

# ANTI-CORRUPTION TOOL KIT

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**Enforcement**



## V. ENFORCEMENT

### Introduction

One key problem faced by those investigating corruption is that, unlike many traditional crimes such as robbery or murder, there is no clear victim to complain or overt occurrence likely to be reported by witnesses. In corruption cases, those with direct knowledge of the offence generally profit in some way, making them unlikely to report it. Corruption is not a “victimless” crime, but the only victim in many cases is the general public interest, which is not aware of the crime or in a position to report or complain about it. For this reason, any anti-corruption strategy should include elements intended to bring to light the presence of corruption. These include elements intended to encourage those who witness or are aware of corruption incidents to report them and incentives to complain about sub-standard public services which may be due to corruption, supported by more general education about corruption, the harm it causes and basic standards that should be expected in the administration of public affairs. Also included are elements that generate information and evidence of corruption in other ways, such as audit and inspection requirements. In some cases, there are relatively direct victims of corruption, such as the unsuccessful participants in a corrupt competition for a public contract or employment position, and strategies should also encourage these victims to be aware of the possibility of corruption and report it when suspected.

In encouraging those aware of corruption to report it, the greatest challenge is often the fact that those who are victimised directly are often vulnerable to intimidation or retaliation from the offenders, either because they belong to vulnerable groups, or because of the relationship to the offenders which made them aware of the corruption in the first place. Those who deal with officials in circumstances of physical or social isolation, such as new immigrants or residents of rural areas might be the subject of information campaigns about what standards to expect from officials and given the means to lodge complaints if the standards are not met, for example. Government agencies can set up channels that permit corruption to be reported internally.

## Tool 28 - Guidelines for Successful Investigations into Corruption

### *Purpose*

The following guidelines are meant to give members of the law enforcement community some general directions for investigating corruption

### *Description*

There are no universal rules for investigating corruption, but some the following elements, if incorporated into national strategies, will help to develop investigative structures which can detect corruption and conduct effective investigations that produce information which can be used to develop and apply effective responses. Investigative results should be capable of supporting not only criminal prosecutions and other responses directed at those involved as individuals, but also measures intended to restructure or reorganise public or private administration to make it more resistant to corruption. The autonomy and security of investigations is important, both to encourage and protect those who report corruption or assist in other ways, and to ensure that the results of investigations – whether they find corruption or not – are both valid and credible.

### *Education about corruption*

Before corruption can be reported, it must first be identified. This requires that the general population and specific target groups be educated about what constitutes corruption, the full range of forms of corruption, its true costs and consequences, and more generally about reasonable expectations for standards of integrity in public administration and private business practices. Many people have a very narrow appreciation of corruption and may not understand that behaviour they witness or engage in is harmful. Others may understand the harm, but lack motivation to take any action because the problem is seen as pervasive and unchangeable. In environments where corruption has become institutionalised and accepted, considerable educational efforts may be needed to change the popular perception that corruption is a natural or inevitable phenomenon and ensure that it is perceived as socially harmful, morally wrong, and in most cases, a crime. In many countries, similar efforts have proven successful in the past with respect to other forms of crime such as impaired driving, “white-collar” crime, and environmental crime.

### *Opportunities to report corruption*

Those who have knowledge of corruption must be placed in a position where they are able to report it. This requires having officials charged with the responsibility for dealing with corruption, ensuring that they are properly trained in dealing with cases, that they are easily available to potential complainants or witnesses, and that those who might report corruption are aware of the existence of such officials and can readily contact them with information.

### *Security against retribution*

Victims and witnesses will not come forward if they fear retribution, and precautions against this are commonly incorporated into instruments dealing with corruption and organized crime, where the problem is particularly acute<sup>64</sup>. This is particularly true in cases of official corruption, where

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<sup>64</sup> Recent international provisions dealing with intimidation or retribution include: *United Nations Convention Against Transnational Organized Crime* (GA/res/55/25, annex), articles 23 (requiring States

those who have information are usually relatively close to a corrupt official, and the status of the official affords him or her opportunities to retaliate. Measures are usually formulated not only to protect the informant, but also the integrity and confidentiality of the investigation. Common precautions against this include guarantees of anonymity for the informant, assurances that officials accused of corruption will not have any access to investigative personnel, files or records, and powers to transfer or remove an official during the course of an investigation to prevent intimidation or other tampering with the investigation or evidence.

In cases where the informant is an “insider”, additional precautions may be taken because of his or her employment in close proximity to the offenders and because in some cases there may be additional legal liabilities for disclosing the information involved. Many countries have adopted “whistleblower” laws and procedures that protect insiders who come forward with information. These protections may apply to inside informants from both the public and private sectors. Additional protections in such cases may include shielding the informant from civil litigation in areas such as breach of confidentiality agreements and libel or slander, and in the case of public officials, from criminal liability for the disclosure of government or official secrets. Such protections may extend to cases where the information was incorrect, provided that it was disclosed in good faith.

Safeguards against abuses by the informants themselves may also be needed, particularly in cases where they are permitted to remain anonymous or are broadly shielded from legal liability. To balance the interests involved, legislation may limit legal protections to cases of bona fide good faith disclosures or create civil or criminal liability for cases where the informant cannot establish good faith or that the belief that malfeasance had occurred was not based on reasonable grounds.

In cases where the informant’s information proves valid and triggers official action, his or her anonymity often cannot be maintained, making retribution possible even after changes have been made to address the complaint. In such cases, legislation may provide for compensation, transfers to other agencies or employment removed from those involved in the case, or in extreme cases where the informer is in more serious danger, relocation and a new identity unknown to the offenders.

### Independence and credibility of investigators and prosecutors

Independence from those under investigation is critical to the protection of victims, witnesses and informants, but it is also important that officials or bodies responsible for investigating corruption be independent or autonomous for other reasons. Functional independence ensures that investigations will be effective in identifying corruption by reducing the potential for tampering with investigations by corrupt officials, and ensuring that evidence obtained will be credible when used in criminal or disciplinary proceedings<sup>65</sup>. It is also important as a means of

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Parties to provide criminal penalties for obstruction of justice) and 24 (requiring States Parties to take measures to protect witnesses); the Council of Europe *Criminal Law Convention on Corruption* (1998), Article 22 (Protection of collaborators and witnesses); the Organisation of American States’s *Inter-American Convention Against Corruption* (1996), Article III (preventative measures); Global Coalition for Africa, *Principles to Combat Corruption in African Countries* (1999) (Art. 15); and Principles 2 and 5 of the Global Forum’s *Guiding Principles for Fighting Corruption and Safeguarding Integrity Among Justice and Security Officials* (1999). For a more detailed analysis of these instruments, see UN document E/CN.15/2001/3 (Report of the Secretary General on Existing International Legal Instruments Addressing Corruption).

<sup>65</sup> References to disciplinary proceedings are intended to include sanctions taken against a public or private sector worker which are based on contracts or other legal obligations which arise out of the worker’s individual position or employment, rather than the general obligations created by criminal or administrative law. These include such things as terms or conditions of employment contracts, public service standards or codes of practice, and the rules applied to professional groups such as doctors and lawyers. Common forms

instilling confidence in both the investigators and in the bureaucracies or agencies they investigate. Where the investigation is independent, populations have some assurance that if corruption exists it will be identified and eliminated, and that if investigators conclude that corruption does not exist or has been eliminated, the bureaucracy can be trusted.

The mechanics of functional independence vary from one country or justice system to another. Most systems incorporate elements of judicial independence to ensure the integrity of court proceedings,<sup>66</sup> but the means of securing autonomy for the prosecutorial and investigative functions differ. In systems where criminal investigations are carried out by magistrates or other judicial officials, these functions also fall within the ambit of judicial independence. Where investigations and prosecutions are carried out by non-judicial personnel, judicial oversight may still play a role, but as this only applies to cases which come before the courts in such systems, other methods must be found to review or monitor key functions such as the conduct of investigations and the decisions which determine who is investigated and whether a prosecution is brought before the courts in each case.<sup>67</sup>

The problem of *quis custodiet ipsos custodes?*<sup>68</sup> Also arises in developing structures which separate anti-corruption investigations from other elements of government. The agencies involved must be sufficiently independent to protect their functions against undue interference, but must also be subject to sufficient oversight to prevent abuses and to identify corruption on the part of investigators and prosecutors should it occur. These are common problems in establishing law enforcement and prosecutorial agencies in any system, but are arguably more critical in dedicated anti-corruption agencies because those involved will almost certainly be the subject of attempts at bribery, coercion or other undue influences, often by very sophisticated and well-resourced corrupt officials or organized criminal groups. It is essential that investigators be subject to overall regulation and accountability for their activities, but that such oversight does not extend to interference with operational decisions such as whether a particular individual should be investigated, what methods should be used, or whether a case should be the subject of further action, such as criminal prosecution, once the investigation has concluded.

### Adequate training and resources for investigators

Adequate training and resources are necessary both to ensure that reported cases will be dealt with effectively, and to encourage those aware of corruption to come forward with information. Informants will only assume the risk of reporting if they are confident that effective action against corruption will be the result. This confidence requires not only assurances that investigations will themselves be independent and free of corruption, but also that investigators are actually capable of detecting it, gathering evidence against offenders, and taking whatever measures are needed to eliminate it. The commitment of significant resources also sends a powerful signal that the highest levels of government are strongly committed to the prevention and elimination of corruption, which both deters offenders and encourages informants.

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of discipline include dismissal or suspension from employment, removal of the right or license to practice a profession, limitations on what jobs can be performed and requirements that the individual concerned work under supervision.

<sup>66</sup> See the Basic Principles on the Independence of the Judiciary in Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985: report prepared by the Secretariat (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. D.2.

<sup>67</sup> See the Code of Conduct for Law Enforcement Officials contained in the annex to General Assembly resolution 34/169 of 17 December 1979. See also the guidelines on the role of prosecutors contained in the annex to resolution 26 of the Eighth Congress (Eighth United Nations Congress, pp. 188-194).

<sup>68</sup> “Who will watch the watchman?”

The wide range of forms of corruption requires a wide range of specific skills and knowledge on the part of investigators, but most will find frequent need for legal and accounting skills in order to identify, preserve and present evidence, whether in criminal proceedings, disciplinary proceedings or other fora. Adequate capabilities also depend to a large degree on the presence of adequate resources to ensure that sufficient numbers of investigators are present and that they have the necessary skills and training to work effectively. Apart from personnel and funding, other resources, such as systems for the creation, retention and analysis of records, can also be important. Often the strongest evidence of high-level corruption will be a long-term pattern in complaints about lesser abuses, for example.

#### Liaison with other investigative agencies

Given the need for autonomy and independence and the extreme sensitivity of many corruption cases, a careful balance should be struck when establishing the relationship between anti-corruption investigators and other agencies. In environments where corruption is believed to be relatively pervasive and widespread, complete autonomy is advisable. Establishing an anti-corruption unit in a police force may not be advisable, for example, if there is a significant likelihood that the police themselves may be investigated or if they are suspected of corruption. On the other hand, it will be important that anti-corruption investigators interact effectively with other agencies. Information from tax authorities or agencies investigating money-laundering or other economic crimes may uncover evidence of corruption or of unexplained wealth which may have been derived from corruption, for example, and audits of government agencies may uncover inefficiency or malfeasance which is not due to corruption, but which warrants further investigation or reform by other agencies.

#### *Other means of detecting corruption*

While encouraging those who witness corruption to report it is clearly a major means of detection, other methods should not be overlooked. Many of these can also be considered as preventive in nature and are discussed in the previous part of this Manual. Others are examined in more detail in the following segments.

#### Disclosure and reporting requirements

Requiring that public officials make periodic disclosure of their assets both deters unjust enrichment and provides investigators and auditors with a powerful instrument to detect corruption by detecting the existence of unexplained wealth. Similarly, non-compliance with requirements to disclose actual or potential conflicts of interest may alert auditors or investigators to the possibility that the official intends to corruptly exploit undetected or undisclosed conflicts. Such measures may be effective even if the official is not honest in complying with the reporting requirements, since gaps and inconsistencies may well trigger more thorough investigations, and the official may ultimately be held liable not only for corruption per se, but for non-compliance with the reporting requirements themselves.

Sanctions against non-disclosure or false reporting should be approximately as severe as those against the underlying corruption, to prevent offenders from avoiding liability for corruption by committing the lesser disclosure and reporting offences.<sup>69</sup> They should also always permit at

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<sup>69</sup> With respect to relevant recent international principles addressing this issue, see e.g., Principle 5, point 2 of the Global Forum on Fighting Corruption's *Guiding Principles for Fighting Corruption and Safeguarding Integrity Among Justice and Security Officials* (1999). For a more detailed analysis of this instrument, see UN document E/CN.15/2001/3 (Report of the Secretary General on Existing International Legal Instruments Addressing Corruption)."

least the possibility of dismissal or removal from office to ensure that corrupt behaviour can be ended even in cases where the inadequate disclosure is successful in concealing unjust enrichment and the underlying corruption. As noted in the previous Part, regular periodic disclosure is also preferable to requiring disclosure only on entering and leaving office, as this will detect corruption while it is still ongoing, reducing the harm caused to the public interest.

### Audits and inspections

Audits of records, physical inspections of premises or items, or interviews with potential victims, witnesses or others who may have relevant information can be used both proactively as a means of monitoring the quality and integrity of public administration and identifying possible abuses, and reactively as a means of investigating those already suspected of corruption or other malfeasance.<sup>70</sup> Audits may be conducted on an internal or local basis, but overall anti-corruption strategies should provide for a central, national audit agency. Such agencies require adequate resources and expertise, and in order to audit senior levels of government, they must enjoy a substantial degree of autonomy approaching if not equal to judicial independence. This independence should extend to decisions about which officials, sectors or functions should be audited, how audits should be carried out, the drawing and formulation of conclusions about the results of audits, and to some degree the publication or release of such conclusions.

Auditors and their investigative staffs should have the power to conduct regular or random audits to ensure overall deterrence and surveillance, as well as specific targeted audits directed at individuals or agencies suspected of malfeasance. In many countries, the mandate goes beyond suspected malfeasance, as auditors are also responsible for identifying and addressing cases of waste or inefficiency deriving from problems other than crime or corruption. Where problems are identified, auditors generally have the power to recommend administrative or legal reforms to address institutional or structural problems, and can refer cases to law enforcement agencies or criminal prosecutors if criminal wrongdoing is suspected.

Auditors should be supported by legal powers such as requirements that compel individuals or agencies being audited to cooperate, but auditors should not be allowed to become law enforcement agencies. In most countries, once criminal offences are suspected, higher standards of procedural safeguards are applied to protect the human rights of those involved, but once the procedural requirements have been met, criminal investigators are authorised to use much more intrusive powers to detain suspects and gather evidence.<sup>71</sup> Maintaining the distinction between auditors or inspectors and criminal investigators ensures that the former retain the legal powers needed to monitor relatively broad areas of public administration in order to identify corruption and inefficiencies and to propose systemic or structural solutions. When individual malfeasance is uncovered as a result, it can then be referred to other agencies, which have the necessary powers, resources and expertise to conduct criminal investigations and prosecutions.

### “Sting” or “integrity testing” operations

<sup>70</sup> In some countries, human rights protections limit the use of general inspections or require additional procedural safeguards once a crime is suspected.

<sup>71</sup> In many justice systems, a person cannot be compelled to assist investigators once he or she is suspected of having committed a criminal offence. Article 14(3)(g) of the *International Covenant on Civil and Political Rights* (GA/res/2200A of 12 December 1966, UNTS#14668) establishes the right of a criminal suspect “...Not to be compelled to testify against himself or to confess guilt”, which is interpreted in many national human rights instruments as a general right against self-incrimination. Where such suspicions are established to an appropriate standard, however, criminal investigators gain powers to engage in more intrusive powers of search and seizure in order to obtain the necessary evidence.



A more controversial – but also unquestionably effective – means of identifying corrupt officials is the use of decoys or other integrity-testing tactics. These involve undercover agents who offer officials opportunities to engage in corruption in circumstances where evidence of their reaction can be easily and credibly gathered. Depending on local policy or legal constraints, officials may be targeted at random or on the basis of evidence or reason for specific suspicion of corruption.

The criticisms of these tactics are substantial. Arguably, even the most honest official might yield to temptation if the offer is sufficiently convincing, and the willingness to do so when approached may not necessarily establish that he or she is inherently corrupt or that similar transgressions have occurred in the past. This problem underlies restrictions intended to prevent “entrapment” in some countries. Usually in such countries, undercover agents are permitted to create opportunities for a suspect to commit an offence, but not to offer any actual encouragement to do so. Police officers might be occasionally exposed to undercover agents in circumstances where a corrupt officer would normally solicit a bribe to see if this occurs, for example, but the undercover agents would be prohibited from actually offering bribes.

These tactics represent a powerful instrument for both deterring corruption and detecting and investigating offenders. As they do not necessarily require any inside information or assistance, they can be used quickly against any official at virtually any level who is suspected of corruption. If the suspect is corrupt, they quickly provide highly-credible evidence, usually in the form of audio- or videotapes, photographs and the personal testimony of the investigators involved, which may form the basis of a criminal prosecution or serve as the justification for other investigative methods such as electronic surveillance or the search of financial records. If the suspect is not corrupt, his or her refusal also tends to reliably establish, provided that adequate confidentiality precautions are taken to ensure that investigative targets are not warned beforehand and that undercover agents are well-trained and competent.

#### Electronic surveillance, search and seizure and other investigative methods

Techniques such as wiretapping or the monitoring of electronic communications and search and seizure have limited use in the initial detection of corruption in many countries because human rights safeguards usually prohibit their use unless there is already substantial evidence that a crime has been, or is about to be, committed.<sup>72</sup> As noted in (b) above, procedural protections and questions relating to the competence of investigators and control over the use of intrusive investigative methods will usually also restrict the use of such methods to criminal law enforcement agencies, as opposed to more general surveillance agencies such as auditors, inspectors or ombudsmen.

Where evidence of criminal wrongdoing justifies their use, however, these are well-established and proven methods of gathering the evidence necessary to identify and link offenders and establish criminality in criminal prosecutions. Electronic communications using telephones, fax machines, e-mail and other technologies may be intercepted and recorded as evidence, and physical premises, computers, bank or financial records, files and other sources of evidence may be physically or electronically searched. Searches may target virtually any location at which there is a reasonable expectation of finding evidence, including locations associated with the suspected offender or third parties. Thus, search warrants or similar documents could be obtained to search not only the bank accounts of persons suspected of taking bribes for example, but also those suspected of paying them. Similarly, they may be used for any offence, including

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<sup>72</sup> Article 17(1) of the *International Covenant on Civil and Political Rights* (GA/res/2200A of 12 December 1966, UNTS#14668) provides that “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence...”, which has been interpreted in many domestic constitutional and legal provisions as requiring prior authorization by a judicial or other independent authority based on adequate grounds to believe that a crime has been or will be committed and that the invasion of privacy is needed to prevent the crime or gather evidence of it.

not only initial corruption offences, but also related crimes such as the concealment or laundering of the proceeds of corruption.

In some cases, intrusive investigative methods being used to investigate other crimes may also uncover previously-unsuspected corruption, particularly in organized crime cases, where offenders often try to corrupt officials or obstruct justice in order to shield their other criminal operations from detection or criminal liability. Corruption and the obstruction of justice are both offences for which international cooperation can be sought between countries that are parties to the United Nations Convention against Transnational Organized Crime<sup>73</sup>.

Other forms of electronic surveillance, such as the use of video or audio recordings may also be used as evidence in corruption cases. Procedural safeguards and restrictions based on privacy rights may not apply where these are used in circumstances where there is no privacy to protect, such as public places or communications channels which are open broadcasts or where participants are warned that conversations may be monitored. Depending on national laws, it may be possible to routinely or randomly monitor communications between public officials and those they serve, if such a warning can be given and if this is not inconsistent with the public function being performed.

If this is feasible from a standpoint of human rights, technical and cost considerations, it will create a powerful deterrent, since corrupt officials always face the possibility that their conversations may be recorded and used as evidence if corrupt transactions take place. Where resources limit the extent of monitoring, a system of universal notification combined with occasional random monitoring may still provide an effective deterrent.

The detection of fraud and other forms of economic corruption may also be accomplished or assisted using forensic accounting techniques. These generally consist of examining financial records for patterns that are unusual or at variance with the patterns or norms established by other records. Such things as abnormally high balances in accounts used for discretionary spending, abnormal fluctuations in balances, payments which are unusually high or unusually frequent, records kept in formats which make them difficult to read or interpret, or any other pattern of spending or record keeping which cannot be attributed to operational requirements may suggest the presence of corruption or other economic crime. Basic forensic tests may be applied by auditors as part of the process of screening for evidence of corruption, or by criminal investigators who suspect particular individuals or agencies and are gathering evidence.

The time-honoured practice of interviewing suspects and possible witnesses also remains a major investigative tool, once corruption is suspected. The investigative skills needed are similar to those for other forms of criminal investigation, although specialised knowledge of corrupt practices and related matters will generally be an advantage. Given the concerns about retribution against witnesses or informants, it will also generally be important that investigators interview contacts in a secure, confidential environment, take steps to protect any information gained and the identity of the source from disclosure, and be able to conduct interviews in a manner which will reassure informants.

### *Choice when disposing corruption cases*

Cases where corruption on the part of individuals is identified can be dealt with in several ways:

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<sup>73</sup> GA/res/55/25, annex, articles 8 (general corruption) and 23 (obstruction of justice). The obligation upon States Parties to criminalize corruption sets out various forms of corruption applicable to the corruption of any “public official” for any purpose. The obligation regarding obstruction of justice is more specific, covering only corruption which seeks to interfere with investigative or judicial proceedings relating to *Convention* offences, but it extends to both positive (e.g., offering an “undue advantage”) and negative (e.g., force, threat or intimidation) inducements.

- By criminal or administrative prosecutions, which lead to incarceration, fines, restitution requirements or other punishments;
- By disciplinary actions, which lead to employment-related measures such as dismissal or demotion;
- By bringing or encouraging civil proceedings, in which those directly affected, or in some cases the State, seek to recover the proceeds of corruption or civil damages; and,
- Remedial actions such as the retraining of individuals or restructuring of operations in ways which reduce or eliminate opportunities for corruption.

Generally, the same detection techniques, investigative procedures and evidentiary requirements will apply regardless of the process chosen, although criminal prosecutions usually entail higher standards of reliability and probative value for evidence because of the serious penal consequences for offenders. The decision about whether to apply criminal sanctions or to seek less- drastic remedies can be exceedingly difficult, balancing moral and ethical considerations against pragmatic costs and benefits, and is itself susceptible to corruption in systems which embody relatively broad prosecutorial discretion.

Criminal prosecutions may not be desirable or possible in the following circumstances:

#### The conduct may not be a crime

In some cases, behaviour might be considered as “corrupt” for the purposes of a national anti-corruption programme or the internal programmes of a company or government agency, but not be the subject of a criminal offence. Alternatively, it may be conduct which has been overlooked in the development of the criminal law, or conduct such as purely private-sector malfeasance which is seen as corrupt, but which does not sufficiently harm the public interest to warrant criminalisation.

#### Available evidence may not support prosecution

As noted above, the evidence and burden of proof in criminal prosecutions involve relatively high standards because of the penal consequences involved. In some cases, there may be sufficient evidence to justify lesser corrective measures, but not to support a criminal prosecution. Where this occurs, authorities must generally decide whether the circumstances warrant the additional delay, effort and expense needed to gather sufficient evidence to proceed, or whether measures such as disciplinary or remedial action should be pursued instead. One cost factor in such cases is the cost of leaving a corrupt official in place long enough to complete a full criminal investigation. Another consideration is the possibility that evidence of past corruption has been lost, making prosecution impossible.

#### Prosecution may not be in the public interest

In some cases the conduct may amount to a crime, but official discretion may be exercised not to prosecute the offender on the basis that the public interest is better served by some other course of action. Where large numbers of officials are involved, for example, the costs of prosecution include not only litigation costs, but also the costs of incarceration or other punishment, and the loss of expertise and costs of replacing the convicted officials. Discretionary decisions on this basis can be extremely problematic. On one hand, officials may face high costs of prosecuting offenders on a case by case basis, but if a decision is made not to prosecute, it may create the impression that the justice system itself is corrupt, which encourages corruption in other sectors and seriously erodes any deterrence value in criminal justice measures. Where such a decision is made, it is important that it be well documented and made in the most transparent way possible to prevent actual corruption and dispel any public perception of corruption.

Criminal prosecutions and punishments effectively remove corrupt officials from any position where they can commit further offences, and deter both the individuals involved and others in similar positions. Since most corruption is economic in nature and is pre-planned rather than spontaneous, general deterrence is likely to form a significant part of the criminal justice component of anti-corruption strategies. The high financial and human costs impose practical limits on the extent of such prosecutions, however, and attempting large numbers of prosecutions as part of an anti-corruption drive may pressure investigators or prosecutors to engage in improprieties that effectively distort or corrupt the criminal justice system itself.

In formulating anti-corruption strategies, it is important that criminal prosecution and punishment be seen as only one of a number of options, and that other possibilities, ranging from preventive measures such as education or training and the incorporation of security measures to administrative or disciplinary sanctions which remove offenders at a lesser cost to them and society also be considered, and where appropriate, applied.

### *Case management*

#### Managing investigations

Corruption investigations tend to be large, complex and expensive, however, and to ensure the efficient use of resources and a successful outcome the elements and personnel involved must also be managed effectively. Such management should be seen not only as a matter of administrative necessity, but also part of the overall strategy of protecting the integrity of the investigation and ensuring public confidence in its outcome. As part of an ongoing anti-corruption strategy, some management issues may be dealt with as matters of standing practice or procedure, while others will require attention or review on a case-by-case basis.

Teams working on specific cases will generally require expertise in the use of investigative techniques ranging from financial audits or other inspections to intrusive techniques. If legal proceedings are not excluded as an outcome from the outset, experience in assembling such cases and legal expertise in areas such as the law of evidence and the human rights constraints on such things as search and seizure may also be needed. In large, complex investigations, teams of investigators may be assigned to specific target individuals or aspects of the case. One group might be engaged in the tracing of proceeds, for example, while others interview witnesses or maintain surveillance of suspects.

It is essential that all of these functions be conducted in accordance with an agreed strategy and coordinated under the supervision of an investigative manager or lead investigator who receives timely information about the progress of investigators on a regular and frequent basis. The interviewing of witnesses or conduct of search and seizure operations will generally disclose the existence of an investigation and to some degree its purpose, and should not be undertaken until other measures which are only effective if conducted without alerting the targets have been concluded. On the other hand, such procedures may become urgent, if it appears that proceeds will be moved out of the jurisdiction or evidence destroyed unless rapid steps are taken. Coordinating these factors in order to maximise effectiveness require competent and well-informed senior investigators. Given the magnitude of many investigations, human and financial resources will also often become a concern, and lead investigators will often have to seek out the necessary resources and allocate scarce resources to areas of the investigation where they will be most effectively used.

Investigative management must be flexible, capable of quickly adapting both strategy and tactics to take account of experiences and information as they accumulate. While investigators usually develop theories about what individual pieces of information mean and how they fit together, these theories often require amendment as investigations proceed, and investigators must always be open to alternative possibilities and information or evidence which does not appear to be

consistent with the theory being pursued at any given time. Investigations initiated into particular incidents of corruption will often turn up evidence of other, hitherto unsuspected corruption, or other forms of improper or criminal activity.

### *Management of information*

#### Internal information

This flexibility should be supported by effective information management, in which information is made available to those who require it as quickly as possible, and then retained in a format which is cross-referenced and quickly accessible so that it can be reviewed as needed and so that links to other relevant information are made apparent. Assessment of the relative sensitivity or confidentiality for each piece of information should also be done and linked to the information itself. This sensitivity may not be obvious to those not familiar with the information. Disclosure of facts that may seem insignificant in the context of an ongoing investigation, for example, may inadvertently disclose or help identify a source or informant who had been promised anonymity, for example, reducing the credibility of investigators and their ability to obtain similar information in future cases.

#### Media relations

Another critical element of information-management is media-relations. Ensuring that information is passed to the public media is important to ensuring transparency and the credibility of investigations. More fundamentally, media scrutiny and publicity is essential to raising public expectations, public awareness of the presence of corruption or substandard practices, and to generating political pressure for measures against corruption. Public awareness of the existence of anti-corruption investigators is also an important means of encouraging and assisting those who witness or suspect corruption to report it and provide evidence. Ensuring that the media have access to accurate and authoritative information may also be important as a means of reducing the tendency to report information that may be incorrect or harmful to the investigation or persons or agencies being investigated.

Measures should be taken to ensure that any information released for publication has been carefully reviewed, both to ensure accuracy, and to eliminate disclosures that could be harmful to the investigation. It is also important to ensure that only specified individuals release such information or participate in press conferences and similar activities to ensure that information is properly reviewed and that all information given the media is consistent. Those in contact with the media must also be competent, both in media-relations and in the subject matter they will discuss, and should not comment on matters which are beyond their expertise.

### *Managing the security of investigations and investigators*

The management of security is also a critical function. As noted in the previous segment, protecting the confidentiality of informant and other sources is often the only way to ensure cooperation, and the leakage of sensitive information may warn targets, allowing them to modify their behaviour, conceal or destroy evidence, or make attempts to corrupt or disrupt the investigative process. Maintaining effective security requires an assessment of the full range of attempts that might be made to penetrate or disrupt anti-corruption investigators, both in general and in the context of specific investigations. Attempts may be directed at obtaining information or denying information to investigators by disrupting, distorting or destroying it, or at the intimidation or even murder of the investigators themselves. The following areas should be assessed.

### Physical premises

The premises where investigators base their work and store information should be chosen with a view to the ability to control entry, exit and access to exclude unauthorised persons, and resistance to attempts using force or stealth to gain entry when unoccupied. Where premises are part of larger law-enforcement or other government establishments, they should also be isolated from the remainder of the establishment in which they are located. Threats to destroy information or evidence by destroying the premises themselves using methods such as arson or explosives may also require consideration. Also important is security against various forms of electronic surveillance in the form of concealed microphones, transmitters and similar apparatus. This entails both premises that reduce the possibility of such surveillance and regular inspections or “sweeps” to detect devices that may have been installed since the last inspection.

### Personnel Security

Personnel security consists of two major threats. The physical safety and security of personnel must be assessed and protected in order to ensure that competent investigators can be employed and to frustrate any attempts to disrupt investigations by threatening, intimidating or actually harming personnel. Investigations may also be disrupted if key personnel are corrupted or intimidated or if corrupt individuals succeed in gaining employment for that purpose. Generally, employees should be screened by examining their past history, family ties or other relationships to identify factors that suggest vulnerability to corruption. Threats to physical safety should be regularly assessed and when identified, vigorously pursued by other law enforcement agencies. Other protective measures may include advice with respect to security precautions, anonymity, and arming investigators.

### Information, documents and communications

Most of the security concerns raised by investigations revolve around the possibility that critical information will fall into the hands of investigative targets, frustrating attempts to obtain evidence against them. Addressing these concerns requires management of each investigation so that steps which generate public attention are not taken prematurely, that documents are used, stored and transported in secure conditions, that access to copying equipment is limited and monitored, and that channels of electronic communication including wire- and wireless telephones, fax machines, radios, electronic mail and other media are made resistant to unauthorised interception or monitoring. Where the physical security of channels cannot be ensured, this will often entail the use of encryption or similar technologies to ensure that those who can receive data cannot decipher and read them.

### Relationships with other agencies

Anti-corruption agencies must still ultimately be accountable for their activities, which requires some degree of timely disclosure of information to political or judicial bodies responsible for their oversight. When such disclosure should be made may vary and can be a difficult issue. As a general principle, investigations should only be externally reviewed after they have concluded, but this will not prevent some harm from occurring if abuses occur sooner, and in some cases this may include irreversible consequences. In such cases, it may be appropriate to permit investigators to consult more senior officials such as judges for advice or direction, and many systems make some provision for this.

### Threat assessment

Threats to the security of investigators and investigations should be assessed both in general terms and in the context of each specific investigation. Relevant factors will include the numbers of individuals suspected, whether they are organised or not, the sophistication of the corruption suspected, the sophistication of the individuals or group targeted, the magnitude and scope of the corruption and its proceeds, whether the targets are involved in crimes other than corruption, and whether there is any specific history of violence or attempts to obstruct investigations or prosecutions.

### *Managing transnational or “grand corruption” cases*

Cases which involve “grand corruption” or which have significant transnational aspects raise additional management issues. For example, cases where very senior officials are suspected raise exceptional concerns about integrity and security and are likely to attract extensive media attention. Large-scale and sophisticated corruption is well-resourced and well-connected, making it more likely that conventional sources of information will either not have the necessary information or evidence, or that they will be afraid to cooperate. Senior officials may be in a position to interfere with investigations. The magnitude of proceeds in grand corruption cases make it more likely that part of the overall case strategy is the tracing and forfeiture of the proceeds, and where they have been transferred abroad, obtaining their return. Allegations that senior officials are corrupt may also be extremely damaging in personal and political terms if they become public and later turn out to be unsubstantiated or false.

Transnational elements are more likely to arise in grand corruption cases. Senior officials realise while in office that there is no domestic shelter for the proceeds which will not be located once they are out of office, and generally transfer very large sums abroad, where they are invested or concealed. In many cases, the corruption itself has foreign elements, such as the bribery of officials by foreign companies seeking government contracts or the avoidance of costly domestic legal standards in areas such as employment or environmental protection. The offenders themselves also often maintain foreign residences and flee there once an investigation becomes apparent.

Generally, transnational or multi-national investigations require much the same coordination as do major domestic cases, but the coordination and management must be accomplished among law enforcement agencies that report to sovereign governments with a potentially wide range of political and criminal justice agendas. This will generally involve liaison between officials at more senior levels with their foreign counterparts to set overall priorities and agendas, and more direct cooperation between investigators within the criteria set out for them. From a substantive standpoint, investigative teams in such cases will generally be much larger and will involve additional areas of specialisation such as extradition, mutual legal assistance and international money laundering.

### *Case Selection Strategies and Techniques*

Given the extent of corruption, the range of cases likely to exist, the range of possible outcomes, and the limits imposed by human and financial resource constraints, most national anti corruption programmes will find it necessary to make priority choices about which cases to pursue, and what outcomes to seek. This involves the exercise of considerable discretion that should be carefully managed to ensure consistency, transparency and the credibility of both the decision-making process and its outcomes. A major element of this process is the setting and, where appropriate, publication of criteria for case-selection. These will ensure that like cases are dealt with similarly, and reassure those who make complaints and members of the general public that decisions not to pursue reported cases are based on objective criteria and not on improper or corrupt motives.

The interaction of criteria will vary from case to case, but criteria that should generally be considered include the following.

#### Seriousness and prelevance of the other corruption alleged

Assuming that the fundamental objective of a national anti-corruption strategy is to reduce overall corruption as quickly as possible, priority may be given to cases that involve the most common forms of corruption. Where large numbers of individuals are involved, these will often lead to proactive outcomes such as the setting of new ethical standards and training of officials, rather than criminal prosecutions and punishments.

#### Legal nature of the alleged corruption

Broadly speaking, corruption could be categorised as including criminal or administrative corruption offences such as bribery, related criminal offences such as money-laundering or obstruction of justice, and non-criminal corruption. As previously discussed, the legal nature will often affect both the availability and choice of outcomes. Conduct that is not a crime cannot be punished as such for example. This same nature will often determine which agency deals with it and how it is prioritised.

#### Cases which set precedents

Cases that raise social, political or legal issues that, once resolved in the context of an initial “test” case, can be applicable to many other cases to follow, may be given priority. Examples of this include dealing publicly with common conduct which has not been perceived as corruption in order to change public perceptions, and cases which test the extent of criminal corruption offences, either setting a useful legal precedent or establishing the need for legislation to close a legal gap or correct a problem. In the case of legal precedents, time-consuming appeals may be required which is another reason for starting the process as soon as a case that raises the necessary issues is identified.

#### Viability or probability of satisfactory outcome

Cases may be downgraded or deferred if an initial review establishes that no satisfactory outcome can be achieved. Examples of this include cases in which the only desirable outcome is a criminal prosecution, but the suspect is deceased or unavailable, or essential evidence has been lost. Part of the assessment of such cases should include a review of possible outcomes to see if other appropriate remedies might be achievable.

#### Availability of financial, human and technical resources

The overall availability of resources is always a concern in determining how many cases can be dealt with at the same time or within a given period, and the tendency for cases to change as investigations proceed require periodic reassessment of case-loads. Generally this will not be related to the setting of priorities with respect to the type of case taken up or the priority of individual cases, but there are exceptions. A single major case, if pursued, may result in the effective deferral of larger numbers of more minor cases, for example, and unavailability of specialised human expertise may make specific cases temporarily impossible. This makes the assessment of costs and benefits important, before any decisions are made. “Grand corruption” and other transnational cases raise substantial costs in areas such as travel and foreign legal services, but may also raise the need to make examples of corrupt senior officials for reasons of deterrence and credibility, and to recover large proceeds hidden both at home and abroad.



### Criminal intelligence criteria

As national anti-corruption programmes gain overall expertise and knowledge and deal with numbers of individual cases, intelligence information should be gathered and assessed. This will usually include open research and assessment of overall corruption patterns, leading to conclusions about which are the most prevalent or which case the most social or economic harm. It will also include the gathering of confidential information about patterns and links between specific offenders or organised criminal groups. Both of these will assist in identifying cases in which the allocation of high priorities and significant resources will end the activities of criminal groups or bring about other far-reaching improvements. In some cases, investigations may also be given priority in areas where intelligence is needed, in order to develop sources and gather information.

### *Investigative Techniques*

Some of the following techniques have proven highly efficient in the investigation of widespread large-scale corruption. In particular, various types of financial investigations into suspected corrupt individuals are often the most direct and successful method of proving criminal acts.

**Focus Investigations.** If the results of a corruption investigation suggest that corruption and bribery in a certain public service is widespread, it is advisable to concentrate on the systematic checking of the assets of all possible bribe takers (See *Financial Investigations & Monitoring of Assets*). However, this exercise may not yield enough information to warrant further investigation. For example, certain government functions are prone to inviting widespread corruption in terms of the number of officials receiving the bribes but in relatively small money amounts. Branches involved in licensing and permitting are good examples. A high volume of potential bribe-givers, the public in this case, visits these branches on a daily basis. Quite often, the frustrations of applying for a drivers license, or getting permission to construct a new home, or requesting copies of documents or just about any other service to the public becomes a quagmire of government 'red tape' and delay. This sort of environment breeds bribery as a means to quickly solving the frustration and delay of 'red tape'. In such cases, an investigation into the working files of the branch will be more effective and efficient than investigating financial records of employees. Before devoting efforts in any investigation, it is important to evaluate the most cost-effective means of deploying staff and focusing investigative energies.

**Terms of Reference.** Before starting investigations, clear and comprehensive terms of reference (TOR) should be drafted. They should contain a comprehensive list of all the resources needed (human, financial, equipment) to conduct the investigations. Particular consideration should be given to the possible need of additional resources to maintain the secrecy of the investigation. The suspect corrupt civil servant might have connections to other civil servants who might alert them to investigations or they might even be members of the criminal justice system and thus have access to restricted information. It is therefore essential at the outset to evaluate methods to ensure the confidentiality of the investigation. Steps taken to protect the secrecy of the investigations could include:

- Renting non-police or undercover locations and making them secure;
- Use of fictitious names to purchase or rent equipment; and
- Use of stand-alone computer systems not tied into any other governmental operation.

**Policy Document.** In addition to the TOR, a policy and procedures document must be created containing a clear description of the facts giving rise to the investigation, all decisions rendered during the investigation with their justifications and reasons for the involvement / non-involvement of the senior management of the institution for which the suspect works. It should be noted that there can be hidden costs involved with the investigation such as loss of morale

within the target institution and their potential loss of public trust. Every investigation must be evaluated on a case-by-case basis with regard to its cost and benefit to the government and the public.

**Selection of the Investigative Team.** The selection of an effective team will be crucial to the success of an investigation. Its members should possess the specific investigative skills needed, should have proven integrity and high ethical standards and be willing to undertake the work. Their backgrounds should be thoroughly checked, including their social and family ties and lifestyle. The team must be made aware of the personal implications of the investigation, in particular when undercover work needs to be conducted. Skills that are typically needed to conduct large-scale corruption investigations include financial investigative skills, undercover and surveillance skills, information technology skills, interviewing and witness preparation abilities, excellent report writing skills and the ability to analyse intelligence.

**Intelligence and Analysis.** Both are vital in corruption investigation. During the course of investigation, fragments of information, or intelligence, is collected. This intelligence must be analysed in order for the investigator to piece together fragments of information in order to have a clear picture of the relationships and events that taken together can constitute proof of criminal activity. Unlike other crimes such as theft or murder, where a complainant with some interest in uncovering the crime comes forward, crimes of corruption and bribery are committed in the shadows with both parties benefiting from the crime. This unique relationship, since neither party believes they are victims of any crime, prevents authorities from knowing that a crime has taken place. It is unlikely that either party is going to report the crime. For this reason, corruption investigation is especially challenging and difficult. Intelligence gathering and analysis is therefore critical in uncovering corruption. In addition, a constant analysis of the results will help to redirect and adjust efforts and will serve to help allocate resources efficiently.

**Proactive Integrity Testing.** Although this activity might initially require considerable preparation and resources, it can produce rapid results that serve as an excellent deterrent. Close monitoring and strict guidelines are essential to avoid the danger of entrapping a target. Any decision to use integrity testing must have a sound and defensible basis. The test itself must be fair to the target so that can be defended in court as reasonable and fair (see Integrity Testing). All integrity testing should be electronically recorded in the interest of fairness to the target and for accurate evaluation of criminal responsibility by judge and jury. Conviction's resulting from integrity testing must be based clearly on the necessary mens rea, or criminal intent, on the part of the accused. The government must not engage in convincing anyone to commit a crime they are not predisposed to commit. More than in any other area of policing, the public must be protected from false accusations or behavior tending to entrap an individual into committing and offence he or she would not have otherwise committed but for the encouragement of the police.

**Multi-faceted Approach.** Rather than following only one investigative path, it is advisable to pursue reasonable leads that might prove useful. It is not unusual that seemingly insignificant information becomes vital in proving criminal activity. This also applies to statements and documents. They should be carefully analysed and cross-referenced using the names, places and all other information that can help to provide information and may serve to confirm the validity of evidence gathered.

**Identify Middleman and Facilitators.** Middlemen are often involved in committing corruption on behalf of others. For example, politicians often provide the necessary link between bribe givers and bribe takers, and international businessmen facilitate the creation of slush funds, commit the actual bribe transaction and help to launder the proceeds of corruption.

**Financial Investigation.** One of the most successful ways to produce evidence against corrupt public officials is to conduct financial investigations to prove that they spend or possess assets beyond the means of their income (see Financial Investigations and Monitoring of Assets). This will help to produce a preponderance of evidence of corruption, and can identify those illegal assets that might later be confiscated. However, suspects are unlikely to place the bounty from a

bribe into their daily bank accounts and instead may transform the proceeds into other forms of property. Therefore, financial investigations should also concentrate on the lifestyles, expenditures and property of the suspected persons. In this respect, it might be extremely helpful to look not only at what has actually been spent, but also to compare the amounts of money deposited into the bank accounts of suspects with deposits from previous years. Efforts should also be focused on identifying whether the suspected corrupt person maintains foreign accounts. The existence of such an account can be suspicious alone and indicate that funds are being hidden. In order to be effective, financial investigations should be extended to the suspected persons' family members and those living in the same household: experience shows that they are often used as conduits for corruption proceeds.

**Identification of Slush Funds.** In order to avoid paying bribes directly out of the corporate bank account, it is common practice for larger organisations to create so-called slush funds, i.e. funds that do not appear in official corporate accounts and records. Money needed to pay bribes can be taken from these funds as needed. The methods adopted to create these funds are very similar to techniques used to launder money. One common method is where the costs of services or goods are falsified and funds used to pay for these alleged services or goods are transferred into the slush fund account. It is usually extremely difficult to prove the actual receipt of this money as, for example, in the case where consultants are hired and schemes enacted where monies paid are actually returned to the slush fund in cash.

**Investigation into the Slush Fund.** Once a slush fund has been identified, the investigation should be broadened to include all payments made out of this fund. All individuals with access to the funds should be identified. Companies and private persons that have ongoing business with the state and are found paying a bribe on one occasion are most likely to have done so on several occasions.

**Court Orders.** If court orders are needed to carry out specific covert evidence gathering activities, particular care should be given to the particular judge receiving the request. It is not unusual that politically and socially connected suspects and other suspects having connections to the criminal justice system might have contacts with the judge issuing the order.

**Suspension.** During the period of investigation, a decision might be made to suspend suspects from their official duties. In particular, if they are involved in making important decisions and a subsequent conviction may negatively influence the validity of their decisions, actual or perceived, it may become necessary to remove them from any approval processes. When the suspect is employed by an institution of the criminal justice system, measures should be taken to prevent him from "networking" after any suspension. Colleagues of the suspected persons should be given strong warnings about relating information to the suspended colleague who should be authorized to contact only one specific supervisor within their organisation.

**Witnesses.** A comprehensive interviewing strategy should be designed. It should include measures to overcome obstructive lawyers, witness protection, ensuring the credibility of the witness and to avoid suspected illegal managing of witnesses. Witnesses often have a criminal background themselves and therefore might not be very credible. It is essential that witnesses admit their involvement in prior criminal acts, particularly if they are involved in the acts of corruption for which the suspects are being investigated. Nothing is more damaging to a prosecutor's case than for an important witness to be exposed to the jury as a criminal. The personal background of the criminal witness must be offered to the jury as soon as possible in the proceedings. Witnesses must be protected against threats. The most cost-effective means to do this is to protect the identity of witnesses for as long as possible. The best way to avoid allegations of illegal enquiry methods or promises made to witnesses by the investigating team is to electronically record all interviews.

**Preparation of Court Presentation.** It is essential that as many facts as possible are corroborated. In particular, if witnesses are used, it is important to obtain secondary evidence, where possible, to support their credibility. In those systems where the police are not required by law to conduct

investigations under the direct supervision of a public prosecutor, it is crucial to involve the Prosecutor's Office at a very early stage.

**Media Strategy.** During investigations and court proceedings, a clear media strategy should be elaborated that assigns one person to interface with and report to the media. All other personnel and investigators involved should be made aware of the potential damage that may be caused to the successful outcome of the investigation and prosecution if they make comments to the media. This also applies to the witnesses. In the case where a public official is accused, the senior managers of the institution in which the accused works should be informed of the risks of commenting to the media.

**International Focus.** Cases of grand corruption often include international aspects. For example, the bribe giver may be a foreign investor, the slush fund might be located in a country other than that where the bribe is paid, or the bribe might be transferred directly into a recipient's foreign bank account. Investigators and prosecutors should therefore be trained on mutual legal assistance and exchange of information procedures at the international level.

### ***Preconditions and Risks***

*The following factors contribute to successful investigations:*

**Independence of the Prosecutor, both Internally and Externally.** Especially in cases of investigations into high-level corruption, political interference can interfere with investigations and prevent prosecution if executive branches of government directly control the Prosecutor's Office. The judicial police should report directly to the prosecutor in order to integrate investigation and prosecution, to ensure mutual loyalty and to protect the investigations from being jeopardised by undue political interference in the work of the investigating police team.

**Secrecy of the First Stages of the Investigation.** There should be no obligation to inform the suspect about the investigation during its early stage. When a suspect has knowledge of an investigation prior to the time the police can secure sufficient evidence, the suspect might destroy evidence and warn other targeted persons to do the same.

**Strong Investigative Powers.** Strong investigative powers are fundamental for successful investigation. In particular, the ability to order searches and seizures without court authorisation, ability to remove banking secrecy during investigations and the ability to request preventive detention and telephone interception have proved extremely helpful.

**Plea-Bargaining and Summary Proceedings.** The possibility of making recourse to plea bargaining and summary proceedings have been extremely helpful in increasing efficiency during what are normally long and complex proceedings. Plea-bargaining has also been successfully used to help identify other criminal activity as reported by suspects wishing to reduce the severity of a potential conviction.

**Seeking the Support of the Media and General Public Support.** Several factors are likely to place investigation and prosecution of corruption at risk. These include:

- ***Statutes of Limitation.*** Given the complexity of investigations into "victimless" crimes such as corruption, statutes of limitation often expire before the accused is charged with a crime. Therefore, an extension or exception to a statute of limitation should be considered especially in those cases where the lengthiness of the investigation is due to factors beyond the control of the government.
- ***Inefficient International Cooperation.*** Requests for information and for mutual legal assistance should be submitted as soon as possible since experience shows that even well meaning collaborating jurisdictions normally give the lowest priority to requests for assistance.

A likely related tools could be:

- Establish, disseminate, discuss and enforce a Code of Conduct for public servants
- Establish and disseminate, discuss and enforce a Citizen Charter
- Establish an independent and credible complaints mechanism where the public and other parts of the criminal justice system can file complaints
- Establish a Disciplinary Mechanism with the capability to investigate complaints and enforce disciplinary action when necessary
- Conduct an independent comprehensive assessment of the governments levels, cost, coverage and quality of service delivery, including the perceived trust level between the public service and the public
- Simplifying procedures of complaining,
- Raising public awareness where and how to complain (e.g. by campaigns telling to public what telephone number to call), and
- Introducing a computerized complaints system allowing the institutions to record and analyse all complaints and monitor actions taken to deal with the complaints.

## **Tool 29 - Financial Investigations and The Monitoring of Assets**

### ***Purpose***

Financial investigations, in addition to assessments of directly or indirectly owned assets, are an extremely efficient tool for pro-active and re-active investigations into corruption. The information gained from such investigations might be used either as a starting point for further investigation or as back-up evidence for corruption allegations.

### ***Description***

**Initial Target (Group) Restriction.** When financial investigations are used in a traditional law enforcement context, for example, after a suspect has been caught and his crime identified, the target of the financial investigation is already well defined. Specifically, the suspect's finances should be investigated to uncover additional evidence of the crime. Investigative accountants can be used to unravel even complex and confusing financial crimes especially where they have a specific target on which to focus their efforts.

In cases where an anti-corruption agency or similar institution desires to use financial disclosure information or other indicia of ones finances and purchasing power to uncover potential corruption, the task is much more difficult. This sort of pro-active monitoring aimed at targeting indicators of corruption, for example, living beyond ones means, requires clever use of available resources and careful consideration as to who will be targeted and why. Of course, where resources are not limited, it is possible to thoroughly investigate each and every official or group. Since this scenario is unlikely in just about every jurisdiction, selective and efficient allocation of resources is necessary.

Where monitoring resources are limited, rigorous evaluation in the selection of a target group should include the likelihood of uncovering corruption. For example, if available data suggests that employees of the driver's license issuing office have solicited bribes, it may be tempting to launch a review of financial disclosures filed by the employees assigned to that office. However, such an exercise will most likely be a waste of time and energy. The money amount of bribes paid to such employees is likely small and, in all probability, is used as 'pocket money' and not deposited into a bank account or used to make large purchases. Investigators should instead direct their efforts towards reviewing disclosures by employees whose public duties expose them to a higher money level of potential bribes. While it is probable that a larger percentage of the employees in a licensing office solicit bribes versus the percentage of employees, for example, in a procurement office, for the purpose of allocating pro-active financial investigative resources, there is a greater likelihood of uncovering indicia of corruption by reviewing financial disclosures of procurement office employees.

**Evaluation of Key Life Style Indicators.** Prior to in-depth asset and life style monitoring, a target's lifestyle should undergo initial screening to determine whether further investigation should be undertaken. This might be restricted to a few significant assets that are given priority over others, such as homes, second houses or holiday homes, means of transport and other items of significant value.

**Initial Screening Methods.** The initial methods used should be limited to acquisition of readily accessible information, such as public registers and direct observation. The latter has proven to be more accurate since corrupt officials tend to disguise their acquisitions by registering property in the names of others.

**Target Definition.** Once initial grounds for suspicion have been found and a concrete target for further investigation has been identified, the screening should not be limited to the suspected persons, but should also target persons with whom they have strong ties, such as spouses and

family members. Quite frequently, corruption proceeds are deposited into bank accounts belonging to husbands or wives (less frequently to children, brothers or parents). This same scheme to disguise actual ownership is often used for the registration of property.

**Life Style Indicators.** Investigators should focus on owned or rented residential homes, including short-term vacation rentals, cars, boats, planes, holiday trips, recreational expenses (for example restaurants), clothing expenses, the purchase of works of art and antiques, the purchase of jewels, medical expenses and other large purchases in general. These parameters are usually used to verify whether an in-depth asset assessment is justified.

**Sources of Information.** The instruments used to investigate disproportionate living standards include public registers and contracts that can indicate excessive availability of money or property (for example, a contract for the lease of a particularly expensive house). Bank and company documentation might contain further information. In addition, verification of expenses incurred by the public officials or persons close to them has proven extremely effective in uncovering indicators of corruption.

**Third Party Protection.** In-depth investigations into the origins of third party property should only be made when there are elements to reasonably justify the suspicion that third parties possess property that belongs to the suspected corrupt official.

**International Investigations.**<sup>74</sup> Unlawfully received money is frequently hidden in foreign bank accounts registered under false names or corporations. Illegal property is also sometimes registered in foreign jurisdictions using false identities while the corrupt official enjoys the property. For example, vacation homes and boats are examples of property whose ownership can be disguised by the use of registration under a false name or corporation. Depending upon whether or not the jurisdiction in which the funds are deposited has signed a Mutual Legal Assistance document, it can be very difficult to obtain assistance from that jurisdiction in identifying and recovering stolen assets.

**Alternatives to Enhance Monitoring.** Some jurisdictions have introduced measures that place the burden on public officials to account for their assets. Where it can be shown that the living standards of public officials exceed their known lawful income and when they are unable or unwilling to account for the discrepancy, such excess property can be confiscated. This measure does not reverse the burden of proving illicit enrichment but simply provides that where there is a preponderance of evidence that an official possesses ill-gotten property, it is up to them - and not the prosecuting agency - to produce satisfactory explanations as to the origins of the excess property (see *Facilitating the Gathering of Evidence in Corruption Cases – Easing the Burden of Proof*).

### ***Preconditions and Risks***

National laws must provide for comprehensive registration of assets and identification of the beneficial owners of such assets. It must also empower the monitoring agency to gain access to official registers and to company and bank documentation. Anonymity of ownership is the natural enemy of transparency and accountability. If a country's legislation does not provide for transparency in this regard, financial monitoring and investigative efforts will likely not produce meaningful results.

### ***Related tools***

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<sup>74</sup> W.H. Heath, *Civil Processes to Combat Corruption*, paper presented at the 9th International Anti-Corruption Conference, [http://www.transparency.de/iacc/9th\\_iacc/papers/day3/ws1/d3ws1\\_whheath.html](http://www.transparency.de/iacc/9th_iacc/papers/day3/ws1/d3ws1_whheath.html)

Tools which may be required before declaration of assets can be successfully implemented include:

- A code of conduct that spells out who has to declare their assets and how it is expected to be done.
- The establishment of an independent and credible complaints mechanism to deal with complaints that the prescribed standards have not been met;
- The establishment of appropriate disciplinary procedures, including tribunals and other bodies to investigate complaints, adjudicate cases and impose and enforce appropriate remedies or other outcomes;

Tools which may be needed in conjunction with codes of conduct include:

- Tools which involve the training and awareness-raising of officials subject to each code of conduct to ensure adherence and identify problems with the code itself;
- Assessments of institutions and where necessary, of individuals, to
- The enforcement of the code of conduct by investigating and dealing with complaints, as well as more proactive measures such as “integrity testing”; and,
- The linking of procedures to enforce the code of conduct with other measures which may identify corruption, such as more general assessments of performance and the comparison of disclosed assets with known incomes



## Tool 30 - Integrity Testing

### *Purpose*

Integrity testing is an instrument that enhances both the prevention and prosecution of corruption. The objectives of integrity testing are to:

- Determine whether or not a public civil servant or branch of government engages in corrupt practices and;
- Increase the actual and perceived risk for corrupt officials of being detected thereby deterring corrupt behaviour

### *Description*

#### *Sting operations*

A more controversial – but also unquestionably effective – means of identifying corrupt officials is the use of decoys or other integrity-testing tactics. These involve undercover agents who offer officials opportunities to engage in corruption in circumstances where evidence of their reaction can be easily and credibly gathered. Depending on local policy or legal constraints, officials may be targeted at random or on the basis of evidence or reason for specific suspicion of corruption.

These tactics represent a powerful instrument for both deterring corruption and detecting and investigating offenders. As they do not necessarily require any inside information or assistance, they can be used quickly against any official at virtually any level who is suspected of corruption. If the suspect is corrupt, they quickly provide highly credible evidence, usually in the form of audio- or videotapes, photographs and the personal testimony of the investigators involved, which may form the basis of a criminal prosecution or serve as the justification for other investigative methods such as electronic surveillance or the search of financial records. If the suspect is not corrupt, his or her refusal also tends to reliably establish, provided that adequate confidentiality precautions are taken to ensure that investigative targets are not warned beforehand and that undercover agents are well-trained and competent.

The criticisms of these tactics are substantial. Arguably, even the most honest official might yield to temptation if the offer is sufficiently convincing, and the willingness to do so when approached may not necessarily establish that he or she is inherently corrupt or that similar transgressions have occurred in the past. This problem underlies restrictions intended to prevent “entrapment” in some countries. Usually in such countries, undercover agents are permitted to create opportunities for a suspect to commit an offence, but not to offer any actual encouragement to do so. Police officers might be occasionally exposed to undercover agents in circumstances where a corrupt officer would normally solicit a bribe to see if this occurs, for example, but the undercover agents would be prohibited from actually offering bribes.

#### *Integrity Testing*

Integrity testing has been used effectively to ‘test’ whether public officials resist bribe offers and refrain from bribe solicitation. Integrity tests have proved to be an extremely effective and efficient deterrent to corruption.

***Targeted and Random Integrity Testing.*** Integrity testing can be used to verify the integrity, or dishonesty, of an employee in a specific situation. A scenario is created in which a public civil servant, for example, is placed into a typical everyday situation where he has the opportunity to use his discretion in deciding whether or not to engage in criminal or other inappropriate

behavior. The employee may be offered a bribe by an agent provocateur or be presented with an opportunity in which to solicit a bribe.

Integrity testing can also be used as a “targeted test” to help verify the genuineness of an allegation or suspicion of corrupt behavior. Members of the public, criminals or other officials may have provided information to law enforcement alleging that a certain person or even an entire branch of government is corrupt. Quite frequently, complainants include those who allege that a corrupt official has solicited them for a bribe.

When used as a random test, for example, where law enforcement has actively identified groups of officials or entire operations particularly susceptible to corruption, random testing can be used to ascertain the degree of corruption present. When carried out in secret, very reliable data can be gathered which will assist in accurately gauging the true extent of corrupt practices within the group selected. After reliable baseline data has been established, corrupt targets identified and other secret use of the data has been completed, integrity testing can be used as an effective deterrent to corrupt behavior. Public notification that such testing will be carried out at random and with consistency serves to greatly deter corruption.

***Fairness.*** In democratic society, it is unacceptable that government would engage in activities that encourage individuals to commit crimes. However, it is quite acceptable for government to observe whether or not one will commit a crime under ordinary and everyday circumstances. For this reason, integrity testing must be carried out with the strictest discipline. Integrity testing, as such an aggressive government effort, demands that audio and visual recording of the actual test be made to show that the accused person was not acting with any motivation other than his own free will. This measure will also help to ensure that government has sufficient evidence to pursue a successful prosecution.

As an additional safeguard to both the government and the person subjected to testing, witnesses should be placed in the vicinity of the test to augment what may or may not be seen and heard on the recording devices. Both random and targeted tests must be as realistic as possible in order not to expose the test-taker to a greater temptation than that to which they are normally exposed. In order to ensure the fairness of the test and for its acceptance by both those subjected to it and the general public, the methods and scenarios used should be evaluated and approved by competent authorities. The test should be carefully prepared to include detailed intelligence work about the types, situations, forms and amounts of bribes that the tested person might be exposed to.

***Regular Repetition.*** Experiences in various police forces where integrity tests have been carried out, such as the London Metropolitan Police, the Police of Queensland, Australia and the New York Police Department, have shown that it is not enough to “clean up” an area of corruption when problems appear. Instead, systems must be developed that help to ensure that follow-up testing is undertaken. The most desirable situation possible includes publication of the fact that consistent integrity testing of all government branches is performed at unknown intervals. Even where this is not possible, the object is to convince potential bribe takers that integrity testing is performed regularly.

### ***Preconditions and Risks***

***Integrity Testing and Constitutional Concerns.*** Although integrity tests can be extremely effective as an investigative tool as well as an excellent deterrent, courts do not always easily accept this method of collecting evidence. Notwithstanding this fact, there are substantial reasons for their use. It is one of the most effective tools for eradicating corrupt practices in government services in an extremely short time. In particular, in cases of rampant corruption and low trust levels by the public, it is one of the few tools that can promise immediate results and can help to restore trust in public administration. Legal systems that provide for “agent provocateur” scenarios should try and ensure that they are never designed to instigate conduct that makes criminals out of those who might otherwise have reacted honestly in a given scenario. It is

therefore important to ensure that the degree of temptation not be extreme and unreasonable. Many criminal law systems exclude evidence of an agent provocateur when the provocation is considered to be excessive.

*Appropriate Public Service Salaries.* If public service salaries are extremely low, there is the risk that integrity testing will not be accepted as fair play by either the tested person or by the general public. In this case, the tests will be counter-productive and can serve to damage the morale of those in public service.

## Tool 31 - Electronic Surveillance Operations

### *Purpose*

Electronic surveillance encompasses all information gathering, or intelligence gathering, by use of electronic means. This can include covert activities such as video recording, wiretapping or eavesdropping, and also includes the use of audio and video recorders and transmitters secreted on or in the presence of collaborating witnesses and informants for the purpose of consensual recording of activities.

The difference between covert and consensual is that covert surveillance, as we will use the term, is undertaken where none of the parties whose activities are being observed is aware that law enforcement is secretly listening and/or watching. Consensual recordings always involve the knowledge and consent of at least one of the parties to a conversation or activity.

### *Description*

Electronic surveillance, as an investigative tool, is often the only method available to investigators powerful enough to pierce the veil of secrecy shielding corrupt activities from discovery. The most commonly used form of electronic surveillance is consensual in nature and involves the assistance of collaborating witnesses, whistle blowers and victims of extortion and other corrupt offers. This is because in most democratic societies, the public enjoys a right to privacy from government intrusion and has the expectation that their words and actions are not subject to interception by the police. Where one of the parties to a corrupt or criminal conspiracy decides to expose the enterprise using electronic means to secure evidence, society tolerates that government invades an otherwise private affair. However, society does not easily tolerate when government secretly and with no consent or knowledge by any of the parties, decides to ‘spy’ on the conversations and activities of citizens.

This intolerance towards government’s covert activities stems from distrust on the part of society towards government in general. Past abuses of government authority arising from political interests, personal vendetta’s and other nefarious motivations have served to instil enough distrust on the part of the public to the point where society is unwilling to entrust the government with the unbridled authority to ‘spy’ on the activities of the citizenry. In America, for example, the Constitution protects citizens from “unreasonable searches and seizures” by the government<sup>75</sup>. Although this provision of American law was written over 200 years ago, the principal remains as strong today as when it was first written. Its applicability to electronic surveillance can be stated quite simply. Given that democratic society expects to have freedom of speech and movement, and that government is supposed to protect the citizenry from any and all threats to democratic principals, society considers it to be unreasonable for government to search using electronic means to uncover behaviour it proscribes and to then seize such evidence by recording it. This helps to account for the fact that only 1190 court approvals for covert wiretapping operations in the US were granted for all of the year 2000.<sup>76</sup> Approximately 75 per cent of those approvals were for drug trafficking investigations.

### *Covert Interceptions and Recording*

This category of electronic surveillance includes wiretapping, eavesdropping and video surveillance operations. Covert interceptions of private citizens’ words and activities are

<sup>75</sup> 4<sup>th</sup>. Amendment to the Constitution of the United States, also known as the Bill of Rights, 1791

<sup>76</sup> Report of the Director of the Administrative Office of the United States Courts, April, 2001

arguably the most invasive and aggressive sort of government intrusion into one's privacy. Notwithstanding this fact, it is sometimes the only method available to law enforcement to collect sufficient amounts of evidence against criminal enterprises. The extreme sensitivity with which the public views this law enforcement effort demands that strict guidelines and oversight of covert operations be firmly in place. Covert interceptions should be used as a last resort and only after it has been shown that all other efforts at evidence collection have failed or are likely to have no effect.

Wiretaps and eavesdropping are generally illegal in most countries. In the US, the federal government and more than thirty state governments have legalised interceptions by law enforcement of wire, oral and electronic communications. In all of these jurisdictions, however, very strict guidelines must be followed before a judge will grant a court order authorising such interceptions. The guidelines are designed to help assure protection of citizen rights to privacy and Fourth Amendment rights while, at the same time, allowing for the use of wiretaps during investigations of serious criminal activity and for foreign intelligence.

Due to technological advancements in electronic communications over the past 20 years, state statutes have been modified to keep pace with these advances in telecommunications. For example, New Jersey has amended its electronic surveillance statute to include cellular telephones, cordless telephones, digital display beepers, fax transmissions, computer-to-computer communications, and traces obtained through "caller-ID".

#### *Application for Court Order*

All government wiretaps and eavesdropping should require a court order based upon a detailed showing of probable cause. To obtain a court order, a three-step process should be involved. First, the law enforcement officer responsible for the investigation must draw up a detailed affidavit showing that there is probable cause to believe that the target telephone or other communication device is being used to facilitate a specific, serious, indictable crime. Second, an attorney for the federal, state, or local government must work with the law enforcement officer to prepare an application for a court order, based upon the officer's affidavit. At the national level, the competent judicial officer must approve the application. At the state and local level, the application should be made and approved by the principal prosecuting attorney of the state or political subdivision. The government attorney should be authorised by a statute of that state to make such applications.

Third, the attorney must present the approved application *ex parte* (without an adversary hearing) to a judge who is authorised to issue a court order for electronic surveillance. A state or local police officer or national law enforcement agent should not be allowed to make an application for a court order directly to a judge.

Typically, a court order should only be requested after investigation and the use of a "Dialed Number Recorder" (DNR). The DNR is used to track the outgoing calls from the suspect's phone or other communication device in order to demonstrate that the suspect is communicating with known criminals. In the case of eavesdropping, it is similarly important to ascertain with precision the likelihood that the person or group under investigation will gather in a certain place to discuss criminal activity. Any request for a court order should contain the following information:

- (a) The identity of the investigative or law enforcement officer making the application and the high-level government attorney authorizing the application;
- (b) The facts and circumstances of the case justifying the application, including details of the particular offence under investigation, the identity of the person committing it, the type of communications sought, and the nature and location of the communication facilities;

- (c) Whether or not other investigative procedures have been tried and failed or why they would likely fail or be too dangerous;
- (d) The period of time for the interception
- (e) The facts concerning all previous applications involving any of the same suspects or locations;

### *Issuance of a Court Order*

Before a judge can approve an application for electronic surveillance and issue a court order, the judge must determine that:

- (a) There is probable cause for belief that an individual is committing, has committed, or is about to commit an offence covered by the law;
- (b) There is probable cause for belief that particular communications concerning that offence will be obtained through such interception;
- (c) Normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed or to be too dangerous;
- (d) There is probable cause for belief that the facilities from which, or the place where the communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offence, or are leased to, listed in the name of, or commonly used by such person.

In addition to showing probable cause, one of the main criterions for determining whether a court order should be issued is whether normal investigative techniques have been or are likely to be unsuccessful. Electronic surveillance is a tool of last resort and should not be used where other less intrusive methods of investigation could reasonably be used instead. Such normal investigative methods usually include visual surveillance, interviewing subjects, the use of informers and telephone record analysis. However, these techniques often have limited impact on an investigation. Continuous surveillance by police can create suspicion and therefore be hazardous; further, surveillance alone will not disclose the contents of a personal meeting nor a telephone conversation. Questioning identified suspects or executing search warrants at their residence can substantially jeopardise an investigation.

Informants are useful and should be sought out by police, but the information they provide does not always reveal all of the players or the extent of an operation, and great care must be taken to ensure that the informants are protected. Moreover, because informants are often criminals themselves, they may not be believed in court. Telephone record analysis is helpful, but does not reveal the contents of conversations nor do they always reveal the identities of parties. Other methods of investigation that may be tried include undercover operations and stings. But while effective in some cases, undercover operations are difficult and dangerous, and sting operations are costly and not always successful.

If the judge approves the application, then a court order is issued specifying the relevant information given in the application, namely, the identity of the person (if known) whose communications are to be intercepted, the nature and location of the communication facilities, the type of communication to be intercepted and the offence to which it relates, the agency authorised to perform the interception and the person authorising the application, and the period of time during which such interception is authorised. A court order may also require that interim status reports are made to the issuing judge while the wiretap or eavesdropping is in progress.

### *Minimization*

Once the covert electronic recordings begin, the law enforcement officers should limit interception of communications to the offences specified in the court order. Before the

surveillance actually begins, a government attorney should convene a meeting with the officers who will participate in the case to ensure that recorded material conforms to the crimes alleged in the enabling affidavit. Turning off the recording equipment and then performing a spot check every few minutes to determine if the conversation has turned to the subject of the court order usually accomplishes minimisation. This avoids picking up unrelated gossip. Special problems may arise where criminals communicate in codes that are designed to conceal criminal activity in what sounds like uninteresting or unrelated discussion. If an intercepted communication is in a code or foreign language, and someone is not simultaneously interpreting the code or foreign language, then the conversation can be recorded and minimisation deferred until an expert in that code or language is available to interpret the communication. Should a wiretap or eavesdropping effort fail to meet the minimisation parameters, all of the evidence obtained from the wiretap could be inadmissible.

### *Recording*

All intercepted communications are to be recorded when possible. As a practical matter, law enforcement officers make working copies of the original tapes. In many instances at the national and local level, the originals are delivered to the prosecutor's office and maintained in the prosecutor's custody.

The case officer should screen conversations that tend to prove that a crime has been, is being or will be committed. A compilation of the relevant conversations, together with the corroborating surveillance reports often provide probable cause for search warrants and/or arrest warrants.

### *Termination of Covert Electronic Surveillance*

In order to continue an interception beyond the limit set by the original court order, the responsible law enforcement officer, through a government attorney, should apply for and be granted an extension based upon a new application and court order. When the period of a court order, or extension, expires, the original tapes must be made available to the issuing judge and should be sealed under court supervision. The tapes should be maintained in such fashion for a period of years.

### Consensual Recording Operations

Unlike covert electronic surveillance operations, consensual operations involve the cooperation of at least one party who is trusted by the criminal target. This government collaborator might be a person who is being extorted or victimised in some manner, may be an ostracised member of a criminal enterprise with a personal vendetta, or might be a criminal who is trading information for leniency from the court. The vast majority of electronic surveillance operations involve these sorts of collaborators. With respect to corruption investigations and other so-called victimless crimes, the time needed to complete the criminal arrangement is usually not critical and most often involves the payment of cash money between the parties. This fact is important for anti-corruption investigators. For example, most cases of mid- and higher level bribery usually require that substantial amounts of money be assembled. In the case where a government inspector demands a bribe from a citizen or where the citizen conversely offers the bribe, there is often sufficient time for the honest citizen or government employee to notify the appropriate authorities before the actual transaction takes place. In the case of the collaborating criminal seeking leniency, he can usually control to some extent the timing of his meetings with the targeted criminals. This flexibility presents the opportunity for law enforcement officials to prepare the cooperating person to respond to the corrupt offer in such a way as to provide legal recourse to the authorities. For example, electronic surveillance methods could be used to record the bribe offer or solicitation.

