to Fraud in an Audit of Financial Statements*:

This ISA deals with the auditor's responsibilities relating to fraud in an audit of financial statements. The objectives of the auditor are:

- To identify and assess the risks of material misstatement of the financial statements due to fraud;
- To obtain sufficient appropriate audit evidence regarding the assessed risks of material misstatement due to fraud, through designing and implementing appropriate responses; and
- To respond appropriately to fraud or suspected fraud identified during the audit.

- ISA 250, *Consideration of Laws and Regulations in an Audit of Financial Statements*:

This ISA deals with the auditor's responsibility to consider laws and regulations in an audit of financial statements. The objectives of the auditor are:

- To obtain sufficient appropriate audit evidence regarding compliance with the provisions of those laws and regulations generally recognized to have a direct effect on the determination of material amounts and disclosures in the financial statements;
- To perform specified audit procedures to help identify instances of non-compliance with other laws and regulations that may have a material effect on the financial statements; and
- To respond appropriately to non-compliance or suspected non-compliance with laws and regulations identified during the audit.

- The CFAS follow a comprehensive due process. The Due Process Policy is available here <https://www.irba.co.za/guidance-to-ras/technical-guidance-for-auditors/auditing-standards-and-guides/status-of-pronouncements,-due-process-policy-and-adoption-of-the-standards>

##### 2.3.8 The IRBA's involvement with international standard setting bodies and regulatory bodies:

- Section 4(2)(a) of the APA allows the IRBA to participate in the activities of international bodies whose main purpose is to develop and set auditing standards and to promote the auditing profession.
- Section 4(2)(b) of the APA allows the IRBA to cooperate with international regulators in respect of matters relating to audits and auditors.

Examples of implementation

The IRBA's involvement with international standard setting bodies and regulatory bodies:

- Representatives from the IRBA are members or technical advisors on several international boards:
  - The International Auditing and Assurance Standards Board (the IAASB).
  - The International Accounting Education Standards Board (the IAESB).
  - The International Ethics Standards Board for Accountants (the IESBA).

These are Boards of the International Federation of Accountants (IFAC).

- The IRBA is also a founding member of the International Forum of Independent Regulators (IFIAR) and the African Forum of Independent Accounting and Auditing Regulators (AFIAAR).
- Refer to pages 25-28 of the 2017 IRBA Integrated Report, available here <https://www.irba.co.za/library/integrated-reports> for further information on these memberships.

#### 2.3.9 Proposed amendments to the APA:

- The Financial Matters Amendment Bill includes amendments to the APA to strengthen the governance of the regulatory board; to strengthen the investigating and disciplinary processes; to provide for the power to enter and search premises; to subpoena persons with information required for an investigation or disciplinary process; and to provide for the sharing of information amongst the regulators of the auditing profession.

Examples of implementation

Proposed amendments to the APA:

- The Financial Matters Amendment Bill can be downloaded from [www.treasury.gov.za](http://www.treasury.gov.za).
- The Bill is currently in Parliament for public hearings.

## 2.4 Competition Commission

The Competition Commission is a statutory body constituted in terms of the Competition Act, 1998 (Act no. 89 of 1998). It is one of three, independent competition regulatory authorities established in terms of the Competition Act, 1998, with the other two being the Competition Tribunal (the Tribunal) and the Competition Appeal Court. While the Commission is the investigative and enforcement agency, the Tribunal is the adjudicative body and the Competition Appeal Court (CAC) considers appeals against decisions of the Tribunal. The Competition authorities are functionally independent institutions but are administratively accountable to the Economic Development Department (now the merged with the Department of Trade and Industry).

The Commission is empowered by the Competition Act, 1998, to investigate, control and evaluate restrictive business practices, abuse of dominant positions and to regulate mergers in order to achieve equity and efficiency in the South African economy. Its purpose is to promote and maintain competition in South Africa in order to:

- Promote the efficiency, adaptability and development of the economy;
- Provide consumers with competitive prices and product choices;
- Promote employment and advance the social and economic welfare of South Africans;

- Expand opportunities for South African participation in world markets and recognize the role of foreign competition in the Republic;
- Ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
- Promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

## Examples of Implementation

### 2.4.1 Enforcement functions of the Competition Commission

The Commission’s enforcement function relates to contraventions of abuse of dominance, vertical restrictive practices and horizontal restrictive practices, including cartels as provided for in Chapter 2 of the Competition Act, 1998. In order to provide a dedicated focus to cartel conduct, which is the most egregious of all competition law contraventions, the Commission established a Cartels division in 2011. This was a function which was previously performed by the Enforcement and Exemptions division, but due to the observed prevalence of this type of conduct in the South African economy, the Commission pursued a specialist and dedicated focus on cartel investigations. As such, the enforcement work of the Commission is undertaken by the Cartels and Market Conduct divisions respectively.

#### Cartels Division

A cartel involves an agreement or concerted practice between two or more competitors to engage in fixing prices and/or trading conditions, dividing markets and/or collusive tendering. By artificially limiting competition that would normally prevail between them, firms avoid exactly the kind of pressures that lead them to innovate, both in terms of product development and production methods. This results ultimately in high prices and reduced consumer choice.

In South Africa, cartel behavior is prohibited by section 4(1)(b) of the Competition Act, 1998. The penalty for participation in a cartel is a fine of up to 10% of the firm’s annual turnover. The firm also faces the risk of damages claims by customers who may have suffered harm as a result of the cartel activity. The customers may use the finding of cartel behavior against the firm to claim damages in the civil courts. The table below depicts the cases received, investigated and finalized in the past 3 years.

CARTEL CASES RECEIVED, INVESTIGATED AND FINALISED	2016/17	2017/18	2018/19
Total cases handled in the year	86	146	142
Completed investigations	33	63	30
Referrals to the Tribunal	27	52	18
Cases non-referred	6	11	12
Cases initiated by the Commission	26	28	22
Cases received from third parties	17	35	13
Cases taken over from previous year	74	83	91

Table 11: Cartel cases over the past 3 years

(Source: Commission Annual Reports accessible on the website at: <http://www.compcom.co.za/annual-reports/>)

#### *Corporate Leniency Policy (“CLP”)*

The Commission’s Corporate Leniency Policy (CLP) offers a cartel member the possibility to disclose information on a cartel to the Commission in return for immunity from prosecution and fines. Immunity is only available to the first cartel member to approach the Commission. If other cartel members wish to come clean on their involvement in the same cartel, the Commission will also encourage such cooperation outside the scope of the CLP, which can eventually result in a reduction in the fine to be paid in a settlement agreement. In particular, this means that a firm applying for leniency must be the first to provide full and complete information concerning the cartel. The information must be sufficient to allow the Commission to institute proceedings against the cartel members and the applicant must cooperate fully and truthfully with the Commission. The applicant is also required to cease participating in the cartel and not to alert other cartel members to its application. If the conditions of the CLP are met, the Commission will grant the applicant conditional immunity which means that, provided all the conditions of the CLP continue to be met throughout the competition proceedings, the applicant will receive total immunity from prosecution and fine. Table 12 below depicts leniency applications processed in the past 3 years. The policy can be found on the Commission’s website at: <http://www.compcom.co.za/corporate-leniency-policy/>

LENIENCY APPLICATIONS PROCESSED	2016/17	2017/18	2018/19
CLP applications received during the year	6	2	7
Total number of CLPs handled	0	10	40
CLP applications decided during the year	5	4	7
CLP applications rejected	0	0	0

Table 12: CLP applications processed (Source: Commission Annual Reports accessible on the website at: <http://www.compcom.co.za/annual-reports/>)

### *Criminalisation*

As at 01 May 2016, directors and managers will face jail time for participation in a cartel according to the amendments to the Competition Act, 1998, which introduce personal criminal liability for cartel conduct. The amendment introduces criminal liability for directors and individuals with ‘management authority’ who are responsible for or knowingly acquiesce in cartel conduct. Cartel conduct includes the direct or indirect fixing of prices (including purchase prices) and trading conditions, market division, and collusive tendering among competitors or potential competitors. An individual can only be charged if the company involved has already been found to have contravened the cartel provisions by the Competition Tribunal, or it has admitted a contravention in a formal consent order.

### Market Conduct Division

The Market Conduct Division (MCD) investigates and prosecutes restrictive vertical practices and abuses of dominance. MCD also evaluates exemption applications when these are brought to the Commission. The work of the MCD comes from two main sources which are exemption applications and complaints lodged by the public and that are proactively initiated by the Commission. Figure xx below depicts MCD’s cases in the past 3 years.

Table 13: E&E Cases in the past 3 years

Source: Commission Annual Reports accessible on the website at: <http://www.compcom.co.za/annual-reports/>

	2016/17	2017/18	2018/19
Complaints received from the public	205	313	256
Complaints initiated by the Commission	4	5	1
Complaints withdrawn	3	8	6
Complaints closed (non-referred) at screening stage	144	193	193
Complaints that became full investigations in Market Conduct	22	31	10
Complaints closed (non-referred) after full investigation	11	23	14
Complaints referred to the Tribunal for adjudication after full investigation	3	4	1
Exemption Applications received		2	1
Exemptions granted		0	2

### Administrative penalties

The Commission regards administrative penalties as an important tool in enforcing the Act. The primary objective of administrative penalties is deterrence. Administrative penalties serve as a specific deterrent against future anti-competitive behavior by firms that have contravened the Act and as a general deterrent to other firms that may consider engaging in anti-competitive conduct. The Act provides for administrative penalties to be imposed on firms for engaging in conduct that is prohibited in terms of sections 4(1)(b), 5(2) or 8(a), (b) or (d) of the Act and for engaging in conduct that is substantially a repeat by the same firm of conduct previously found by the Tribunal to be a prohibited practice in terms of sections 4(1)(a), 5(1), 8(c) or 9(1) of the Act. Figure xx below depicts the administrative penalties imposed in the past 10 years.

Year	Administrative penalty
2017/18	R354 million
2016/17	R1.628 billion
2015/16	R338 million
2014/15	R191 million
2013/14	R1.7 billion
2012/13	R225 million
2011/12	R584 million
2010/11	R794 million
2009/10	R487 million
2008/09	R331 million
2007/08	R0.00

Table 14: the administrative fees paid to the Competition Commission for the past 10 years Source: Commission Annual Reports accessible on the website at: <http://www.compcom.co.za/annual-reports/>

### Other Examples of implementation

The Commission also issues guidelines to members of the public and practitioners to inform them on how the Commission will address and/or enforce certain aspects of the Competition Act.

## Guidelines for Determination of Administrative Penalties

- The guidelines have been prepared in terms of section 79(1) of the Competition Act, 1998 (Act no. 89 of 1998), which allows the Competition Commission (“Commission”) to prepare guidelines to indicate its policy approach on any matter falling within its jurisdiction in terms of the Act.
- There has been a growing need from the Competition Tribunal (“Tribunal”), the Competition Appeal Court (“CAC”) and stakeholders for the Commission to develop guidelines for determining administrative penalties.
- These guidelines present the general methodology that the Commission will follow in determining administrative penalties for purposes of concluding consent orders and settlement agreements and recommending an administrative penalty in a complaint referral before the Tribunal.
- The Commission recognizes that the imposition of administrative penalties is not a precise science. Therefore, these guidelines will not prevent the Commission from exercising its discretion on a case-by-case basis. The primary objective of these guidelines is to provide objectivity and transparency in the method of determining administrative penalties.
- The guidelines for the determination of administrative penalties can be found on the Competition Commission website at <http://www.compcom.co.za/guidelines-for-determination-of-administrative-penalties/>

### Article 12, paragraph 2

*Measures to achieve these ends may include, inter alia:*

#### *(a) Promoting cooperation between law enforcement agencies and relevant private entities*

- The Commission (CIPC) has a memorandum of agreement with law enforcement agencies.

The Commission can also refer any suspected irregularities to either the South African Revenue Services (SARS), National Prosecuting Authority or Directorate for Priority Crime Investigations.

- CIPC and IRBA works closely with regards to the development of guideline documents for use as guidance applicable for members of the Auditing Profession, (meetings are ad-hoc ).
- Workshops and quarterly liaison meetings are held in collaboration with organized institutes in the accountancy profession.
- The Companies Act, 2008, makes provision for an independent review process where independent reviewers are required to report to the Commission when they observe irregularities in the course of **performing the independent review of financial statements of a relevant entity.**
- The Close Corporations Act, 1984 makes provision in terms of Section 62 for reports that Accounting Officers must send to the Commission if they believe the entity in the form of a CC is trading even when liabilities exceed the assets.
- As part of South Africa’s administrative responsibility on public offerings (prospectus), Chapter 4 of the Companies Act, 2008, all public companies are required to make periodic disclosures - on the day when the offer closes, a report confirming that shares have been fully subscribed or that a minimum subscription has been reached must be submitted; after 3 months and 6 months from when the offer closed every company must submit confirmation that the terms and conditions of the prospectus has not changed since the time of issue.

### Examples of implementation

- A Reportable Irregularities Task Group has been formed by CIPC together with IRBA;
- A proposed revised guide for registered auditors regarding reportable irregularities in terms of the Auditing Profession Act has been developed;
- Workshop on Independent Reviews was held with Industry on 26 September 2014;
- The certificate of registration of a prospectus we issue, reflects our requirement for periodic reporting by the companies as part of our oversight responsibility.
- Independent review and section 62 cc act reports.

	13-Oct	14 Oct - 30 Nov
Opening Balance	372	284
Allocated	372	276
	Sept -13 Oct	14 Oct - 30 Nov
Deregistered	10	2
Ability to Pay Debts	13	14
Dormant	5	8
Subordinated	32	23
Compliance Achieved	17	13
Other	11	4
Total Closed	88	64
Closing Balance	284	496

Table 15: Independent Review Statistics and Reports on Liabilities Exceeding Assets Volumes

*(b) Promoting development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of businesses and all relevant professions and the prevention of conflicts of interest, and for the promotion of the use of good commercial practices among businesses and in the contractual relations of businesses with the State.*

The Companies Act, 2008 clearly stipulates how company directors must conduct themselves in running the companies for which they are stewards, as well as clear consequences should they be found to have contravened or abused their fiduciary capacity. For example, in section 75, the Companies Act prescribes compulsory disclosure of directors' personal interest. The Act also prescribes standards of directors' conduct in section 76, in particular:

*A director of a company must—*

*(a) not use the position of director, or any information obtained while acting in the capacity of a director—*

*(i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or*

*(ii) to knowingly cause harm to the company or a subsidiary of the company; and*

*(b) communicate to the board at the earliest practicable opportunity any information that comes to the director's attention, unless the director—*

*(i) reasonably believes that the information is—*

*(aa) immaterial to the company; or*

*(bb) generally available to the public, or known to the other directors; or*

*(ii) is bound not to disclose that information by a legal or ethical obligation of confidentiality.*

Furthermore, section 77 provides for directors' liability as follows:

*A director of a company may be held liable—*

*(a) in accordance with the principles of the common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in section 75, 76(2) or 76(3)(a) or (b); or*

*(b) in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of—*

*(i) a duty contemplated in section 76(3)(c);*

*(ii) any provision of this Act not otherwise mentioned in this section; or*

*(iii) any provision of the company's Memorandum of Incorporation.*

In addition, Section 22 of the Companies Act prohibits reckless trading and fraudulent activities by companies. Section 28 requires companies to keep and maintain accurate accounting records, which applies even when companies are not subjected to audit requirements based on their public interest scores. Contravention of the section is an offence pursuant to Section 214 and may attract the sanction of an administrative fine or imprisonment.

#### The Case of Dudu Myeni of South African Airways Ltd versus CIPC

Following an application in 2017 by the then Chairperson of the SAA, Ms Dudu Myeni (in her personal capacity) to the Companies Tribunal to set aside a Compliance Notice and the Tribunal's subsequent dismissal of her application with costs, the CIPC requested the State Attorneys to take the necessary action to collect the amount of R200 525.08 for taxation cost from her.

In terms of the Companies Act, 2008, the Minister has powers to prescribe companies or category of companies that must establish social and ethics committees. The social and ethics committees are meant to be subcommittees of boards. They report to the board and shareholders in meetings on social and ethical issues that can involve the company.

In line with regulation 43 of the Company Regulations, 2011, the following companies are required to establish a social and ethics committee:

(i) All state owned companies;

(ii) all listed public companies; and

(iii) all companies that have, in any two of the previous five years, had a public interest score of at



least 500 points.

Functions of the social and ethics committee include:

- (i) To monitor the company's activities with regard to -
  - social and economic development;
  - good corporate citizenship;
  - the environment, health and public safety;
  - consumer relationships; and
  - labour and employment.
- (ii) to draw matters within its mandate to the attention of the Board...; and
- (iii) to report...to the shareholders...on the matters within its mandate.

Awareness-raising of how companies should be governed is conducted by the regulator and this is not tailored specifically to corruption instances. It covers all instances of dishonesty and contravention of the provisions of the Companies Act.

Section 187 of the Companies Act mandates the Companies and Intellectual Property Commission (CIPC) to educate and create awareness in the business community on the compliance requirements. The Commission's annual report confirms interventions aimed at increasing the awareness of directors and entities of directors' required conduct and other regulatory obligations.

Private sector organisations like the Institute of Directors South Africa NPC teach courses on directors' ethics and many company boards attach value to directors who undergo such immersion programmes.

Inherent in the Companies Act provisions is advocacy for ethical directorship and the need for directors to make the necessary disclosures.

News headlines assist in having a deterrent effect in the business world. For example, the settlement reached in the Eskom case, whereby Deloitte suffered serious reputational damage <https://www.iol.co.za/news/south-africa/eskom-reaches-r150-million-out-of-court-settlement-with-deloitte-45309933>

*(c) Promoting transparency among private entities, including, where appropriate, measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities.*

The Companies Act, 2008, prescribes for companies to maintain security registers. Security registers must reflect shareholders, holders of beneficial interests and the extent of the interests in the securities (section 50). At present, only companies are required to maintain security registers and the information contained therein is not submitted to the regulator. However, the Companies Act is in the process of being amended in order to allow for the implementation of a beneficial ownership register and to mandate companies to file such register annually with the Companies and Intellectual Property Commission.

As a member of the G20 Anti-Corruption Working Group, South Africa has adopted the G20 High

Level Principles on Beneficial Ownership Transparency. Assessment of existing and emerging risks associated with different types of legal persons and arrangements, was conducted and finalised in 2018. The country is in a process of developing an action plan to mitigate the risks identified.

*(d) Preventing the misuse of procedures regulating private entities, including procedures regarding subsidies and licenses granted by public authorities for commercial activities.*

There is no provision in the Companies Act, 2008.

*(e) Preventing conflicts of interest by imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure.*

There is no policy regarding post-employment in the public service.

*(f) Ensuring that private enterprises, taking into account their structure and size, have sufficient internal auditing controls to assist in preventing and detecting act of corruption and that the accounts and required financial statements of such private enterprises are subject to appropriate auditing and certification procedures, financial statements of such private enterprises are subject to appropriate auditing and certification procedures.*

The Companies Act, 2008 aligns the country's accounting standards with international financial reporting standards. Section 22 of the Act prohibits reckless trading and fraudulent activities by companies. Section 28 further requires companies to keep and maintain accurate accounting records, which applies even when companies are not subjected to audit requirements based on their public interest scores. Contravention of the section is an offence pursuant to Section 214 and may attract the sanction of an administrative fine or imprisonment.

In terms of the Companies Act, 2008, companies can either be audited or independently reviewed. Independent review is a lower kind of quality assurance. All public and state-owned companies above a certain size have to be audited while all private companies falling below the 350 public interest score threshold may be independently reviewed. Private companies have to be audited if they exceed a certain threshold in terms of the Public Interest Scores (350 points is the minimum), as prescribed by the Minister in the Companies Regulations, 2011 (regulation 26(2)). Public Interest Scores are calculated using the size, turnover or number of employees for a particular year.

There is no requirement under the Companies Act for companies to have internal auditing controls to assist in preventing and detecting acts of corruption.

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

Examples of implementation are provided in each section of the response.

*(b) Observations on the implementation of the article*

South Africa has adopted legislation to prevent and combat corruption in the private sector and among state-owned entities. The Companies Act 2008 requires state-owned, listed and public companies, as well as companies of a certain size to take certain basic steps to enhance accountability and transparency, including to establish social and ethics committees, which are to monitor companies' progress regarding the OECD recommendations on preventing corruption, including bribery. The social and ethics committees appear to be focused more on good corporate governance, corporate citizenship, and fair labour practices, than on anti-corruption compliance. In addition, the Companies Act prescribes standards of directors' conduct and liability, as well as compulsory disclosure of directors' personal interests (sections 75-77). Chapter 3 of the Companies Regulations, 2011 further prescribes enhanced accountability and transparency for South African companies.

During the country visit it was confirmed no comprehensive anti-corruption compliance requirements have been established for South African companies. While the CIPC has issued a "Guideline for Corporate Compliance Programme 2018" pursuant to Regulation 4 of the Companies Regulations 2011, the guideline is addressed to companies' social and ethics committees and is limited to state-owned, listed and public companies, as well as companies of a certain size. It was explained that the guidelines needed to be expanded to make them applicable also to smaller companies.

Furthermore, it was explained that there are no specific efforts underway to raise awareness of anti-corruption requirements for companies. Some activities are conducted by CIPC to educate and create awareness in the business community of corporate governance requirements, which cover all instances of dishonesty and contravention of the provisions of the Companies Act. Also, private entities like the Institute of Directors South Africa conduct activities aimed at increasing the awareness of directors and entities of directors' required conduct and other regulatory obligations, albeit not specific to corruption. CIPC representatives explained that education on business ethics and integrity is a ministerial priority.

Regarding governance provisions for private companies and SOEs, the King IV Code on Corporate Governance aims to support companies' leadership to be economically, environmentally and socially responsible. It provides guidance for improving the transparency and stability of financial management of listed companies, including guidelines on risk management, the composition of boards of directors and the performance of board members, as well as on implementing affirmative action and social responsibility programmes. While the King IV Code is not enforceable, legislation such as the Companies Act incorporates some of its provisions. A corporate governance guideline on avoiding corruption was also issued to companies under Regulation 4 of the Companies Regulations.

The Companies Act requires companies to maintain security registers that reflect shareholders, holders of beneficial interests and the extent of interests in securities (section 50). The Act is being amended to allow for the implementation of a beneficial ownership register and to require companies to file information annually with the Companies and Intellectual Property Commission. As a member of the G20 Anti-Corruption Working Group, South Africa has adopted the G20 High Level Principles on Beneficial Ownership Transparency.

No specific measures are in place to prevent the misuse of procedures regulating private entities, including subsidies and licenses for commercial activities.

There is no policy regarding post-employment restrictions for former public servants.

The Companies Act aligns the country's accounting standards with international financial reporting standards. Section 22 of the Act prohibits reckless trading and fraudulent activities by companies. Section 28 further requires companies to keep and maintain accurate accounting records, which applies even when companies are not subjected to audit requirements based on their public interest scores. Contravention of the section is an offence pursuant to Section 214 and may attract the sanction of an administrative fine or imprisonment.

All public and state-owned companies and private companies above a certain size must be audited. However, there is no requirement for companies to have internal auditing controls to assist in preventing and detecting acts of corruption.

State-owned enterprises have not been a primary focus of anti-corruption mechanisms, although the SOE sector was identified as a priority area in terms of vulnerability to fraud and corruption in the development of the national anti-corruption strategy. There is a need to include State-owned enterprises in anti-corruption efforts.

**Based on the information provided it is recommended that South Africa continue to strengthen measures to prevent corruption involving the private sector, including by strengthening anti-corruption compliance requirements and providing additional guidance and awareness-raising to private entities, including state-owned enterprises, specifically on anti-corruption requirements; promoting rules on business integrity and good commercial practices; strengthening transparency of beneficial ownership of legal entities; requiring companies to have sufficient internal auditing controls to prevent and detect acts of corruption; preventing the misuse of procedures regulating commercial activities; and considering the adoption of post-employment restrictions with a view to preventing conflicts of interest.**

*Paragraph 3 of article 12*

*3. In order to prevent corruption, each State Party shall take such measures as may be necessary, in accordance with its domestic laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, to prohibit the following acts carried out for the purpose of committing any of the offences established in accordance with this Convention:*

- (a) The establishment of off-the-books accounts;*
- (b) The making of off-the-books or inadequately identified transactions;*
- (c) The recording of non-existent expenditure;*
- (d) The entry of liabilities with incorrect identification of their objects;*
- (e) The use of false documents;*
- (f) The intentional destruction of bookkeeping documents earlier than foreseen by the law.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

South African accounting and auditing standards are principles-based. As a result they do not explicitly prohibit the accounting practices listed under paragraph 3 of article 12 of the Convention. Instead, International Standards on Auditing (ISA) 240 and 250 and the Auditing Profession Act contain relevant provisions. It is through jurisdictional law that companies are prohibited from engaging in the accounting practices listed under this paragraph of the Convention. More specifically the rules provide as follows.

In the context of auditors and auditing:

Auditing standards that are applied by registered auditors (RAs) would possibly detect incorrect or fraudulent bookkeeping and accounting such as off-balance sheet transactions.

In the context of the Independent Regulatory Board for Auditors (IRBA):

The Independent Regulatory Board for Auditors (IRBA) prescribes the *IRBA Code of Professional Conduct for Registered Auditors (revised November 2018)* (the IRBA Code) for all registered auditors (RAs) in South Africa.

- The IRBA Code is available here <https://www.irba.co.za/guidance-for-ras/ethics:-the-rules-and-the-code/the-irba-code-revised-2018>
- The IRBA Code sets out fundamental principles of ethics for RAs, reflecting the profession's recognition of its public interest responsibility. These principles establish the standard of behaviour expected of a registered auditor. The fundamental principles are: integrity, objectivity, professional competence and due care, confidentiality, and professional behavior.
- RAs and professional accountants in business have a duty to consider reporting non-compliance with laws and regulations (NOCLAR) in terms of the IRBA Code. The NOCLAR requirement is a framework for registered auditors and/or professional accountants in business to act in the public interest against non-compliance with laws and regulations.

The IRBA has a whistle-blowing policy.

Companies Act, 2008

- Chapter 9 (Part A) of the Companies Act, 2008, as amended contains all relevant applicable provisions relating to Offences and Penalties. Section 214 in particular spells out prohibited conduct. In addition, section 171 of the Act allows for the issuance of a Compliance Notice of which failure to comply may attract the imposition of an administrative fine in terms of section 175 of the Companies Act.

- Section 24 prescribes that every company must maintain specific company records for seven years.

## **Companies Act**

### *214. False statements, reckless conduct and non-compliance*

*(1) A person is guilty of an offence if the person—*

*(a) is a party to the falsification of any accounting records of a company;*

*(b) with a fraudulent purpose, knowingly provided false or misleading information in any circumstances in which this Act requires the person to provide information or give notice to another person;*

*(c) was knowingly a party to—*

*(i) conduct prohibited by section 22(1); or*

*(ii) an act or omission by a business calculated to defraud a creditor, employee or security holder of the company, or with another fraudulent purpose; or*

*(d) is a party to the preparation, approval, dissemination or publication of—*

*(i) financial statements or summaries, to the extent set out in section 29(6);*

*(ii) a prospectus, or a written statement contemplated in section 101, that contained an 'untrue statement' as defined and described in section 95.*

*(2) For the purposes of subsection (1)(d), a person is a party to the preparation of a document contemplated in that subsection if—*

*(a) the document includes or is otherwise based on a scheme, structure or form of words or numbers devised, prepared or recommended by that person; and*

*(b) the scheme, structure or form of words is of such a nature that the person knew, or ought reasonably to have known, that its inclusion or other use in connection with the preparation of the document would cause it to be false or misleading.*

*(3) It is an offence to fail to satisfy a compliance notice issued in terms of this Act, but no person may be prosecuted for such an offence in respect of a particular compliance notice if the Commission or Panel, as the case may be, has applied to a court in terms of section 171(7)(a) for the imposition of an administrative fine in respect of that person's failure to comply with that notice.*

## **Auditing standards**

Relevant auditing standards include (among many others):

- International Standard on Auditing (ISA) 240, *The Auditor's Responsibilities Relating to Fraud in an Audit of Financial Statements*:

This ISA deals with the auditor's responsibilities relating to fraud in an audit of financial statements. The objectives of the auditor are:

- a. To identify and assess the risks of material misstatement of the financial statements due to fraud;
  - b. To obtain sufficient appropriate audit evidence regarding the assessed risks of material misstatement due to fraud, through designing and implementing appropriate responses; and
  - c. To respond appropriately to fraud or suspected fraud identified during the audit.
- ISA 250, *Consideration of Laws and Regulations in an Audit of Financial Statements*:

This ISA deals with the auditor's responsibility to consider laws and regulations in an audit of financial statements. The objectives of the auditor are:

- a. To obtain sufficient appropriate audit evidence regarding compliance with the provisions of those laws and regulations generally recognized to have a direct effect on the determination of material amounts and disclosures in the financial statements;
- b. To perform specified audit procedures to help identify instances of non-compliance with other laws and regulations that may have a material effect on the financial statements; and
- c. To respond appropriately to non-compliance or suspected non-compliance with laws and regulations identified during the audit.

### **Additional Material**

#### **Auditing Profession Act, Section 45 – Reportable Irregularities**

Section 1 of the Auditing Professions Act (APA) defines a reportable irregularity as an unlawful act or omission committed by any person responsible for the management of an entity, which leads to one of the following three things, namely:

1. The unlawful act or omission has caused or is likely to cause material financial loss to the entity and a partner, member, shareholder, creditor or investor in respect of their dealings with the entity; or
2. The unlawful act or omission is fraudulent or amounts to theft; or
3. The unlawful act or omission represents a material breach of any fiduciary duty (defined as a legal duty to act solely in another party's interests) owed by such person to the entity or any partner, member, shareholder, creditor or investor of the entity under any law applying to the entity or conduct or management thereof.

#### **Reportable irregularities in terms of Regulation 29(6) of the Companies Regulations, 2011**

##### **Independent Review**

Regulation 29 of the Companies Act, No. 71 of 2008 deals with the 'Independent Review of Annual Financial Statements'.

For the purpose of this Regulation-

1. 'independent reviewer', means a person referred to in regulation 29(4) and who has been appointed to perform an independent review under this regulation; and
2. 'reportable irregularity', means any act or omission committed by any person responsible for the management of a company, which-
  - o Unlawfully has caused or is likely to cause material, financial loss to the company or to any member, shareholder, creditor or investor of the company in respect of his, her or its dealings with that entity; or
  - o Is fraudulent or amounts to theft; or
  - o Causes or has caused the company to trade under insolvent circumstances.

When an independent review of a company's financial statements must be carried out

Regulation 29 (4) states that ‘An independent review of a company’s annual financial statements must be carried out-

1. In the case of a company whose public interest score for the particular financial year was at least 100, by a registered auditor, or a member in good standing of a professional body that has been accredited in terms of section 33 of the Auditing Professions Act; or
2. In the case of a company whose public interest score for the particular financial year was less than 100, by-
  - A registered auditor, or a member in good standing of a professional body that has been accredited in terms of section 33 of the Auditing Professions Act; or
  - A person who is qualified to be appointed as an accounting officer of a close corporation in terms of section 60(1), (2) and (4) of the Close Corporations Act, 1984 (Act 69 of 1984).

#### Steps to alert CIPC about a "Reportable Irregularity"

- An independent reviewer of a company that is satisfied or has reason to believe that a reportable irregularity has taken place or is taking place in respect of that company must, without delay, send a written report to the Commission. This is known as the ‘**first report**’.
- The report must give particulars of the reportable irregularity referred to above and must include such other information and particulars as the independent reviewer considers appropriate.
- The independent reviewer must within three (3) business days of sending the report to the Commission notify the members of the Board of the company in writing of the sending of the report referred to in regulation 29(6) and the provisions of this regulation.
- The First report of the reportable irregularities (RI’s) from the Independent Reviewer to CIPC must include the letter which was sent to the board of directors notifying them of the reportable irregularity.
- The independent reviewer must as soon as reasonably possible but not later than 20 business days from the date on which the report referred in regulation 29(6) (the first report) was sent to the Commission-
  1. Take all reasonable measures to discuss the first report with the members of the board of the company;
  2. Afford the members of the board of the company an opportunity to make representations in respect of the report; and
  3. A second report must be sent by the Independent Reviewer to the Commission within twenty (20) business days from the date of the First report. The second report must include the independent reviewer’s opinion as to whether:
    - no reportable irregularity has taken place or is taking place; or
    - the suspected reportable irregularity is no longer taking place and that adequate steps have been taken for the prevention or recovery of any loss as a result thereof, if relevant; or
    - the reportable irregularity is continuing; and the detailed particulars and information supporting his conclusions.
- If the second report from the independent reviewer states that the reportable irregularity is continuing, the Commission must notify the appropriate regulator in writing and provide a



copy of the reportable irregularity to them. The Commission may investigate any alleged contravention of the Act.

Independent Review reports must be e-mailed to: [independentreview@cipc.co.za](mailto:independentreview@cipc.co.za).

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

Examples of implementation

- Complaints received by the Unit: Corporate Disclosure Regulation and Compliance to date do not include Section 214 Offences as yet (see below). However, where fraud is suspected, matters are usually referred to the SA Police Services for Investigation.

Types of complaints received	Co. Act contravened
Failure to give access to company records	Sec 26
Failure to prepare Annual Financial Statements	Sec 30
Failure to convene Annual General Meeting	Sec 61
Loans or financial assistance to directors	Sec 45
Misstatement of Annual financial statements	Sec 29(6)
Non Compliance with IFRS	Sec 29 (4)
Trading recklessly - liabilities exceed assets	Sec 22
Failure to keep Accounting records	Sec 28
Trading Recklessly and Financial Assistance	Sec 22, Sec 45 & Sec 46

Table 16: Complaints received by the unit to date

### **Non-compliance investigations and matters referred to the South African Police Service (SAPS)**

The Companies and Intellectual Property Commission (CIPC) opened 3 criminal cases with the SAPS for investigation relating to section 214 (1) (c) of the Companies Act. They are (1). CIPC/McKinsey; (2) CIPC/SAP and (3) CIPC/KPMG. Below is a summary of each complaint.

1. The act of McKinsey informing Eskom that Trillian was acting as McKinsey's subcontractor for a portion of the project, when McKinsey never entered into a formal subcontract with Trillian leads the CIPC to conclude that McKinsey has contravened Section 214 (1) (c) of the Companies Act.
2. The act of SAP concluding a contract with CAD House for the assistance in the procurement of a Transnet contract despite SAP being aware that CAD House was not in the same business environment as SAP leads the CIPC to conclude that SAP may have contravened section 214 (1) (c) of the Act read with section 12 (1) (b) (i) (aa) of Precca (Preventing and Combating of Corrupt Activities Act) .
3. The act of KPMG South Africa, which comprises of KPMG Services and KPMG Inc., receiving the R 23 million fee from SARS and referring to legal opinions and legal conclusions as if they are opinions of KPMG South Africa in the SARS Report despite KPMG South Africa knowing that providing legal advice and expressing legal opinions was outside the mandate of KPMG South Africa and outside the professional expertise of those working on the engagement and the act of KPMG South Africa knowingly failing to appropriately apply its own risk management and quality controls which has resulted in that part of the report which refers to

conclusions, recommendations and legal opinions to no longer be relied upon leads the CIPC to conclude that KPMG Services and KPMG Inc. have contravened Section 214 (1) (c) of the Companies Act.

A plea and settlement agreement relating to contravention of section 214 is section 214 (3) – noncompliance of a compliance notice was also provided to demonstrate that sanctions that can be imposed by the regulator for such contravention.

*(b) Observations on the implementation of the article*

South African accounting and auditing provisions in the companies legislation do not specifically prohibit the accounting practices listed under paragraph 3 of article 12 of the Convention. Instead, registered auditors apply international standards (principally ISA 240 and 250), which prescribe auditors' responsibilities relating to fraud in financial statement audits and require auditors to conduct financial audits in compliance with laws and regulations, and thus may indirectly lead to the detection of incorrect or fraudulent accounting and bookkeeping practices, such as off-balance sheet transactions.

**Based on the information provided, it is recommended that South Africa take measures as may be necessary to prohibit the acts enumerated in paragraph 3 of article 12 of the Convention.**

*Paragraph 4 of article 12*

*4. Each State Party shall disallow the tax deductibility of expenses that constitute bribes, the latter being one of the constituent elements of the offences established in accordance with articles 15 and 16 of this Convention and, where appropriate, other expenses incurred in furtherance of corrupt conduct.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

The South African Income Tax Act, 1962 (ITA) (Act no. 58 of 1962), incorporates relevant provisions.

Section 1 of the ITA defines “gross income” in relation to any year or period of assessment to mean, in the case of any resident, the total amount, in cash or otherwise, received or accrued to or in favour of such a resident. For income tax purposes, section 23(o) of the ITA specifically prohibits the deduction of expenses incurred on corrupt activities, bribes or fines.

SARS has also issued Interpretation Note No. 54 which deals with deductions relating to Corrupt

## Activities, Fines and Penalties.

Building on the OECD 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials, South Africa prohibits the tax deductibility of bribes and payments resulting from or incurred in furtherance of unlawful activity, irrespective of the identity or status of the recipient. Section 23(o) was introduced into the South African Income Tax Act by section 28(1)(e) of the Revenue Laws Amendment Act No. 31 of 2005 with effect from 1 January 2006. It applies to any year of assessment commencing on or after that date.

Before the introduction of section 23(o), the Act did not specifically address the non-deductibility of expenses incurred on bribes or fines resulting from unlawful activities.

The provision reads as follows:

*28.(1) Section 23 of the Income Tax Act, 1962, is hereby amended— ...*

*(e) by the addition of the following paragraph:*

*“(o) any expenditure incurred—*

*(i) where the payment of that expenditure or the agreement or offer to make that payment constitutes an activity contemplated in Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004); or*

*(ii) which constitutes a fine charged or penalty imposed as a result of an unlawful activity carried out in the Republic or in any other country if that activity would be unlawful had it been carried out in the Republic.”.*

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

Example of implementation

SARS does not keep specific statistics. That said work has been done in the area. Through this work, it is evident that the manner in which bribes are accounted for varies, as follows:

- highly unsophisticated scheme (i.e. bribes are 100% accounted for outside the accounting records);
- masked as study bursaries, cars purchased and fake invoices; and
- highly sophisticated schemes.

SARS also developed an internal reference guide entitled “Reference guide bribery and corruption awareness” setting out the obligations on SARS’ auditors in cases where they detect, in the normal course of conducting tax compliance audits, expenses constituting a bribe or otherwise in furtherance of corrupt conduct (Guide provided).

*(b) Observations on the implementation of the article*

South Africa prohibits the tax deductibility of bribes and payments resulting from or incurred in

furtherance of unlawful activity (sect. 23 (o), Income Tax Act).

The provision is implemented.

*(c) Challenges, where applicable*

**Please outline actions required to ensure or improve the implementation of the article under review and describe any specific challenges you might be facing in this respect.**

None required.

*(d) Technical assistance needs*

No assistance would be required

**Is any technical assistance already being provided to you? If so, please provide a general description of the nature of the assistance, including donor information.**

No.

## Article 13. Participation of society

### *Paragraph 1 of article 13*

*1. Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as:*

*(a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes;*

*(b) Ensuring that the public has effective access to information*

*(c) Undertaking public information activities that contribute to non-tolerance of corruption, as well as public education programmes, including school and university curricula;*

*(d) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:*

*(i) For respect of the rights or reputations of others;*

*(ii) For the protection of national security or ordre public or of public health or morals.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

Responses

*Paragraph 1(a): Enhancing the transparency of and promoting the contribution of the public to decision-making processes*

1. Participation of civil society

South Africa is a constitutional democracy. The constitutional values and principles which guide the public administration in South Africa include transparency, democratic values and openness. Based on these principles, SA has always encouraged participation of non-governmental organisations (NGOs) in government programmes.

National Anti-Corruption Summit: Recognising the fact that corruption is a societal problem and therefore, the fight against corruption cannot only involve government, but requires national consensus and coordination of activities, the first National Anti-corruption summit was convened in 1999, involving government leaders, organised business, organised religious bodies, the non-governmental organisations (NGO) sector, donor countries, the media, organised labour unions, academic and professional bodies and the public sector. The summit adopted resolutions related to prevention and combating corruption, building integrity and raising awareness. The summit was also a springboard for the establishment of the National Anti-Corruption Forum (NACF).

National Anti-Corruption Forum (NACF): The NACF is a coalition formed by representatives of the public, business and civil society sectors and was established in 2001 with the aim of driving the national anti-corruption campaign. However, the NACF was not active at the time of review. Its mandate is to:

- (i) contribute towards the establishment of a national consensus through the coordination of sectoral strategies against corruption;
- (ii) advise government on the implementation of strategies to combat corruption;
- (iii) to share information and good practice on sectoral anti-corruption work; and
- (iv) advise sectors on the improvement of sectoral anti-corruption strategies.

The NACF also became a platform for consultation regarding anti-corruption initiatives in the Country. Each sector is represented by ten members nominated by their respective constituencies, as follows:

Civil Society is represented on the NACF by the following ten organisations:

- The Convenor of Civil Society Network Against Corruption (CSNAC)

- The Secretary-General of the Congress of SA Trade Unions (COSATU)
- The Convenor of the Economic and Social Council (ECCOSOC)
- The Secretary-General of the Federation of Unions of SA (FEDUSA)
- The CEO of the Moral Regeneration Movement (MRM)
- The Secretary-General of the National Council of Trade Unions (NACTU)
- The Chairperson of the South African National Editors' Forum (SANEF)
- The Chairperson of the National Religious Leaders Forum (NRLF)
- The CEO of South African National NGO Coalition (SANGOCO)
- The CEO of Transparency SA (T-SA)

#### Business organisations representation in the NACF

- The business sector is represented by 10 delegates from Business Unity South Africa (BUSA). The work of BUSA on the NACF is coordinated by Business Against Crime South Africa (BAC).

#### Government representation at the NACF

- Government is represented by the following Ministries:
- Arts and Culture
- Finance
- Home Affairs
- Intelligence Services
- Justice and Constitutional Development
- Public Enterprises
- Public Service and Administration
- Provincial and Local Government
- Safety and Security

#### The Secretariat of the NACF

The secretariat services to the NACF is provided by the Public Service Commission (PSC). The PSC was established in terms of the *Constitution of the Republic of South Africa, 1996* (the Constitution) as an independent institution, which must be impartial, and must exercise its powers and perform its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethic in the public service.

The NACF hosts the biennial National Anti-Corruption Summits. The primary function of the Summits is to report back on the implementation of resolutions and to pass new ones for further implementation. The NACF also uses the Summit to reflect on the nature and state of corruption in the country and the initiatives and efforts needed to be put in place to deal with corruption.

Consequently, it passes resolutions to address these concerns. NACF Summit resolutions are available at: <https://www.nacf.org.za/anti-corruption-summits/index.html>.

The NACF has over the years faced challenges which made it difficult for the structure to meet consistently. The last NACF Summit was held in 2011 and the NACF was not active at the time of review. Various efforts have been made to resuscitate the structure because of its important role in the fight against corruption in the country. The proposed way forward for the revival of the NACF include-

1. Convening of the Executive Committee of the NACF by the Minister for Public Service and Administration (leader of government in the NACF).
2. A review of the governance model and arrangements for future sustainability.

## 2. Open Government Partnership Programme

South Africa is one of the founding members of the OGP when it was formally launched on 20 September 2011, and has made a number of commitments that seek to build on existing government and citizen-led initiatives related to open government in the country. From the South African perspective, OGP commitments must be aligned to the five year national priorities which are, in turn, linked to the targets identified in the NDP and which are derived from the assessment of South Africa's achievement of the national vision as stipulated in the Constitution. That is the achievement of a non-racial, non-sexist, united, democratic South Africa.

Through OGP, governments and civil society co-create two-year plans, with concrete commitments across a broad range of issues. This model allows civil society organisations to help shape and oversee governments. South Africa is currently implementing 8 commitments from the 2016-2018 action plan.

## 3. Requirement for public consultations before issuing legislation and regulations

Before issuing of legislation and regulations, government issues a government gazette to publish such legislation or regulations and invite public comments. Amendments of laws are also published (Gazetted) by implementing bodies (departments) to solicit public inputs and civil society organisations are encouraged to make submission to Parliament on legislative amendments.

## 4. Fiscal Transparency

As indicated under article 10, South Africa is highly ranked in the world in terms of budget transparency. South Africa has consistently been rated amongst the top three since it held the first position in the 2010 Open Budget Index. The rating of second in 2012 and third in 2015 coincided with a change in the OBI survey scoring which placed increased emphasis on budget participation.

<https://www.internationalbudget.org/open-budget-survey/results-by-country/country-info/?country=za>

*Paragraph 1(b): Ensuring that the public has effective access to information*

#### 5. Measures to promote access to information

Refer to measures indicated in article 10, mainly:

The Promotion of Access to Information Act, 2000 (Act No. 2 of 2000) (PAIA): A right to access information in South Africa is a Constitutional right (section 32 of the Constitution of the Republic of South Africa, 1996). PAIA is aimed at encouraging an open democracy where individuals from all walks of life are empowered to engage with government and participate in decisions which affect their lives. The South African Human Rights Commission developed a manual to simplify understanding of the PAIA and procedures to request information from both public and private bodies: <https://www.sahrc.org.za/home/21/files/Section%2010%20guide%202014.pdf>.

The manual is also a helpful tool to assist public and private bodies to comply with the PAIA. It outlines requirements of the Act in respect of public and private bodies and explains procedures to request access to information.

The South African Human Rights Commission (SAHRC) is mandated under PAIA to:

- Promote the right of access to information;
- Monitor the implementation of PAIA by public and private bodies;
- Make recommendations to strengthen the PAIA; and
- Report annually to Parliament.

#### 6. Beneficial ownership transparency of legal persons and arrangements

South Africa has endorsed the G20 High-Level Principles on Beneficial Ownership Transparency. Two important steps have been taken in this regard:

- (i) the Financial Intelligence Centre Amendment Act, 2017 (Act No. 1 of 2017) defines beneficial owner in respect of a legal person; and
- (ii) in 2018, the Country undertook a risk assessment in this regard and some recommendations are considered to take the process further. This project was also part of the implementation of the OGP programme.

*Paragraph 1(c): Undertaking public information activities that contribute to non-tolerance of corruption, as well as public education programmes, including school and university curricula;*

#### 7. Partnerships established by the Public Service Commission (PSC)

The PSC has established partnerships with other institutions and concluded memoranda of



understanding (MoUs) with them with the purpose of promoting moral values and anti-corruption activities. These institutions include:

7.1 The Moral Regeneration Movement MRM. The primary mandate of the MRM is to be a networking platform for enhancing all existing initiatives and processes aimed at combating moral decay. In partnership with the MRM, the PSC aims to host public lecture series, seminars and workshops aimed at promoting ethical leadership in the Public Service.

7.2 UNISA. Through the MoU with UNISA the parties aim to jointly host public lecture series, seminars and workshops. Where necessary, the PSC will contract UNISA to provide training and conduct research on its behalf.

7.3 Financial and Fiscal Commission (FFC). Through the MoU with the PSC aims to promote good governance and development in the Public Service.

#### 8. International Youth Contest on Social Anti-Corruption Advertising

South Africa through participation in BRICS participates in the International Youth Contest on Social Anti-Corruption Advertising, which is the initiation of the Russian Federation. The goals of the contest are: to encourage the young people to participate in corruption prevention, to develop and use social advertising against corruption, to foster interaction between the society and prosecution authorities and other public authorities in anti-corruption education of the population.

*Paragraph 1(d): Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:*

*(i) For respect of the rights or reputations of others;*

*(ii) For the protection of national security or ordre public or of public health or morals.*

#### 9. Protection of Personal Information Act, 2013 (Act No. 4 of 2013) (POPIA)

While promoting and protecting citizens' rights to access information, the Promotion of Access to Information Act, 2000 (PAIA), seeks to strike a balance with other competing rights, including the rights to privacy and personal information. In 2013, the Protection of Personal Information Act, 2013 (Act No. 4 of 2013) (POPIA) was adopted. The POPIA promotes the protection of personal information by requiring that public and private bodies comply with certain standards when collecting, processing, storing and sharing personal information. Like the right to access information, the right to privacy is a Constitutional right in South Africa. In stated in its preamble, the POPIA recognises this right and states thus:

(i) section 14 of the Constitution of the Republic of South Africa, 1996, provides that everyone has the right to privacy;

(ii) the right to privacy includes a right to protection against the unlawful collection, retention, dissemination and use of personal information; and

(iii) the State must respect, protect, promote and fulfil the rights in the Bill of Rights.

The POPIA further provides for the establishment of an Information Regulator to exercise certain

powers and to perform certain duties and functions in terms of this Act and the Promotion of Access to Information Act, 2000.

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

1. Examples of implementation

Paragraph 1(a):

- NGO participation has always been a feature of the review processes in South Africa. SA government has always encouraged and involved NGOs and civil society in the following programmes:

- (i) African Peer Review Mechanism;
- (ii) Open Government Partnership (OGP); and
- (iii) First cycle implementation review of the United Nations Convention against Corruption

South Africa's end-of-term OGP report 2016-2018 is available at: <https://www.opengovpartnership.org/documents/south-africa-end-of-term-report-2016-2018/>

- National Anti-corruption Programme - Two year programme jointly implemented by Government, civil society and the private sector (the National Anti-corruption Forum). The last Programme was adopted in 2008.

- The Public Service Anti-Corruption Strategy is a product of engagements of the NACF. In accordance with the resolution of the First National Anti-corruption Summit, this strategy represents a further step towards Government's contribution towards establishing a National Anti-corruption Strategy for the country.

- Public consultations

See <http://www.treasury.gov.za/public%20comments/default.aspx>, as an example.

- Transparency in public procurement

<http://www.treasury.gov.za/divisions/ocpo/ostb/contracts/default.aspx>

Paragraph 1(b):

Refer to examples of implementation under article 10.

Paragraph 1(d):

Civil society organisations can freely publish their reports on corruption and related matters. Examples include:

The Status of Whistleblowing in South Africa - report published in 2010 by Open Democracy Advice Centre (ODAC): [https://openjournalismworkshop.files.wordpress.com/2013/03/odac\\_whistleblowing\\_report\\_web](https://openjournalismworkshop.files.wordpress.com/2013/03/odac_whistleblowing_report_web).

[pdf](#)

Empowering our Whistleblowers report commissioned by the Right to Know Campaign - authored by ODAC, and published in 2014:

<https://www.corruptionwatch.org.za/wp-content/uploads/migrated/WhistleblowingBook.pdf>

Financial disclosure requirements in South Africa 2004-2008: Holding elected politicians accountable by the Institute of Security Studies: <https://issafrica.org/research/papers/financial-disclosure-requirements-in-south-africa-2004-2008-holding-elected-politicians-accountable>

*(b) Observations on the implementation of the article*

Various measures are in place to promote the participation of individuals and groups outside the public sector, such as civil society, in the prevention of and the fight against corruption. Key among them are the National Anti-Corruption Summits; National Anti-Corruption Forum (not currently active), a coalition formed by representatives of the public, business and civil society sectors aimed at driving the national anti-corruption campaign; and Open Government Partnership Programme. Efforts in support of fiscal transparency, such as the publication of key budget documents prior to and following the enactment of the budget, and public consultations in the legislative process further enhance the public's involvement.

South Africa implements anti-corruption related public awareness programmes and civil society is actively engaged in anti-corruption efforts.

The authorities have expressed an interest in establishing anti-corruption education programmes in schools and universities.

**Based on the information provided, it is recommended that South Africa consider establishing anti-corruption education programmes in schools and universities. Furthermore, it is recommended that South Africa continue efforts to review the governance model and arrangements for the future sustainability of the National Anti-Corruption Forum or an equivalent body.**

*Paragraph 2 of article 13*

*2. Each State Party shall take appropriate measures to ensure that the relevant anti-corruption bodies referred to in this Convention are known to the public and shall provide access to such bodies, where appropriate, for the reporting, including anonymously, of any incidents that may be considered to constitute an offence established in accordance with this Convention.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Responses

### 1. Anti-Corruption Task Team

The Anti-Corruption Task Team (ACTT) prioritised communication of the government anti-corruption programme to the public. Programme 1 of the ACTT focuses on communication and awareness. The purpose of this programme is to, among other things developing key messages and identifying relevant messengers, ensuring the involvement of key stakeholders and adequate communication of all measures instituted to combat corruption.

In this regard, Government Communication Information System has developed messages around government anti-corruption programme: <https://www.gov.za/anticorruption>

### 2. Public Service Commission

The Public Service Commission (PSC) releases the quarterly bulletins titled: The Pulse of the Public Service. The Pulse of the Public Service, is based on the governance matters in the Public Service, relating to, amongst others, National Anti-Corruption Hotline, including nature of complaints and cases of alleged corruption reported; Management of Financial Disclosure Framework, including submission of registrable interest by members of the Senior Management Service (SMS) to Heads of Department as well as the nature of grievances reported and handled by the PSC.

The bulletin is released by the PSC with the view to keep stakeholders abreast on governance matters in the Public Service. Media is invited to attend and cover the briefings.

### 3. Other reporting channels

Corruption reports may also be made to the South African Police Service (SAPS) and the Hawks, South Africa's Directorate for Priority Crime Investigation (DPCI) which targets organized crime, economic crime, corruption, and other serious crime referred to it by the President or the South African Police Service.

In addition, the Director-General of the Department of Public Service and Administration (DPSA), the National Director of Public Prosecution and the National Commissioner of Police signed a Memorandum of Agreement to enforce the implementation of the prohibition on public service employees conducting business with the State. The DPSA will report public service employees found to be conducting business with the state to the police. The list naming 1539 employees possibly conducting business with the State was handed to the SAPS to facilitate criminal investigations.

To support departments with the implementation of lifestyle audits in the public service, the DPSA consulted with the South African Police Service (SAPS), National Prosecuting Authority (NPA), Special Investigating Unit (SIU), Auditor-General South Africa (AGSA), National Treasury and Financial Intelligence Centre (FIC). The SAPS and NPA play a leading role to investigate and prosecute criminal conduct, and the other role-players will play a supportive role in terms of providing data for conducting lifestyle audits and to provide guidance to the DPSA in coordinating the process. This expert group will assist with implementing the lifestyle audits in the public service.

## 2. Examples of the implementation of those measures

### 2.1 Public Service Commission

Kindly find below the links to the PSC Quarterly Bulletins. Same can be accessed under “*News Letters*” on our website [www.psc.gov.za](http://www.psc.gov.za)

- Pulse of the Public Service Volume 8  
[http://www.psc.gov.za/newsletters/docs/pulse\\_newsletter/Quarterly\\_Bulletin\\_Jan\\_March2019.pdf](http://www.psc.gov.za/newsletters/docs/pulse_newsletter/Quarterly_Bulletin_Jan_March2019.pdf)
- Pulse of the Public Service Volume 7  
[http://www.psc.gov.za/newsletters/docs/pulse\\_newsletter/Pulse%20of%20the%20Public%20Service%20Volume%207.pdf](http://www.psc.gov.za/newsletters/docs/pulse_newsletter/Pulse%20of%20the%20Public%20Service%20Volume%207.pdf)
- Pulse of the Public Service Volume 6  
[http://www.psc.gov.za/newsletters/docs/pulse\\_newsletter/Final%20Quarterly%20Bulletin%20July%20to%20September%202018.%2012%20November%202018doc.pdf](http://www.psc.gov.za/newsletters/docs/pulse_newsletter/Final%20Quarterly%20Bulletin%20July%20to%20September%202018.%2012%20November%202018doc.pdf)
- Pulse of the Public Service Volume 5  
[http://www.psc.gov.za/newsletters/docs/pulse\\_newsletter/Quarterly%20Bulletin%20April%20to%20June%202018.pdf](http://www.psc.gov.za/newsletters/docs/pulse_newsletter/Quarterly%20Bulletin%20April%20to%20June%202018.pdf)
- Pulse of the Public Service Volume 4  
[http://www.psc.gov.za/newsletters/docs/pulse\\_newsletter/Revised\\_4th\\_Quarterly\\_Bulletin\\_July\\_2018.pdf](http://www.psc.gov.za/newsletters/docs/pulse_newsletter/Revised_4th_Quarterly_Bulletin_July_2018.pdf)
- Pulse of the Public Service Volume 3  
[http://www.psc.gov.za/newsletters/docs/pulse\\_newsletter/approved%203rd%20Quarterly%20Bulletin%20-%20October%20-%20December%202017.pdf](http://www.psc.gov.za/newsletters/docs/pulse_newsletter/approved%203rd%20Quarterly%20Bulletin%20-%20October%20-%20December%202017.pdf)
- Pulse of the Public Service Volume 2  
[http://www.psc.gov.za/newsletters/docs/pulse\\_newsletter/Pulse\\_bulletin\\_July\\_september\\_2017.pdf](http://www.psc.gov.za/newsletters/docs/pulse_newsletter/Pulse_bulletin_July_september_2017.pdf)
- Pulse of the Public Service Volume 1  
[http://www.psc.gov.za/newsletters/docs/pulse\\_newsletter/Pulse\\_Bulletin\\_Volume1.pdf](http://www.psc.gov.za/newsletters/docs/pulse_newsletter/Pulse_Bulletin_Volume1.pdf)

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

Examples of the implementation of those measures

### 1. Public Service Commission

Kindly find below the links to the PSC Quarterly Bulletins. Same can be accessed under “*News Letters*” on our website [www.psc.gov.za](http://www.psc.gov.za)

- Pulse of the Public Service Volume 8  
[http://www.psc.gov.za/newsletters/docs/pulse\\_newsletter/Quarterly\\_Bulletin\\_Jan\\_March2019.pdf](http://www.psc.gov.za/newsletters/docs/pulse_newsletter/Quarterly_Bulletin_Jan_March2019.pdf)
- Pulse of the Public Service Volume 7  
[http://www.psc.gov.za/newsletters/docs/pulse\\_newsletter/Pulse%20of%20the%20Public%20Service%20Volume%207.pdf](http://www.psc.gov.za/newsletters/docs/pulse_newsletter/Pulse%20of%20the%20Public%20Service%20Volume%207.pdf)
- Pulse of the Public Service Volume 6  
[http://www.psc.gov.za/newsletters/docs/pulse\\_newsletter/Final%20Quarterly%20Bulletin%20July%20to%20September%202018.%2012%20November%202018doc.pdf](http://www.psc.gov.za/newsletters/docs/pulse_newsletter/Final%20Quarterly%20Bulletin%20July%20to%20September%202018.%2012%20November%202018doc.pdf)
- Pulse of the Public Service Volume 5  
[http://www.psc.gov.za/newsletters/docs/pulse\\_newsletter/Quarterly%20Bulletin%20April%20to%20June%202018.pdf](http://www.psc.gov.za/newsletters/docs/pulse_newsletter/Quarterly%20Bulletin%20April%20to%20June%202018.pdf)
- Pulse of the Public Service Volume 4  
[http://www.psc.gov.za/newsletters/docs/pulse\\_newsletter/Revised\\_4th\\_Quarterly\\_Bulletin\\_July\\_2018.pdf](http://www.psc.gov.za/newsletters/docs/pulse_newsletter/Revised_4th_Quarterly_Bulletin_July_2018.pdf)
- Pulse of the Public Service Volume 3  
[http://www.psc.gov.za/newsletters/docs/pulse\\_newsletter/approved%203rd%20Quarterly%20Bulletin%20-%20October%20-%20December%202017.pdf](http://www.psc.gov.za/newsletters/docs/pulse_newsletter/approved%203rd%20Quarterly%20Bulletin%20-%20October%20-%20December%202017.pdf)
- Pulse of the Public Service Volume 2  
[http://www.psc.gov.za/newsletters/docs/pulse\\_newsletter/Pulse\\_bulletin\\_July\\_september\\_2017.pdf](http://www.psc.gov.za/newsletters/docs/pulse_newsletter/Pulse_bulletin_July_september_2017.pdf)
- Pulse of the Public Service Volume 1  
[http://www.psc.gov.za/newsletters/docs/pulse\\_newsletter/Pulse\\_Bulletin\\_Volume1.pdf](http://www.psc.gov.za/newsletters/docs/pulse_newsletter/Pulse_Bulletin_Volume1.pdf)

*(b) Observations on the implementation of the article*

Several institutions are mandated to receive corruption reports from the public, namely, PSC, through its national anti-corruption hotline, the Public Protector, Special Investigation Unit, the South African Police Service and the Directorate for Priority Crime Investigation (DPCI; also known as the Hawks).

The authorities confirmed that reports can be made anonymously through the hotlines, by email or any other means.

*(c) Challenges, where applicable*

**Please outline actions required to ensure or improve the implementation of the article under review and describe any specific challenges you might be facing in this respect.**

*(d) Technical assistance needs*

**Capacity-building: please describe the type of assistance**

Technical assistance required to implement article 13, paragraph 1(c)

*Paragraph 1(c): Design of anti-corruption public education programmes, including school and university curricula.*

**Is any technical assistance already being provided to you? If so, please provide a general description of the nature of the assistance, including donor information.**

None.

## Article 14. Measures to prevent money-laundering

### *Subparagraph 1 (a) of article 14*

#### *1. Each State Party shall:*

*(a) Institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions, including natural or legal persons that provide formal or informal services for the transmission of money or value and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer and, where appropriate, beneficial owner identification, record-keeping and the reporting of suspicious transactions;*

### *(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

#### (a) Response

##### 1. Information on anti-money laundering regulatory and supervisory regimes:

South Africa has criminalised money laundering (ML) in three separate provisions of the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998) (POCA). Liability for money laundering extends to both natural and legal persons. The penalties for money laundering are a fine not exceeding ZAR 100 million or imprisonment for a period not exceeding 30 years in terms of POCA.

POCA provides for both criminal (conviction based) and civil (not dependent on a conviction) forfeiture. The Asset Forfeiture Unit (AFU) in the National Prosecuting Authority (NPA) administers and implements the freezing and forfeiture provisions of the POCA which apply to a broad range of proceeds (both direct and indirect) and property of corresponding value. Additionally, the Criminal Procedure Act provides for the search, seizure, forfeiture and disposal of the instrumentalities of crime. Any property which may be subject to confiscation or civil forfeiture may be frozen (restrained) by means of an ex parte application.

The Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001) (FIC Act) and the Money

Laundrying and Terrorist Financing Control Regulations (MLTFC Regulations) in terms of the FIC Act create the anti-money laundering regulatory and supervisory regime for banks and non-bank financial institutions.

2. List of relevant regulatory and supervisory authorities:

Schedule 2 to the FIC Act lists the names of Supervisory Bodies which include:

- The Financial Services Board (FSB)-Financial Sector Conduct Authority
- The South African Reserve Bank (SARB)
- The Estate Agency Affairs Board (EAAB)
- The Independent Regulatory Board for Auditors (IRBA)
- Provincial law societies
- Provincial Licensing Authorities (PLAs)-Gambling Boards

Section 45 of the FIC Act states that every supervisory body is responsible to supervise and enforce compliance with the FIC Act by all accountable institutions regulated or supervised by it. Section 4(g) states that the Financial Intelligence Centre (the Centre) is responsible to supervise and enforce compliance with the FIC Act for all accountable and reporting institutions that are not regulated or supervised by a supervisory body or where a supervisory body fails to enforce compliance despite recommendations by the Centre.

The South African Reserve Bank (SARB) is responsible for supervising banking institutions and overseeing South Africa’s exchange control regime-powers which it exercises through its Banking Supervision Department (BSD), now the Prudential Authority, and Exchange Control Department (ExCon). The Financial Services Board (FSB), now the FSCA, is responsible for supervising financial advisors and intermediaries including investment managers, the insurance industry, retirement funds, friendly societies, collective investment schemes, exchanges, central securities depositories and clearing houses. The Johannesburg Stock Exchange (JSE) is a licensed exchange and self-regulatory organisation which is responsible for supervising authorised users of the exchange.

3. Onsite/off-site supervision by financial sector and DNFBP regulators

**Supervisory body inspections conducted (DNFBP sector) – Financial year 2018-2019**

Estate Agency Affairs Board (Supervisory Body for Estate Agents)	<b>130</b>
Provincial Licensing Authority: Gauteng Province 30	<b>30</b>
Provincial Licensing Authority: Mpumalanga Province 22	<b>22</b>
Provincial Licensing Authority: Limpopo Province 12	<b>12</b>
Provincial Licensing Authority: KwaZulu-Natal Province 14	<b>14</b>
Provincial Licensing Authority: Eastern Cape Province 70	<b>70</b>
Provincial Licensing Authority: Western Cape Province 23	<b>23</b>



(Provincial Licensing Authority refers to Provincial Gambling Boards (Supervisory bodies for Gambling Industry)).

Supervisory Body	Full-time equivalent positions (FTEs)	FTEs	FTEs
	AML-Specific	General	Total
PA	19		19
FSCA	3	74	77
JSE		10	10
FIC	9		9
LPC	?	?	?
EAAB		4 <sup>15</sup>	4
PLAs		81	81

With regards to off-site monitoring, the Financial Sector Conduct Authority (FSCA) issues an annual compliance report that inter alia deals with FIC Act compliance for financial service providers (FSPs) only. The table below indicates the number of compliance reports received from FSPs.

Year	Number of reports
2014	8 464
2015	8 689
2016	11 789
2017	11 987
2018	10 391

The compliance report is compulsory for all accountable institutions regulated under the Financial Advisory and Intermediary Services (FAIS) Act. High risk FSPs such as investment managers (category II FSPs), hedge fund managers (category IIA FSPs) and investment administrators (category III FSPs) submit compliance reports bi-annually. The FSCA can suspend or withdraw the licence of the FSP for failure to submit the report. The reports are analysed by the FSCA. The FSCA has also issued readiness surveys to FSPs for them to indicate progress in complying with the amendments to the FIC Act. Collective Investment Schemes (CIS) managers and authorised users of an exchange are submitting quarterly reports on their readiness to comply with the FIC Act.

Year	No. of FAIS onsite visits	No of FAIS onsite visits with FIC inspections	Compliant	Contraventions - Remedial actions	FIC Act s20 A to 21H	s22 to 24	s28	s28A	s29	s42	s42A	s43	s43B
2014	227	214	183	31	4	3	6	7	7	14	4	7	10
2015	160	138	95	43	19	22	18	13	12	29	7	18	15
2016	250	219	164	55	13	7	8	5	9	27	4	16	23
2017	151	130	92	38	10	3	2	2	1	23	0	15	10

<sup>15</sup> Supported by 9 private sector auditing firms

2018		330	0	330										
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- ✓ The FSCA also monitors completion of remedial actions when revisiting a firm.
- ✓ The table below provides a summary of the sanctions applied by the FSCA since 2014.

Date	Type of financial institution	Nature of violation	Sanction	Details
12 October 2018	Satrix managers (CIS manager)	CDD, non-registrati on	R60 000	<a href="https://www.fsca.co.za/Enforcement-Matters/Documents/Satrix%20Manager%20Administrativ e%20Sanction.pdf">https://www.fsca.co.za/Enforcement-Matters/Documents/Satrix%20Manager%20Administrativ e%20Sanction.pdf</a>
22 October 2015	Thebe stockbroki ng (Authorise d user of an exchange)	CDD	R500 000	<a href="https://www.fsca.co.za/Enforcement-Matters/Documents/ORDER_EC_Thebe_2015-10-13_signed%20by%20Judge%20Eloff.pdf">https://www.fsca.co.za/Enforcement-Matters/Documents/ORDER_EC_Thebe_2015-10-13_signed%20by%20Judge%20Eloff.pdf</a>
26 April 2016	Sikhese (FSP)	CDD	Withdrawal of license	
12 August 2016	Thomas B Brokers (FSP)	Non-registrati on	Withdrawal of license	

- ✓ An important aspect of the enforcement process is the public notice which includes the name of the subject of the action, details from the case and the sanction imposed. This has a deterrent effect on both the individual firm and the wider supervised sector. Providing such information on the breaches is also helpful in signalling to AIs the FSCA's expectations in terms of compliance.
- ✓ The FSCA published a notice in March 2018 on enforcement of the amendments to the FIC Act. According to the notice, accountable institutions supervised by the FSCA have until 2 April 2019 to comply with the amendments to the FIC Act. From 2 April 2019, enforcement action will be taken against non-compliant institutions. Accountable institutions will, however, have to demonstrate progress in meeting compliance requirements.

Inspections conducted at banks and mutual banks						
Number of on-site examinations involving AML/CFT component						
	2014	2015	2016	2017	2018	2019 **
Local	8	7	9	7*	4	2
Foreign	1	2	2	2	1	0
Total	9	9	11	9	5	2

The statistics below relate to the number of compliance inspections conducted by the Centre and the supervisory bodies for the past 3 years on accountable and reporting institutions:

FY 2016/17= 186  
 FY 2017/18= 202  
 FY 2018/19= 205  
 TOTAL = 804

Penalties imposed on Banks for FIC Act non-compliance during from 2014:

<http://www.resbank.co.za/PrudentialAuthority/AML-CFT/Pages/Enforcement.aspx>.

Enforcement sanctions issued from 2014 are available on SARB website.

All inspections conducted at banks between 2012 and 2016 were performed following a rules-based approach. Such approach was in line with the requirements of the FIC Act and the Money Laundering and Terrorist Financing Control Regulations. Also, when the Prudential Authority (PA) commenced with inspections it had limited knowledge of banks' programmes to combat ML/TF. To this end it conducted "full scope inspections" to gain a clear understanding of the threats and vulnerabilities facing the banking sector.

Inspections at banks between 2014 and 2016 were conducted over a period of between 3 to 8 weeks to gain an in depth understanding of banks ML/TF deficiencies. Inspection teams consisted of between 4 and 12 inspectors depending on the size and complexity of the bank inspected. Total number of test samples varied from 50 to approximately 500 per bank inspected

In 2017, the PA implemented a risk-based approach model to score the banks for ML/TF purposes. Thus, banks inspected in 2017 onwards were inspected in a more risk sensitive manner taking into account the ML/TF risk posed by individual banks. Other supervisors also follow risk-based supervision and compliance inspections.

#### Administrative sanctions

Since 2014 the PA has imposed financial penalties amounting to R253,25 million (USD 17.729 million) on 18 banks. The highest financial penalty imposed on a single bank to date amounted to R55 million (USD3.85 million), which was imposed in 2018.

Details pertaining to the sanctions imposed are made public on the PA's website including a schedule <https://www.resbank.co.za/PrudentialAuthority/AML-CFT/Documents/Updated%20Administrative%20sanctions%20imposed%20on%20supervised%20institutions.pdf> with salient reasons for imposing the sanctions.

[Link: <https://www.resbank.co.za/PrudentialAuthority/AML-CFT/Pages/Enforcement.aspx>]

Year	Type of Financial Institutions	Nature of violation	Type of sanction or other remedial action
2014	Banks (commercial and statutory banks)	4 banks (Non-compliance with the FIC Act)	Total financial penalties: R125 million
	Life Insurance companies	0	0
2015	Banks (commercial and statutory banks)	2 banks (Non-compliance with the FIC Act)	Total financial penalties: R15 million
	Life Insurance companies	0	0
2016	Banks (commercial and statutory banks)	7 banks (Non-compliance with the FIC Act)	Total financial penalties paid: R44.5 million
	Life Insurance companies	0	0
2017	Banks (commercial and statutory banks)	1 bank (Non-compliance with the FIC Act)	Total financial penalties paid into National Revenue fund: R500 000
2018	Banks (commercial and statutory banks)	2 banks (Non-compliance with the FIC Act)	Total financial penalties paid into National Revenue fund: R62,5 million
	Life Insurance companies	0	0
2019	Banks (commercial and statutory banks)	2 banks (Non-compliance with the FIC Act)	Total financial penalties paid into National Revenue fund: R5.725 million
	Life Insurance companies	0	0

### Sector Risk Assessment

The FIC has conducted a preliminary risk assessment of the following sectors:

1. Legal Practitioners
2. Estate Agents
3. Gambling Institutions
4. Kruger Rand Dealers
5. Motor Vehicle Dealers
6. Trust Service Providers
7. Ithala
8. PostBank
9. A person who carries on the business of lending money against the security of securities.

#### 4. List of the relevant institutions subject to the regimes:

Accountable institutions are listed in schedule 1 to the FIC Act and include:

1. A practicing attorney
2. A board of executors or a trust company or any other person that invests, keeps in safe custody, controls or administers trust property
3. An Estate agent
4. An authorised user of an exchange
5. A Collective Investment Schemes Manager
6. Banks
7. Mutual Banks
8. Long term insurance businesses
9. Businesses that make available gambling activities
10. Businesses who deal in foreign exchange
11. Businesses that lend money against the security of securities
12. A financial services provider (excluding short term insurance and medical aids)
13. Business that sells or redeems traveller's cheques, money orders or similar instruments
14. The Postbank
15. The Ithala Development Finance Corporation Limited
16. Businesses who are money remitters.

Reporting Institutions are listed in schedule 3 to the FIC Act and include:

1. Motor vehicle dealers

## 2. Kruger rand dealers

### 5. Guidance issued by regulatory or supervisory body:

Section 4(c) of the FIC Act requires the Centre to give guidance to accountable institutions, supervisory bodies and other persons regarding the performance and compliance by them with their duties and obligations in terms of the FIC Act or any directive made in terms thereof.

Guidance from the Centre takes two forms:

Formal Guidance - consisting of Directives, Guidance Notes and Public Compliance Communications (PCC); and

Awareness Initiatives - consisting of publications of articles in various media formats, roadshows, telematics sessions and videos.

In fulfilling this legislative obligation and to ensure and facilitate effective supervision and enforcement with the FIC Act, the Centre has issued:

- ✓ 5 Directives, in consultation with supervisory bodies.
- ✓ 7 Guidance Notes, in consultation with supervisory bodies.
- ✓ 40 Public Compliance Communications, in consultation with supervisory bodies.
- ✓ 57 articles were published by the Centre in various media forums.
- ✓ 202 roadshows were conducted by the Centre or where the Centre was a participant, in the major metropolitan centres in the country over the period of assessment, which attracted approximately 15 000 sector participants.
- ✓ 6 telematic sessions were conducted by the Centre over the period of assessment, with 3 000 viewers participating.
- ✓ 6 YouTube videos were posted by the Centre, attracting more than 18 000 views.

The Centre also operates a comprehensive website, [www.fic.gov.za](http://www.fic.gov.za) where all sector participants and the general public can access a wide range of information to assist them in better understanding the objectives and purpose of the FIC Act and complying with the provisions thereof.

The Centre also operates a Call Centre, through which any person can contact the Centre to seek assistance with any compliance related query. Through the Call Centre, the query will either be addressed directly or escalated to the relevant department for resolution. During the period of assessment, the Centre has received and addressed 117 634 compliance queries.

## 6. FSCA

### PROMOTING A CLEAR UNDERSTANDING OF AML/CFT OBLIGATIONS AND ML/TF RISKS

The Financial Sector Conduct Authority (FSCA) has undertaken a range of outreach activities with regard to the sectors that it supervises. The FSCA held 10 conferences in major cities since 2016 and shared critical information with authorised FSPs relating to inspection findings, amendments to the FIC Act and readiness to comply with the FIC Amendment Act. The FSCA also facilitated workshops for small FSPs without compliance officers in Polokwane, Bloemfontein and Port Elizabeth. There are six additional workshops scheduled to be held in Pretoria in February and March 2019. The FSCA also published three newsletters targeted at authorised FSPs. The

newsletters focused on inspection findings and FICA compliance. The Table below provides a summary of the awareness campaigns facilitated by the FSCA.

Awareness for authorised Financial Services Providers (FSPs)

Period: 1 April 2014 to 31 March 2019

	Date	Type of event	Issues covered	No of participants
1	26/02/2016	Newsletter for authorised FSPs	Feedback on FIC onsite inspections conducted on motor dealerships	
2	14/03/2016	FAIS conference in Pretoria for authorised FSPs	Feedback on FIC onsite inspections conducted on motor dealerships	525
3	16/03/2016	FAIS conference in Cape Town for authorised FSPs	Feedback on FIC onsite inspections conducted on motor dealerships	400
4	01/03/2017	FAIS conference in Sandton for authorised FSPs	FIC Amendment Act	200
5	06/03/2017	FAIS conference in Cape Town for authorised FSPs	FIC Amendment Act & readiness	300
6	08/03/2017	FAIS conference in Pretoria for authorised FSPs	FIC Amendment Act & readiness to implement	120
7	17/03/2017	FAIS conference in Johannesburg for authorised FSPs	FIC Amendment Act & readiness	320
8	06/09/2017	Newsletter for authorised FSPs	FIC Amendment Act	
9	04/12/2017	Newsletter for authorised FSPs	FIC Amendment Act	
10	06/03/2018	FICA workshop in Bloemfontein for small FSPs without compliance officers	FIC Amendment Act & readiness	33
11	09/03/2018	FAIS conference in Pretoria for authorised FSPs	FIC Amendment Act & readiness	335
12	12/03/2018	FAIS conference in Benoni for authorised FSPs	FIC Amendment Act & readiness	440
13	13/03/2018	FAIS conference in Durban for authorised FSPs	FIC Amendment Act & readiness	220
14	20/03/2018	FAIS conference in Cape Town for authorised FSPs	FIC Amendment Act & readiness	220
15	23/03/2018	FICA workshop in Port Elizabeth for small FSPs without compliance officers	FIC Amendment Act & readiness	16
16	27/03/2018	FICA workshop in Polokwane for small FSPs without compliance officers	FIC Amendment Act & readiness	20
17	01/04/2018 to 31/03/2019	Planned 330 Compliance visits to small category I FSPs without compliance officers	FIC Amendment Act & readiness	330

Table 22: AML/CFT training - Authorised Users

Date	Title of Course/ Workshop	Organisers	No. of participants (from the reporting agency)
1	13/05/2015	Internal Rules Workshop and Member reviews	JSE 9 JSE Participants

2	28/05/2015	FICA Inspection Course	FIC	11 JSE Participants 2 FIC Participants
3	28/05/2015	Compliance to FIC Act	FIC	11 JSE Participants 2 FIC Participants
4	10/06/2016	FICA Refresher Course	JSE	12 JSE Participants
5	6/12/2016	FIC Act Enforcement Forum Feedback	JSE	15 JSE Participants
6	28/09/2017	FICA Amendment Act Info Session	JSE	14 JSE Participants

Table 23: Training / awareness

The FSCA issued two notices to accountable institutions supervised by it:

- a) 6 April 2018 - Roadmap on implementation of the amendments to the FIC Act.
- b) 25 April 2019 - Supervisory approach post 2 April 2019

<https://www.fsca.co.za/Regulatory%20Frameworks/Pages/AMLCFT.aspx>

The FSCA raises issues needing guidance with the FIC. The FIC is the only entity legislatively mandated to issue guidance. The FIC will consult the FSCA on all guidance issued.

## 7. Prudential Authority

As part of the Prudential Authority's supervisory programme it annually conducts three AML/CTF prudential meetings with each of the large banks (considered high risk from an AML/CTF perspective) in South Africa (thus 15 meetings in total). These meetings are dedicated to AML/CTF matters and inter alia include discussions pertaining to the following:

- international AML/CTF developments
- feedback regarding the outcome of FATF plenary meetings
- amendments to AML/CTF legislation, and guidance products
- interpretation of legislation;
- challenges faced by banks
- The following documents are attached hereto:

### AML/CTF workshops

The PA annually conducts one day AML/CTF workshops with a select number of accountable institutions identified in accordance with its risk-based approach. These workshops assist the PA to interact with accountable institutions regarding:

- accountable institutions' AML/CTF programmes;
- ML/TF threats and vulnerabilities;
- international and local AML/CTF developments; and
- any challenges experienced by accountable institutions.

### AML/CTF Workshop /Seminar: Life insurance industry

The Prudential Authority hosted a one-day AML/CTF workshop for all life insurers in October 2018. The purpose of the workshop was to:

- formally introduce the PA to the life insurance industry role-players involved in the implementation of the Financial Intelligence Centre Act 38 of 2001, as amended (FIC Act);
- provide an update on initiatives currently underway in preparation for the 2019 Financial Action Task Force's Mutual Evaluation of South Africa;
- brief the life insurance industry of a money laundering and terrorist financing sector risk assessment to be undertaken by the PA early in 2019;
- explain the PA's on-site and off-site supervisory processes;
- explain the PA's mandate in terms of section 45C of the FIC Act, as amended (i.e. imposition of administrative sanctions);
- discuss matters pertaining to the implementation of the FIC Amendment Act 1 of 2017;
- discuss matters pertaining to the screening of customers against sanctions lists; and
- creating a platform for dialogue on the above matters.

#### Thematic reviews of banks' sanctions screening systems

The Prudential Authority conducted sanctions screening system thematic reviews in 2014 and 2017. The said reviews inter alia assisted the Prudential Authority to make the banking sector much more aware of the importance and their responsibilities pertaining to the implementation of effective sanctions screening programmes.

#### "Bulk Awareness@ - (email messages)

The Prudential Authority periodically transmits bulk email messages to the CEO's/compliance units of accountable institutions to make them aware of potential scams or new guidance products issued by the Financial Intelligence Centre.

#### Supervisory Colleges

The Prudential, Authority, under the Basel Framework hosts bi-annual supervisory colleges (3 days) for all cross-border banking subsidiaries of South African banks. These workshops make provision for discussions on AML/CTF matters.

#### Knowledge sharing - Foreign competent Authorities

The PA, when called upon, assists supervisory bodies in Africa with capacity building initiatives relating to the supervision and monitoring of financial institutions for compliance with AML/CFT obligations. Such workshops are held at the SARB in Pretoria over a period of five days. The list below provides salient details of training provided to foreign competent authorities since 2013.

- AML/CTF Conference - Working Group on Cross-border Banking Supervision of the Community of African Banking Supervisors



- The Prudential Authority, on behalf of the South African Reserve Bank hosted an AML/CTF conference for the members of the Working Group on Cross-border Banking Supervision of the Community of African Banking Supervisors and associated officials from 4 to 6 December 2017.
- The purpose of the conference inter alia was to:
  - discuss the design and implementation of a national and supervisory risk-based approach to AML/CFT;
  - the magnitude of, and recommendations on, curbing illicit cross-border financial flows; and
  - measures applied to combat the financing of terrorism

#### Customer due diligence and beneficial owner identification

Financial and non-financial institutions covered by the FIC Act (“accountable institutions”) are prohibited from establishing a business relationship or concluding a single transaction with a prospective customer before establishing and verifying the customer’s identity, and the identity of any person acting on behalf of the customer or on whose behalf the customer is acting (section 21, FIC Act). Accountable institutions are also required to establish and verify the identity of all customers with whom they have entered into a business relationship before the FIC Act took effect (so-called “existing customers”). The MLTFC Regulations set out in detail the measures to be taken by accountable institutions when establishing and verifying their customers’ identities.

In terms of section 1 of the FIC Act, “beneficial owner”, in respect of a legal person, means a natural person who, independently or together with another person, directly or indirectly owns the legal person or exercises effective control of the legal person.

Section 21B of the FIC Act deals with additional due diligence measures relating to legal persons, trusts and partnerships.

In terms of section 42(2)(f), the RMCP must provide for the manner in which and the processes by which the institution conducts additional due diligence measures in respect of legal persons, trust and partnerships.

#### 8. List of major relevant anti-money laundering requirements:

FIC has adopted what it calls “7 pillars of Compliance which are:

1. Customer Due Diligence (Sections applicable 20A, 21A to 21H).
2. Record Keeping (Section 22, 22A, 23 & 23)
3. Reporting (Section 28, 28A, 29)
4. Risk Management & Compliance Programme (Section 42)
5. Training (Section 43)
6. Governance of AML&CFT (Section 42A)
7. Registration (Section 43 B)

In terms of section 42(1) of the Financial Intelligence Centre Act (FIC Act) an accountable institution must develop, document, maintain and implement a programme for anti-money laundering and counter-terrorist financing risk management and compliance.

In terms of section 42(2)A Risk Management and Compliance Programme must enable the accountable institution to identify, assess, monitor, mitigate and manage, the risk that the provision by the accountable institution of products or services may involve or facilitate money laundering activities or the financing of terrorist and related activities.

With respect to reporting obligations, all financial institutions and businesses (not just accountable institutions) are required to report suspicious transactions. All suspicious transactions must be reported to the Financial Intelligence Centre, including attempted transactions, regardless of amount. No criminal or civil action may be brought against a person who files an STR in good faith, and tipping-off is prohibited.

Section 42A of the FIC Act deals with governance and compliance with the FIC Act. In summary, the board of directors or person holding the most senior position is responsible for compliance with the FIC Act.

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

Examples of implementation

The FIC has established an internal adjudication panel consisting of executive managers to consider matters referred by the inspectorate for possible administrative sanction. The adjudication panel may then make recommendations to the Director.

Supervisory bodies are stepping up enforcement initiatives. For example, during the previous three years, the South African Reserve Bank - the supervisory body for the banking industry - conducted inspections of banks' anti-money laundering systems (see details of the Prudential Authority's inspection statistics above). The FIC worked closely with the Reserve Bank prior to these visits, which uncovered certain regulatory failures. The Reserve Bank issued administrative and financial sanctions against the four major banking groups (after the reporting period had closed).

Please note the previous section on inspections conducted and sanctions issued.

The FIC provides general compliance awareness on all aspects relating to the FIC Act to accountable and reporting institutions and not training. In the last financial year, the FIC conducted 45 compliance awareness sessions.

Source of report (sector)	No. of STRs received					
	2014	2015	2016	2017	2018	2019
Business entity with a reporting obligation in terms of Section 29 of the FIC Act				14	97	78
Attorneys	124	162	265	133	123	430
Trust Companies	14	10	10	22	7	15
Estate Agents	13	15	11	6	22	71
Authorised users of exchange	43	12	27	36	127	106
Unit Trusts (collective investment scheme managers)	21	153	186	125	64	29
Banks	110 366	95 744	98 054	193 609	209 020	175 580
Mutual Banks	19	4	3	22	78	70
Long-term insurers	55	151	180	114	110	205
Gambling	905	600	1 030	1 373	1 893	2 064
Foreign Exchange	125 721	84 727	27 635	54 625	43 145	29 457

Money lenders against securities	5	7	9	5	8	8
Investment advisors or intermediaries	9 242	18 140	13 310	2 410	1 164	2 294
Issuers of travelers' cheques and money orders	14 847	5 558	266	41	148	46
Postbank	439	379	154	83	60	363
Stock exchange	Incorporated under item 4					
Ithala Development Finance Corporation	2	0	2	1	0	1
Approved person by Registrar of Stock Exchanges (asset managers)	Incorporated under item 12					
Registrar of Financial Markets (asset managers)	Incorporated under item 12					
Money Remitters	91 403	53 584	30 437	100 519	65 429	67 245
Motor vehicle dealers	2 139	8 141	8 721	5 271	9 118	10 274
Kruger rand dealers	11	11	63	3	26	98

Table 24: Information on STRs

*(b) Observations on the implementation of the article*

South Africa's legal regime to prevent money-laundering consists of the Prevention of Organized Crime Act, the Financial Intelligence Centre Act, and the Money Laundering and Terrorist Financing Control Regulations, as well as the relevant guidance notes and directives issued by FIC.

Financial institutions and non-financial businesses and professions covered by the FIC Act are those listed under Schedule 1 and are referred to as "accountable institutions", whereas their respective supervisory bodies are listed under Schedule 2. The range of regulated activities includes: lawyers, notaries and conveyancers, persons dealing with trust property, public accountants and auditors, estate agents, persons dealing with securities, managers registered in terms of the Collective Investment Schemes Act, banks, insurance, gambling activities, persons dealing with foreign exchange, traveller cheque issuers, money orders or similar instruments, Post Bank, Ithala Ithala Development Finance Corporation Limited, and persons dealing with money remittance. It was confirmed that dealers in precious metals and stones, natural or legal persons that provide informal services for the transmission of money or value, as well as natural or legal persons that engage in the business of money and currency exchange are not covered and that a proposal for amending schedule 1 has been tabled to address those categories of businesses.

Supervisory bodies determined in Schedule 2 include: the Financial Services Board, Financial Sector Conduct Authority, the South African Reserve Bank, the Estate Agency Affairs Board, the Independent Regulatory Board for Auditors, the National Gambling Board, the provincial law societies and the provincial licensing authorities. The Financial Intelligence Centre is responsible for supervising and enforcing compliance with the FIC for all accountable and reporting institutions that are not regulated or supervised by a supervisory body or where a supervisory body fails to enforce compliance despite recommendations by the Centre. The FIC Act was under revision, as described below, at the time of the country visit in order to expand the supervisory function of the FIC to cover the entire DNFBP sector.

The FIC Act subjects all accountable institutions to customer due diligence requirements (chapter III), including the identification and verification of the beneficial owners (section 21) and record keeping measures (part 2, sections 22–25).

The FIC Act also includes a third schedule, Schedule 3, which defines as "reporting institutions"

persons who carry on the business of dealing in motor vehicles, and persons who carry on the business of dealing in Kruger rands. According to several provisions of the FIC Act, namely the customer due diligence and record-keeping requirements in parts 1 and 2 of chapter 3 (sections 20A to 26), reporting persons are bound by the obligation to report to the FIC (section 27) and are not subject to the other core requirements of the anti-money laundering regime, such as customer due diligence and record-keeping. During the country visit, authorities confirmed that work had been ongoing to amend the three schedules to bring them in line with international standards.

Under the FIC Act, all businesses, including accountable institutions, are required to report suspicious transactions, including attempted transactions, to the Financial Intelligence Centre. Failure to do so is considered as an offence (Section 52). The FIC is responsible for receiving, analysing and disseminating such reports and for collaborating with investigating and prosecuting authorities (section 4 of the FIC Act). This attests to a broad reporting system, which is not limited to accountable institutions but extended to all businesses.

The Financial Sector Conduct Authority (FSCA) and other supervisors undertake a range of outreach and training activities for their supervised sectors in major cities and provinces in order to promote a clear understanding of obligations and risks in relation to money-laundering.

In terms of enforcing anti-money-laundering measures, although on-site visits have been conducted for certain designated non-financial businesses and professions, most supervisors have not sanctioned the respective institutions they regulate.

During the country visit, authorities explained that the absence of sanctions was due to the lack of capacity of the respective supervisors, and the absence of proportionate and sufficiently deterrent penalties. It was reported that advanced steps had been taken to expand the mandate of the FIC to assume supervisory functions for all DNFBPs. More specifically, authorities mentioned that the necessary corresponding amendments to the FIC Act had been pre-approved by the Minister of Finance and submitted for public comments.

South Africa is in the process of concluding its first national risk assessment of ML risks and the anticipated timeframe for its completion is February 2022.

Although the country has not developed a formal strategy to counter money-laundering and the financing of terrorism, relevant policy priorities were set out in a consultation paper issued by FIC and the National Treasury in 2017. These include: a) strengthening AML/CFT measures through a more consultative approach based on partnerships between key stakeholders in both the public and private sectors; b) improving coordination and collaboration to ensure more effective preventive measures and better enforcement measures; and c) more customer-friendly and less-costly approach to implementation of AML/CFT requirements. These high-level principles were to be supported by increased customer due diligence obligations (including for domestic PEPs), increased beneficial owner transparency, introducing asset freezing in respect of UN Security Council resolutions, and improved information sharing and enforcement by supervisory bodies.

**Based on the information provided, it is recommended that South Africa (a) ensure that all designated non-financial businesses and professions particularly susceptible to money laundering are covered by the anti-money laundering requirements, including dealers in precious metals and stones, natural or legal persons that provide informal services for the transmission of money or value, as well as natural or legal persons that engage in the business of money and currency exchange; (b) consider including reporting institutions in the category of accountable institutions subject to anti-money laundering requirements, in particular with regard to customer due diligence and record-keeping; (c) strengthen the supervisory and**

sanctioning regime for designated non-financial businesses and professions at the operational level, including through the application of proportionate and dissuasive sanctions; and (d) finalize the national risk assessment and implement corresponding risk-based requirements.

*(c) Successes and good practices*

Outreach activities undertaken to raise awareness in major cities and provinces of obligations to counter money-laundering and the financing of terrorism.

*Subparagraph 1 (b) of article 14*

1. Each State Party shall: ...

*(b) Without prejudice to article 46 of this Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

*Reference should also be made to the response to article 58.*

1. Establishment of a Financial Intelligence Unit.

The financial intelligence unit of South Africa was established in terms of the Financial Intelligence Centre Act 38 of 2001. The Financial Intelligence Centre which became operational in 2003 is an “administrative” FIU under the Ministry of Finance.

2. Information on its organization, structure, tasks, responsibilities and accomplishments

The Centre is a well-staffed and well-functioning organisation. The Centre’s staff component during the 2018 reporting year was 197.

The Centre became a member of the Egmont Group of Financial Intelligence Units in 2003 and has access to a wide range of financial, administrative and law enforcement information to enhance its ability to analyse suspicious transaction reports (STRs).

Cash Threshold Reports (CTRs), which cover all transactions of R25 000 and above (section 28 Reports), received during the 2017/2018 reporting period, were 4 884 417. The majority of these reports were received from banks.

Suspicious Transaction Reports (Section 29 Reports) received during the 2017/2018 reporting period were 330,639.

#### Section 29 Reports received by FIC from AIs and RIs (2013/14 to 2018/19)<sup>16</sup>

FY	2013/2014	2014/2015	2015/2016	2016/2017	2017/2018	2018/2019	TOTAL	AVERAGE
<b>STR</b>	355,369	267,398	180,363	161,435	169,203	144,730	<b>1,278,498</b>	<b>213,083</b>
<b>STRB Reports</b>				136,722	77,702	71,818	<b>286,242</b>	<b>95,414</b>
<b>STRB Transactions</b>				2,040,190	258,264	172,204	<b>2,470,658</b>	<b>823,553</b>
<b>SAR</b>				60,237	83,709	71,696	<b>215,642</b>	<b>71,881</b>
<b>TFAR</b>				11	15	30	<b>56</b>	<b>19</b>
<b>TFTR</b>				7	10	160	<b>177</b>	<b>59</b>
<b>TOTAL s.29</b>	355,369	267,398	180,363	358,412	330,639	288,434	1,780,615	296,769

#### Section 28 Reports received by FIC from AIs and RIs (2013/14 to 2018/19)

FY	2013/2014	2014/2015	2015/2016	2016/2017	2017/2018	2018/2019	TOTAL	AVERAGE
<b>CTR (million)</b>	6.1	6.7	9.3	2.6	2.7	2.6	<b>30</b>	<b>5.0</b>
<b>CTRA (million)</b>				2.1	2.1	2.6	<b>6.8</b>	<b>2.3</b>
<b>TOTAL s.28 (million)</b>	6.1	6.7	9.3	4.7	4.8	5.2	<b>36.8</b>	<b>6.1</b>
<b>Reports linked to investigations</b>	5,873	6,188	27,310	4,577	83,709	21,707	<b>153,112</b>	<b>25,519</b>

Section 40 of FICA is the main provision that regulates access to information held by the Centre. In essence, investigating authorities, the South African Revenue Service and intelligence services may be provided with information on request, or at the initiative of the Centre. Information may also be provided to foreign entities performing functions similar to those of the Centre, pursuant to a formal, written agreement between the Centre and that entity or its authority.

FIC can share information with any other FIU, and that information sharing may exclude the information stipulated in Section 40.

The competent authorities in South Africa seek and exchange information informally with their foreign counterparts on a regular basis. The LEAs and the intelligence organizations are at the forefront of such information exchange. The NPA uses its membership of the Africa Prosecutors Association (APA) for the effective exchange of information with other prosecutors. FIC is the most prolific seeker of international cooperation. FIC made 306 requests for information from other jurisdictions during the period under review. Forty of the requests related to ML, 28 related to TF and 238 related to predicate offences. FIC also made inquiries on behalf of the SAPS, DPCI, CATS and AFU.

The FIC collaborates with FIUs around the world to strengthen global efforts in combating money laundering and terrorism financing through exchange of information. Statistics for the past three

<sup>16</sup> The average total value of STRs filed with FIC in each of the last three years is approximately R300 billion (approx. \$ 16.2 billion).

financial years are tabulated below:

### 2.3 Functioning of the system in terms of domestic cooperation and exchange of information.

#### **Proactive Disclosures made by the FIC to domestic Law Enforcement Agencies (LEAs) (2014–2018)**

<b>Crime Type</b>	<b>Number of Disclosures</b>	<b>Percentage of Total Disclosures</b>
Fraud Related Crimes	607	23%
Tax Evasion	510	19%
Corruption	98	4%
Drug Related Crimes	92	3%
Environmental Crimes	43	2%
Robbery & Theft	16	1%
ML	521	20%
TF	329	12%
<b>Total</b>	<b>2216</b>	<b>84%</b>

The Interdepartmental Committee (IDC) is the highest AML/CFT coordination body in South Africa. The National Treasury serves as its Chair and Secretariat, and its membership includes the main government agencies responsible for AML/CFT in the country.

### 2.4 Functioning of the FIC's international cooperation

The FIC can provide the widest range of international cooperation both spontaneously and upon request. One of the FIC's objectives is to exchange information on Money Laundering (ML) and associated offences and Terrorist Financing (TF) with other bodies with similar objectives in foreign jurisdictions (FIC Act, s.3(2)(b)). It is also required of the Financial Intelligence Centre to share information it has with foreign counterparts and investigating authorities (FIC Act, s.40(1)(b)). The FIC can co-operate or share information on a spontaneous basis (FIC Act s.40(1B)).

As a member of Egmont, the FIC exchanges information with other members of the Egmont through the Egmont Secure Web (ESW) and also through goAML, and encrypted emails on the basis of memorandums of understanding signed with foreign counterparts. When dealing with non-members of Egmont they only share information from open sources. While the powers of the FIC Act are broad, membership of Egmont imposes rules which must be followed to help ensure confidentiality. To facilitate proper exchange of information and international cooperation the FIC has signed Memoranda of Understanding (MoUs) with 91 countries, including 12 non-Egmont members. FIC provides international cooperation within 15 days at most.

In addition, the competent South African authorities seek and exchange information informally with their foreign counterparts on a regular basis. The LEAs and intelligence organizations are at the forefront of such information exchange. The National Prosecuting Authority (NPA) uses its membership in the Africa Prosecutors Association (APA) for the effective exchange of information with other prosecutors. FIC is the most prolific seeker of international cooperation. FIC made 306 requests for information to other jurisdictions from 2014 to 2018. Forty of the requests related to ML, 28 related to TF and 238 related to predicate offences. FIC also made inquiries on behalf of

the South African Police Service (SAPS), Directorate for Priority Crime Investigation (DPCI), CATS and the Asset Forfeiture Unit (AFU).

**Number of FIC Requests Sent to Other FIUs (Outgoing Requests) (2014-2018)**

Crime	2014	2015	2016	2017	2018	Total
Money laundering (ML)	2	3	11	7	17	40
Terrorism Financing (TF)	3	0	13	6	6	28
Fraud	26	13	3	26	11	79
Corruption	9	2	-	6	14	31
Bribery	-	1	-	-	-	1
Foreign Bribery	-	-	-	-	4	4
Racketeering	-	-	-	-	3	3
Tax Crimes	22	12	16	13	12	75
Narcotics Related	4	1	-	4	-	9
Environmental Crimes	-	-	-	4	-	4
Rhino Horn Smuggling	2	2	1	-	-	5
Human Smuggling	-	-	1	-	-	1
Kidnapping and Extortion	-	-	-	4	-	4
Hijacking	1	-	-	-	-	1
Gold Smuggling	3	-	-	-	-	3
Precious Metals and Stones Smuggling	-	-	-	-	1	1
Child Pornography	-	4	-	-	-	4
Murder	-	-	2	1	-	3
Possession of Illegal Firearms and Ammunition	-	1	-	-	-	1
Illicit Flow of Funds	-	-	-	5	-	5
Exchange Control Contraventions	-	-	4	-	-	4
<b>Total</b>	<b>72</b>	<b>39</b>	<b>51</b>	<b>76</b>	<b>68</b>	<b>306</b>
Requests Granted	N/A	N/A	4	4	8	16
Average Response Time (Months)	3-9	3-9	3-9	3-9	3-9	3-9

Additional information on the FIC's international cooperation activities is provided under article 58 below.

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

Examples of implementation

- Recent corruption related money laundering cases prompted by the Financial Intelligence Centre, including data on investigations, prosecutions and convictions.

Please refer to the table above on Section 29 Reports received by FIC from 2013/14 to 2018/19.



## CORRUPTION RELATED

	Number of cases prosecuted	Number of convictions
2014	95	81
2015	227	219
part 2016	247	224
2017	245	213

	2012-2013	2013-2014	2017/18	2018/19	2019/20
Reactive Intelligence Products	65	81	216	324	289
Proactive Intelligence Products	4	10	22	102	85

(not limited to corruption cases)

## JOINT TASK TEAMS

### NATIONAL PROJECT COMMITTEE AND PROVINCIAL PROJECT COMMITTEES

National Project Committee (NPC) and Provincial Project Committees (PPCs) – The Directorate for Priority Crime Investigation (DPCI) has established the NPC and PPCs to register evaluate and terminate all approved Project driven investigations. The PPC meets monthly and the NPC quarterly to monitor and coordinate LEAs joint efforts in these investigations.

### ANTI-CORRUPTION TASK TEAM (ACTT)

Anti-Corruption Task Team (ACTT) a multidisciplinary task team (inclusive of the FIC) established to bring about a more efficient and effective finalisation of the investigation and prosecution of high-profile corruption

### NATIONAL OPERATIONS COMMITTEE (NOC) AND POC PROVINCIAL OPERATIONS COMMITTEES

National Operations Committee (NOC) - DPCI (OC - PRECIOUS METALS) - The meeting is attended by various stakeholders in the Precious Metal Industry. In these regular meetings progress of the projects is discussed as well as strategies to assist in the fight against precious metal crimes in South Africa.

### NATIONAL CO-ORDINATING STRATEGIC MANAGEMENT TEAM (NCSMT)

In August 2009, the JCPS (Justice, Crime Prevention and Security Cluster) Cabinet Committee received a presentation from the Department of Mineral Resources (DMR) on the scope and extent of illicit mining. The Ministers decided that illicit mining be added as a standing item to the monthly meetings of the JCPS DG Cluster and that the establishment of the National Multi-Agency Strategic Management Team (NCSMT) be prioritised. The JCPS Directors General meeting in April 2012

directed that GCIS constitute an interdepartmental task team to strategise and implement communication on the issue of illegal mining. All meetings were attended, and quarterly feedback was given.

#### INTELLIGENCE WORKING GROUP (IWG): RHINO HORN SMUGGLING

Intelligence Working Group (IWG): Rhino Horn Smuggling - As part of the Priority Committee on Wildlife, the Intelligence Working Group coordinated by NICOC Consolidating information on rhino horn.

#### *(b) Observations on the implementation of the article*

South Africa has established the Financial Intelligence Centre (FIC) as a South African financial intelligence unit responsible for gathering, assessing, analysing and disseminating suspicious transaction reports. It is administrative in nature and put under the umbrella of the Ministry of Finance.

FIC is legally authorised to share information, upon request or spontaneously, with relevant national authorities involved in the fight against corruption. The range of those entities is set forth in Section 40 of the FIC Act and includes, among others, LEAs, supervisory bodies, courts and prosecution, as well as any other person entitled to receive information by the Centre in terms of other national legislation. National coordination is also ensured through a number of joint task teams and joint operations.

At the international level, the FIC has been a member of the Egmont Group since 2003. The FIC Act provides for the possibility for the FIC to share information with its counterparts and other relevant authorities in a foreign country through a written agreement. It is also required of the Financial Intelligence Centre to share information with foreign counterparts and investigating authorities (FIC Act, s.40(1)(b)). The FIC can cooperate or share information on a spontaneous basis (FIC Act s.40(1B)). In addition, the competent authorities in South Africa seek and exchange information informally with their foreign counterparts on a regular basis.

#### *Paragraph 2 of article 14*

*2. States Parties shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.*

#### *(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

Response

South Africa implements a written declaration system for all travelers carrying amounts above a certain threshold as per the *Exchange Control Regulations, 1961*.

Any person entering or leaving the Republic must declare all goods in their possession which are required to be declared (those that are prohibited, restricted or controlled under any law) (Customs and Excise 1964 (C&E Act), s.15). 'Goods' under the *Act* includes cash and is broad enough to cover BNIs; however, the *Exchange Control Regulations, 1961* articulate prohibited, restricted and controlled goods and do not prohibit, restrict or control incoming BNIs nor outgoing BNIs payable in foreign currency. The authorities suspended the requirement to make a written declaration in respect of cash at border points in 2008. Currently persons entering South Africa at border entry points are expected to make an oral declaration if they are carrying cash in excess of R25,000 or foreign currency exceeding USD 10,000 or equivalent. However, this requirement is not well-advertised to travelers, thus impacting effectiveness. It is illegal to send cash through the mail (section 3, *Exchange Control Regulations*).

During the country visit, authorities in South Africa described how the "oral declaration" system works on the ground. This is done by creating two separate channels (corridors), one for travellers having goods or financial instruments to declare and the other one for those having nothing to declare. Incoming travellers carrying amounts in excess of the prescribed thresholds are expected to take the corresponding channel and to report the excess amounts to the Customs officials, who capture the declarations in writing on specific forms. It was also reported that the FIC Act contains additional provisions that are meant to supplement the existing regulatory framework; however, those provisions have not yet entered into force. Furthermore, it was indicated that scrutiny of outgoing travellers in terms of potential breach of the regulations on cross border transport of cash or financial instruments is carried out on a random basis or on the basis of suspicion or intelligence.

South African Revenue Services customs officers may search for and seize currency under the Exchange Control Regulations when travelers have South African banknotes in excess of R25,000 unless the traveller is going to a country within the Common Monetary Area (CMA), when the foreign currency is not less or equal to what was declared upon arrival by the non-resident, and when the travellers does not have permission granted by the National Treasury. Overall, the authorities rely on their powers under foreign exchange controls to regulate cross-border movement of cash.

Customs officials also have extensive powers to question persons and obtain additional information concerning any matter dealt with in the C&E Act, including whether goods are being transported in violation of the *Act* or any other law (C&E Act, s4(7)). Incoming BNIs and outgoing BNIs payable in foreign currency are not covered by the regime.

Currently the Financial Surveillance department within the Central Bank provides the FIC with all cross-border transaction information in relation to electronic fund transfers (EFTs) to and from the Republic of South Africa. This information, however, does not contain information of declarations of physical transportation of cash nor information regarding suspicious incidents of such transportation. There are MOU's in place with various supervisory bodies and the MOU's articulate what type of information may be shared. Over and above these MOU's the supervisory bodies have quarterly meetings where they engage on issues of mutual interest.

Regarding penalties, the *Exchange Control Regulations* provide as follows:

#### PENALTY

22. Every person who contravenes or fails to comply with any provision of these regulations, or contravenes or fails to comply with the terms of any notice, order, permission, exemption or

condition made, conferred or imposed thereunder, or who obstructs any person in the execution of any power or function assigned to him by or under these regulations, or who makes any incorrect statement in any declaration made or return rendered for the purposes of these regulations (unless he proves that he did not know, and could not by the exercise of a reasonable degree of care have ascertained, that the statement was incorrect) or refuses or neglects to furnish any information which he is required to furnish under these regulations, shall be guilty of an offence and liable upon conviction to a fine not exceeding two hundred and fifty thousand rand or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment; provided that where he is convicted of an offence against any of these regulations in relation to any security, foreign currency, gold, bank note, cheque, postal order, bill, note, debt, payment or goods, the fine which may be imposed on him shall be a fine not exceeding two hundred and fifty thousand rand, or a sum equal to the value of the security, foreign currency, gold, bank note, postal order, bill, note, debt, payment or goods, whichever shall be greater.

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

#### SARs cash seizures 2015–2019

	2015	2016	2017	2018	2019	Total	Percent
<b>Total Seizures</b>	4	9	8	14	5	40	
<b>Total Value</b>	R 89,292,379	R 28,499,097	R 19,053,371	R 55,026,433	R 23,175,912	R 215,047,192	
<b>USD</b>	\$6,998,422	\$1,937,447	\$ 1,428,955	\$ 4,155,789	\$ 1,509,057	\$ 16,029,670	
<b>Location:</b>							
<b>Courier/Mail</b>	R 242,379	R 97,945	R 2,400	R 35,875	R 212,931	R 591,530	0%
<b>Border Posts</b>	-	R 35,000	R 1,513,030	R 1,508,505	-	R 3,056,535	2%
<b>Airports</b>	R 242,379	R 97,945	R 2,400	R 35,875	R 212,931	R 591,530	0%
<b>Airports – In</b>	-	R 50,760	-	-	-	R 50,760	
<b>Airports – Out</b>	R 89,050,000	R 28,315,392	R 17,537,941	R 53,482,053	R 22,962,981	R 211,348,367	98%
<b>Airports – Average</b>	R 29,683,333	R 5,673,230	R 5,845,980	R 5,942,450	R 5,740,745	R 8,808,297	
<b>Airports – Average (USD)</b>	\$ 2,326,475	\$ 385,682	\$ 438,434	\$ 448,795	\$ 373,798	\$ 656,562	

No details of sanctions imposed were available.

#### *(b) Observations on the implementation of the article*

By virtue of the Customs and Excise Act (1964) and the Exchange Control Regulations (1961), South Africa has implemented a cross-border declaration system for incoming and outgoing travellers, mail and cargo, while the incoming transfer of cash in an amount equivalent to or above 25,000 rand or 10,000 United States dollars in foreign currency must be declared orally. However, this requirement is not well-advertised to travelers, thus impacting effectiveness.

Section 15 of the Customs and Excise Act (1964) requires all persons entering or leaving the country

to declare, *inter alia*, goods, including currency<sup>17</sup>, that are restricted or controlled under any law. However, foreign currency must only be declared by outgoing travellers, and not by incoming travellers (sections 3.3 and 3.6, Exchange Control Regulations). Furthermore, the Customs and Excise Act and Exchange Control Regulations do not prohibit, restrict or control incoming bearer negotiable instruments or outgoing bearer negotiable instruments payable in foreign currency.

Although customs officers of the South African Revenue Service may, under the Exchange Control Regulations, search for and seize currency, information on declarations and seized consignments of a suspicious nature is not notified to the FIC.

In regard to the identified gaps regarding declarations of cash and bearer negotiable instruments as well as reporting to the FIC, it is noted that the FIC Act, in section 30, would establish an obligation to report, upon demand, transfers of cash or bearer negotiable instruments in excess of a prescribed amount to a person authorised by the Minister of Finance and to furnish copies of such declarations to the FIC. However, section 30 of the FIC Act has not yet come into operation. It was explained that consultations have commenced to bring the section into operation, and the proposed threshold is set at zero Rands.

The provision reads as follows:

*30. Conveyance of cash to or from Republic (Date of commencement to be proclaimed)*

*(1) A person who intends conveying or who has conveyed or who is conveying an amount of cash or a bearer negotiable instrument in excess of the prescribed amount to or from the Republic must, on demand, report the prescribed particulars concerning that conveyance to a person authorised by the Minister for this purpose. [Substituted by s. 8 of Act 11 of 2008.]*

*(2) A person authorised in terms of subsection (1) must without delay send a copy of the report to the Centre.*

**Based on the information provided, it is recommended that South Africa consider extending the cross-border declaration system to cover: (a) foreign currency declarations by incoming travellers; (b) written declarations of cash transfers in amounts above prescribed thresholds; and (c) incoming bearer negotiable instruments and outgoing bearer negotiable instruments payable in foreign currency; and consider establishing a mechanism requiring FIC to be notified of declarations and seized consignments of a suspicious nature.**

*Paragraph 3 of article 14*

*3. States Parties shall consider implementing appropriate and feasible measures to require financial institutions, including money remitters:*

*(a) To include on forms for the electronic transfer of funds and related messages accurate and meaningful information on the originator;*

*(b) To maintain such information throughout the payment chain; and*

*(c) To apply enhanced scrutiny to transfers of funds that do not contain complete information on the originator.*

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<sup>17</sup> 'goods' includes all wares, articles, merchandise, animals, currency, matter or things;

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

Response

Wire transfers through banks may only be executed in South Africa by any one of the 21 banks that are members of the National Payment System using SWIFT messaging standards. The Electronic Funds Transfer (EFT) systems are primarily used to process low value wire transfers (*i.e.* credit payment transfers of up to ZAR 5 million and debit payment transfers of up to ZAR 500 000). Payments processed through the EFT for domestic purposes are batched. The batches contain “trace numbers” which can be traced back to originators. The messaging format used in the National Payment System makes the completion of the field for originator information compulsory for every payment message. However, there is no general legal requirement for all wire transfers to be accompanied by full originator information.

The previous deficiencies pertaining to wire transfers (commonly referred to as electronic funds transfers) in South Africa were addressed in 2015 through a *Directive for Conduct within the National Payment System in respect of the Financial Action Task Force Recommendations for Electronic Funds Transfers* (FATF Electronic Funds Transfer Directive 1 of 2015).<sup>18</sup> In 2017, the National Payment System Department (NPSD) published an Interpretation Note for Directive 1 of 2015.<sup>19</sup> In 2019, the NPSD in collaboration with the FIC published a revised draft Directive 1 of 2019<sup>20</sup>, supplemented with a draft Guidance Note 102 to bring clarity and legal certainty required to ensure common interpretation of the FATF Electronic Funds Transfer Directive and ultimately strengthen compliance with FATF Recommendation 16.

The provisions of the FATF Electronic Funds Transfer Directive 1 of 2015 require all banks and clearing system participants to ensure that any domestic and cross-border electronic funds transfers meet the requirements of FATF Recommendation 16.

Cross border electronic funds transfers are processed via SWIFT and the domestic electronic funds transfer payments are processed using the domestic payment infrastructure, with limitation to carry the required information throughout the payments value chain due to legacy payments systems and infrastructures. For domestic electronic funds transfers, the NPSD decided to apply the following exemption:

*“if the required information cannot be included in a domestic electronic funds transfer transaction, this information should be maintained and made available to the beneficiary financial institution and appropriate authorities by other means within three business days (72 hours) (excluding weekends and public holidays) of receiving a request. The ordering financial institution must include the account number of the account from which the*

<sup>18</sup>

[https://www.resbank.co.za/RegulationAndSupervision/NationalPaymentSystem\(NPS\)/Legal/Documents/Directives/Directive%20of%202015%20Recommendations%20for%20Electronic%20funds%20transfers.pdf](https://www.resbank.co.za/RegulationAndSupervision/NationalPaymentSystem(NPS)/Legal/Documents/Directives/Directive%20of%202015%20Recommendations%20for%20Electronic%20funds%20transfers.pdf)

<sup>19</sup>

[https://www.resbank.co.za/RegulationAndSupervision/NationalPaymentSystem\(NPS\)/Legal/Pages/DirectivesForConductWithinTheNPS.aspx](https://www.resbank.co.za/RegulationAndSupervision/NationalPaymentSystem(NPS)/Legal/Pages/DirectivesForConductWithinTheNPS.aspx)

<sup>20</sup> [http://www.resbank.co.za/RegulationAndSupervision/NationalPaymentSystem\(NPS\)/Legal/Pages/Documents-for-Comment.aspx](http://www.resbank.co.za/RegulationAndSupervision/NationalPaymentSystem(NPS)/Legal/Pages/Documents-for-Comment.aspx)

*transaction is funded or a unique transaction reference number in the message, provided that this number or identifier will permit the transaction to be traced back to the originator or the beneficiary”.*

This exemption was provided on the basis that both the originating and the beneficiary financial institutions (and originator and beneficiary) are situated within the South African borders and that both apply the AML/CFT requirements for their respective customers. The information thus remains within the borders of South Africa and the FIC Act is applicable to both the originating and beneficiary financial institutions.

Payment system operators are further required to keep records of each payment instruction for a period of five (5) years, pursuant to section 2 of NPSD Directive No. 2 of 2007, entitled *Directive for Conduct Within the National Payment System In Respect Of System Operators*.

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

None provided.

*(b) Observations on the implementation of the article*

Directive 1 of 2015 of the National Payment System Department requires that all wire transfers be carried out in line with the relevant international standards, namely FATF recommendation 16.

However, there is no requirement to apply enhanced scrutiny to wire transfers that do not contain complete information on the originator. In the case of domestic wire transfers, an exemption applies in cases where the required information cannot be included in a domestic electronic funds transfer; in these cases, the information should be maintained and made available to the beneficiary financial institution and appropriate authorities within three business days of receiving a request.

**Based on the information provided, it is recommended that South Africa consider requiring financial institutions to apply enhanced scrutiny to transfers of funds that do not contain complete originator information.**

*Paragraph 4 of article 14*

*4. In establishing a domestic regulatory regime and supervisory regime under the terms of this article, and without prejudice to any other article of this Convention, States Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

Response

South Africa is a member of the Financial Action Task Force since 2003. South Africa underwent a FATF mutual evaluation in 2003 and a joint FATF/ ESAAMLG (Eastern and Southern Africa Anti-Money Laundering Group) mutual evaluation in 2009. South Africa is currently reporting progress to the FATF and ESAAMLG on how identified deficiencies are being addressed.

The FATF standards are used as the international benchmark when addressing AML/CFT issues in South Africa.

South Africa held the Presidency of the 17th Plenary year (2005-2006) of the FATF, during which strengthening the global network to combat money laundering and terrorist financing was a priority for the FATF. South Africa is now in the process of preparing for its next FATF/ESAAMLG mutual evaluation of the FATF, which is scheduled for 2020.

*According to the second post evaluation progress report of South Africa “with respect to Recommendations 6, 8, 9, 11, 12 and 15, the Review Group noted that South Africa has largely addressed the deficiencies against all the Recommendations. However, it was noted that there are some minor deficiencies including the scoping issue against Recs. 5, 6, 8, 9, 10, 11, 12 and 15”.*

*Further, it was noted that “the authorities had indicated that they are in the process of widening the scope of financial institutions. The Review Group noted that South Africa was due to be evaluated in 2019 and as the core issues had largely been addressed; the outstanding matters were not material enough to warrant the continued reporting biannually. The Review Group encouraged the Authorities to attend to the outstanding issues under R. 15” (New Technologies).*

South Africa has taken measures as a follow up to this report.

In the Consultation Paper on Policy Proposals for Crypto Assets prepared by the Inter-Governmental Fintech Working Group (IFWG), considerations have been given to harmonizing the regulatory framework and the envisaged introduction of AML/CFT obligations to Virtual Asset Service Providers (VASPs). A consultation paper on financial inclusion recognizes the need to balance financial inclusion objectives and implementation of AML/CFT measures.

Furthermore, the Financial Intelligence Centre has undertaken a review of the scope of the FIC Act as determined by Schedules 1, 2 and 3 to the Act with a view to bringing it in line with the current International Standards of the Financial Action Task Force (FATF) and recent legislative amendments and to accommodate the Centre’s experience in the implementation of the Act.

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

None provided.

*(b) Observations on the implementation of the article*

South Africa has been a member of FATF since 2003 and underwent the its Mutual Evaluation Review in 2003 and a joint FATF/ ESAAMLG mutual evaluation in 2009. The fourth round evaluation by FATF, initially scheduled for June 2020 has been postponed to a later date as a result of the coronavirus disease (COVID-19) pandemic.

Provisions of the FIC Act appear to be inspired by the FATF standards.



FIC has been a member of the Egmont Group of Financial Intelligence Units since 2003.

South Africa reported that it has taken measures as a follow up to the second post evaluation progress report, as described above.

*Paragraph 5 of article 14*

*5. States Parties shall endeavour to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

Response

In keeping with its commitment to fight money laundering and the financing of terrorism, regionally and globally, South Africa is constantly engaging with foreign jurisdictions and FIU's in order to improve international cooperation on issues of common interests. In this regard, South Africa is a member of the Financial Action Task Force (FATF), the Egmont Group of FIUs and the FATF Style Regional Body (FSRB), the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG).

Currently, the Financial Intelligence Centre, South Africa has signed Memoranda of Understanding (MOUs) with 91 jurisdictions, in order to enhance exchange of information and bilateral relations.

Furthermore, the Centre engages with FIUs in Eastern and Southern Africa to facilitate their admission to the Egmont Group of Financial Intelligence Units. To date, the Centre has successfully sponsored the admission of several FIUs to the Egmont Group, including Seychelles, Tanzania, Angola, Namibia and Malawi.

From a domestic perspective, the most prominent corruption matters are disseminated to or being investigated by the Anti-Corruption Task Team. The Task Team was established to bring about a more efficient and effective finalisation of the investigation and prosecution of cases and to increase the success in fighting and preventing corruption in South Africa. All other referrals related to corruption are being disseminated to a nodal point with the Directorate for Priority Crime Investigation (DPCI).

**Please provide examples of the implementation of those measures, including related court or other cases, available statistics etc.**

None provided.

*(b) Observations on the implementation of the article*

South Africa promotes regional and international cooperation on AML/CFT, including through its participation in relevant bodies and the signature of 91 memorandums of understanding between the FIC and its counterparts as well the sponsoring of admission of a number of them to the Egmont Group.

*(c) Challenges, where applicable*

**Please outline actions required to ensure or improve the implementation of the article under review and describe any specific challenges you might be facing in this respect.**

*(d) Technical assistance needs*

No assistance would be required

**Is any technical assistance already being provided to you? If so, please provide a general description of the nature of the assistance, including donor information.**

## V. Asset recovery

### Article 51. General provision

#### *Article 51*

*1. The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.*

#### *(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention, including identifying both any legal authorities/procedures for accepting requests for asset recovery and assessing that these requests are reasonably substantiated and supplemented as well as any time frame established under domestic laws and procedures for their execution, taking into account requests received from countries with similar or different legal systems and any challenges faced in this context.**

Response:

#### 1. Cooperation and assistance afforded to other States parties

The Financial Intelligence Centre (FIC) can provide the widest range of international cooperation both spontaneously and upon request. One of the FIC's objectives is to exchange information on Money Laundering (ML) and associated offences and Terrorist Financing (TF) with other bodies with similar objectives in foreign jurisdictions (FIC Act, s.3(2)(b)). It is also required of the Financial Intelligence Unit, to share information it has with foreign counterparts and investigating authorities (FIC Act, s.40(1)(b)). The FIC can co-operate or share information on a spontaneous basis (FIC Act s.40(1B)).

As a member of Egmont, the FIC exchanges information with other members of the Egmont through the Egmont Secure Web (ESW) and also through goAML, and encrypted emails on the basis of memorandums of understanding signed with foreign counterparts. When dealing with non-members of Egmont they only share information from open sources. While the powers of the FIC Act are broad, membership of Egmont imposes rules which must be followed to help ensure confidentiality. To facilitate proper exchange of information and international cooperation, the FIC has signed Memoranda of Understanding (MoUs) with 91 countries, including 12 non-Egmont members. FIC provides international cooperation within 15 days at most.

#### 2. The Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998)

South Africa has introduced the Prevention of Organised Crime Act, 121 of 1998 (POCA). The purpose of POCA, according to its preamble, is to introduce measures to:

- combat organised crime, money laundering and criminal gang activities;
- prohibit certain activities relating to racketeering activities;
- provide for the prohibition of money laundering and for an obligation to report certain information;
- criminalise certain activities associated with gangs;
- provide for the recovery of the proceeds of unlawful activity;
- for the civil forfeiture of criminal assets that have been used to commit an offence or assets that are the proceeds of unlawful activity;
- to provide for the establishment of a Criminal Assets Recovery Account

The domestic provisions of POCA provides for both ‘criminal forfeiture’ (conviction based forfeiture such as confiscations) and ‘civil forfeiture’ (non-conviction based forfeiture), in Chapters 5 and 6 thereof respectively.

The legal architecture of POCA applies to all crimes, not only corruption. The purpose of POCA is certainly to combat the specific evils associated with organised crime but it is not the only purpose thereof and its provisions are designed to reach far beyond organised crime and apply also to cases of individual wrongdoing.

See: NDPP v Van Staden and others [2007] 2 All SA 1 (SCA) at para 1

NDPP v R O Cook Properties (Pty) Ltd; NDPP v 37 Gillespie Street Durban (Pty) Ltd and another; NDPP v Seevnarayan [2004] 2 All SA 491 (SCA) at paragraph 65

This issue was ultimately considered by the Constitutional Court in Mohunram v NDPP (Law Review Project as Amicus Curiae) 2007 (4) SA 222 (CC) at paragraphs 25 - 27, and the decisions of the SCA, in respect of the wider application of the Act, as set out in Van Staden and Cook Properties confirmed.

This domestic non-conviction based forfeiture powers can, and have, been used in cases where criminality was committed in another country.

Further, POCA is part of the domestic implementation of South Africa’s international obligations. This position was concisely captured by the South African Constitutional Court in the matter of NDPP v Mohamed NO and Others 2002 (4) SA 843 (CC) at para 14:

‘The present Act (and particularly Chapters 5 and 6 thereof) represents the culmination of a protracted process of law reform which has sought to give effect to South Africa’s international obligation to ensure that criminals do not benefit from their crimes.’

POCA therefore provides the necessary legislative mechanism to facilitate the forfeiture of assets in accordance with the Republic’s existing and prospective international obligations. POCA also signifies an intention on the part of government to comply with current international practice and to facilitate international co-operation in the fight against crime.

### 3. National Prosecuting Authority of South Africa

#### Independence

The National Prosecuting Authority of South Africa (NPA) was established by section 179 of the Constitution of the Republic Of South Africa, 1996 (Constitution). The NPA is guided by the Constitution and seeks to ensure justice for the victims of crime by prosecuting without fear, favour

and prejudice and by working with its partners and the public to solve and prevent crime.

The position and independence of the NPA in the broader South African legal system structure was set out by the Supreme Court of Appeal in: The Minister for Justice and Constitutional Development v Moleko [2008] 3 All SA 47 (SCA), at paragraph 18 thereof on page 52, as follows:

- The National Prosecuting Authority Act, 1998 (Act No. 32 of 1998) (NPA Act) provides that the Minister for Justice and Constitutional Development exercises final responsibility over the NPA Authority but only in accordance with the provisions of the NPA Act (s 33(1)).
- The National Director of Public Prosecutions (NDPP) must, at the request of the Minister, inter alia furnish him with information in respect of any matter dealt with by the NDPP or any Director of Public Prosecutions (DPP), and with reasons for any decision taken by a DPP, 'in the exercise of their powers, the carrying out of their duties and the performance of their functions' (ss 33(2)(a) and (b)).
- The NDPP must furnish the Minister, at his request, with information regarding the prosecution policy and the policy directives determined and issued by the NDPP (ss 33(2)(c) and (d)).
- The NPA is only accountable 'to Parliament in respect of its powers, functions and duties under this Act, including decisions regarding the institution of prosecutions' (s 35(1)).

#### Appointment of the National Director of Public Prosecution (NDPP)

The Constitution requires that the NDPP be appointed by the President as head of the National Executive.

The President does however have a discretion to regulate this recruitment and appointment process. This was demonstrated with the appointment of the current NDPP in that the assistance of a panel of individual experts from the legal fraternity and 'State Institutions Supporting Constitutional Democracy' were invited in recommending suitable candidates.

#### The Asset Forfeiture Unit of the NPA

In 1999, the NPA established the Asset Forfeiture Unit (AFU) to ensure the implementation of POCA.

The mandate of the Unit is to take the profit out of crime by utilising both conviction and non-conviction based confiscation and forfeiture proceedings.

The Unit is comprised of managers, advocates, state attorneys, financial investigators, administrative support staff as well as enforcement officers who are responsible for the enforcement of asset forfeiture court orders.

Both advocates and the AFU state attorneys are responsible for preparing cases for court.

Financial investigators are responsible for conducting financial related investigations such as asset tracking and analysis of cash flows. The Unit is also assisted by police financial investigators who fall under the SAPS Directorate for Priority Crimes Investigations (DPCI).

#### 4. International Co-operation in Criminal Matters Act, 1996 (Act No. 75 of 1996) (ICCMA)

The International Co-operation in Criminal Matters Act, 1996 (Act No. 75 of 1996) (ICCMA) governs the provision of mutual legal assistance by South Africa.

Chapter 4 thereof concerns confiscation and transfer of proceeds of crime. In terms of the ICCMA, assistance can be provided to requesting States, when a formal letter of request has been issued.

It is a requirement to apply for the letter of request as part of an asset forfeiture application which

would then be issued by the Court in terms of the ICCMA (see sec 2, 19 and 23). Only upon the Court granting such an application, is the letter sent to the Director-General for sending on to the requested State.

5. Measures taken to ensure that no unaccounted money of foreign origin is deposited in our domestic banks, financial institutions etc.

The FIC Act only prohibits Accountable Institutions (AIs) to establish a business relationship or conclude a single transaction with an anonymous client or a client with an apparent false or fictitious name (s.20A), where the criterion requires prohibition from keeping such relationships as well.

The FIC can provide the widest range of international cooperation both spontaneously and upon request. One of the FIC’s objectives is to exchange information on Money Laundering (ML) and associated offences and Terrorist Funding (TF) with other bodies with similar objectives in foreign jurisdictions (FIC Act, s.3(2)(b)). It is also required, when acting as an FIU, to share information with foreign counterparts and investigating authorities (FIC Act, s.40(1)(b)). The FIC can co-operate or share information on a spontaneous basis (FIC Act s.40(1B)).

As a member of Egmont, the FIU exchanges information through the Egmont Secure Web (ESW) with other Egmont members and also through goAML, and encrypted emails on the basis of MoUs signed with foreign counterparts. When dealing with non-members of Egmont they only share information from open sources. While the FIC Act powers are broad, membership of Egmont imposes rules which must be followed to help ensure confidentiality. To facilitate proper exchange of information and international cooperation the FIC has signed Memoranda of Understanding (MoUs) with 91 countries, including 12 non-Egmont members. FIC provides international cooperation within 15 days at most.

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

Examples of implementation

The following copies were provided:

1. Asset Forfeiture Policy 8 (2006): AFU procedure to follow when receiving MLA matters (Domestic)

Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998)

NDPP v Van Staden and others [2007] 2 All SA 1 (SCA) at para 1

NDPP v R O Cook Properties (Pty) Ltd; NDPP v 37 Gillespie Street Durban (Pty) Ltd and another; NDPP v Seevnarayan [2004] 2 All SA 491 (SCA) at paragraph 65

NDPP v Mohamed NO and Others 2002 (4) SA 843 (CC)

The Minister for Justice and Constitutional Development v Moleko [2008] 3 All SA 47 (SCA)

2. Agreements dealing with mutual legal assistance in criminal matters as on 8 April 2019

Date signed	Country/Organization	Title of agreement	Date (yymmdd)
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19990916	USA	Treaty on Mutual Legal Assistance in Criminal Matters	20010625 (r) Entry into force: 20010625
19991112	Canada	Treaty on Mutual Legal Assistance in Criminal Matters	Entry into force: 20010504
20010419	Lesotho	Treaty on Mutual Legal Assistance in Criminal Matters	Entry into force: Not in force
20010531	France	Agreement on Mutual Legal Assistance in Criminal Matters	Entry into force: 20040301
20011019	Algeria	Agreement on Mutual Legal Assistance in Criminal Matters	20071029 (r) Entry into force: 20071129
20011022	Egypt	Agreement on Mutual Legal Assistance in Criminal Matters	20030821 Entry into force: 20030916
20020328	Nigeria	Treaty on Mutual Legal Assistance in Criminal Matters	Entry into force: Not in force
20021003	SADC	Protocol on Mutual Legal Assistance in Criminal Matters	20030616 (r) Entry into force: 20070301
20030120	People's Republic of China	Treaty on Mutual Legal Assistance in Criminal Matters	Entry into force: 20041117
20031016	India	Treaty on Mutual Legal Assistance in Criminal Matters	20051206 (r) Entry into force: 20051206
20040831	Iran	Treaty on Mutual Legal Assistance in Criminal Matters	Entry into force: 20140416
20070228	Argentine Republic	Treaty on Mutual Legal Assistance in Criminal Matters	Entry into force: 20151016
20070503	Republic of Korea	Treaty between the Republic of South Africa and the Republic of Korea on Mutual Legal Assistance in Criminal Matters	Entry into force: 20140620
20090220	Hong Kong, SAR China	Agreement concerning Mutual Legal Assistance in Criminal Matters	Entry into force: 20111202
20131101 20140324	Mexico	Treaty between the Government of the Republic of South Africa and the Government of the United Mexican States on Mutual Legal Assistance in Criminal Matters	Entry into force: Not in force
20170820	SADC	Agreement Amending the Protocol on Mutual Legal Assistance in Criminal Matters 2017	20170820 (s) Entry into force: 20170920
20180925	United Arab Emirates	Treaty between the Government of the Republic of South Africa and the Government of the United Arab Emirates on Mutual Legal Assistance in Criminal Matters	Entry into force: Not in force

Table 31: List of agreements regarding mutual legal assistance in criminal matters as on 8 April 2019

### 3. Extradition List (copy provided).

#### 4. SADC Protocols on Extradition and Mutual Legal Assistance (MLA) in Criminal Matters

The Protocols were signed by Summit on 3 October 2002 and ratified by Parliament on 14 April 2003. The Protocol on Extradition entered into force on 18 August 2006. The Protocol on Mutual Legal Assistance entered into force on 1 March 2007. Both Protocols were published in Government Gazette 35368 on 25 May 2012.

All Mutual Legal Assistance Agreements contain AFU provisions.

#### 5. Measures taken to ensure that no unaccounted money of foreign origin is deposited in domestic banks, financial institutions etc.

Examples of implementation

##### BOTSWANA:

A request for information (RFI) was received from the FIU in Botswana on which the FIU was working domestically with their Directorate on Corruption and Economic Crime (DCEC). It was alleged that funds were misappropriated from a state owned enterprise (SOE) in Botswana - funds of which flowed into South Africa. It was further alleged that Politically Exposed Persons (PEPs) and Prominent Influential Persons (PIPs) were implicated.

After analysis of the matter, the Centre was able to establish the following:

- Various moveable assets purchased in South Africa (to the value of approximately ZAR 20 million)
- A number of properties that were purchased in South Africa were linked to the subjects of the request.

The FIC subsequently met with the Botswana FIU to present the results of the analysis and requested further detail on the matters. Subsequent to the meeting, the RSA Asset Forfeiture Unit (AFU) also submitted a request on the matter, to assist with an MLA process to recover the proceeds. This case-study therefore demonstrates international FIU-to-FIU cooperation, but also domestic cooperation, in terms of FIC-AFU.

##### DENMARK:

The FIC received a request from the FIU-Denmark, requesting information on 4 Danish nationals, being the main subject (a mother) and her three adult children. According to the RFI, the main subject (subject 1) of the request was suspected of defrauding her former employer, the Danish National Board of Social Services and had been dismissed by that employer on 25 September 2018, and subsequently fled to South Africa.

The FIC identified bank accounts belonging to subject 1, and bank accounts as well as two vehicles belonging to one of the subject's children (subject 2). The FIC met with the Danish Senior Prosecutor on the case and the Danish Detective Inspector on the case, as well as the following domestic agencies: the NPA, the AFU, INTERPOL and First National Bank (FNB) - to establish the facts of the case as well as to expedite action on the case.

The FIC subsequently received a request for intervention from the AFU with regards to funds in



two of subject 2's accounts, and funds in a third party's account, which funds had been transferred from subject 2's account. As a result, the FIC issued 3 s34 directives / freezing orders on a cumulative amount of ZAR 6,700,109.92 on the three accounts. Additionally, a fourth s34 directive / freezing order was effected for an amount of ZAR310,000.00 on an account which had received the proceeds of the sale of one of subject 2's motor vehicles referred to above.

Subsequent to all the above, both subject 1 and subject 2 were arrested by the South African Police Service (SAPS) in South Africa. This case-study therefore demonstrates international FIU-to-FIU cooperation, as well as domestic cooperation. The following feedback was received in relation to the information provided:

Lesotho - MIRQT-181017-0000002 (2018/2019 F/Y); satisfactory response re feedback

Canada - MIRQT-180906-0000008 (2018/2019 F/Y); satisfactory response re feedback

An example of a successful case of asset recovery involving the return of confiscated assets to Germany, Von Creyzt (preservation & forfeiture), is described under article 54(1)(b) below.

Another example, Salia (preservation & forfeiture), is described under article 57.

#### *(b) Observations on the implementation of the article*

The legal framework for asset recovery comprises, principally, provisions in the International Cooperation in Criminal Matters Act and Prevention of Organised Crime Act, as well as the systems and institutions described under the subsequent articles.

As of October 2020, South Africa has signed 19<sup>21</sup> bilateral agreements on mutual legal assistance in criminal matters that include asset recovery provisions and also recognizes the Convention as a legal basis for international cooperation.

In the past 10 years, 54 mutual legal assistance requests were received by South African authorities (not only related to corruption and asset recovery matters). South Africa has never refused a request for mutual legal assistance.

Procedures that AFU applies when receiving legal assistance requests are detailed in the AFU Policy Guideline No. 8 (2006), which also provides a mechanism for managing requests received informally.

#### *(c) Successes and good practices*

The development of the AFU internal policy guide for handling asset recovery requests and managing requests received informally.

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<sup>21</sup> In 2020, the South African Parliament ratified extradition and mutual legal assistance treaties with Bangladesh, which entered into force on 06 October 2020. Furthermore, extradition and mutual legal assistance treaties with Mexico were ratified by the National Assembly and the National Council of Provinces in May and June 2020, respectively. At the time of the country visit, the Department of Justice and Constitutional Development was in the process of finalizing extradition and mutual legal assistance treaties with Viet Nam, Cuba and Ecuador, and authorities reported that mutual legal assistance treaties were to be signed soon with United Kingdom and Brazil.

*(d) Challenges, where applicable*

**Please outline actions required to ensure or improve the implementation of the article under review and describe any specific challenges you might be facing in this respect.**

*(e) Technical assistance needs*

No assistance would be required

**Is any technical assistance already being provided to you? If so, please provide a general description of the nature of the assistance, including donor information.**

## Article 52. Prevention and detection of transfers of proceeds of crime

### *Paragraph 1 of article 52*

*1. Without prejudice to article 14 of this Convention, each State Party shall take such measures as may be necessary, in accordance with its domestic law, to require financial institutions within its jurisdiction to verify the identity of customers, to take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts and to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates. Such enhanced scrutiny shall be reasonably designed to detect suspicious transactions for the purpose of reporting to competent authorities and should not be so construed as to discourage or prohibit financial institutions from doing business with any legitimate customer.*

### *(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

#### (a) Response

1. Any specific identification requirement of beneficial owners of high value or similar

Section 21 of the FIC Act (the requirement to establish and verify a client's identity) also applies to clients who are not natural persons acting in their personal capacity. Clients of this nature are referred to as corporate vehicles and include legal persons, trusts and partnerships. In addition to the obligation to establish and verify the identities of corporate vehicles, section 21B of the FIC Act also requires "accountable institutions" to apply additional due diligence measures, namely to establish: the nature of the client's business; the ownership and control structure of the client; and the beneficial ownership of clients, and to take reasonable steps to verify the identity of the beneficial owners. In addition to establishing and verifying a legal person's identity an accountable institution also must establish the nature of the legal person's business and its ownership and control

structure. Furthermore, an accountable institution must also establish who the beneficial owner of the legal person is and take reasonable steps to verify the beneficial owner's identity.

Once the accountable institution has determined who the beneficial owner of a legal person is, the institution must take reasonable steps to verify that person's identity. The remarks made above about the verification of a natural person's identity also apply in this instance. The reference to "reasonable steps" confirms that accountable institutions must apply measures that are commensurate with the assessed ML/TF risk in a given case to the verification of the beneficial owner's identity. This includes making use of information obtained by reasonably practical means while striking a balance between the accuracy of the verification required, on the one hand, and the level of effort invested in the means to obtain such verification on the other. The different measures which an accountable institution uses to verify the identities of beneficial owners of legal persons must be described in the institution's Risk Management and Compliance Programme (RMCP). The underlying element of this requirement is that the "accountable institution" must be satisfied that it knows who the beneficial owner is.

Regarding implementation of RMCP requirements in practice, South African authorities explained that Section 42 of the FIC Act obliges accountable institutions to develop, document, maintain and implement a programme for anti-money laundering and counter-terrorist financing risk management and compliance (RMCP). An accountable institution's ability to apply a risk-based approach effectively is largely dependent on the quality of its RMCP. An accountable institution's RMCP must be sufficient for countering the ML/TF risks facing the institution. It is important for accountable institutions to bear in mind that a RMCP not only comprises of policy documents, but also of procedures, systems and controls that must be implemented within the institution. The RMCP can therefore be described as the foundation of an accountable institution's efforts to comply with its obligations under the FIC Act on a risk sensitive basis. It is also important that accountable institutions note that the board of directors, senior management or the person with the highest level of authority is ultimately responsible for ensuring that the institution maintains an effective internal AML/CFT control structure through a RMCP.

## 2. Requirements on enhanced scrutiny of accounts maintained by or on behalf of Politically Exposed Persons

Sections 21F, 21G and 21H of the FIC Act deal with persons in prominent positions. The starting point for the effective implementation of measures relating to persons who are entrusted with prominent public or private sector positions, is for accountable institutions to have effective measures in place to know who their clients are and to understand their clients' business.

## 3. Any criteria applied to Politically Exposed Persons (PEP), including whether this is applicable for domestic and foreign PEPs and whether there is a data base for their identification

Business relationships with domestic prominent influential persons are not inherently high-risk. Accountable institutions must consider each such relationship on its own merits in order to determine whether there is any reason to conclude that it brings higher risk of abuse for money laundering and terrorist financing purposes. If so, the accountable institution must apply the same requirements as for foreign prominent public officials. The definition of a 'domestic prominent influential person' used in the FIC Act includes prominent public functions (Sch. 3A). Included are:

- (Deputy) President of the Republic;
- government minister or deputy minister;

- Premier of a province;
- member of the Executive Council of a province;
- executive mayor of a municipality;
- leader of a political party; being the person identified by the party to occupy the position of the highest level of authority in the party (Guidance Note 7, paragraph 147), and therefore limits the extent of 'senior politicians' as included in the FATF definition;
- member of a royal family or senior traditional leader;
- head, accounting officer or chief financial officer of a national or provincial department or government component;
- municipal manager or municipal chief financial officer;
- chairperson of the controlling body,
- chief executive officer,
- accounting authority,
- chief financial officer,
- chief investment officer of a public entity

Business relationships with foreign prominent public officials must always be considered high-risk. If an accountable institution finds out that it is dealing with a foreign prominent public official, an accountable institution must also take reasonable measures to establish the source of wealth and source of funds of the client and conduct enhanced ongoing monitoring of the business relationship. Accountable institutions are not required to verify the information about the client's source of wealth and source of funds but will have to include this information in its client profile which will be used as the basis for enhanced ongoing monitoring. These requirements also apply to immediate family members and known close associates of such prominent public officials.

All items listed in schedule 1 to the FIC Act are subject to Customer Due Diligence (CDD) requirements. The list below includes also non-financial institutions

1. A practicing attorney
2. A board of executors or a trust company or any other person that invests, keeps in safe custody, controls or administer trust property
3. An Estate agent
4. An authorised user of an exchange
5. A Collective Investment Schemes Manager
6. Banks
7. Mutual Banks
8. Long term insurance businesses
9. Businesses that make available gambling activity
10. Businesses who deal in foreign exchange
11. Businesses that lend money against the security of securities
12. A financial services provider (excluding short term insurance and medical aids)

13. Business that sells or redeems traveller's cheques, money orders or similar instruments
14. The Postbank
15. The Ithala Development Finance Corporation Limited

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

Source of report (sector)	No. of STRs received					
	2014	2015	2016	2017	2018	2019
Business entity with a reporting obligation in terms of Section 29 of the FIC Act				14	97	78
Attorneys	124	162	265	133	123	430
Trust Companies	14	10	10	22	7	15
Estate Agents	13	15	11	6	22	71
Authorised users of exchange	43	12	27	36	127	106
Unit Trusts (collective investment scheme managers)	21	153	186	125	64	29
Banks	110 366	95 744	98 054	193 609	209 020	175 580
Mutual Banks	19	4	3	22	78	70
Long-term insurers	55	151	180	114	110	205
Gambling	905	600	1 030	1 373	1 893	2 064
Foreign Exchange	125 721	84 727	27 635	54 625	43 145	29 457
Money lenders against securities	5	7	9	5	8	8
Investment advisors or intermediaries	9 242	18 140	13 310	2 410	1 164	2 294
Issuers of travelers' cheques and money orders	14 847	5 558	266	41	148	46
Postbank	439	379	154	83	60	363
Stock exchange	Incorporated under item 4					
Ithala Development Finance Corporation	2	0	2	1	0	1
Approved person by Registrar of Stock Exchanges (asset managers)	Incorporated under item 12					
Registrar of Financial Markets (asset managers)	Incorporated under item 12					
Money Remitters	91 403	53 584	30 437	100 519	65 429	67 245
Motor vehicle dealers	2 139	8 141	8 721	5 271	9 118	10 274
Kruger rand dealers	11	11	63	3	26	98

*(b) Observations on the implementation of the article*

The Financial Intelligence Act (FIC Act) stands as the main regulatory framework in South Africa for preventing the combatting money laundering. It contains the core requirements that must be followed by financial institutions and designated businesses and professions identified as such by the Act. Money Laundering and Terrorism Financing Control Regulations (MLTFC) are, according to Section 77 of the FIC Act, administrative acts issued by the Minister of Finance and by which provisions of the FIC Act are promulgated for the purpose of making, repealing and amending any

matters related to the Act's prescriptions or are necessary to prescribe for the proper implementation or administrations of its provisions. The Minister has also powers, according to Section 74 of the Act, to issue, after consulting the Centre, exemptions from compliance with any provisions of the Act. Those exemptions are noticed in the Gazette and tabled in the Parliament before their publications.

The FIC has issued a number of reporting guidelines to assist with the filing of reports related to CTRs, CTRAs, SARs, STRs, TFARs, TFTAs and TPRs. Other guidance notes have been issued concerning, among others, the application of the RBA, CDD measures, record keeping, financial sanctions, registration of accountable institutions, and with respect to a number of obligations imposed on supervisory bodies and accountable institutions under the Act.

*Customer Due Diligence and identification of beneficial owner:*

Under the FIC Act, "accountable institutions," which cover both financial institutions (FIs) and designated non-financial businesses and professions (DNFBPs), are subject to CDD measures that are set forth in chapter III of the FIC Act. The Law clearly forbids such institutions from establishing a business relationship or concluding any transaction with an anonymous client or a client with an apparent false or fictitious name (section 20A). Establishment and verification of the identity of a customer, and the identity of any person acting on behalf of the customer or on whose behalf the customer is acting, is set forth in section 21(1).

Additional due diligence measures required for legal persons are prescribed in section 21(B). The latter involves the implementation of a risk management compliance programme that requires subjected institutions to establish (a) the nature of the client's business and (b) the ownership of the control over the entity. The definition of the beneficial owner laid out in section 1 appears to be in line with the relevant international standards. Steps for verification of the beneficial owner in the case of legal persons and arrangements are set forth in section 21B (2).

CDD measures are required before establishing a business relationship and prior to processing any transaction, irrespective of any threshold. The requirements also cover customers with existing business relationships (section 21(2)) and ongoing due diligence (section 21C). This means that CDD is always required unless there is an exemption as foreseen in section 77 of the FIC Act as it may be for a person, an accountable institution or a category of persons or accountable institutions. However, in the absence of an explicit indication in the FIC Act that obliges accountable institutions to conduct CDD in case there is suspicious of ML/FT, low risk exempted institutions might not conduct CDD. Regarding current exemptions issued in application of Section 77 of the FIC Act, it was explained by South African authorities that all exemptions previously issued by the Minister of Finance have been withdrawn.

Section 21 D of the FIC Act requires accountable institutions to take certain measures in case of doubts about the veracity of previously obtained information.

*Higher-risk persons, transactions and accounts:*

Accountable institutions are required to adopt a risk-based approach in implementing customer due diligence requirements (section 42). Enhanced due diligence is required for higher-risk customers and transactions, including for "domestic prominent influential persons" and "foreign prominent public officials".

The FIC Act establishes two categories of Politically Exposed Persons ("PEPs"), "domestic prominent influential persons" and "foreign prominent public officials". Schedules 3A and 3B

include respectively the definitions of these two categories of PEPs, while listing the functions that fall under both of them. Business relationships with domestic prominent influential persons are not inherently high-risk. In accordance with section 21G, accountable institutions must consider each such proposed relationship and transaction in accordance with the institution's Risk Management and Compliance Programme (RMCP). If there is a higher risk of ML/TF, the accountable institution must apply the same requirements as for foreign prominent public officials. Business relationships with foreign prominent public officials must always be considered high-risk. If an accountable institution finds out that it is dealing with a foreign prominent public official, an accountable institution must also take reasonable measures to establish the source of wealth and source of funds of the client and conduct enhanced ongoing monitoring of the business relationship. Section 21 H extends the same measures to "*family members*" and "*known close associates*" of both categories of PEPs respectively.

Regarding domestic PEPs, it was explained that business relationships with domestic prominent influential persons are not inherently high-risk. Accountable institutions must consider each such relationship on its own merits in order to determine whether there is any reason to conclude that it brings higher risk of abuse for money laundering and terrorist financing purposes. If so, the accountable institution must apply the same requirements as for foreign prominent public officials (foreign PEPs). If a domestic prominent influential person is not a high-risk person, a normal CDD will be obtained from the client, and the RMCP will spell out which CDD measures are going to be applied.

Regarding former PEPs, or persons who no longer hold prominent influential positions, in terms of schedule 3A to the FIC Act a person is a domestic prominent influential person if he or she holds that position in South Africa, including in an acting position, for a period exceeding six months. A person is also considered to be a domestic prominent influential person for a further 12 months from the date the person ceased to hold that position. It is important to note that high-risk customers are not confined to foreign or domestic influential persons. A person no longer considered a PEP may still fall under a category of high-risk customer.

#### Detection of suspicious transactions:

Under the FIC Act, all businesses, including accountable institutions, are required to report suspicious transactions, including attempted transactions, to the Financial Intelligence Centre. Failure to do so is considered as an offence (section 52). The FIC is responsible for receiving, analysing and disseminating such reports and for collaborating with investigating and prosecuting authorities (section 4 of the FIC Act). This attests to a broad reporting system, which is not limited to accountable institutions but extended to all businesses.

Tipping off is prohibited for all business and not only accountable institutions by virtue of Section 29 of the FIC Act and constitute an offence. Further, the protection of persons making reports is enshrined in Section 38.

Statistics shown under Article 14, paragraph 1 with regard to suspicious transaction reports (STRs) are referred to.

*Subparagraph 2 (a) of article 52*

2. In order to facilitate implementation of the measures provided for in paragraph 1 of this article, each State Party, in accordance with its domestic law and inspired by relevant initiatives of regional, interregional and multilateral organizations against money-laundering, shall:

(a) Issue advisories regarding the types of natural or legal person to whose accounts financial institutions within its jurisdiction will be expected to apply enhanced scrutiny, the types of accounts and transactions to which to pay particular attention and appropriate account-opening, maintenance and record-keeping measures to take concerning such accounts; and

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

The FIC Act incorporates a risk-based approach to compliance elements such as customer due diligence (CDD) into the regulatory framework. A risk-based approach requires accountable institutions to understand their exposure to money laundering and terrorist financing risks. By understanding and managing their money laundering and terrorist financing risks, accountable institutions not only protect and maintain the integrity of their businesses but also contribute to the integrity of the South African financial system. FIC issued Guidance Note 7 which covers the Risk Based Approach.

All these Guidance Notes are accessible from the website of the Financial Intelligence Centre: <http://www.fic.gov.za/>

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

The FIC has issued the following guidance notes:

- Guidance Note 6A (2019-03-27)
- Guidance Note 4B (2019-03-26)
- Draft Guidance Note 104 (2019-03-01)
- Draft Guidance Note 5C (2019-03-01)
- Guidance Note 7 Note (2017-10-02)
- Guidance Note 6 2017-10-02
- Guidance Note 05B (2017-10-02)
- Guidance Note 04A (2017-10-02)
- Guidance Note 5A (2016-03-31)
- Guidance Note 5: Financial Intelligence Centre Act (38/2001) 2013-05-14
- Guidance Note 4: Suspicious Transaction Reporting 2005-07-20



- Guidance Note 3A: For accountable institutions on client identification and verification and related matters. 2005-07-19
- Guidance Note 3: For Banks on customer identification and verification and related matters (2005-07-18)
- Guidance Note 2: To financial services industries regulated by the Financial Services Board concerning the meaning of the word "transaction" (2004-06-18)
- Guidance Note 1: General guidance note concerning identification of clients (2004-06-13)<sup>22</sup>

The FIC has also issued a number of Directives, as described under article 14(1), which are regularly posted on the FIC website and can be accessed through the following link: <https://www.fic.gov.za/Compliance/Pages/Directives.aspx>.

*(b) Observations on the implementation of the article*

The Financial Intelligence Centre has issued a number of guidance notes and directives, which are authoritative in nature, for the purpose of facilitating the implementation of the Financial Intelligence Centre Act provisions, which provide an interpretation of issues arising out of them, as stipulated in sections 4(C); 42(B) and 43(A) (1) of the FIC Act. Drafts of the said notes are prepared in consultation with the accountable institutions and supervisory bodies and published for collecting submissions and comments.

Guidance note 7 on the implementation of various aspects of the FIC Act, dedicated to the RBA, includes risk-mitigation measures that may be applied in cases of higher ML/TF risk, which consist, among other, in increasing automated transaction monitoring; increasing intensity of CDD measures; increasing the review periods of client information and dedicating specialist staff to managing enhanced due diligence for specific clients.

*Subparagraph 2 (b) of article 52*

*2. In order to facilitate implementation of the measures provided for in paragraph 1 of this article, each State Party, in accordance with its domestic law and inspired by relevant initiatives of regional, interregional and multilateral organizations against money-laundering, shall:*

...

*(b) Where appropriate, notify financial institutions within its jurisdiction, at the request of another State Party or on its own initiative, of the identity of particular natural or legal persons to whose accounts such institutions will be expected to apply enhanced scrutiny, in addition to those whom the financial institutions may otherwise identify.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is**

<sup>22</sup> <https://www.fic.gov.za/Compliance/Pages/Guidance-Notes.aspx>

**planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

The FIC can provide the widest range of international cooperation both spontaneously and one of the FIC's objectives is to exchange information on ML and associated offences and TF with other bodies with similar objectives in foreign jurisdictions (FIC Act, s.3(2)(b)). It is also required, when acting as an FIU, to share information it has with foreign counterparts and investigating authorities (FIC Act, s.40(1)(b)). The FIC can co-operate or share information on a spontaneous basis (FIC Act s.40(1B)).

Section 3(b) of the FIC Act provides for the FIC ... *“to exchange information with bodies with similar objectives in other countries regarding money laundering activities, the financing of terrorist and related activities, and other similar activities”*;

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

None provided.

*(b) Observations on the implementation of the article*

There are no apparent measures in place for financial institutions to be notified at the request of a foreign State regarding higher risk accounts or transactions.

During the country visit, authorities confirmed that there is no specific mechanism for financial institutions to be notified at the request of another State party, of the identity of particular natural or legal persons to whose accounts institutions are expected to apply enhanced scrutiny.

**Based on the information provided, it is recommended that South Africa adopt measures as necessary for financial institutions to be notified at the request of a foreign State regarding higher risk accounts or transactions.**

*Paragraph 3 of article 52*

*3. In the context of paragraph 2 (a) of this article, each State Party shall implement measures to ensure that its financial institutions maintain adequate records, over an appropriate period of time, of accounts and transactions involving the persons mentioned in paragraph 1 of this article, which should, as a minimum, contain information relating to the identity of the customer as well as, as far as possible, of the beneficial owner.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

Accountable institutions must keep transaction records of single transactions and transactions concluded in the course of the business relationship with the client in terms of section 22A of the FIC Act.

This means that the accountable institution must keep records of every transaction which that accountable institution has with a client. Transaction records must be sufficient to enable the transaction to be reconstructed and include the amount, currency, date of transaction, parties to the transaction, the nature of the transaction, pertinent or relevant business correspondence and also the identifying particulars of all accounts and account files related to the transaction if the accountable institution provides account facilities.

The FIC Act is not prescriptive as to the manner in which records must be kept. This implies that records may be stored in accordance with an accountable institution's standard procedures for the capture of information and the retention of records. Records can therefore be kept by way of storing original documents, photocopies of original documents, and scanned versions of original documents or otherwise in computerised or electronic form.

There are many examples of mechanisms which may be used for the storage of records which allow accountable institutions to reduce the volume and density of records such as: Internal networks, Physical storage devices e.g. hard drives, CDs, DVDs, memory sticks, etc. Cloud storage, Electronic document repositories, and Fintech capabilities.

Regardless of the manner in which records are kept, accountable institutions must ensure that the following principles are met: The accountable institution must have free and easy (in other words unencumbered) access to the relevant records; The records must be readily available to the Centre and the relevant supervisory body when required; The records must be capable of being reproduced in a legible format and If the records are stored off-site the Centre and the relevant supervisory body must be provided with the details of the third party storing the records. Records in relation to establishment of a business relationship referred to in section 22 of the FIC Act must be kept for at least five years from the date on which the business relationship is terminated.

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

None provided.

*(b) Observations on the implementation of the article*

Guidance note 7 on the implementation of various aspects of the Financial Intelligence Centre Act addresses the issue of record keeping under chapter 3. It refers to the obligations of the FIC Act stating that accountable institutions must keep records of all information pertaining to a client obtained in the course of their processes to comply with sections 21 to 21H of the FIC Act. The

latter does not specify the manner in which records must be kept, a matter left to the accountable institution's standard procedures for the capture of information and the retention of records.

As for the duration of records keeping, the ones in relation to establishment of a business relationship referred to in section 22 of the FIC Act must be kept for at least five years from the date on which the business relationship is terminated. Records of all transactions concluded referred to in section 22A must be kept for at least five years, as well, from the date on which that transaction is concluded. All other types of records, such as those related to STRs issuance are dealt with in paragraphs 175-179 of the said note.

The record keeping requirements are in line with the relevant international standards.

#### *Paragraph 4 of article 52*

*4. With the aim of preventing and detecting transfers of proceeds of offences established in accordance with this Convention, each State Party shall implement appropriate and effective measures to prevent, with the help of its regulatory and oversight bodies, the establishment of banks that have no physical presence and that are not affiliated with a regulated financial group. Moreover, States Parties may consider requiring their financial institutions to refuse to enter into or continue a correspondent banking relationship with such institutions and to guard against establishing relations with foreign financial institutions that permit their accounts to be used by banks that have no physical presence and that are not affiliated with a regulated financial group.*

#### *(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

Regulation 36(17)(b)(i)(C) of the Regulations relating to Banks prohibits banks from entering into or continuing a correspondent banking relationship with a shell bank located in a foreign jurisdiction. Furthermore Regulation 36(17)(b)(iii)(B) of the Regulations relating to Banks requires banks to ensure that the respondent institution does not permit its accounts to be used by a shell bank.

A shell bank is defined in the Regulations as being a bank without physical presence in the country in which it is authorized to conduct banking business, and not being subject to adequate solo or consolidated supervision.

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

None provided.

#### *(b) Observations on the implementation of the article*

The established process of banks' licensing in South Africa prohibits the establishment of banks without a physical presence. Section 11 of the Banks Act (1990) states that “no person shall conduct the business of a bank unless it is a public company registered as a bank under the Banks Act”. The conditions of submitting an application to SARB, the Central Bank of South Africa, requires a written statement setting out the address of the institution's head office as well as its postal address (section 16(bb) of the Banks Act, 1990).

Sections 36(17)(b)(i)(C) and 36(17)(b)(iii)(B) of Regulations relating to Banks of 12 December 2012 require financial institutions to guard against entering into or maintaining a correspondent banking relationship with a shell bank or with a respondent institution that permits its accounts to be used by a shell bank.

*Paragraph 5 of article 52*

*5. Each State Party shall consider establishing, in accordance with its domestic law, effective financial disclosure systems for appropriate public officials and shall provide for appropriate sanctions for non-compliance. Each State Party shall also consider taking such measures as may be necessary to permit its competent authorities to share that information with the competent authorities in other States Parties when necessary to investigate, claim and recover proceeds of offences established in accordance with this Convention.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

Refer to information provided in response to article 7, paragraph 4 and article 8, paragraph 5.

**Public Service Regulations, 2016:**

18. Disclosure of designated employees' interests.

(1) SMS members, except for a head of department shall, not later than 30 April of each year, disclose to the relevant head of department, in a form prescribed for this purpose by the Minister, particulars of all his or her interests in respect of the period 1 April of the previous year to 31 March of the year in question.

(2) A head of department shall, not later than 30 April of each year, disclose to the relevant executive authority, in the form prescribed for this purpose by the Minister, particulars of all his or her interests in respect of the period 1 April of the previous year to 31 March of the year in question.

(3) Any other designated employee not contemplated in subregulations (1) and (2) shall submit to the relevant head of department, on a date and form directed by the Minister, particulars of all his or her interests for the period as may be directed by the Minister.

(4) Any person who assumes duty as a designated employee on or after 1 April in a year shall make such disclosure within 30 days after assumption of duty in respect of the period from 1 April to date of disclosure.

(5) The head of department or executive authority, as the case may be, shall ensure that the disclosure of interests by designated employees is submitted electronically to the Commission or

the relevant authority as may be directed by the Minister in terms of subregulation (3), unless otherwise determined by the Minister.

(6) An executive authority shall submit to the Commission a copy of the form submitted to the executive authority in terms of:

- (a) subregulation (2) not later than 31 May of the year in question; or
- (b) subregulation (4), in so far as it relates to a head of department, not later than 30 days after it has been so submitted.

(7) A head of department shall submit to the Commission a copy of the form submitted to the head of department by a member of the SMS in terms of-

- (a) subregulation (1) not later than 31 May of the year in question; or
- (b) subregulation (4), in so far as it relates to a member of the SMS, excluding a head of department, not later than 30 days after it has been so submitted.

Section 19: Details of interests to be disclosed:

The following details of interests shall be disclosed:

(a) Shares, loan accounts or any other form of equity in a registered private or public companies and other corporate entities recognised by law-

- (i) The number, nature and nominal value of shares of any type in any public or private company and its name; and
- (ii) other forms of equity, loan accounts, and any other financial interests owned by an individual or held in any other corporate entity and its name.

(b) Income generating assets-

- (i) A description of the income-generating asset;
- (ii) the nature of the income; and
- (iii) the amount or value of income received.

(c) Trusts-

- (i) The name of the trust, trust reference or registration number as provided by the Master of the High Court, and the region where the trust is registered;
- (ii) the purpose of the trust, and your interest or role in the trust; and
- (iii) the benefits or remuneration received (these include fees charged for services rendered).

(d) Directorships and partnerships-

- (i) The name, type and nature of business activity of the corporate entity or partnership; and
- (ii) if applicable, the amount of any remuneration received for such directorship or partnership.

(e) Remunerated work outside the employee's employment in her or his department-

- (i) The type of work;
- (ii) the name, type and nature of business activity of the employer;
- (iii) the amount of the remuneration received for such work; and
- (iv) proof of compliance with section 30 of the Act must be attached.

(f) Consultancies and retainerships-

- (i) The nature of the consultancy or retainership of any kind;
- (ii) the name, type and nature of business activity of the client concerned; and
- (iii) the value of any benefits received for such consultancy or retainership.

- (g) Sponsorships-
  - (i) The source and description of direct financial sponsorship or assistance;
  - (ii) the relationship between the sponsor and the employee;
  - (iii) the relationship between the sponsor and the department; and
  - (iv) the value of the sponsorship or assistance.
- (h) Gifts and hospitality from a source, other than a family member-
  - (i) A description, value and source of a gift;
  - (ii) the relationship between the giver and the employee;
  - (iii) the relationship between the giver and the department; and
  - (iv) a description and the value of any hospitality intended as a gift in kind.
- (i) Ownership and other interests in immovable property-
  - (i) A description and extent of the land or property;
  - (ii) the area in which it is situated;
  - (iii) the purchase price, date of purchase and the outstanding bond on the property; and
  - (iv) the estimated market value of the property.
- (j) Vehicles-
  - (i) A description (make and model) of the vehicle;
  - (ii) the registration number of the vehicle; and
  - (iii) the purchase price, date of purchase and the outstanding amount owing on the vehicle.

For other categories of public officials, the information under article 8(5) is referred to.

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

Examples of implementation

Refer to information provided in response to article 8, paragraph 4.

*(b) Observations on the implementation of the article*

South Africa has implemented a financial disclosure system for appropriate public officials, which can be summarized as provided under article 8(5) of the Convention:

Categories of public officials required to disclose their financial interests	Members of Parliament	Members of the Executive	Municipal Councillors	Public Service employees	Senior Managers in the municipalities
Objectives of the disclosure systems	<input type="checkbox"/> <input type="checkbox"/> Prevention of conflict of interests <input type="checkbox"/> <input type="checkbox"/> Promotion of transparency	<input type="checkbox"/> <input type="checkbox"/> Prevention of conflict of interests <input type="checkbox"/> <input type="checkbox"/> Promotion of transparency	<input type="checkbox"/> <input type="checkbox"/> Prevention of conflict of interests <input type="checkbox"/> <input type="checkbox"/> Promotion of transparency	Prevention of conflict of interests	Management of conflict of interest
Frequency of the declarations	<input type="checkbox"/> <input type="checkbox"/> The first disclosure must be within 60	<input type="checkbox"/> <input type="checkbox"/> The first disclosure must be within 60	<input type="checkbox"/> <input type="checkbox"/> First disclosure must be made within	<input type="checkbox"/> <input type="checkbox"/> The first disclosure must be done within	<input type="checkbox"/> <input type="checkbox"/> The first disclosure must be done within

	days of the opening of Parliament or appointment as a Member. <input type="checkbox"/> <input type="checkbox"/> Thereafter annually or as determined by the Ethics Committee	days of the appointment as a Member. <input type="checkbox"/> <input type="checkbox"/> Thereafter annually	60 days of becoming a councillor <input type="checkbox"/> <input type="checkbox"/> Any change will be declared annually	30 days of assumption of duty as a designated employee <input type="checkbox"/> <input type="checkbox"/> Thereafter annually	60 days after appointment <input type="checkbox"/> <input type="checkbox"/> Thereafter annually after commencement of the new financial year of the municipality.
Method of disclosure	Paper (planning to move to an electronic system)	Paper - (planning to move to an electronic system)	Paper	Electronic, using the eDisclosure system	Paper
Declaration for family members	Yes. Information is filed on the confidential part of the register.	Yes. Information is filed on the confidential part of the register.	No.	Not at the moment. Section 9 of the Public Administration Management Act 2014 will require designated employees to disclose financial interests of their spouses and persons living with them as if they were married. The section is not yet in operation.	Municipal staff members are affected by the Public Administration Management Act, 2014. So, section 9 of this Act will apply to them. Section 9 will require designated employees to disclose financial interests of spouses and persons living with them as if they were married. The section is not yet in operation.
Information to be disclosed	(a) shares and other financial interests in companies and other corporate entities; (b) remunerated employment outside Parliament; (c) directorships and partnerships; (d) consultancies; (e) sponsorships; (f) gifts and hospitality from a source other than a family Member or permanent companion; (g) any other benefit	1. shares and other financial interests in companies and other corporate entities; 2. sponsorships; 3. gifts and hospitality other than that received from a spouse or permanent companion or family member; 4. Benefits; 5. Foreign travel other than personal visits paid for by the member, or official travel	(a) shares and securities in any company; (b) membership of any close corporation; (c) interest in any trust; (d) directorships; (e) partnerships; (f) other financial interests in any business undertaking; (g) employment and remuneration; (h) interest in property; (i) pension; and (j) subsidies, grants and sponsorships by any	a) Shares, loan accounts or any other form of equity in a registered private or public companies and other corporate entities recognised by law b) Income-generating assets c) Trusts d) Directorships and partnerships: e) Remunerated work outside the employee's employment in her or his department f) Consultancies	a) Shares, securities and other financial interests; b) Interest in a trust; c) Membership, directorships and partnerships; d) Remunerated work outside the Municipality; e) Consultancies, retainerships and relationships; f) Subsidies, grants and sponsorships by any organisation; g) Gifts and hospitality from a source other



	of a material nature; (h) foreign travel (other than personal visits paid for by the Member, business visits unrelated to the Member's role as a public representative and official and formal visits paid for by the state or the Member's party); (i) ownership and other interests in land and property; and (j) pensions.	paid for by the state, or travel paid for by the member's party; 6. Land and immovable property, including land or property outside South Africa; and 7. Pensions.	organisation. (k) Gifts received by a councillor above a prescribed amount	and retainerships g) Sponsorships: h) Gifts and hospitality from a source, other than a family member i) Ownership and other interests in immovable property j) Vehicles:	than a family member; and h) Land and property.
Tools and advisory services	<input type="checkbox"/> <input type="checkbox"/> An electronic manual explaining ethical concepts <input type="checkbox"/> <input type="checkbox"/> The Joint Committee on Ethics and Members' Interests serves as an advisory and consultative body, both generally and to Members, concerning the implementation and interpretation of the Code			<input type="checkbox"/> <input type="checkbox"/> Explanatory manual on details of interests to be disclosed <input type="checkbox"/> <input type="checkbox"/> Department Administrators <input type="checkbox"/> <input type="checkbox"/> Ethics Officers in departments <input type="checkbox"/> <input type="checkbox"/> Support from the Department of Public Service and Administration	
Verification				<input type="checkbox"/> <input type="checkbox"/> The PSC is responsible for verification of the disclosed interests by SMS members <input type="checkbox"/> <input type="checkbox"/> The HOD is responsible for verification of disclosed interests by other categories of designated employees <input type="checkbox"/> <input type="checkbox"/> Verification is done electronically against the	

				companies register, Deeds register and vehicle register.	
Sanctions for non-compliance	(i) a reprimand; (ii) a fine not exceeding the value of 30 days' salary; (iii) a reduction of salary or allowances for a period not exceeding 15 days; or (iv) the suspension of privileges or a Member's right to a seat in Parliamentary debates or committees for a period not exceeding 15 days.	The Public Protector must investigate breach of the code of ethics on receipt of a complaint.	(a) a formal warning to the councillor; (b) reprimand the councillor; (c) request to the MEC for local government in the province to suspend the councillor for a period; (d) fine the councillor; and (e) request to the MEC to remove the councillor from office.	Failure to disclose financial interest is a misconduct. The Executive Authorities and Heads of Departments have to take disciplinary action against such employees. Depending on the severity of the transgression, sanctions include: <input type="checkbox"/> <input type="checkbox"/> A final written warning; <input type="checkbox"/> <input type="checkbox"/> Suspension without pay; <input type="checkbox"/> <input type="checkbox"/> Demotion as an alternative to dismissal; and <input type="checkbox"/> <input type="checkbox"/> Dismissal.	Failure to disclose benefits is a breach of contract and must be dealt with in terms of the Code of Conduct for Municipal Staff, read in conjunction with the Disciplinary Regulations.

Examples of implementation, including statistics of submissions of financial disclosures by members of the SMS were provided for 2013-2018.

South Africa has implemented a financial interest disclosure system for designated public officials, selected on the basis of seniority and the level of risk associated with their positions. It covers members of the Executive, members of Parliament, municipal councillors, senior managers in municipalities and designated public service employees, including members of SMS (all employees graded 13 and above) and employees in supply chain management and finance units. Declarations are scrutinized by PSC and failure to file is a punishable act of misconduct. Declarations are submitted electronically in the case of public service employees, and implementation reports show that there is significant compliance by public officials with the filing requirements. Not all financial disclosures are accessible to the public. Declarations by public service employees do not currently cover the interests of family members, as described under article 8(5) of the Convention above. There are no measures to permit the sharing of financial disclosure information with foreign competent authorities for purposes of investigation.

Please refer to the observations and recommendations under article 8(5).

**It is recommended that South Africa consider taking necessary measures to permit its competent authorities to share financial disclosure information with foreign competent authorities when necessary to investigate, claim and recover criminal proceeds.**

*Paragraph 6 of article 52*

6. Each State Party shall consider taking such measures as may be necessary, in accordance with its domestic law, to require appropriate public officials having an interest in or signature or other authority over a financial account in a foreign country to report that relationship to appropriate authorities and to maintain appropriate records related to such accounts. Such measures shall also provide for appropriate sanctions for non-compliance.

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

Although designated employees and appropriate public officials are required to disclose their financial interests, such financial interests do not include financial accounts (banking accounts) whether domestic or foreign.

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

None provided.

*(b) Observations on the implementation of the article*

Authorities confirmed that no consideration has been given to requiring appropriate public officials having an interest in or signature or other authority over a foreign financial account to report that relationship to appropriate authorities.

**Based on the information provided it is recommended that South Africa consider taking measures that would require appropriate public officials having an interest in or signature or other authority over a foreign financial account to report that relationship to appropriate authorities and to maintain appropriate records related thereto.**

*(c) Challenges, where applicable*

**Please outline actions required to ensure or improve the implementation of the article under review and describe any specific challenges you might be facing in this respect.**

*(d) Technical assistance needs*

No assistance would be required

**Is any technical assistance already being provided to you? If so, please provide a general description of the nature of the assistance, including donor information.**

## Article 53. Measures for direct recovery of property

### *Subparagraph (a) of article 53*

*Each State Party shall, in accordance with its domestic law:*

*(a) Take such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention;*

### *(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response:

#### 1. Superior Courts Act, 2013 (Act No. 10 of 2013)

Section 21 of the Superior Courts Act, 2013, allows any State Party and/or foreign individual, as a litigant, to initiate any action and/or application procedure in the South Africa courts.

Furthermore, any affected foreign State Party and/or individual, with a vested and/or direct and substantial interest in the outcome of any dispute, may approach a South African Court to be joined as litigant or interested party to any dispute.

Note that in terms of section 173 of the 1996 Constitution, all South African High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

#### 2. POCA

In terms of Chapters 5 and 6 of POCA, only the NDPP is allowed to initiate or institute asset forfeiture proceedings.

However, POCA specifically allows for parties, either foreign or domestic, with an interest in the property to claim the property in the processes described hereunder.

## Chapter 5 of POCA (Conviction based)

1 In terms of section 24 of the POCA a High Court may, for purposes of issuing a confiscation order, enquire into any benefit a convicted person may have derived from an offence.

Where such a convicted person dies or absconds before a confiscation order is made, the court may, among others, make a confiscation order or authorise the realisation of the property.

Further, section 24(4) of the POCA provides that the High Court shall not make such orders, unless it has afforded all persons having any interest in the property, an opportunity to make presentations to it in connection with the making of such orders.

2 In terms of section 26 of the POCA, a High Court may on application by the National Director of Public Prosecutions make a restraint order in respect of realisable property.

In terms of section 26(10) of the POCA, a person affected by such a restraint order may apply for the rescission of the order.

3 In terms of section 29 of the POCA, a High Court may make orders in respect of immovable property which is subject to a restraint order.

In terms of section 29(6) of the POCA any person affected by such an order may at any time apply for the rescission of the order.

4 In terms of section 30 of the POCA, a High Court may, on the application of the National Director of Public Prosecutions, make an order in respect of the realisation of property which is under a confiscation order.

In terms of sections 30(3) and (4) of the POCA the Court shall not make such an order unless it has afforded all persons known to have an interest in the property concerned an opportunity to make representations in connection with the realisation of that property.

## Chapter 6 of POCA (Non conviction based)

1 Section 48 of the POCA deals with applications for forfeiture orders.

Section 48(1) provides that if a preservation of property order is in force the National Director may apply to a High Court for an order forfeiting to the State all or any of the property that is subject to the preservation of property order.

In terms of section 48(2) the National Director must give 14 days' notice of such an application to every person who entered an appearance in terms of section 39(3).

Any person who entered such an appearance may appear at the application to oppose the making of the order or to apply for an order excluding his or her interest in that property from the operation of the order or varying the operation of the order in respect of that property and may adduce evidence at the hearing of the application (section 48(4)).

2 In terms of section 52(1) of the POCA a High Court considering a forfeiture order, may on application make an order excluding certain interests of persons in property from the operation of a forfeiture order.

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

Examples of implementation

1. In Bisonbord Ltd. v K Braun Woodworking Machinery (Pty) Ltd. 1991 (1) SA 482 (AD); [1991] 1 All SA 201 (A), the then Appellate Division of the Supreme Court of South Africa had to decide on the question of the competence of a Court to hear and determine an action sounding in money instituted against a company solely on the grounds that it was incorporated in South Africa and has its registered office within the area of jurisdiction of such court.

2. In the Witwatersrand Local Division the appellant instituted an action for the payment of damages against two defendants. The first defendant in the action was the respondent in the appeal. Apart from pleading to the merits of the case the respondent filed a special plea in which it raised an objection to the jurisdiction of the then Witwatersrand Local Division of the High Court of South Africa to hear the action. The argument was that although its registered office is situated in Johannesburg the respondent carries on its business at Butterworth in the Republic of Transkei. The respondent's objection to the jurisdiction of the Court a quo was therefore based upon the fact that its sole place of business is in the Transkei.

The Appellate Division, at 499F, held that the nature of the inquiry into whether a court has jurisdiction 'is a dual one: (1) is there a recognised ground of jurisdiction; and, if there is, (2) is the doctrine of effectiveness satisfied - has the Court power to give effect to the judgment sought? See Hugo v Wessels 1987 (3) SA 837 (A)'.

It was further held, at 488B, that: 'A judgment sounding in money may be put into effect anywhere. From this it follows (see Pollak: The South African Law of Jurisdiction (1937) at 22) that in an action for the payment of money "it is a sufficient basis for jurisdiction that the State in whose court the action is brought has power over the Defendant"' ... 'In my view the legal position is correctly summarised thus by Forsyth Private International Law 2nd ed (1990) at 175-6: 'Provided that the Defendant is an incola of the court's area of jurisdiction, the court will be prepared to hear the case.... Accordingly, if the Defendant is either domiciled or resident in the area, this will be a sufficient jurisdictional connETCing factor.'

3. In the recent unreported matter of Apleni v African Process Solutions (Pty) Ltd and Another (15211/17) [2018] ZAWCHC 160 (27 November 2018), the Court quoted Bisonboard - supra with approval and concluded, at paragraph 57, that: 'In my view, and after having regard to all the authorities cited, it is clear that the Court should follow a pragmatic approach in order to determine whether it would have jurisdiction over a matter when the delict was caused in a foreign country. The overwhelming wealth of authority seems to suggest that the court may deviate from the *lex loci delicti* rule in cases where there is common link between the parties, which link seems to be that the Plaintiff and Defendant have a common residence, domicile or nationality and some other link between them.'

### *(b) Observations on the implementation of the article*

South Africa has no explicit provisions that allow a foreign State party to initiate a civil action before its courts. However, section 21 of the Superior Court Act partly addresses the requirements of this provision of the Convention. Section 21(2) allows any foreign person to be *joined as a party* to any cause in relation to which the court has jurisdiction or to *become party* to such cause as a third party.

While only the National Director of Public Prosecutions (NDPP) is allowed to initiate or institute asset forfeiture proceedings in terms of chapters 5 and 6 of the Prevention of Organized Crime Act (POCA), POCA provides a framework for any foreign party with an interest in the property to file a claim in such civil or criminal proceeding, in accordance with the processes described therein.

The provision appears to be partly implemented insofar as the law does not specify the right of a foreign party to initiate civil litigation as a primary claimant in the domestic courts.

South African authorities referred to section 52 of POCA (reproduced below), which allows for the exclusion of interests in property on application by a person who did not enter an appearance in a proceeding. However, this section does not specify the right of a foreign party to initiate civil litigation in the courts, but to intervene in an existing forfeiture proceeding to have their interest excluded. The Nigerian case example provided illustrates the exclusion of the interest of the respondent, as a victim in the existing proceeding. See UNCAC article 53 (c) below.

**It is recommended that South Africa ensure that foreign States are explicitly granted *locus standi* to initiate civil action in its courts in order to establish title to or ownership of property acquired through the commission of an offence established in accordance with the Convention.**

52. *Exclusion of interests in property*

(1) *The High Court may, on application-*

(a) *under section 48 (3); or*

(b) *by a person referred to in section 49 (1),*

*[Para. (b) substituted by s. 29 (a) of Act 24 of 1999.]*

*and when it makes a forfeiture order, make an order excluding certain interests in property which is subject to the order, from the operation thereof.*

(2) *The High Court may make an order under subsection (1), in relation to the forfeiture of the proceeds of unlawful activities, if it finds on a balance of probabilities that the applicant for the order-*

(a) *had acquired the interest concerned legally and for a consideration, the value of which is not significantly less than the value of that interest; and*

(b) *where the applicant had acquired the interest concerned after the commencement of this Act, that he or she neither knew nor had reasonable grounds to suspect that the property in which the interest is held is the proceeds of unlawful activities.*

*[Sub-s. (2) substituted by s. 9 of Act 38 of 1999.]*

(2A) *The High Court may make an order under subsection (1), in relation to the forfeiture of an instrumentality of an offence referred to in Schedule 1 or property associated with terrorist and related activities, if it finds on a balance of probabilities that the applicant for the order had acquired the interest concerned legally, and-*

(a) *neither knew nor had reasonable grounds to suspect that the property in which the interest is held is an instrumentality of an offence referred to in Schedule 1 or property associated with terrorist and related activities; or*

(b) *where the offence concerned had occurred before the commencement of this Act, the applicant has since the commencement of this Act taken all reasonable steps to prevent the use of the property concerned as an instrumentality of an offence referred to in Schedule 1 or property associated with terrorist and related activities.*

*[Sub-s. (2A) added by s. 9 of Act 38 of 1999 and substituted by s. 27 (1) of Act 33 of 2004.]*

The following case example of implementation was provided.

Reference is made to the matter wherein the Nigerian Government successfully litigated in a South African court. Application and judgment were provided, and can be summarized as follows:

1.1 On 5 September 2014, a plane transporting 6 individuals from Nigeria landed at Lanseria International Airport. The individuals were 3 crew members from Nigeria and 3 international passengers.

1.2 On the general declaration for the aircraft it is indicated that the airplane was en route from Abuja to Lanseria. It is not indicated that the airplane was merely there for a stopover.

1.3 Neither of the men disclosed any cargo; however, when SARS searched the plane, they found two suitcases.

1.4 Passenger 1 claimed ownership of the bags and voluntarily disclosed that the bags contained US dollars.

1.5 Passenger 1 was asked for documents to prove the authenticity of the money, whereupon he produced an end user certificate dated 5 September 2014 from Nigeria and a letter of mandate dated 4 September 2014. The SARS official informed Passenger 1 that this does not prove the authenticity of the money. Passenger 1 then told the official that someone was waiting for him who had the receipt. This person was identified as X, the director of Company Y. Company Y's business is described as training, consulting services and allied activities. X also told the SARS official that Company Y leases aircraft from other people to Nigeria. X produced an invoice and order form in the amount of \$27 637 240 dated 5 September 2014.

1.6 When Passenger 1 was asked why an electronic transfer was not done, Passenger 1 said that it was difficult to do electronic payments from Nigeria. When Passenger 1 was again asked for a receipt, he said that the money originated from the Nigerian government. When Passenger 1 was asked why no one from the Nigerian Embassy was at the airport to receive the money, Passenger 1 said that he did not want the Embassy of Nigeria to be involved.

1.7 The explanation was not sufficient and as such SARS confiscated the cash. When counted it was \$9.34 million. On Monday, 8 September 2014, the cash was registered at the Reserve Bank for safekeeping.

1.8 On 12 September 2014, the AFU obtained a preservation order in respect of the money in the Gauteng Division, Pretoria of the High Court.

1.9 On 19 December 2014, a forfeiture application was filed. The forfeiture application was set for 2 February 2015.

1.10 On 27 January 2015, the Nigerian Government filed a Notice of appearance in terms of section 39(3) of the POCA as well as a Notice of Intention to oppose.

1.11 On 24 February 2015, the Nigerian Government, through their attorney, filed an application in terms of section 52 of the POCA.

1.12 On 10 June 2015, the AFU filed a notice to oppose the section 52 application.

1.13 An agreement was reached between the parties that the money should be paid back to the Nigerian government.

1.14 On 23 September 2015, this agreement was formalized by an order of court in the Gauteng Division, Pretoria of the High Court.

1.15 On 1 April 2016, the Nigerian Government confirmed receipt of the money.



*Subparagraph (b) of article 53*

*Each State Party shall, in accordance with its domestic law: ...*

*(b) Take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences; and*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response:

South Africa allows its courts, both lower and higher, to award compensation and restitution to parties, both foreign and domestic.

Sections 300 - 301 of Chapter 29, of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (CPA), provides as follows:

1 Section 300(1) of the CPA provides that where a person is convicted by a superior court, a regional court or a magistrate's court of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court in question may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss.

2 Section 301 of the CPA makes provision for compensation to an innocent purchaser of property unlawfully obtained.

3 Section 297 of the CPA allows for the imposition, in deserving cases, of compensation as part of the punishment, as a suspensive condition to the sentence.

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

Examples of implementation

1. S v Crane 1994 (2) SACR 197 (C) at 211J it was held that:

Before an accused could be ordered to pay compensation in terms of s 300 of the Criminal Procedure Act, it had to be established that the damage or loss of the property concerned was directly caused by the commission of the very offence of which the accused had been convicted.

2. S v Ngceni (CA&R: 176/2015) [2015] ZAECGHC 69 (7 July 2015) at paragraphs 3 - 5, referred to Crane with approval, and held:

- For the Court to make an order of compensation or restitution against the accused he or she must have been convicted of an offence which has resulted in damage or loss of property which can be calculated in monetary value. [S v Crane 1994 (2) SACR 197 (C)]. The injured person must, after conviction, have made an application for compensation, such compensation to be made by the convicted person. In that case the public prosecutor must bring the application on behalf of the injured person who suffered as a result of the offence committed by the convicted person [S v Mgabhi 2008 (2) SACR 377 (D)].
- The request by the complainant must have been made before the order is granted.
- The purpose for the application in terms of section 300 of the CPA is to assist the applicant who must normally be put in a position he or she would have been in had the misrepresentation or loss not been made. If necessary oral evidence would have to be led in such enquiry.

*(b) Observations on the implementation of the article*

South Africa has no explicit provisions allowing its courts to order compensation to a foreign State party that has been harmed by an offence.

The Criminal Procedure Act, section 300 may be relied upon to provide such compensation. Section 300 provides that the court may award compensation where an offence causes damage to or loss of property to any person. Section 297 allows for the imposition, in deserving cases, of compensation as a part of the punishment.

The provision is implemented.

*Subparagraph (c) of article 53*

*Each State Party shall, in accordance with its domestic law: ...*

*(c) Take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognize another State Party's claim as a legitimate owner of property acquired through the commission of an offence established in accordance with this Convention.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

1. POCA

POCA provides for damages to be paid a person under certain circumstances in both Chapters 5 & 6 thereof.

1.1 Chapter 5 of POCA

In terms section 30(5) Chapter 5 of POCA (realisation order), if a High Court is satisfied that a person who has suffered damage to or loss of property or injury as a result of an offence or related criminal activity referred to in section 18(1) which was committed by the defendant-

(a) has instituted civil proceedings, or intends to institute such proceedings within a reasonable time; or

(b) has obtained a judgment against the defendant,

in respect of that damage, loss or injury, the court may order that the *curator bonis* suspend the realisation of the whole or part of the realisable property concerned for the period that the court deems fit in order to satisfy such a claim or judgment and related legal expenses and may make such ancillary orders as it deems expedient.

## 1.2 Chapter 6 of POCA

(i) Section 38 of the POCA deals with preservation orders.

In terms of section 38((1) the National Director of Public Prosecutions may by way of an *ex parte* application apply to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.

(ii) Section 38(2) provides that the High Court shall make an order referred to in section 38(1) if there are reasonable grounds to believe that the property concerned-

(a) is an instrumentality of an offence;

(b) is the proceeds of unlawful activities; or

(c) is property associated with terrorist and related activities.

Following the making of such a preservation order, the provisions of section 39 of the POCA are relevant.

(iii) Section 39 of the POCA provides as follows:

(1) If a High Court makes a preservation of property order, the National Director shall, as soon as practicable after the making of the order-

(a) give notice of the order to all persons known to the National Director to have an interest in property which is subject to the order; and

(b) publish a notice of the order in the Gazette.

(2) A notice under subsection (1)(a) shall be served in the manner in which a summons whereby civil proceedings in the High Court are commenced, is served.

(3) Any person who has an interest in the property which is subject to the preservation of property order may enter an appearance giving notice of his or her intention to oppose the making of a forfeiture order or to apply for an order excluding his or her interest in the property concerned from the operation thereof.

(4) An appearance under subsection (3) shall be delivered to the National Director within, in the case of-

(a) a person upon whom a notice has been served under subsection (1)(a) 14 days after such service; or

(b) any other person, 14 days after the date upon which a notice under subsection (1)(b) was published in the Gazette.

(5) An appearance under subsection (3) shall contain full particulars of the chosen address for the delivery of documents concerning further proceedings under this Chapter and shall be accompanied by an affidavit stating-

- (a) full particulars of the identity of the person entering the appearance;
- (b) the nature and extent of his or her interest in the property concerned; and
- (c) the basis of the defence upon which he or she intends to rely in opposing a forfeiture order or applying for the exclusion of his or her interests from the operation thereof."

(iv) Section 54(1) of the POCA provides that any person affected by a forfeiture order who was entitled to receive notice of the application for the order, but did not receive such notice, may, within 45 days after the notice of the making thereof is published in the *Gazette*, apply for an order excluding his or her interest in the property concerned from the operation of the order, or varying the operation of the order in respect of such property.

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

Examples of implementation

The matter referred to below did not specifically deal with corruption and the action taken by South Africa was not preceded by any formal mutual legal request.

The example is however cited to demonstrate South Africa's ability to recognise a claim by a legitimate owner of property.

NDPP in re immovable property held by O I Sunmola (Preservation & Forfeiture)

Olayinka Ilumsa Sunmola (Sunmola), an adult male Nigerian national was arrested on 9 August 2014 at London Heathrow Airport in response to an Interpol Red Notice issued by the Washington DC Interpol office on 2 July 2014. He was indicted in the US in respect of some of his criminal activities. Sunmola and his accomplices defrauded American citizens and businesses. The fraudulent scheme was conducted from within South Africa. The *modus operandi* involved the use of fictitious identities and other tricks that enabled Sunmola and his accomplices to gain an unfair and dishonest advantage over victims located within the Southern District of Illinois and elsewhere in the U.S.

On 20 November 2014 the NPA's Asset Forfeiture Unit obtained a preservation of property order, in the High Court: Pretoria, for immovable properties registered in Sunmola's name and the contents thereof on the grounds that it represents the proceeds of unlawful activities or instrumentalities of offences listed under Schedule 1 to POCA, or both.

On 1 April 2015 the AFU obtained a forfeiture order in respect of the properties. The curator sold the properties and the funds totalling approximately R2 823 336.82 were returned to the US for victim compensation.

Subsequent to further investigations, on 13 October 2015 the AFU also obtained a preservation of property order in terms whereof it seized funds totalling R19 730.10 in an ABSA bank account held in the name of Sunmola. A forfeiture order was subsequently granted on 4 March 2016 in respect of these funds where after it was returned to the US for victim compensation.

The seizure was the result of a joint multi-agency investigation between the South African Police Services' Directorate for Priority Crimes Investigation Unit, the United States Homeland Security, the United States Postal Inspection Services and the AFU.

According to US authorities, on 3 March 2016, Sunmola pleaded guilty.

*(b) Observations on the implementation of the article*

Chapter 5 of POCA, section 30(5) permits the court to suspend the realization of property to satisfy the claim or judgment of a person who has suffered damage to or loss of property or injury as a result of an offence, including legal expenses, and to make ancillary orders. Furthermore, section 39 of POCA, which provides for notice to be given of property preservation orders and publication thereof in the official Gazette, permits any persons having an interest in property subject to a preservation order to apply to exclude their interests from the forfeiture procedure.

Reference is also made to the information provided in relation to section 52 of POCA under article 53(a) above.

The provision appears to be implemented.

*(c) Challenges, where applicable*

**Please outline actions required to ensure or improve the implementation of the article under review and describe any specific challenges you might be facing in this respect.**

*(d) Technical assistance needs*

No assistance would be required

**Is any technical assistance already being provided to you? If so, please provide a general description of the nature of the assistance, including donor information.**

**Article 54. Mechanisms for recovery of property through international cooperation in confiscation**

*Subparagraph 1 (a) of article 54*

*1. Each State Party, in order to provide mutual legal assistance pursuant to article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law:*

*(a) Take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party;*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response:

International Cooperation in Criminal Matters Act, 1996 (Act No. 75 of 1996) (ICCMA)

ICCMA enables South Africa to provide the widest legal assistance, both with regard to natural and legal persons, including all types of assistance listed in the UNCAC.

Section 20 of the ICCMA makes provision for identifying and tracing proceeds of crime. The section makes it possible for South Africa to assist with a request for executing a foreign confiscation order. Further, section 20 also makes provision for the confiscation and transfer of foreign proceeds of crime, amongst others.

Generally, in deciding whether assistance can be rendered, South Africa will consider other relevant legislation such as the 1996 Constitution of the Republic of South Africa, the Criminal Procedure Act, 1977, the Prevention of Organised Crime Act, 1998 and the Prevention and Combating of Corrupt Activities Act, 2004

Chapter 4 of the International Co-operation in Criminal Matters Act, 1996

Confiscation and transfer of proceeds of crime

Registration of foreign confiscation order:

20. (1) When the Director-General receives a request for assistance in executing a foreign confiscation order in the Republic, he or she shall, if satisfied-

- (a) that the order is final and not subject to review or appeal;
  - (b) that the court which made the order had jurisdiction;
  - (c) that the person against whom the order was made, had the opportunity of defending himself or herself;
  - (d) that the order cannot be satisfied in full in the country in which it was imposed; that the order is enforceable in the requesting State; and
  - (e) that the person concerned holds property in the Republic,
- submit such request to the Minister for approval.

(2) Upon receiving the Minister's approval of the request contemplated in subsection (1), the Director-General shall lodge with the clerk of a magistrate's court in the Republic a certified copy of such foreign confiscation order. (3) When a certified copy of a foreign confiscation order is lodged with a clerk of a magistrate's court in the Republic, that clerk of the court shall register the foreign confiscation order-

- (a) where the order was made for the payment of money, in respect of the balance of the amount payable thereunder; or
  - (b) where the order was made for the recovery of particular property, in respect of the property which is specified therein.
- (4) The clerk of the court registering a foreign confiscation order shall forthwith issue a notice in writing addressed to the person against whom the order has been made-

- (a) that the order has been registered at the court concerned; and

(b) that the said person may, within the prescribed period and in the prescribed manner, apply to that court for the setting aside of the registration of the order.

(5) (a) Where the person against whom the foreign confiscation order has been made is present in the Republic, the notice contemplated in subsection (4) shall be served on such person in the prescribed manner.

(c) Where the said person is not present in the Republic, he or she shall in the prescribed manner be informed of the registration of the foreign confiscation order.

Effect of registration of foreign confiscation order:

21. (1) When any foreign confiscation order has been registered in terms of section 20, such order shall have the effect of a civil judgment of the court at which it has been registered in favour of the Republic as represented by the Minister.

(2) A foreign confiscation order registered in terms of section 20 shall not be executed before the expiration of the period within which an application in terms of section 20(4)(b) for the setting aside of the registration may be made, or if such application has been made, before the application has been finally decided.

(3) The Director-General shall, subject to any agreement or arrangement between the requesting State and the Republic, pay over to the requesting State any amount recovered in terms of a foreign confiscation order, less all expenses incurred in connection with the execution of such order.

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

Regarding case examples where the courts have ordered the registration and enforcement of a foreign confiscation order, South African authorities reported that one (1) request was received in the last 10 years (Johnson (UK)). However, the request was not registered due to some incorrect information.

*(b) Observations on the implementation of the article*

Foreign confiscation orders are given effect to in South Africa after the registration process described under sections 19 and 20 of the International Co-operation in Criminal Matters Act, 1996. A registered foreign confiscation order shall have the effect of a civil judgment of the court at which it has been registered (Section 21, ICCMA).

The provision is implemented.

*Subparagraph 1 (b) of article 54*

*1. Each State Party, in order to provide mutual legal assistance pursuant to article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law:*

...

(b) Take such measures as may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering or such other offence as may be within its jurisdiction or by other procedures authorized under its domestic law; and

(a) Summary of information relevant to reviewing the implementation of the article

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

POCA

South African legislation does not require that the predicate offence specifically take place in South Africa. South African money laundering offences under Chapter 3 of POCA are wide in scope to include cases where the predicate offence occurred in another country.

The provisions of Chapter 3 of POCA specifically provide that any person, who knows or ought reasonably to have known, that property is or forms part of the proceeds of unlawful activities, may be prosecuted for the offence of money laundering.

The confiscation provisions under Chapter 5 of POCA provides for the recovery of any assets from an offence and has no *de minimus* threshold. The confiscation provisions can therefore be used after a confiscation of money laundering where the predicate offence occurred in another country.

The confiscation provisions in POCA provide for the courts to calculate the amount a person has benefited for unlawful activities if he/she has at any time, whether before or after the commencement of POCA, received or retained any proceeds of unlawful activities.

The location of assets (realisable property) that have been used in the calculation of such benefit derived on the confiscation order does not matter, these can be in another country.

A confiscation order in South African law is *in persona*, a value based order against the individual requiring him/her to pay that amount.

The provisions of Chapter 6 of POCA allows for the forfeiture of proceeds and instrumentalities of money laundering offence even if the person is not present in South Africa.

A forfeiture order in South African law is *in rem*, and not dependant on a criminal conviction.

Chapter 3: Offences relating to proceeds of unlawful activities

4 Money laundering

Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and-

(a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or

(b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person, which has or is likely to have the effect-



- (i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or
  - (ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere-
- (aa) to avoid prosecution; or
  - (bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence, shall be guilty of an offence.

#### 5 Assisting another to benefit from proceeds of unlawful activities

Any person who knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities, and who enters into any agreement with anyone or engages in any arrangement or transaction whereby-

- (a) the retention or the control by or on behalf of the said other person of the proceeds of unlawful activities is facilitated; or
- (b) the said proceeds of unlawful activities are used to make funds available to the said other person or to acquire property on his or her behalf or to benefit him or her in any other way, shall be guilty of an offence.

#### (6) Acquisition, possession or use of proceeds of unlawful activities

Any person who-

- (a) acquires;
- (b) uses; or
- (c) has possession of,

property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities of another person, shall be guilty of an offence.

### Chapter 5: Proceeds of Unlawful Activities

#### 18 Confiscation orders

- (1) Whenever a defendant is convicted of an offence, the court convicting the defendant may, on the application of the public prosecutor, enquire into any benefit which the defendant may have derived from-
- (a) that offence;
  - (b) any other offence of which the defendant has been convicted at the same trial; and
  - (c) any criminal activity which the court finds to be sufficiently related to those offences,

### Chapter 6: Civil Recovery of Property

#### 50 Making of forfeiture order

- (1) The High Court shall make a forfeiture order if the Court finds on a balance of probabilities that the property concerned is an instrumentality of an offence, is the proceeds of unlawful activities or is property associated with terrorist and related activities.

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

Examples of implementation

The matter referred to below did not specifically deal with corruption and the action taken by South Africa was not preceded by any formal mutual legal request.

In the below mentioned example, money laundering was pleaded as one of the offences in addition to theft and fraud. However South African law allows for the offence of money laundering to be pleaded as a standalone offence.

Von Creytz (Preservation & Forfeiture)

On 26 April 2017, an Absa Bank account at the Woodstock branch by a female: Christiane Von Creytz (Von Creytz) holding a Swaziland passport.

On 22 June 2017, the said account was credited with an international transfer from Germany amounting to R716 835.65. The transaction appeared to be suspicious as it displayed signs of a *modus operandi* used by a syndicate who open accounts with false passports to solicit funds by fraudulent pretences from foreign banks.

The bank subsequently placed a hold on the account pending further investigations. The account holder, Von Creytz was requested to supply evidence of the source of the funds. She provided letters from AXA Lebensversicherung AG in Cologne, Germany which shows a €50 000 (Fifty thousand Euro) pay-out from a life insurance policy 24914136001. According to the letters, she is residing at 135 Blaauwberg Road, Table View, Cape Town.

Further investigation revealed that the Swaziland passport in the name of Christiane Von Creytz was never issued by the Kingdom of Swaziland and it is thus fake.

The genuine Christiane Von Creytz was traced who confirmed that she is the holder of the life insurance policy 24914136001 at AXA Lebensversicherung AG but that she never requested a pay-out of the policy. She further confirmed that she never opened an Absa Bank at Woodstock and that she does not reside at 135 Blaauwberg Road, Table View. She also confirmed that the signature on the request for the pay-out is not hers and is forged.

It was pleaded, that the funds in the Absa cheque account represented the proceeds of unlawful activities, namely, the common law offences of fraud, theft and money laundering in contravention of the provisions of chapter 3 of POCA.

On 1 September 2017 the AFU obtained a preservation order as per case number 6026/17. On 2 March 2018 the AFU was granted a forfeiture order and on 16 April 2018 an amount of R682 624 was returned to the victim AXA Lebensversicherung AG in Germany.

*(b) Observations on the implementation of the article*

Under POCA, foreign offences count as predicate offences to the extent they would constitute offences in South Africa. The definition of money laundering under section 4 includes predicate offences committed abroad. Further, proceeds of unlawful activities are defined under POCA as “any property or any service advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of the Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived”.

Confiscation of proceeds of unlawful activities, including money laundering may be ordered against a defendant for the payment to the State of any amount the court considers appropriate, according to section 18.

The case referred to is an example of a successful case of asset recovery and return.

The provision appears to be implemented.

*Subparagraph 1 (c) of article 54*

*1. Each State Party, in order to provide mutual legal assistance pursuant to article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law:*

...

*(c) Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

POCA

The provisions of Chapter 5, more specifically section 24 thereof, allows for a confiscation order to be granted, under certain circumstances, where a person absconds or dies.

The provisions of Chapter 6 of POCA allows for the forfeiture of proceeds and instrumentalities of money laundering offence even if the person is not present in South Africa.

A forfeiture order in South African law is *in rem*, and not dependant on a criminal conviction.

Chapter 1: Definitions and Interpretation

Section 1 "property" means "money or any other movable, immovable, corporeal or incorporeal thing and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof;".

Chapter 5: Proceeds of Unlawful Activities

24 Procedure where person absconds or dies

(1) If a court is satisfied that-

- (a) (i) a person had been charged with an offence;
- (ii) a person had been convicted of any offence;
- (iii) a restraint order had been made against a person; or

- (iv) there is sufficient evidence for putting a person on trial for an offence;
  - (b) a warrant for his or her arrest had been issued and that the attendance of that person in court could not be secured after all reasonable steps were taken to execute that warrant;
  - (c) the proceedings against him or her cannot be resumed within a period of six months due to his or her continued absence; and
  - (d) there are reasonable grounds to believe that a confiscation order would have been made against him or her were it not for his or her continued absence, the court may, on the application by the National Director, enquire into any benefit the person may have derived from that offence.
- (2)(a) Whenever a defendant who has been convicted of an offence dies before a confiscation order is made, the court may, on the application by the National Director, enquire into any benefit the person may have derived from that offence if the court is satisfied that there are reasonable grounds to believe that a confiscation order would have been made against him or her were it not for his or her death.
- (b) The executor of the estate of the deceased shall be entitled to appear before the court and make representations for purposes of the enquiry referred to in paragraph (a).
- (3) The court conducting an enquiry under this section may-
- (a) if the court finds that the person referred to in subsection (1) or (2) has so benefited, make a confiscation order and the provisions of this Part shall, with the necessary changes, apply to the making of such order;
  - (b) if a curator bonis has not been appointed in respect of any of the property concerned, appoint a curator bonis in respect of realisable property; and
  - (c) authorise the realisation of the property concerned in terms of Part 4.
- (4) A court shall not exercise its powers under subsection (3) (a) and (c) unless it has afforded all persons having any interest in the property concerned an opportunity to make representations to it in connection with the making of such orders.
- (5) A court conducting an enquiry under this section shall not apply sections 21 and 22.
- (6) If a person, excluding a person contemplated in subsection (1) (a) (ii), against whom a confiscation order had been made under subsection (3) is subsequently tried and-
- (a) convicted of one or other of the offences in respect of which the order had been made, the court convicting him or her may conduct an enquiry under section 18 and make an appropriate order;
  - (b) acquitted of the offence in respect of which the order had been made, the court acquitting him or her may make an appropriate order.

## Chapter 6: Civil Recovery of Property

### 38 Preservation of property orders

- (1) The National Director may by way of an *ex parte* application apply to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property.
- (2) The High Court shall make an order referred to in section 38(1) if there are reasonable grounds to believe that the property concerned-
  - (a) is an instrumentality of an offence;

(b) is the proceeds of unlawful activities; or

(c) is property associated with terrorist and related activities.

(3) A High Court making a preservation of property order shall at the same time make an order authorising the seizure of the property concerned by a police official, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.

(4) Property seized under subsection (3) shall be dealt with in accordance with the directions of the High Court which made the relevant preservation of property order.

#### 41 Seizure of property subject to preservation of property order

(1) In order to prevent property subject to a preservation of property order from being disposed of or removed contrary to that order, any police official may seize any such property if he or she has reasonable grounds to believe that such property will be so disposed of or removed.

(2) Property seized under subsection (1) shall be dealt with in accordance with the directions of the High Court which made the relevant preservation of property order.

#### 48 Application for forfeiture order

(1) If a preservation of property order is in force the National Director, may apply to a High Court for an order forfeiting to the State all or any of the property that is subject to the preservation of property order.

#### 50 Making of a forfeiture order

(1) The High Court shall make a forfeiture order if the Court finds on a balance of probabilities that the property concerned is an instrumentality of an offence, is the proceeds of unlawful activities or is property associated with terrorist and related activities.

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

Examples of implementation

#### 1. NDPP v PANOS PANAGIOTOU

On 5 May 2011 the NDPP brought a confiscation application against Panos Panagiotou (the Defendant) in terms of Section 24 of POCA. A decision to charge the Defendant with fraud and/or theft was taken on 1 April 2008.

The modus operandi followed by the Defendant was to submit fraudulent claims with the Road Accident Fund (RAF) by using false employment certificates of the deceased. The Defendant submitted claims accompanied by fraudulent employer's certificates for claims of loss of support on behalf of the claimants. The submission of these fraudulent certificates resulted in the fact that the amounts eventually settled by the RAF were not supposed to be paid out resulting in an actual loss to the RAF in the amount of R 4 795 176-18.

A provisional restraint order in terms of section 26 of POCA, relating to fraud and/or theft was obtained against the Defendant on 28 March 2009 under case number 31467/2009.

The provisional restraint order was confirmed on 10 July 2009. The Defendant initially filed a notice of intention to defend but ultimately decided not to proceed with his opposition.

This confiscation application flows from the restraint application. Since the investigating officer

was unable to trace the Defendant, the Defendant cannot be tried for the offences which he has committed, nor could a confiscation order be obtained against him in the normal course of events. On the application of the NDPP, the High Court initiated an enquiry in terms of section 24 of POCA. The purpose of the enquiry is to enquire whether the defendant had benefited from the offences committed by him or from any criminal activity which the court found to be sufficiently related to such offences.

During the course of the proceedings the defendant absconded and the NDPP could not bring the confiscation application in the normal course of Section 18(1) of POCA, therefore the NDPP had to resort to Section 24 (1) of POCA.

On 5 September 2011 a confiscation order to an amount of R 5 106 256 was granted in terms of section 24 of POCA.

## 2. NDPP v SHAHIDA BIBI MAHOMED TAYOB AND OTHERS

On 28 February 2018 NDPP brought a confiscation application against Shahida Tayob (the Defendant) in terms of Section 24 of POCA. Before the defendant could be charged, he together with his wife absconded the Republic. A warrant of arrest was issued against Shahida Tayob and Abdool Tayob. The investigating officer made numerous attempts to trace the defendants but was unsuccessful. During the course of the proceedings the Mr Tayob passed away.

A provisional restraint order against the Defendants was obtained on 1 March 2010 and confirmed on 14 April 2010.

The defendants were accused persons in a criminal matter whereby they committed fraud against the South African Revenue Services (SARS) by submitting fraudulent Value Added Tax (VAT) returns. Investigations revealed that the first defendant, through his son ostensibly sold cell phones to the value of R334 792 45.69 to a certain number of suppliers of his son third defendant over a given period and claimed VAT refunds in the region of R35 742 763.93.

However, the NDPP could only recover the amount of R 1 573 597.32 because other property was damaged and the defendants absconded with large amounts of money when they left the country. The provisions of Section 24 of POCA were followed as in Panos case above and the NDPP was successful in obtaining a confiscation order.

### *(b) Observations on the implementation of the article*

The provisions of Chapter 5, more specifically section 24 thereof, allows for non-conviction-based confiscation, under certain circumstances, where a person absconds or dies. In addition, chapter 6 of POCA (Civil recovery of property) provides a framework for non-conviction based confiscation in civil proceedings.

South Africa has furnished an example of the implementation of this provision (NDPP v PANOS PANAGIOTOU). The provision is implemented.

### *Subparagraph 2 (a) of article 54*

*2. Each State Party, in order to provide mutual legal assistance upon a request made pursuant to paragraph 2 of article 55 of this Convention, shall, in accordance with its domestic law:*

*(a) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a freezing or seizure order issued by a court or competent authority of a requesting State Party that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this article;*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

ICCMA makes provision of the registration of foreign freezing orders in the South African courts and does not specify a time duration for the registration of such orders.

Chapter 4: Confiscation and transfer of proceeds of crime

24 Registration of foreign restraint order

(1) When the Director-General receives a request for assistance in enforcing a foreign restraint order in the Republic, he or she may lodge with the registrar of a division of the Supreme Court a certified copy of such order if he or she is satisfied that the order is not subject to any review or appeal.

(2) The registrar with whom a certified copy of a foreign restraint order is lodged in terms of subsection (1), shall register such order in respect of the property which is specified therein.

(3) The registrar registering a foreign restraint order shall forthwith give notice in writing to the person against whom the order has been made-

- (a) that the order has been registered at the division of the Supreme Court concerned; and
- (b) that the said person may within the prescribed period and in terms of the rules of court apply to that court for the setting aside of the registration of the order.

(4)(a) Where the person against whom the foreign restraint order has been made is present in the Republic, the notice contemplated in subsection (3) shall be served on such person in the prescribed manner.

(b) Where the said person is not present in the Republic, he or she shall in the prescribed manner be informed of the registration of the foreign restraint order.

25 Effect of registration of foreign restraint order

When any foreign restraint order has been registered in terms of section 24, that order shall have the effect of a restraint order made by the division of the Supreme Court at which it has been registered.

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

Example of implementation

Peter Michael Chapman.

South Africa received a Mutual Legal Assistance Request from the United Kingdom (UK) dated 24 February 2016.

The request was executed by the AFU based on a restraint order obtained in the UK prohibiting the disposal of assets of Mr Chapman. The request specified the prohibiting of dealing in certain assets.

South Africa was required to register the restraint in respect of shares held by Swingaxcle Limited in Calilline Investments (PTY) Limited South Africa. The shares have been frozen pending the outcome of the criminal proceedings in the UK.

The restraint order was duly registered, in terms of section 24 of ICCMA in the in the High Court of South Africa, Gauteng Division Pretoria under case number 39773/2017 on 12 June 2017.

*(b) Observations on the implementation of the article*

Foreign restraint orders are given effect in South Africa subsequent to the registration process described under section 24 of the International Co-operation in Criminal Matters Act, 1996. A registered foreign restraint order shall have the effect of a restraint order made by the court at which it has been registered (section 25, ICCMA).

This provision has been applied in practice.

South Africa has implemented the provision under review.

*Subparagraph 2 (b) of article 54*

*2. Each State Party, in order to provide mutual legal assistance upon a request made pursuant to paragraph 2 of article 55 of this Convention, shall, in accordance with its domestic law:*

...

*(b) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a request that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this article; and*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

South Africa does not require a freezing order to be issued in the requesting State in order to provide



assistance to such a requesting State.

The South African POCA legislation, as discussed above, allows for the preservation and subsequent forfeiture of property identified as either proceeds of unlawful activity and/or the instrumentality of an offence as listed in Schedule 1.

At the preliminary stage of the application a Court only needs to be satisfied of evidence showing that reasonable grounds to believe that a confiscation order may be made against the defendant have been set out in the application (section 25, ICCMA).

Unlawful activity is defined as conduct which constitutes a crime, or which contravenes any law whether such conduct occurred before or after the commencement of POCA and whether such conduct occurred in South Africa or elsewhere.

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

Examples of implementation

#### THE BELGIUM MATTER: DE GROOF

Since 2004, two Belgium Nationals namely Dirk De Groof (De Groof) and Antoon Cochet (Cochet) operated an investment scheme purported to invest in off-shore gold reserves.

In order to convince the investors to invest, high interest rates which were not market related were offered to the investors.

1 However, the investment scheme was a fraud. False, non-existing capital and/or bank guarantees were used as tools to mislead the investors into investing into the scheme. The money was also not invested as agreed but diverted via various channels around the world into different accounts and structures.

2 A total of 641 private persons invested an amount of approximately €100 000 000 (One Hundred Million Euro).

3 Investigations revealed that De Groof and Cochet played a major role in the different companies as shareholders and/or managing directors of the various firms.

4 The investigation further revealed that some of the investment money was diverted into part of a structure known as Pardef S.A located in Slovakia. De Groof and Cochet turned out to be the managers and sole shareholders of Pardef SA.

5 During the period 9 March 2010 through 22 February 2011, five transfers were done from the Luxemburg account of Pardef S.A into the account of Belle Vue Farms for a total sum of €323 235 for the purchase of the shares in the name of Pardef. The first four transactions bear the description loan PARDEF/BELLE VUE while the fifth was described as CAPITAL INCREASE.

6 Belle Vue Farms is a registered company in South Africa.

7 The money transferred originated from the investments in the scheme and the shares therefore represents the proceeds of unlawful activity.

#### Mutual Legal Assistance

8 The Belgium authorities requested mutual legal assistance from the Director-General of the Justice and Constitutional Development, South Africa to investigate the matter in the Republic.

Since South Africa has no MLA agreement with Belgium, assistance was rendered in terms of the International Cooperation in Criminal Matters Act 75 of 1996.

9 A judge in Belgium issued a motivated order of attachment for the freezing and seizure of the shares in Belle Vue Farms. This order formed part of South Africa's application.

#### Court Orders

10 A preservation order was granted on 6 June 2014 and a forfeiture order was granted on 3 November 2014.

#### Execution of forfeiture order

11 In terms of the preservation order, a curator bonis was appointed to preserve the property.

12 However, it turned out that Bellevue Farms was not profitable and that the sales of the shares were used to fund the company. There was no equity in the company.

#### *(b) Observations on the implementation of the article*

Reference appears to be made here to section 38, subsections 1 and 2 of the Prevention of Organized Crime Act:

“The National Director may, by a way of an *ex parte* application, apply to a High Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property”. Such order shall be granted if there are reasonable grounds to believe that the property concerned constitutes an instrumentality of an offence or is the proceeds of unlawful activities.

A High Court may issue a restraint order pursuant to section 25 of the Prevention of Organized Crime Act when: (a) a prosecution for an offence has been instituted against a defendant; either a confiscation order has been made against the defendant or it appears to the court that there are reasonable grounds to believe that a confiscation order may be made against the defendant; and the proceedings against the defendant have not been concluded; or (b) the court is satisfied that a person is to be charged with an offence and it appears to the court that there are reasonable grounds to believe that a confiscation order may be made against the defendant.

Section 38(1) and (2) read in conjunction with section 25 of the Prevention of Organized Crime Act appears to satisfy the requirements of this provision of the Convention.

Based on the information provided, the provision is implemented.

#### *Subparagraph 2 (c) of article 54*

2. Each State Party, in order to provide mutual legal assistance upon a request made pursuant to paragraph 2 of article 55 of this Convention, shall, in accordance with its domestic law:

...

(c) Consider taking additional measures to permit its competent authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property.

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

The South African POCA legislation, as discussed above, allows for the preservation and subsequent forfeiture of property identified as either proceeds of unlawful activity and/or the instrumentality of an offence as listed in Schedule 1.

Unlawful activity is defined as conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of POCA and whether such conduct occurred in South Africa or elsewhere.

South African law further allows for money laundering provisions to be prosecuted domestically and POCA legislation provides that a restraint order, effectively freezing assets, against such person present in South African can be obtained on the basis of a criminal investigation having been started in another country.

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

Example of implementation

Note in the below mentioned example the suspects were extradited to Denmark for prosecution. South Africa was able to utilise the provisions of Chapter 6 of POCA to freeze the assets

NDPP in re various movable and immovable property held in the names of B Nielsen & J Hayat (Danish citizens)

This is a 2018/2019 matter.

In October 2018, the Government of the Republic of South Africa received a request for the extradition of Ms B Nielsen and her son J Hayat from the Government of Denmark.

The reason for the extradition was that Nielsen, who was previous employee of the National Board of Social Services of the Government of Denmark, committed 'data fraud' in terms of Danish criminal law, in Denmark in that she:

- 1 Was tasked with the evaluation, approval and payment of all subsidiary project funding applications;
- 2 In her capacity as employee of the National Board of Social Services set up fictitious subsidiary projects with fictitious recipients and changed the account details of actual subsidiary project recipients to reflect her own banking details;
- 3 Transferred the criminal proceeds of the data fraud into accounts, held in her name, at the Danish banks of Nordea and Danske Bank.
- 4 During the period 5 July 2007 to 19 March 2012, transferred a sum of DKK1 628 511.91, the current equivalent of approximately R3 662 173, from her Danske bank account to a bank account held in South African.

5 During the period of 1 December 2008 to 28 September 2018, and in 37 separate transactions, transferred a sum of EUR 984 025, the current equivalent of approximately R16 430 017, from her Nordea bank account a bank account held in South African.

In South Africa, Nielsen used the part of the funds to purchase movable of immovable property either in her name or the name of her son Hayat.

The Asset Forfeiture Unit worked closely with the legal and investigating officials of the Office of the Danish State Prosecutor for Serious Economic and International Crime to finalise the initial draft preservation application for freezing and asset recovery.

To date that the Asset Forfeiture Unit of the National Prosecuting Authority preserved the assets listed below to the value of approximately R12 million:

- R 6 million held in different South African bank accounts in the name of Hayat and another person.
- R235 000 held in a South African bank account of the second hand car dealer in respect of a vehicles sold by Hayat.
- Immovable property to the value of R4 million located in the town of Palaborwa in the Limpopo Province of South Africa
- R2 million held by attorneys in trust in respect of the sale of immovable property by Hayat
- R648 730 confiscated from Nielsen during her arrest.

These liquid assets, or the money value thereof after sale, will be returned to Denmark after forfeiture.

*(b) Observations on the implementation of the article*

Section 38(1) and (2) of the Prevention of Organized Crime Act (POCA) may be used by South Africa to apply for a preservation order on the basis of a criminal investigation having been started in another country.

Based on the information provided, the provision is implemented.

*(c) Challenges, where applicable*

**Please outline actions required to ensure or improve the implementation of the article under review and describe any specific challenges you might be facing in this respect.**

*(d) Technical assistance needs*

No assistance would be required

**Is any technical assistance already being provided to you? If so, please provide a general description of the nature of the assistance, including donor information.**

## Article 55. International cooperation for purposes of confiscation

### *Paragraph 1 of article 55*

*1. A State Party that has received a request from another State Party having jurisdiction over an offence established in accordance with this Convention for confiscation of proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of this Convention situated in its territory shall, to the greatest extent possible within its domestic legal system:*

- (a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or*
- (b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party in accordance with articles 31, paragraph 1, and 54, paragraph 1 (a), of this Convention insofar as it relates to proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, situated in the territory of the requested State Party.*

### *(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

#### (a) Response

##### 1. Procedure to follow when submitting a foreign confiscation order

A request for registration of a foreign confiscation order should be made to the Director-General in terms of Section 20 of the International Cooperation in Criminal Matters Act. As soon as the Director-General has satisfied himself:

- that the order is final and not subject to review of appeal;
- that the court which made the order had jurisdiction;
- that the person against whom the order was made, had the opportunity of defending himself or herself;
- that the order cannot be satisfied in full in the country in which it was imposed;
- that the order is enforceable in the requesting State; and
- that the person concerned holds property in the Republic,

he or she shall submit the request to the Minister for approval. As soon as approval is received, the Director-General shall lodge with the clerk of a magistrate's court a certified copy of the order (the AFU is to assist the Director-General in this regard); the clerk of the court shall register the order and the clerk of the court shall issue a notice in writing addressed to the person against whom the order was made, notifying the person regarding the registration of the order and his or her right to apply for the setting aside of the order. (As to the manner in which the notice is to be served, section 20(5) refers to the "prescribed manner", however, it is not defined in the section).

Although no formal guidelines are available, the Department can and will assist upon request by a Requesting State. Guidelines to assist officials in the execution of requests are however available.

2. Measures taken to inform requesting state parties of the proper procedure to follow when submitting such a request for a foreign confiscation order?

Ad hoc consultations are set up with foreign embassies / high commissions to assist in the submission of requests for mutual legal assistance.

3. Is there any differences in procedure, depending on whether the request concerns civil, criminal or administrative action?

No.

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

None provided.

*(b) Observations on the implementation of the article*

Same observations as under article 54(1).

*Paragraph 2 of article 55*

*2. Following a request made by another State Party having jurisdiction over an offence established in accordance with this Convention, the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of this Convention for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request under paragraph 1 of this article, by the requested State Party.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance**

**with this provision of the Convention.**

(a) Response

The FIC can provide the widest range of international cooperation both spontaneously and one of the FIC's objectives is to exchange information on ML and associated offences and TF with other bodies with similar objectives in foreign jurisdictions (FIC Act, s.3(2)(b)). It is also required, when acting as an FIU, to share information it has with foreign counterparts and investigating authorities (FIC Act, s.40(1)(b)). The FIC can co-operate or share information on a spontaneous basis (FIC Act s.40(1B)). See also Article 52 paragraph 1

Statistics on the number of requests received and made from and to other countries. See article 58 where statistics are provided:

Year	Requests for / disclosures of information sent by FIC to other FIUs					
	2013-2014 (01April 2013-31March 2014)	2014-2015 (01April 2014-31March 2015)	2015-2016 (01April 2015-31March 2016)	2016-2017 (01April 2016-31March 2017)	2017-2018 (01April 2017-31March 2018)	2018-2019 (01April 2018 to date: 18/01/2019) To be continuously updated up to the time of the on-site visit
Number of requests sent to other FIU	Nil	72 (2 ML; 3 TF; 67 predicate)	39 (3 ML; 0 TF; 36 predicate)	51 (29 ML; 3 TF; 19 predicate)	79 (7 ML; 6 TF; 66 predicate)	54 (17 ML; 1 TF; 36 predicate): as at 18/01/2019
Number of Spontaneous Disclosures to FIUs	Nil	35 (11 ML; 0 TF; 24 predicate)	27 (11 ML; 4 TF; 12 predicate)	5 (2 ML; 0 TF; 3 predicate) Possible reasons for decline in numbers: 1) Managerial decision for international operational team to focus upon domestic referrals, as opposed to international SDs; 2) Lack of SD-information identification by domestic LES team and also by strategic international team.	2 (0 ML; 0 TF; 2 predicate) Possible reasons for decline in numbers: 1) Managerial decision for international operational team to focus upon domestic referrals, as opposed to international SDs; 2) Lack of SD-information identification by domestic LES team and also by strategic international team.	2 (1 ML; 1 predicate) + 15 (1 ML; 14 predicate) being worked on as at 18/01/2019 (not yet disseminated) Possible reasons for decline in numbers: 1) Managerial decision for international operational team to focus upon domestic referrals, as opposed to international SDs; 2) Lack of SD-information identification by domestic LES team and also by strategic international team, who would be in ideal positions to identify material for SDs as arising from the domestic work engaged in.
Number of requests granted	Not available	Not available	Not available	4	4	
Number of requests refused	Not available	Not available	Not available	Not available	Not available	
Average time required to	3 to 9 months	3 to 9 months	3 to 9 months	3 to 9 months	3 to 9 months	

respond to a request						
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South Africa has the capacity to trace and investigate the proceeds and instrumentalities of crime through a dedicated team of financial investigators that are stationed in the AFU head office and regional offices in each province of the Republic.

The primary function of the Financial Investigators is to conduct financial related investigations such as asset tracking and cash flow analysis.

Their functions further include providing timely assistance to requesting states seeking to recover assets. This function is performed irrespective of a formal MLA request or not.

The AFU Unit is also assisted by Police Financial Investigators who fall under the management of the South African Police Service: Directorate for Priority Crimes Investigations (DPCI).

Part 1 of Chapter 5 of the Prevention of Organised Crime Act, 121 of 1998

Part 1 of Chapter 5 of the POCA provides for the possibility of confiscating assets that constitute proceeds of unlawful activities or their financial equivalent. Section 1 of the POCA specifies that —proceeds of unlawful activities means any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived. Under section 18 of the POCA, whenever a defendant is convicted of an offence, the Court may, on application of the public prosecutor, order the defendant to pay any amount it considers appropriate, but not exceeding the value of the defendant’s proceeds of the offence. It should be pointed out that the Court will look not only at benefits derived from offences of which the defendant has been convicted, but also from —any criminal activity which the Court finds to be sufficiently related to those offences. See section 18(1)(c) of POCA.

Section 19 of the POCA specifies that the value of the proceeds is determined as —the sum of the values of the property, services, advantages, benefits or rewards received or derived by him or her at any time [...] in connection with the unlawful activity. The POCA also provides for the possibility of confiscating proceeds of crimes in the hands of third parties.

Section 1 provides that proceeds of unlawful activities means proceeds —derived, received or retained, directly or indirectly [emphasis added]. In addition, section 14 provides for the confiscation of —any property held by the defendant concerned, as well as —any property held by a person to whom that defendant has directly or indirectly made any affected gift.

Section 12(1)(i) *ibid* defines an —affected gift as —any gift- (a) made by the defendant concerned not more than seven years before the fixed date (b) made by the defendant concerned at any time, if it was a gift (i) of property received by the defendant in connection with an offence committed by him or her or any other person; or (ii) of property, or any part thereof, which directly or indirectly represented in that defendant’s hands property received by him or her in that connection. Whether any such gift was made before or after the commencement of this Act; Section 16(1) of the POCA provides that: a defendant shall be deemed to have made a gift if he or she has transferred any property to any other person directly or indirectly for a consideration the value of which is significantly less than the value of the consideration supplied by the defendant. This would appear to offer the possibility to confiscate proceeds of crime in the hands of third parties, be they natural or legal persons, which may not have been convicted. In practice, these provisions have been successfully relied on and restraint orders are regularly made against property of persons who will not be prosecuted.



For case law relating to restraint orders against legal persons, see National Director of Public Prosecutions v Rautenbach and another [2005] 1 All SA 412 (SCA). Proceedings on application for a confiscation order or a restraint order are civil proceedings. Consequently, the rules of evidence applicable in civil proceedings (i.e. —balance of probabilities) apply to proceedings on application for a confiscation order, and not the stricter rules of evidence applicable in criminal proceedings (i.e. —beyond reasonable doubt). The confiscation provisions available under the POCA were recently applied in practice in the recent prominent case of S v Shaik and Others (Civil Appeal) [2007] 2 All SA 150 (SCA). The Supreme Court of Appeal agreed, on most counts, with the High Court in its interpretation of the POCA provisions relating to confiscation of proceeds of unlawful activities, and confirmed

- (i) that proceeds include benefits received directly or indirectly;
- (ii) that proceeds cover any advantage, benefit, or reward, including those which a shareholder may derive if a company is enriched by the crime; and
- (iii) that the same proceeds can be considered proceeds of criminal activity in the hands of each intermediary and there can therefore be a multiplicity of confiscation orders for the same proceeds.

It is worth noting that the South African Constitutional Court has drawn attention, in several recent decisions, to the need to interpret legislation such as the POCA in a manner that is consistent with the Constitution, and notably the property clause enshrined in terms of Section 25. See, for instance, Mohunram and another v National Director of Public Prosecutions and another (Law Review ProjETC as Amicus Curiae) 2007 (4) SA 222 (CC) and S v Shaik 2008 (2) SA 208 (CC). Also note that section 25 of the South African Constitution provides for the protection against the arbitrary deprivation of property.

A very recent, 29 May 2008 decision of the Constitutional Court, however stressed the importance of going behind complex systems of camouflage to hide proceeds. It confirmed lower courts decisions in the matter of S v Shaik and Others (Civil Appeal) [2007] 2 All SA 150 (SCA) to confiscate proceeds of crime in the amount of ZAR 34 million (EUR 2 734 000; USD 4 230 000).

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

Example of implementation

Sunmola (Preservation & Forfeiture) as referred to paragraph 1 above.

*(b) Observations on the implementation of the article*

Foreign restraint orders are given effect in South Africa subsequent to the registration process described under section 24 of the International Co-operation in Criminal Matters Act, 1996. A registered foreign restraint order shall have the effect of a restraint order made by the court at which it has been registered (section 25, ICCMA).

The Asset Forfeiture Unit (AFU) in the Office of the National Director of Public Prosecutions was established to focus on the implementation of chapters 5 and 6 of POCA. It is responsible, inter alia, for financial investigations, preparing cases for the court, requesting the enforcement of asset forfeiture orders and responding to information requests. AFU has a dedicated team of financial investigators that provides timely assistance to requesting States seeking to recover assets, irrespective of a mutual legal assistance request or not.

*(c) Successes and good practices*

The existence of specialized structures such as the AFU and the Investigating Directorate and Specialized Commercial Crime Unit of NPA in facilitating the recovery and return of assets.

*Paragraph 3 of article 55*

*3. The provisions of article 46 of this Convention are applicable, mutatis mutandis, to this article. In addition to the information specified in article 46, paragraph 15, requests made pursuant to this article shall contain:*

*(a) In the case of a request pertaining to paragraph 1 (a) of this article, a description of the property to be confiscated, including, to the extent possible, the location and, where relevant, the estimated value of the property and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law;*

*(b) In the case of a request pertaining to paragraph 1 (b) of this article, a legally admissible copy of an order of confiscation upon which the request is based issued by the requesting State Party, a statement of the facts and information as to the extent to which execution of the order is requested, a statement specifying the measures taken by the requesting State Party to provide adequate notification to bona fide third parties and to ensure due process and a statement that the confiscation order is final;*

*(c) In the case of a request pertaining to paragraph 2 of this article, a statement of the facts relied upon by the requesting State Party and a description of the actions requested and, where available, a legally admissible copy of an order on which the request is based.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

South Africa determines and regulates its own requirements relating to its international relationships and co-operation to combat crime. This is achieved through:

1. Bilateral treaties
2. Multilateral treaties
3. Domestic legislation as a form of unilateral action,
4. Comity
5. Reciprocity

In such requests South Africa expects that all requests to its Central Authority contain the information set out in paragraph 3 of article 55 of this Convention.

There is little additional information outside the Convention required to be included in the request in order for South Africa to execute it.

Section 20 of the ICCMA

Section 20 of the ICCMA provides that the Director-General of the Department of Justice and Constitutional Development (DG) is the Central Authority to which requests for assistance are to be forwarded.

Section 20 of the ICCMA sets out the grounds requirements for the DG to satisfy himself/herself that the request meets the statutory requirements and then thereafter submit to the Minister for approval.

The section makes it possible for South Africa to assist with a request for executing a foreign confiscation order. Further, section 20 also makes provision for the confiscation and transfer of foreign proceeds of crime, amongst others.

Please further refer to the discussion under Article 54(1)(a) above.

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

Example of implementation

Bobroff wherein there was communication and guidance as to what information to be included in the request.

*(b) Observations on the implementation of the article*

Apart from section 7 of the International Cooperation in Criminal Matters Act, the content requirements for incoming MLA requests are not specified in any law or regulation.

Regarding guidance issued by South Africa to requesting States on how to formulate requests or on its requirements for asset recovery, reference is made to the G-20 Step-By-Step Guide for Asset Recovery for South Africa issued in 2013<sup>23</sup>. South African authorities confirmed that the AFU of the NPA has published an online ‘step-by-step’ guide in this regard, which is accessible from the G-20 website.

The AFU has requested that this ‘step-by-step’ guide be made available on the official website of the NPA for ease of reference. The AFU will further request the Department of Justice & Constitutional Development to share this link on the official website of the Department.

The AFU is in the process of developing an up to date ‘AFU Brochure’, in which the ‘step-by-step’ guide will inter alia be set out and discussed.

The reviewers welcome the steps underway by the AFU to develop an up-to-date asset recovery guide.

**It is recommended that South Africa continue the development by the AFU of an up-to-date asset recovery guide, to be made available together with an updated version of the G-20 step-by-step asset recovery guide.**

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<sup>23</sup> Available on the StAR website: <https://star.worldbank.org/document/g20-asset-recovery-guide-2013-south-africa>

*Paragraph 4 of article 55*

4. The decisions or actions provided for in paragraphs 1 and 2 of this article shall be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral agreement or arrangement to which it may be bound in relation to the requesting State Party.

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

POCA and ICCMA provide that the provisions of this Article and the relevant articles of the Convention are fully implemented.

South Africa does not require any international agreement to support its ability to provide assistance to a requesting State in relation to asset recovery. South African domestic law can apply to any request for assistance in an asset recovery case. South Africa also enters into general and *ad hoc* agreements, on a case to case basis, if it is a requirement of the other State.

See also comments made above in the discussion under Article 55, Paragraph 3.

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

Example of implementation

ICCMA was introduced in 1996 to place South Africa in a position to fully implement the mutual legal assistance asset recovery provisions of the Convention. South Africa also considers drawing up case to case agreements in relation to the return of confiscated assets.

*(b) Observations on the implementation of the article*

South Africa provides mutual legal assistance for the purposes of asset recovery in accordance with the International Cooperation in Criminal Matters Act and the Prevention of Organized Crime Act, as well as applicable bilateral and multilateral agreements. South Africa does not require an international agreement to provide assistance to a requesting State in relation to asset recovery, as the domestic law can apply to any request for assistance in an asset recovery case.

*Paragraph 5 of article 55*

5. Each State Party shall furnish copies of its laws and regulations that give effect to this article and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations.

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please provide a reference to the date these documents were transmitted, as well as a description of any documents not yet transmitted.**

Response

Hyperlinks of the relevant legislation are provided.

*(b) Observations on the implementation of the article*

The relevant legislation and regulations were provided during the course of the review.

*Paragraph 6 of article 55*

6. If a State Party elects to make the taking of the measures referred to in paragraphs 1 and 2 of this article conditional on the existence of a relevant treaty, that State Party shall consider this Convention the necessary and sufficient treaty basis.

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

Please refer to the response above at Article 55, Paragraph 3.

South Africa does not require any international agreement to support its ability to provide assistance to a requesting State in relation to asset recovery. South African domestic law can apply to any request for assistance in an asset recovery case. South Africa also enters into general and *ad hoc* agreements, on a case to case basis, if it is a requirement of the other State.

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

Example of implementation

Not applicable as South Africa does not require a treaty.

South Africa is, however, willing to negotiate treaties and other international agreements should it be required by other State parties.

*(b) Observations on the implementation of the article*

South Africa does not require any international agreement to support its ability to provide assistance to a requesting State in relation to asset recovery, as the domestic law can apply to any request for assistance in an asset recovery case.

*Paragraph 7 of article 55*

*7. Cooperation under this article may also be refused or provisional measures lifted if the requested State Party does not receive sufficient and timely evidence or if the property is of a de minimis value.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

Please refer to the response above at Article 55, Paragraph 3.

There is no *de minimis* value which South Africa requires to provide assistance and South Africa will provide assistance in asset recovery, in terms of this Convention, regardless of the offence and the value.

The South African High Court, in terms of section 173 of the 1996 Constitution, does however have a discretion to regulate their own process and may impose their own *de minimis* thresholds. This situation has however not occurred and is not foreseen.

Section 22 of ICCMA provides for the setting aside of a foreign confiscation order but does not impose any time requirements.

Section 22 of ICCMA: Setting aside of registration of foreign confiscation order

(1) The registration of a foreign confiscation order in terms of section 20 shall, on the application of any person against whom the order has been made, be set aside if the court at which it was registered is satisfied-

- (a) that the order was registered contrary to a provision of this Act;
- (b) that the court of the requesting State had no jurisdiction in the matter;
- (c) that the order is subject to review or appeal;
- (d) that the person against whom the order was made did not appear at the proceedings concerned

or did not receive notice of the said proceedings as prescribed by the law of the requesting State or, if no such notice has been prescribed, that he or she did not receive reasonable notice of such proceedings so as to enable him or her to defend him or her at the proceedings;

- (e) that the enforcement of the order would be contrary to the interests of justice; or
- (f) that the order has already been satisfied.

(2) The court hearing an application referred to in subsection (1) may at any time postpone the hearing of the application to such date as it may determine.

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

Example of implementation

Not applicable as South Africa does not require a treaty.

South Africa is, however, willing to negotiate treaties and other international agreements should it be required by other State parties.

*(b) Observations on the implementation of the article*

South Africa provides assistance in asset recovery regardless of the offence and the value of the property involved.

Based on the information provided, the provision is implemented.

*Paragraph 8 of article 55*

*8. Before lifting any provisional measure taken pursuant to this article, the requested State Party shall, wherever possible, give the requesting State Party an opportunity to present its reasons in favour of continuing the measure.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

This is established practice in South Africa.

South Africa will consult with and allow the requesting State an opportunity to present representations/additional facts before a decision is taken to uplift/rescind a provisional seizure order.

Kindly note that:

1 A provisional seizure order brought in terms of POCA may:

1. be discharged on 24 hours' notice on application by the defendant;
2. be allowed to lapse on the return date thereof

2 A final seizure order may be rescinded on application to a High Court and with notice to all interested parties.

POCA Chapter 5: Section 26(3)(c) and (10)(a)

#### 26 Restraint orders

26(3)(c) Upon application by the defendant, the court may anticipate the return day for the purpose of discharging the provisional restraint order if 24 hours' notice of such application has been given to the applicant contemplated in subsection (1).

26(10) A High Court which made a restraint order-

(a) may on application by a person affected by that order vary or rescind the restraint order or an order authorising the seizure of the property concerned or other ancillary order

POCA Chapter 6: Section 47

#### Variation and rescissions of orders

43(6) Any person affected by an order contemplated in subsection (1) may at any time apply for the rescission of the order

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

None provided.

#### *(b) Observations on the implementation of the article*

South Africa will consult with and provide the requesting State an opportunity to present representations/additional facts before a decision is taken to uplift/rescind a provisional seizure order. The provision appears to be implemented as a matter of practice.

It was explained that there are no guidelines or procedures in the Office of the NPA which provide for such consultations to be held in practice. The matter is not addressed in the AFU Policy Guideline (No. 8 of 2006). However, such a decision would generally be authorized by the Head of the Unit to ensure that proper consideration is given to the matter.

#### *Paragraph 9 of article 55*

*9. The provisions of this article shall not be construed as prejudicing the rights of bona fide third parties.*



*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

1. South African POCA legislation provides for third parties to make representations, to the NDPP/NPA, in relation to all seizure cases affecting such parties. Please refer further to our discussion in respect of article 53(a) of the Convention above.

1.1 In addition, in respect of section 20(5) POCA a Court will afford all persons holding any interest in property concerned an opportunity to make representations to it in connection with the realisation of that property, when making a confiscation order in terms of section 18 of POCA.

2. Section 21 of the Superior Courts Act, 10 of 2013, allows any State Party and/or foreign individual, as a litigant, to initiate any action and/or application procedure in the South Africa courts.

2.1 Furthermore, such an affected foreign State Party and/or individual, with a vested/direct and substantial interest in the outcome of any dispute to approach a South African court to be joined as litigant or interested party to the dispute.

2.2 Note that in terms of section 173 of the 1996 Constitution, all South African High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

A number of matters were noted under the preceding articles wherein the forfeiture orders sought by the NDPP made provision for the return of property to the victim. South Africa does not require a formal appearance for the protection of interests, but will recognise bona fide victims.

Reference is also made to the Nigerian Dollar matter referred to under article 53 above, wherein a formal exclusion of interest application was lodged by the Nigerian Government, which was not opposed by South Africa. As discussed above, the parties (Asset Forfeiture Unit and the Nigerian Government) settled the matter, which settlement was made an order of Court.

*(b) Observations on the implementation of the article*

Under POCA, section 20(5) a Court will afford all persons holding any interest in the property concerned an opportunity to make representations to it in connection with the realization of that property, when making a confiscation order in terms of section 18 of the Prevention of Organized Crime Act.

Under section 39(3) any person who has an interest in property which is subject to a preservation of property order may enter an appearance giving notice of his or her intention to oppose the making of a forfeiture order or to apply for an order excluding his or her interest in the property concerned.

*(c) Challenges, where applicable*

**Please outline actions required to ensure or improve the implementation of the article under review and describe any specific challenges you might be facing in this respect.**

*(d) Technical assistance needs*

No assistance would be required

**Is any technical assistance already being provided to you? If so, please provide a general description of the nature of the assistance, including donor information.**

## Article 56. Special cooperation

### *Article 56*

*Without prejudice to its domestic law, each State Party shall endeavour to take measures to permit it to forward, without prejudice to its own investigations, prosecutions or judicial proceedings, information on proceeds of offences established in accordance with this Convention to another State Party without prior request, when it considers that the disclosure of such information might assist the receiving State Party in initiating or carrying out investigations, prosecutions or judicial proceedings or might lead to a request by that State Party under this chapter of the Convention.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response:

1. Paragraph 46(4) of the first cycle implementation review report, available at: <http://www.dpsa.gov.za/dpsa2g/documents/acc/2013%20UNCAC%20FINAL%20COUNTRY%20REPORT%20SOUTH%20AFRICA.pdf>

2. Financial Intelligence Centre

Section 40 of FICA is the main provision that regulates access to information held by the Centre. In essence, investigating authorities, the South African Revenue Service and intelligence services may be provided with information on request, or at the initiative of the Centre. Information may also be provided to foreign entities performing functions similar to those of the Centre, pursuant to

a formal, written agreement between the Centre and that entity or its authority.

FIC can share information with any other FIU, and that information sharing may exclude the information stipulated in Section 40.

The competent authorities in South Africa seek and exchange information informally with their foreign counterparts on a regular basis. The LEAs and the intelligence organizations are at the forefront of such information exchange. The NPA uses its membership of the Africa Prosecutors Association (APA) for the effective exchange of information with other prosecutors. FIC is the most prolific seeker of international cooperation. FIC made 306 requests for information from other jurisdictions during the period under review. Forty of the requests related to ML, 28 related to TF and 238 related to predicate offences. FIC also made inquiries on behalf of the SAPS, DPCI, CATS and AFU.

The Financial Intelligence Centre became a member of the Egmont Group of Financial Intelligence Units of Financial Intelligence Units in 2003 and has access to a wide range of financial, administrative and law enforcement information to enhance its ability to analyse suspicious transaction reports (STRs).

See the response to article 58

#### INTERNATIONAL CASE-STUDIES: FIU-FIU

##### (i) BOTSWANA:

A RFI was received from the FIU in Botswana on which the FIU was working domestically with their Directorate on Corruption and Economic Crime (DCEC). It was alleged that funds were misappropriated from an SOE in Botswana - funds of which flowed into South Africa. It was further alleged that Politically Exposed Persons (PEPs) and Prominent Influential Persons (PIPs) were implicated.

After analysis of the matter, the Centre was able to establish the following:

- Various moveable assets purchased in South Africa (to the value of approximately ZAR 20 million)
- A number of properties that were purchased in South Africa were linked to the subjects of the request.

The FIC subsequently met with the FIU to present the results of the analysis and requested further detail on the matters. Subsequent to the meeting, the RSA Asset Forfeiture Unit (AFU) also submitted a request on the matter, to assist with a MLA process to recover the proceeds. This case-study therefore demonstrates international FIU-to-FIU cooperation, but also domestic cooperation, in terms of FIC-AFU.

##### (ii) DENMARK:

The FIC received a request from the FIU-Denmark, requesting information on 4 Danish nationals, being the main subject (a mother) and her three adult children. According to the RFI, the main subject (subject 1) of the request was suspected of defrauding her former employer, the Danish National Board of Social Services and had been dismissed by that employer on 25 September 2018, and subsequently fled to South Africa.

The FIC identified bank accounts belonging to subject 1, and bank accounts as well as two vehicles belonging to one of the subject's children (subject 2). The FIC met with the Danish Senior Prosecutor on the case and the Danish Detective Inspector on the case, as well as the following

domestic agencies: the NPA, the AFU, INTERPOL and FNB - to establish the facts of the case as well as to expedite action on the case.

The FIC subsequently received a request for intervention from the AFU with regards to funds in two of subject 2's accounts, and funds in a third party's account, which funds had been transferred from subject 2's account. As a result, the FIC issued 3 s34 directives / freezing orders on a cumulative amount of ZAR 6,700,109.92 on the three accounts. Additionally, a fourth s34 directive / freezing order was effected for an amount of ZAR310,000.00 on an account which had received the proceeds of the sale of one of subject 2's motor vehicles referred to above.

Subsequent to all the above, both subject 1 and subject 2 were arrested by the South African Police Service (SAPS) in South Africa. This case-study therefore demonstrates international FIU-to-FIU cooperation, as well as domestic cooperation. The following feedback was received in relation to the information provided:

Lesotho - MIRQT-181017-0000002 (2018/2019 F/Y); satisfactory response re feedback

Canada - MIRQT-180906-0000008 (2018/2019 F/Y); satisfactory response re feedback

### 3. Police to Police cooperation

The South African Police Service (SAPS) uses the following methods to enhance cooperation with police in other jurisdictions:

3.1 Interpol - As a member of the Interpol, the SAPS has access to various networks in this platform;

3.2 SAPS has liaison officers (focal points) in other jurisdictions to facilitate requests for mutual legal assistance or extradition;

3.3 Some requests are made directly to the National Police Commissioner; and

3.4 SAPS can also enter into bilateral agreements with police in other jurisdictions. Visit the following website for information on some of the agreements: [https://www.saps.gov.za/resource\\_centre/agreement\\_memo/agreement\\_memo.php](https://www.saps.gov.za/resource_centre/agreement_memo/agreement_memo.php)

### 4. Asset Forfeiture Unit

South Africa is part of the ARINSA network and an observer to the CARIN network. These networks provide for certain types of information sharing:

1 ARINSA is a multi-agency informal network between participating countries in Southern Africa which exchanges information, models legislation and county laws in asset forfeiture, confiscations and money laundering.

2 All ARINSA member countries have an investigator and prosecutor that networks and shares with counterparts in depriving criminals of the proceeds of crime.

3 The Secretariat of ARINSA is located in Asset Forfeiture Unit: Head Office of the National Prosecuting Authority of South Africa.

4 CARIN is an informal network of contacts and a co-operative group concerned with all aspects of confiscating the proceeds of crime.

5 CARIN is linked to similar asset recovery networks in Southern Africa, Latin-America & Asia Pacific.

The following benefits of the ARINSA & CARIN need specific reference:

- 1 These networks have proven guidelines and best practices that ensure effective implementation.
- 2 Proper information is shared through established nodal points to ensure the information reaches the correct governmental agency.
- 3 Promotes the element of flexibility in information sharing.

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

Examples of implementation

**INTERNATIONAL COOPERATION BETWEEN FIUS (INCOMING REQUESTS)**

Number of requests received.

Period	Number of requests tasked for analysis
2013-2014	Nil
2014-2015	107
2015-2016	362
2016-2017	368
2017-2018	142
2018-2019 (to date: 01/11/2018)	71
<b>TOTAL</b>	<b>1050</b>

Number of spontaneous referrals made to other FIUs.

Period	Number of Spontaneous Referrals
2013-2014	Nil
2014-2015	8
2015-2016	26
2016-2017	5
2017-2018	2
2018-2019 (to date: 01/11/2018)	2
<b>TOTAL</b>	<b>43</b>

*(b) Observations on the implementation of the article*

Under POCA, Section 40(1)(b), the Centre (FIC) can spontaneously share information with foreign FIUs or investigating authorities pursuant to a written agreement between FIC and its foreign counterpart and subject to the formal approval of the Minister. South African authorities also engage in spontaneous information sharing on the basis of police to police cooperation through the South African Police Service (SAPS) and the NPA’s Asset Forfeiture Unit, which is part of the ARINSA network and an observer in the CARIN network.

Further, as a member of the Egmont Group of Financial Intelligence Units, the FIC exchanges information through the Egmont Secure Web (ESW) with other Egmont members and also through encrypted emails on the basis of memorandums of understanding signed with foreign counterparts.

**Based on the information provided, it is recommended that South Africa consider expanding the powers of FIC to spontaneously share information, including with financial intelligence units of countries with which no bilateral agreements are in place.**

*(c) Successes and good practices*

The posting of South African Police Service liaison officers (focal points) in other jurisdictions to facilitate requests for mutual legal assistance, including asset recovery.

*(d) Challenges, where applicable*

**Please outline actions required to ensure or improve the implementation of the article under review and describe any specific challenges you might be facing in this respect.**

*(e) Technical assistance needs*

No assistance would be required

**Is any technical assistance already being provided to you? If so, please provide a general description of the nature of the assistance, including donor information.**

None.

## **Article 57. Return and disposal of assets**

*Paragraph 1 of article 57*

*1. Property confiscated by a State Party pursuant to article 31 or 55 of this Convention shall be disposed of, including by return to its prior legitimate owners, pursuant to paragraph 3 of this article, by that State Party in accordance with the provisions of this Convention and its domestic law.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

South African law allows for the return and disposal of assets to its legitimate owners.

Further note that section 21 of ICCMA deals with the effect of the registration of a foreign confiscation.

Section 21(3) of ICCMA reads as follows:

(3) The Director-General shall, subject to any agreement or arrangement between the requesting State and the Republic, pay over to the requesting State any amount recovered in terms of a foreign confiscation order, less all expenses incurred in connection with the execution of such order.

In terms of section 1 of the ICCMA the expression “foreign confiscation order” means any order issued by a court or tribunal in a foreign State aimed at recovering the proceeds of any crime or the value of such proceeds.

AFU policy aimed at stating the principles applicable when a request for asset recovery is received in terms of the UNCAC was implemented. This policy serves as a guide to prosecutors that all proceeds relating to UNCAC offences be returned to the country of origin (copy provided).

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

Example of implementation

Salia (Preservation & Forfeiture)

On 30 September 2016, the US Secret Service received a request for assistance from Standard Bank South Africa (SBSA) regarding a large monetary transfer which was made into an account. According to Standard bank, the declarations provided by the accountholders Taiwo Sairudeen Salia (Salia) and Itumeleng Crizala Salia (Itumeleng) to SBSA and the South African Reserve Bank (the SARB) in order to release the money, stated funds as “Reimbursement of litigation costs”, “Shipment cost”, “Privileged client cost assistance”, “Expert witness fees” and “Confidential litigation settlement”. This did not correspond with the principal business of the account holder, Eleni’s, and seemed suspicious. As such, SBSA decided to freeze the money in the account pending further investigations.

Investigations were requested to ascertain whether the funds in the account originated from the proceeds of crime. Seven (7) Wire Transfers and Authorization Forms from First Republic Bank, USA indicating that funds were received into the account were provided to an US Secret Service Special Agent stationed at Financial Crimes Enforcement Network (FinCEN), a bureau of the US Department of Treasury.

FinCEN conduct database searches to find any links pertaining to potential fraud. FinCEN was able to make several links connected with the account details and account holders. These links included approximately 50 individuals, mainly resident in South Africa, who received potential proceeds of crime. The individuals received funds which were transferred to them by US banks and financial institutions including JP Morgan Chase, First Republic Bank, Bank of America, Western Union and Money Gram. Investigations also revealed that these funds originated from cybercrime related scams like 419 scams and romance/dating scams. These transactions were all flagged as money laundering, suspicious EFT/wire transfers and transactions with no apparent economic, business or lawful purpose. Multiple payments to these individuals were reversed if they were

identified in a timely manner.

FinCEN also calculated the actual losses suffered as a result of the cybercrime related scams as R140 000 000, with potential losses calculated at R280 000 000.

US Secret Service Special Agents from their office in San Francisco interviewed the main source of the funds, namely, John David Black (**John**) and Jeanne Marie Black (**Marie**). John and Marie are partners from the law firm of J David Black. Investigations revealed that John was contacted by an individual named Beth Stacey Johnson (**Johnson**) late in 2015 who claimed to live in New York. She required John's assistance in making financial decisions in respect of a property she had inherited. Numerous discussions took place between John and Johnson. It later escalated to such an extent that John made numerous payments to Johnson. All these payments were received into the account. Unbeknownst to John he was part of a scam to deprive him from his money.

On 26 April 2018, a preservation order was granted as per case 28361/2018. On 8 November 2018, a forfeiture order was granted and on 21 December 2018 an amount of R1 410 616.15 was returned to the US in favour of the victim John Black.

*(b) Observations on the implementation of the article*

South African law provides for the return and disposal of assets to requesting States. Section 21 of the International Cooperation in Criminal Matters Act (ICCMA) provides that South Africa will pay to the requesting State any amount recovered in terms of a foreign confiscation order, less expenses incurred, unless an agreement or arrangement provides otherwise.

The provision is implemented. Reference is made to the observations under paragraph 3 of this article.

*Paragraph 2 of article 57*

*2. Each State Party shall adopt such legislative and other measures, in accordance with the fundamental principles of its domestic law, as may be necessary to enable its competent authorities to return confiscated property, when acting on the request made by another State Party, in accordance with this Convention, taking into account the rights of bona fide third parties.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

As stated above, South African law allows for the return and disposal of assets to its legitimate owners. South Africa does not require a request for the return of confiscated property when acting on a requested or in the instance South Africa initiates investigations and obtain freezing and confiscation orders.



**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

None provided.

*(b) Observations on the implementation of the article*

Same observation as above.

*Subparagraph 3 (a) of article 57*

3. In accordance with articles 46 and 55 of this Convention and paragraphs 1 and 2 of this article, the requested State Party shall:

*(a) In the case of embezzlement of public funds or of laundering of embezzled public funds as referred to in articles 17 and 23 of this Convention, when confiscation was executed in accordance with article 55 and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party;*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

As stated above, South African law allows for the return of all proceeds of unlawful activity. However, South African law does not allow for the waiver of the final judgement requirement. In terms of section 20(1)(a) of ICCMA specifically provides that in the request for the registration of a foreign confiscation order the Director-General, amongst others, must be satisfied that such an order is final and not subject to a review or appeal.

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

None provided.

*(b) Observations on the implementation of the article*

South African law provides for the mandatory return and disposal of proceeds of unlawful activity to requesting States. Section 21 of the International Cooperation in Criminal Matters Act prescribes that South Africa shall pay to the requesting State any amount recovered in terms of a foreign confiscation order, less expenses incurred, unless an agreement or arrangement provides otherwise. Accordingly, the law recognizes the mandatory return of proceeds of unlawful activity to the requesting State.

Case examples involving the successful return of assets to foreign countries were provided.  
The provision is implemented.

*Subparagraph 3 (b) of article 57*

3. In accordance with articles 46 and 55 of this Convention and paragraphs 1 and 2 of this article, the requested State Party shall:

...

(b) In the case of proceeds of any other offence covered by this Convention, when the confiscation was executed in accordance with article 55 of this Convention and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party, when the requesting State Party reasonably establishes its prior ownership of such confiscated property to the requested State Party or when the requested State Party recognizes damage to the requesting State Party as a basis for returning the confiscated property;

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

As stated above, South African law allows for the return of all proceeds of unlawful activity. However, South African law does not allow for the waiver of the final judgement requirement. In terms of section 20(1)(a) of ICCMA specifically provides that in the request for the registration of a foreign confiscation order the Director-General, amongst others, must be satisfied that such an order is final and not subject to a review or appeal.

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

None provided.

*(b) Observations on the implementation of the article*

Same observation as above.

*Subparagraph 3 (c) of article 57*

3. In accordance with articles 46 and 55 of this Convention and paragraphs 1 and 2 of this article, the requested State Party shall:

...

(c) In all other cases, give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime.

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

As stated above, South African law allows for the return of all proceeds of unlawful activity to and inclusive of prior legitimate owners and compensation for the victims of crime.

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

Example of implementation

Bawden (Preservation & Forfeiture)

On 26 January 2017 an Absa cheque account was opened at Mooi River branch by a certain David Charles Bawden (Bawden) holding a Malawian passport.

On 12 July 2017, the Absa cheque account was credited with an international transfer from Germany amounting to R1 252 948.52. The transfer relates to a Swift transfer in excess of €82 084.25 which originated from Deutsche Bank AG, Frankfurt Am Main.

According to the Swift message the originator of the transfer is a life insurance company based in Germany called *Alte Leibziger Lebensversicherung*, Oberusel, Germany. Bawden succeeded to withdraw R3 000 a day later at an ATM and a further R250 000 at Absa Fourways. A hold was put onto the account by Absa, pending further investigation as the transaction appeared to be suspicious.

Further investigations by Absa's forensics determined that the Malawian passport used to open the account is fraudulent as the specific passport was issued to a SB White with date of birth 11 January 1978 and not Bawden.

The same individual purporting to be Bawden opened 8 other accounts with Absa using different passports of the Democratic Republic of Congo and Republic of Malawi. The passports bear different names, however they contain the photo of the same individual. The account holder was requested to supply the source of the origins of the funds but failed to do so.

The suspect is in all likelihood part of a known syndicate which targets South African residents with investments or banking accounts abroad by intercepting their bank statements and/or banking information in the mail stream.

Once the syndicate receives the information, fraudulent bank accounts are opened in the name of the individual by the use of false passports from foreign African countries. Shortly after the accounts are opened, substantial amounts of funds are solicited (under fraudulent pretences) from foreign banks by individuals who purport to be the genuine account holders. The funds received from the foreign banks are then paid into the fraudulently opened accounts from where it is withdrawn.

On 6 November 2017, the AFU obtained a preservation order as per case 75129/17. On 29 May 2018 a forfeiture order was granted and on 2 August 2018 an amount of R997 924.55 was returned to the victim Alte Leibziger Lebensversicherung in Germany.

*(b) Observations on the implementation of the article*

Same observation as above.

*Paragraph 4 of article 57*

*4. Where appropriate, unless States Parties decide otherwise, the requested State Party may deduct reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposition of confiscated property pursuant to this article.*

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

Please refer to the discussion under Article 57 (Paragraph 1) above.

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

Example of implementation

Please refer to the discussion under Article 57, paragraph 1 above.

There are currently no examples wherein the costs as outlined in article 57, paragraph 4 have been deducted.

It must be stated that with reference to the Denmark matter, which was not yet finalised at the time of the country visit, a curator bonis has been appointed to administer the property. Upon finalisation of the matter the fees and disbursement, as per the regulation that governs such payments, will be deducted and the remainder of the funds will be returned to Denmark.

*(b) Observations on the implementation of the article*

This provision is implemented through Section 21 (3) of ICCMA.

*Paragraph 5 of article 57*

5. Where appropriate, States Parties may also give special consideration to concluding agreements or arrangements, on a case-by-case basis, for the final disposal of confiscated property.

*(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

(a) Response

South Africa does not require any international agreement to support our ability to provide assistance to a requesting State in relation to asset recovery. South African domestic law can apply to any request for assistance in an asset recovery case. South Africa also enters into general and *ad hoc* agreements, on a case to case basis, if it is a requirement of the other State.

In practice South Africa will provide assistance and with an underlying understanding that the requested state will be entitled to deduct its costs in securing the property.

In addition the parties will negotiate whether the requested state will retain a share of the confiscated property.

There is also nothing preventing South Africa to enter into bi-lateral and multi-lateral agreements regulating this issue.

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

None provided.

*(b) Observations on the implementation of the article*

Section 21 of the International Cooperation in Criminal Matters Act prescribes that South Africa shall pay to the requesting State any amount recovered in terms of a foreign confiscation order, less expenses incurred, unless an agreement or arrangement provides otherwise.

Case examples involving the successful return of assets to foreign countries have been provided.

Authorities confirmed that, apart from international treaties, South Africa has not entered into any other agreements or arrangements with foreign States related to asset return.

*(c) Challenges, where applicable*

**Please outline actions required to ensure or improve the implementation of the article under review and describe any specific challenges you might be facing in this respect.**

*(d) Technical assistance needs*

No assistance would be required

**Is any technical assistance already being provided to you? If so, please provide a general description of the nature of the assistance, including donor information.**

## Article 58. Financial intelligence unit

### *Article 58*

*States Parties shall cooperate with one another for the purpose of preventing and combating the transfer of proceeds of offences established in accordance with this Convention and of promoting ways and means of recovering such proceeds and, to that end, shall consider establishing a financial intelligence unit to be responsible for receiving, analysing and disseminating to the competent authorities reports of suspicious financial transactions.*

### *(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

#### (a) Response

##### 1. Establishment of the Financial Intelligence Unit in South Africa

The financial intelligence unit of South Africa was established in terms of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001). It is formally referred to as the Financial Intelligence Centre (FIC). The FIC became operational in 2003, as an “administrative” FIU under the Ministry of Finance.

##### 2. Institutional arrangements

The FIC operates outside the public service but within the public administration as envisaged in section 195 of the Constitution of the Republic of South Africa, 1996. The FIC is a juristic person. The Centre is a well-staffed and well-functioning organisation. The Centre’s staff component during the 2018 reporting year was 197.

##### 3. The mandate, powers and role of the FIU in cooperating with foreign counterparts and

authorities

The FIC contributes to protecting the integrity of South Africa's financial system. Its mandate is to assist in identifying the proceeds of crime and combating money laundering (ML) and the financing of terrorist activities (TF). The FIC is a support agency to law enforcement and other authorities such as the South African Police Service, the intelligence services and the South African Revenue Service. To this end, the FIC focuses on the national crime priorities and national security strategy to support investigations through financial intelligence to develop evidence in support of investigations and trace assets associated with criminal activities related to ML/TF and predicate offences.

Although the FIC's financial intelligence plays an important role in many criminal investigations, it does not conduct its own investigations or prosecutions.

The Monitoring and Analysis Department (MAA) is a core business department within the FIC and contributes directly to the delivery of the FIC mandate through the support it provides to the criminal justice system. The MAA is also responsible for the receipt and analysis of data related to the identification of the proceeds of crime, money laundering or terror financing. This includes monitoring and scrutinising of reports received by the FIC.

The MAA also focuses on enhanced international cooperation with its foreign counterparts. As indicated the AML/CFT environment is dynamic and FIUs need to adapt to international standards and to operate at optimum capacity. MAA restructured early in 2016 and divided into three sub-units, Investigative Support Services, Intelligence Support Services and Governance and Administration, with Intelligence Support Services being a newly established entity.

4. Participation in international and regional bodies and networks (e.g. the Egmont Group of Financial Intelligence Units), as well as any other measures taken for promoting cooperation for the purpose of asset recovery.

The Centre became a member of the Egmont Group of Financial Intelligence Units of Financial Intelligence Units in 2003 and has access to a wide range of financial, administrative and law enforcement information to enhance its ability to analyse suspicious transaction reports (STRs).

During 2013/2014, based on reported data, the Centre's intelligence products highlighted a range of suspected criminal activities, led by tax related crimes (789 reports), fraud (532) and money laundering (310).

The number of STRs received during this period was 355 369.

Cash Threshold Reports (CTRs) which cover all transactions of R25 000 and above received during the 2017/2018 reporting period was 4 884 417. The majority of these reports were received from banks.

Suspicious transaction reports (STR) (Section 29 Reports) received during the 2017/ 2018 reporting period was 330639.

The FIC can provide the widest range of international cooperation spontaneously. One of the FIC's objectives is to exchange information on ML and associated offences and TF with other bodies with similar objectives in foreign jurisdictions (FIC Act, s.3(2)(b)). It is also required, when acting as an FIU, to share information it has with foreign counterparts and investigating authorities (FIC Act, s.40(1)(b)). The FIC can co-operate or share information on a spontaneous basis (FIC Act s.40(1B)).

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

Examples of implementation

As a member of the Egmont Group of Financial Intelligence Units, they exchange information through the Egmont Secure Web (ESW) with other Egmont members and also through goAML, and encrypted emails on the basis of memorandums of understanding signed with foreign counterparts. When dealing with non-members of Egmont they only share information from open sources. While the FIC Act powers are broad, membership of Egmont imposes rules which must be followed to help ensure confidentiality. To facilitate proper exchange of information and international cooperation the FIC has signed Memoranda of Understanding (MoUs) with 91 countries, including 12 non-Egmont members. FIC provides international cooperation within 15 days at most.

Requests for / disclosures of information sent by FIC to other FIUs						
Year	2013-2014 (01April 2013-31March 2014)	2014-2015 (01April 2014-31March 2015)	2015-2016 (01April 2015-31March 2016)	2016-2017 (01April 2016-31March 2017)	2017-2018 (01April 2017-31March 2018)	2018-2019 (01April 2018 to date: 18/01/2019) To be continuously updated up to the time of the on-site visit
Number of requests sent to other FIU	Nil	72 (2 ML; 3 TF; 67 predicate)	39 (3 ML; 0 TF; 36 predicate)	51 (29 ML; 3 TF; 19 predicate)	79 (7 ML; 6 TF; 66 predicate)	54 (17 ML; 1 TF; 36 predicate): as at 18/01/2019
Number of Spontaneous Disclosures to FIUs	Nil	35 (11 ML; 0 TF; 24 predicate)	27 (11 ML; 4 TF; 12 predicate)	5 (2 ML; 0 TF; 3 predicate) Possible reasons for decline in numbers: 1) Managerial decision for international operational team to focus upon domestic referrals, as opposed to international SDs; 2) Lack of SD-information identification by domestic LES team and also by strategic international	2 (0 ML; 0 TF; 2 predicate) Possible reasons for decline in numbers: 1) Managerial decision for international operational team to focus upon domestic referrals, as opposed to international SDs; 2) Lack of SD-information identification by domestic LES team and also by strategic international	2 (1 ML; 1 predicate) + 15 (1 ML; 14 predicate) being worked on as at 18/01/2019 (not yet disseminated) Possible reasons for decline in numbers: 1) Managerial decision for international operational team to focus upon domestic referrals, as opposed to international SDs; 2) Lack of SD-information identification by domestic LES team and also by strategic



				team.	team.	international team, who would be in ideal positions to identify material for SDs as arising from the domestic work engaged in.
Number of requests granted	Not available	Not available	Not available	4	4	
Number of requests refused	Not available	Not available	Not available	Not available	Not available	
Average time required to respond to a request	3 to 9 months	3 to 9 months	3 to 9 months	3 to 9 months	3 to 9 months	

Table 28: Requests for / disclosures of information sent by FIC to other FIUs

## INTERNATIONAL CASE-STUDIES: FIU-FIU

### BOTSWANA:

A request for information (RFI) was received from the FIU in Botswana on which the FIU was working domestically with their Directorate on Corruption and Economic Crime (DCEC). It was alleged that funds were misappropriated from an SOE in Botswana - funds of which flowed into South Africa. It was further alleged that Politically Exposed Persons (PEPs) and Prominent Influential Persons (PIPs) were implicated.

After analysis of the matter, the Centre was able to establish the following:

- Various moveable assets purchased in South Africa (to the value of approximately ZAR 20 million)
- A number of properties that were purchased in South Africa were linked to the subjects of the request.

The FIC subsequently met with the FIU to present the results of the analysis and requested further detail on the matters. Subsequent to the meeting, the RSA Asset Forfeiture Unit (AFU) also submitted a request on the matter, to assist with a MLA process to recover the proceeds. This case-study therefore demonstrates international FIU-to-FIU cooperation, but also domestic cooperation, in terms of FIC-AFU.

### DENMARK:

The FIC received a request from the FIU-Denmark, requesting information on 4 Danish nationals, being the main subject (a mother) and her three adult children. According to the RFI, the main subject (subject 1) of the request was suspected of defrauding her former employer, the Danish National Board of Social Services and had been dismissed by that employer on 25 September 2018, and subsequently fled to South Africa.

The FIC identified bank accounts belonging to subject 1, and bank accounts as well as two vehicles belonging to one of the subject's children (subject 2). The FIC met with the Danish Senior

Prosecutor on the case and the Danish Detective Inspector on the case, as well as the following domestic agencies: the NPA, the AFU, INTERPOL and FNB - to establish the facts of the case as well as to expedite action on the case.

The FIC subsequently received a request for intervention from the AFU with regards to funds in two of subject 2's accounts, and funds in a third party's account, which funds had been transferred from subject 2's account. As a result, the FIC issued 3 s34 directives / freezing orders on a cumulative amount of ZAR 6,700,109.92 on the three accounts. Additionally, a fourth s34 directive / freezing order was effected for an amount of ZAR310,000.00 on an account which had received the proceeds of the sale of one of subject 2's motor vehicles referred to above.

Subsequent to all the above, both subject 1 and subject 2 were arrested by the South African Police Service (SAPS) in South Africa. This case-study therefore demonstrates international FIU-to-FIU cooperation, as well as domestic cooperation. The following feedback was received in relation to the information provided:

Lesotho - MIRQT-181017-0000002 (2018/2019 F/Y); satisfactory response re feedback

Canada - MIRQT-180906-0000008 (2018/2019 F/Y); satisfactory response re feedback

#### INTERNATIONAL COOPERATION BETWEEN FIUS (INCOMING REQUESTS)

Period	Number of requests tasked for analysis
2013-2014	Nil
2014-2015	107
2015-2016	362
2016-2017	368
2017-2018	142
2018-2019 (to date: 01/11/2018)	71
TOTAL	1050

Table 29: Number of requests received.

Period	Number of Spontaneous Referrals
2013-2014	Nil
2014-2015	8
2015-2016	26
2016-2017	5
2017-2018	2
2018-2019 (to date: 01/11/2018)	2
TOTAL	43

Table 30: Number of spontaneous referrals made to other FIUs.

All Guidance Notes, Public Compliance Communications, Directives, etc. have been published on the Centre's website and can be accessed via it.

In addition, a typologies report published by the Centre on Combating Financial Crime in South Africa, relevant pieces of legislation, the Centre's annual reports and other relevant documents can also be accessed via the Centre's website. <http://www.fic.gov.za>

The FIC is a statutory body that operates outside the public service, but within the public administration, as envisaged in section 195 of the Constitution. It is registered as a Schedule 3A national public entity in terms of the Public Finance Management Act, 1999 (Act 1 of 1999) (PFMA). The Director of the FIC, who is also the accounting authority, reports directly to the Minister of Finance and to parliament.

The FIC consists of five divisions:

- Office of the Director
- Legal and Policy
- Compliance and Prevention
- Monitoring and Analysis
- Corporate Services.

The FIC has total number of 200 staff consisting of top management, senior management, professional qualified, skilled, semi-skilled, and unskilled staff.

The FIC is operationally autonomous. The FIC Director is appointed by the Minister of Finance and can be removed by the Minister based on criteria such as security, misconduct, incapacity or incompetence (FIC Act, s.7). The FIC may do all that is necessary or expedient to perform its functions effectively including doing anything that is incidental to the exercise of any of its powers (FIC Act, s.5).

The FIC is well staffed and legally secured to perform its functions effectively (FIC Act, ss. 5 and 7)

*(b) Observations on the implementation of the article*

South Africa has established a Financial Intelligence Centre (South African FIU) that is administrative in nature and put under the umbrella of the Ministry of Finance. The Financial Intelligence Centre is responsible for receiving, analysing and disseminating information pertaining to money laundering, including suspicious transaction reports, as well as for collaborating with investigative and prosecution authorities (section 4 of the FIC Act). Internationally, the FIC has been member of the Egmont Group of Financial Intelligence Units since 2003.

The FIC is a statutory body that operates within the public administration, as envisaged in section 195 of the Constitution. FIC is operationally autonomous, and the Director of FIC reports directly to the Minister of Finance and to parliament (sects. 5 and 7, Financial Intelligence Centre Act).

During the country visit, authorities in South Africa confirmed that the FIC is endowed with sufficient staff allowing it to carry out its mandate, while pointing out that the FIC did not suffer from long term vacancies or shortage of staff. It was specified that it is envisaged to further expand the pool of active staff as the mandate of the FIC would expand, while ensuring that even without the allocation of new resources, FIC duties would be duly performed.

*(c) Challenges, where applicable*

**Please outline actions required to ensure or improve the implementation of the article under review and describe any specific challenges you might be facing in this respect.**

*(d) Technical assistance needs*

No assistance would be required

**Is any technical assistance already being provided to you? If so, please provide a general description of the nature of the assistance, including donor information.**

## Article 59. Bilateral and multilateral agreements and arrangements

### *Article 59*

*States Parties shall consider concluding bilateral or multilateral agreements or arrangements to enhance the effectiveness of international cooperation undertaken pursuant to this chapter of the Convention.*

#### *(a) Summary of information relevant to reviewing the implementation of the article*

**Please describe (cite and summarize) the measures/steps your country has taken, if any, (or is planning to take, together with the related appropriate time frame) to ensure full compliance with this provision of the Convention.**

##### (a) Response

Refer to the response to article 51.

Please note that South Africa does not require the existence of a treaty in order to provide international assistance in relation to asset recovery.

South Africa does however negotiate and conclude agreements, on an individual case basis or more general basis, to facilitate individual cases and promote asset recovery co-operation.

**Please provide examples of the implementation of those measures, including related court or other cases, statistics etc.**

Example of implementation

Refer to the response to article 51.

#### *(b) Observations on the implementation of the article*

South Africa has signed a number of bilateral agreements dealing with mutual legal assistance and that contain provisions on facilitating the recovery of assets and is also party to the SADC Protocol on Mutual Legal Assistance in Criminal Matters, as referred to under Article 51.

South Africa is also a member of the Asset Recovery Inter-Agency Network for Southern Africa (ARINSA) and the Camden Asset Recovery Inter-Agency Network (CARIN).

*(c) Challenges, where applicable*

**Please outline actions required to ensure or improve the implementation of the article under review and describe any specific challenges you might be facing in this respect.**

None

*(d) Technical assistance needs*

No assistance would be required

**Is any technical assistance already being provided to you? If so, please provide a general description of the nature of the assistance, including donor information.**

No.

UNODC