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# Namibia's Anti-Corruption Bill: An Anti-Corruption Commission cannot fight corruption on its own

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**Several years after a major conference on corruption, Namibia's National Assembly recently passed the Anti-Corruption Bill. Here Jeremy Pope of Transparency International, an organisation dedicated to rooting out corruption worldwide, gives his views on the Bill that was submitted to Parliament.**

Transparency International was asked to comment on Namibia's Anti-corruption Bill by the Institute for Public Policy Research. In response I have put together a short paper which discusses the general background of the fight against corruption around the world against which the Bill to establish an Anti-Corruption Commission in Namibia has been prepared. It examines successes and failures and seeks to identify the lessons learned from different parts of the common law world, particularly the Commonwealth. It then applies these lessons to the Bill recently passed by the National Assembly and suggests areas for improvement that should be considered.

## How should corruption be tackled?

Do governments need to act firmly against corruption, even when it is not seen as being a particularly pressing problem? Those who have studied corruption would answer with a strong affirmative.

Around the world there have been frequent examples of the consequences of failures to maintain an appropriate degree of vigilance. One such example has involved the Metropolitan Police Force in London, England. There, police corruption scandals have been followed by intensive reform efforts. Once the reforms were completed the job was considered as having been done. However, repeatedly – every twenty years or so – scandals have shown corruption to have taken root once again throughout the organisation. It has now been understood that anti-corruption efforts have to be conducted on a continuing basis.

Corruption thus has to be dealt with throughout government structures as an essential aspect of its risk management procedures. It is also widely agreed that although the *prevention* of corruption should be at the forefront of reform efforts, *enforcement* is just as important.

Relying on a "big stick" approach to deal with corruption after the event can be uncertain, ineffective and wasteful. Prosecutions, although unavoidable, are an indication that prevention has failed. Effective legal sanctions are, however, vital. Not only are they essential to deal with those who misbehave, but the very knowledge that sure and effective law enforcement exists contributes significantly to prevention efforts. A public that sees the corrupt go free to enjoy the fruits of their activities is disempowered and despondent. The reformer must therefore address both aspects. Prevention and enforcement reinforce each other.

However, when I talk about laws to fight corruption, I am not just talking about the criminal law and laws of evidence. These are important, and without sound criminal laws and procedures the task is made more difficult. Yet to focus on these elements alone, as many reformers have, is to ignore a much wider range of laws.

These include laws which cover:

- access to information (including official secrets legislation);
- conflict of interest;
- public procurement;
- freedom of expression;
- freedom of the press;
- protection of "whistleblowers" and complainants;
- enabling civil society to mobilise;
- democratic elections;
- banning those convicted of offences of moral turpitude from holding or running for election to public office or from holding directorships;
- gifts and hospitality;
- office of the Ombudsman; and
- judicial review of the legality of administrative actions.

Much can also be accomplished administratively without any need to reform the law at all. This includes abolishing unnecessary licences, streamlining necessary procedures, limiting areas of political and administrative discretion (and defining criteria where they are necessary), developing ethics programmes and creating avenues for citizens to complain effectively.

However, as the corrupt grow more sophisticated, conventional law enforcement agencies are becoming less able to detect and prosecute complex corruption cases. Furthermore, in a system in which corruption is endemic, conventional law enforcement mechanisms may themselves harbour corrupt officials. In recent years, governments have sought to bolster detection efforts (or at least to create the impression of their intention of doing so) by introducing "independent" Anti-Corruption Agencies or Commissions.[1] The usual "model" is the Hong Kong Independent Commission Against Corruption (ICAC). This Commission serves not only to accept and investigate (but not prosecute) allegations of corruption, but also to run public awareness campaigns and to audit the management systems of individual government departments and agencies, from an anti-corruption perspective.

**Should countries establish anti-corruption agencies?**

Anti-Corruption Agencies have become fashionable. But are they, and can they be, effective? And if they are such a good idea, why do so many of them fail in practice? To operate successfully, an Anti-Corruption Commission must possess the following:

- committed political backing at the highest levels of government;
- adequate resources to undertake its mission;

[1] Commissions in a number of African countries appear to have been introduced without any real political will to make them work. The result has been weak bodies, intent only on dealing with corruption at the most junior levels. The most recent serious attempt has been the establishment of the Independent Commission for the Prevention of Corruption (ICPC) in Nigeria.

- political and operational independence to investigate even the highest levels of government;
- adequate powers of access to documentation and for the questioning of witnesses;
- "user-friendly" laws (including the criminalisation of "illicit enrichment"); and
- leadership which is seen as being of the highest integrity.

It is also important that any special powers conferred on an Anti-Corruption Commission conform to international human rights norms and that the Commission itself operates under the law and is accountable to the courts. In setting the parameters for the establishment of an Anti-Corruption Commission, a government must ask itself if it is creating something that would be acceptable if it were an opposition party. Very often the answer changes with this perspective. The search should be for a formula which seems fair and workable to everyone, whether in or out of government. A Commission must be able to survive changes in power. Above all, it should allot appropriate powers of investigation, prosecution and, sometimes most importantly, prevention.

The following major considerations raise issues of appointment and accountability and should be borne in mind:

- an Anti-Corruption Commission may not be independent if it is subject to political direction and be used as a weapon to attack critics; and
- a Commission can, itself, become an agency for extortion and corruption.

**How should the head of an anti-corruption commission be appointed and removed?**

From the outset, the shape and independence of any agency or Commission may well be determined by how the officeholder is appointed or removed. If the appointing mechanism ensures consensus support for an appointee through Parliament, rather than government, and an accountability mechanism exists outside government (such as through a Parliamentary Select Committee on which all major parties are represented), the space for abuse or non-partisan activities can be minimised.

Surveys of the public in Hong Kong over the years have confirmed a confidence rating of its anti-corruption, the ICAC, among the population of between 98 and 99 per cent – well above that of any other agency of the administration.

It is therefore important that the appointment procedure is one which recognises that the task of the office holder is to maintain a check on the Executive and, in particular, the political party in power. If the Executive, or even the ruling party, were to have a free hand in making the appointment, there would be an immediate loss of effectiveness and of public confidence. At best, appointees would risk being seen as hand-picked supporters who could be relied upon not to rock the boat. At worst, they would be seen as the party's "hatchet men".

It follows that the appointment procedure must be one which involves a broader cast of actors than those presently in power. The precise appointment procedure will vary from country to country, but each should address the issue of whether the proposed mechanism sufficiently insulates the appointment process. It must be one which ensures that an independent person of integrity is appointed and that such a person is adequately protected while in office. The office-holder should also be afforded the same rights of tenure of office as those enjoyed by a superior court judge. Removal from office should never be at the discretion of the powers that be, but only in accordance with a prescribed and open procedure, and only on the grounds of incompetence or

misbehaviour.

**What checks and balances should be designed into the legal framework?**

Powers of suspension are rightly written into legislation. Where there is reasonable cause to believe that powers are being misused, it makes sense to be able to suspend officials while investigations are taking place. However, these powers can easily be abused. In one African country, for example, a high profile political figure was kept in jail simply because the regime had not appointed a judge to the Supreme Court and his case could not be heard. One can imagine a scenario in which the head of an Anti-Corruption Commission might be suspended by some President in the future, simply because he was investigating allegations which might be politically embarrassing. There must always be an appropriate check.

The relationship between the Anti-Corruption Commission and the Director of Public Prosecutions (DPP) is also a critical one. What use is evidence if the suspect cannot be prosecuted? Generally a DPP is given, under the Constitution, sole oversight for all prosecutions and is empowered to intervene in any criminal proceedings initiated by any other person or authority. However, in assessing the independence and the likely effectiveness of the anti-corruption commission, the question arises whether, under the Constitution, the DPP enjoys sufficient independence in exercising the discretion to prosecute so as to ensure that there will be little scope for political interference after investigations by the Commission have been completed.

**Should civil society have an oversight role?**

The Commission's relationship with the public is also critical to success. Some agencies, such as the highly-successful Hong Kong ICAC, have established formal arrangements whereby public participation in policy formulation is ensured. By providing for such an arrangement, which could take the form of a committee chaired by the Minister of Justice, the anti-corruption framework encourages public accountability.

The relationship with the public is also important in laying the foundation for the "prevention" function of an Anti-Corruption Commission. The framework must provide for the involvement of a wide range of people and interests in the formulation and execution of prevention policies. In this way, various stakeholders become involved in the prevention process, and their own institutions - both within government and in the private sector - can be mobilised in support of the Commission's efforts.

Another important factor is how the Commission can, in practice, change corrupt practices without expanding its powers beyond its mandate to include enforcement. It would be misleading to think that all recommendations from an Agency or Commission will always be relevant and practical. It might, therefore, be counterproductive to give a Commission the power to require that specific changes be made. Instead, it may be better for the head of the administration to direct departments to cooperate with the Commission, and for the Commission to sit down with a department's line management and work out practical and acceptable changes to the system under review. Solutions worked out together in this way should be implemented by the department. If not, the department should be obliged to give an explanation to both the head of the administration and to the Commission. There may, for example, be some change of conditions that renders a recommended reform no longer appropriate.

Some countries have found that their public services can ignore an anti-corruption body's

recommendations. What is the answer? Can Parliament, perhaps through the Commission's annual report or otherwise, be used as a forum in which departments who fail to cooperate can be questioned and held to account for any such failure to revise bad practices?

Another important factor to be considered in establishing the legal framework for an anti-corruption agency is that adequate powers are given to access documentation and to question witnesses. In some countries, efforts are made to restrict the access of a Commission to information. However, there is no reason why a Commission ought not to enjoy, as the Ombudsman does, all the rights of law enforcement officers and full access to government documents and public servants.

**Why do so many anti-corruption agencies fail?**

Anti-corruption agencies can fail because of:

- Weak political will – vested interests and other pressing concerns overwhelm the leadership
- Lack of resources – there is a lack of appreciation for the cost-benefits of a "clean" administration and of the fact that an effective Commission needs proper funding;
- Political interference – the Commission is not allowed to do its job independently, least of all to investigate officials at the higher and highest levels of government;
- Fear of the consequences – a lack of commitment and a readiness to accommodate the status quo lead to agencies losing independence, resources, or both;
- Unrealistic expectations – fighting systemic corruption is a long-term exercise;
- Excessive reliance on enforcement – the effective preventive capacities of the agencies are not adequately developed;
- Overlooking the elimination of opportunities – relying on enforcement after the event, corruption levels continue unabated;
- Inadequate laws – without enforceable and effective laws, a Commission is ham-strung;
- Being overwhelmed by the past – a new Commission, usually small and needing to settle in, can be overwhelmed by inheriting the total backlog of unfinished business from other enforcement agencies, crippling it from day one;
- Failure to win the involvement of the community – lack of public awareness campaigns;
- Insufficient accountability – if the Commission is not itself accountable in appropriate ways, it can become a Commission for persecuting government critics;
- Loss of morale – as people lose confidence in the Commission, its staff lose morale; and
- The Commission itself becomes corrupt.

Unfortunately, anti-corruption agencies have been more often failures than successes. One suspects that anti-corruption agencies have been established in other countries with perhaps no real expectation of their ever tackling difficult cases at senior levels of government. They have been staffed and resourced accordingly.

Some have done good work in attacking defects in integrity systems, but only at junior levels. However most have had a negligible impact on tackling "grand corruption". Even when Agencies or Commissions are well-resourced and established under model legislation, to be wholly successful they still have to rely on other institutions. If the judicial system is weak and unpredictable, then efforts to provide remedies through the courts will be problematic. So where corruption is widespread, a commission alone will not provide the complete answer but can be an important part of a broader national plan of action.

For reasons not yet wholly apparent (though clearly a functioning rule of law has been a significant factor), they have tended to be much more successful in East Asia - in countries such as Singapore, Malaysia, Taiwan and Hong Kong - than they have been elsewhere. However, one factor is clear. In each of those countries the agencies have enjoyed high levels of political and public support. They have also had adequate research capacity and have adopted both rigorous investigative methods and far-reaching programmes of prevention and public education. The comparatively recent introduction of similar agencies in Botswana and Malawi is being watched with interest.

**Why did Hong Kong succeed?**

It is important to understand from the outset why it is that the Hong Kong model has proved effective. This is not just because of the quality and determination of its staff and of the excellent legal framework which has facilitated their work. It is also because the concepts of prevention and prosecution have both been functions of the Commission.

Prevention has not been a last, single line - a draftsman's after-thought - in the law establishing their responsibilities. Prevention and the community education and awareness-raising that goes with it have been core activities of the Hong Kong model, often informed by the revelations of investigators working on the enforcement side. This enabled the Commission to develop a coherent and coordinated set of strategies with results that are the envy of many. Those who have tried to copy the model have largely failed because they have lacked both this coherent approach and the resources necessary to carry it through. Furthermore, Hong Kong makes the possession of "unexplained wealth" a criminal offence. This, as noted below, has been the key to its success.

**What can the criminal law hope to achieve?**

There are eight general principles which should govern remedies under the criminal law:

1. ***Laws against corruption should comply with international human rights standards*** and afford a fair trial to those accused. It is crucial that criminal laws against corruption respect human rights guarantees, either under a Constitutional Bill of Rights or an international code, to ensure specific procedures are not struck down by the courts as being unconstitutional.

2. ***Laws should not be seen as being unduly repressive.*** They should enjoy popular public support. If they do not, they risk a lack of enforcement. In some countries the argument is that penalties are so slight that it is not worth bringing cases to court.[2]

3. ***There should be clear guidelines on sentencing.*** Sentences should be consistent between one offender and another, and fair, but not outrageously punitive. Clearly, a court must be able to discriminate between cases in which an official has been bribed to perform his duty (such as expediting an official action) and the more serious cases in which an official has been bribed to act in a way which was in itself improper. Legislatures may find satisfaction in enacting laws which provide for heavy penalties but this can actually

[2] For example, in Japan, suspended sentences were handed down to two Tobishima executives for bribing the Governor of Ibaraki Prefecture for a part of a large dam project, because they "repented". In other countries, the opposite argument may apply. In South Korea, a review of criminal law penalties concluded that the penalties on conviction were simply too high. Civil servants faced a minimum of seven years imprisonment, and as a result judges were loathe to convict. In Uganda, an anti-corruption law has never been used in over 20 years on the statute book, apparently because it was thought to be "simply too tough".

undermine the reform effort. Many prosecutors dislike bringing cases in which sentences are likely to be imposed which the community regards as being excessive. The guidelines can also act as a check on corruption in the judiciary by enabling judges whose sentencing frequently strays beyond the guidelines to be identified and investigated.

4. ***Combining the various criminal laws dealing with corruption and secret commissions together in a single law has much merit.*** It reduces the possibility of loopholes and can demonstrate the seriousness with which the law treats this form of behaviour by making it plain that anti-corruption offences apply to the public and private sectors alike. Whichever course is chosen, the offence of giving and receiving "secret commissions" should be provided for.

5. ***Regular reviews of the criminal law framework (including laws of evidence and of the adequacy of existing penalties) are essential.*** This is particularly true as modern technology can run ahead of the more pedestrian legal stipulations.[3] There may also be difficulties where some legal systems have not caught up with the concept of criminal conduct by corporate bodies.[4]

6. ***Special provisions may be necessary in corruption cases.*** One such provision is a requirement that individuals, once they are shown to be wealthy beyond the capacity of known sources of income, are obliged to identify the origins of that wealth to the satisfaction of the court.[5] In such circumstances, the difficulty lies in appearing to reverse the onus of proof - in compelling a person, under threat of conviction for presumed corruption, to explain how assets were acquired legitimately, as opposed to merely giving the person the option to adduce evidence in explanation (as is the position in many jurisdictions). The law may thus call for a prosecutor to prove a linkage – which may be exceptionally difficult to do to the degree necessary in criminal proceedings. A better approach would be to make special legislative provisions which state that conclusions may be drawn by the court "in the absence of a satisfactory explanation by the accused". This is not to compel the person to give evidence (which would contravene international human rights norms against self-incrimination) but, as in other cases where a prima facie case is made out against a person, to place them in the position of having to choose between giving evidence and risking conviction without doing so.

7. ***Special provisions will be needed to ensure that the proceeds of corruption can be recaptured by the state***. These will often be in the hands of third parties or even located outside the country. The criminal law should provide for the tracing, seizure, freezing and forfeiture of illicit earnings from corruption. One of the few benefits to come out of the international war against illicit drug trafficking has been the development of legal frameworks which facilitate the investigation and seizure of proceeds, regardless of the jurisdiction in which they are located. Some countries provide for forfeiture even in the absence of conviction, unless a claim is made by the rightful owner within a certain period of time.

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[3] For example, offences involving computers, and evidence generated by computers, may run counter to existing limitations designed for a paper-based world.

[4] For example, the criminal law should be able to redress corrupt corporate practices such as "bidding rings" for public contracts, in which apparent competitors collude among themselves to decide who will get a particular contract and at what price.

[5] Constitutional problems may arise in circumstances where a law requires that an accused person give evidence under oath. In Zambia, this type of provision was held to be unconstitutional as it infringed on the right of the individual against self-incrimination, but this can be more a matter of legislative drafting and presentation than one of content. But the success of efforts in Hong Kong turned significantly on the creation of an offence of "living beyond one's means".

8. ***Provisions will also be needed to ensure that the crime of corruption is seen to include both the payment as well as the receipt of bribes***. A few countries only make the acceptance of bribes a crime, not their payment. This is obviously a serious limitation to combating corruption at its source. Of course, where "bribes" are not offered, but are extorted under compulsion, it would be unfair to prosecute the payer, as to do so would be to victimise him or her twice over.

***Some questions Namibia will have to ask itself***

Are the conditions in Namibia supportive for the establishment of an effective Anti-Corruption Commission? To answer this, the people of Namibia have to answer a series of other questions.

- First, is there political will? Is the Government serious in its intentions to the point where it is prepared to apply the anti-corruption laws to any of its own supporters who may step out of line, no matter who they might be?

- Second, is the rule of law in Namibia in sound shape? Are the courts held in high regard and is their independence (and that of investigators and prosecutors) respected by the Executive?

- Third, is the legislature likely to vote a budget for the new organisation which will be adequate for it to tackle its tasks effectively?

It is not for outsiders to attempt to answer these questions. Only the people of the country are in a position to make these judgments. However, whatever the answers, a Commission cannot be expected to fight the country's corruption on its own. It must have the support of every sector of the community, including the public sector. Government departments and other official agencies, including the police, should be required to provide appropriate assistance. Is this likely to be forthcoming? The following sections address particular aspects of the Anti-Corruption Bill.

**Question 1: Where should the Commission be located?**

The location of anti-corruption agencies was a key factor in Singapore and Hong Kong's highly successful onslaughts on corruption. Separateness from the public service and autonomy of operation were reflected in law and in practice.

Such a Commission can itself be used corruptly by turning it - and its formidable array of special powers - against political opponents. The introduction of any Commission must guard against this possibility.

Continuing integrity at the highest levels of government is certainly an asset but should not be assumed. The worst excesses of "grand corruption" can take place in and around the Office of the President. An Anti-Corruption Commission placed in such an office is hardly in a position to tackle superiors in the Office hierarchy unless it is supported by other accountability mechanisms.

Thus, the Commission should be responsible to the Legislature and to the courts, in much the same way as an Ombudsman. Citizens' advisory committees monitor the daily work of the Hong Kong Independent Commission Against Corruption building added public confidence into the institution.

***Position under the Bill:***
***Section 2 of the Bill provides for the office to be "independent and impartial". It reports annually on its activities to the Prime Minister, who is then required to table to report in the National Assembly within 30 days (section 16).***

**Question 2: What should the Commission's functions be?**

Best practice suggests that a Commission should have three broad functions: prevention, awareness-raising, and enforcement.

***Position under the Bill:***
***The Bill provides for all three in Section 3. It lists them in a different order, placing enforcement first. This ordering tends to give the appearance of playing down the other elements. The functions should be re-ordered, placing enforcement last, and prevention first.***

**Question 3: What should the Commission's jurisdiction be?**

The jurisdiction of anti-corruption commissions can vary. Some have very broad mandates. Others focus sharply on corruption.

***The position under the Bill:***
***The Commission's jurisdiction is limited to complaints of "corrupt practices" in Section 3(a), and these are rightly defined to include cases where it appears that a person has committed "any other offence discovered during the investigation" the matter must be referred to the Prosecutor-General for a decision on whether or not to prosecute. It is wholly appropriate to separate out the investigation and the decision to prosecute in this way, as a protection against abusive prosecutions. However, it is arguable that the Commission would cease to have any powers of investigation once it had reached a point where it appears that no "corrupt practice" (within the limited definition contained in the Bill in Section 31) has been committed. This possible loophole should be closed by specifically empowering the Commission to continue an investigation where it appears that an offence akin to a corrupt offence has been committed.***

**Question 4: Jurisdiction where allegations are against the Head of State**

Should the legislation provide for a procedure to deal with the theoretical situation of the Anti-Corruption Commission finding evidence that a President may have acted corruptly? Although the likelihood of this happening may be remote, lawmakers must look ahead to unpredictable eventualities. They must also reflect on the issue of public distrust if the President is seen as being outside the scope of the Commission's effective jurisdiction. Frequently, however, law reformers avoid facing up to the issue for fear of embarrassing the present office-holder. However honest the present incumbent may be, his proven integrity provides no safeguard whatsoever against a less worthy successor assuming office at some later date.

Of course one hopes and expects this not to happen. But one way of insuring against it happening is to institutionalise the system of checks and balances and to include the presidency within it. After all, events throughout the world have amply demonstrated the fact that the office in

greatest risk of corruption is that of the President[6], closely followed by members of his or her immediate family and others close to the Presidency. To ignore the Presidency is thus to heavily discount the effectiveness of the proposed law.

Even more significantly, a special provision will send a very important signal to the public that Government and Parliament are serious about countering corruption and that no-one is exempt from the rule of law. It has also been suggested that the public relations aspect of this provision alone warrants its inclusion.

The head of an Anti-Corruption Commission cannot generally prosecute a President while in office, as he or she is usually immune from suit or legal process under the Constitution. Impeachment proceedings will generally follow the Standing Orders of the Legislature or Parliament, with the Speaker presiding over the proceedings. This immunity gap can be closed if the anti-corruption legislation allows the head of the Anti-Corruption Commission to report the matter in full to the Speaker of Parliament where there are reasonable grounds to believe that the President has committed an offence against the Act and there is prima facie evidence of this which would be admissible in a court of law. Thereafter, it would be the responsibility of the Speaker to proceed in accordance with Standing Orders. An alternative is to provide for a Special Prosecutor, along the lines of the legislation in the United States.

***The position under the Bill:***
***The President is specifically exempted from the Bill. Section 36 states that "This Act is not applicable to the President, except to the extent that it confers a power or imposes a duty on the President." The question of whether this blanket exemption from the jurisdiction of the Commission can be reasonably justified in a democratic society will be one for the people of Namibia to determine. It certainly runs counter to international best practice and it assuredly sends out an ambiguous signal to the people of Namibia. Is the administration serious about combating corruption?***

**Question 5: How should the head of the Commission be appointed?**

A flaw in many legislative schemes involves giving presidents or other politicians too much control over the appointment and operations of an anti-corruption commission. The President is the head of the Executive and members of the Executive can also succumb to temptation. This could place the President in the impossible position of deciding whether or not to prosecute close political colleagues. For example, Tanzania's legislation provides that all reports be forwarded to the President in confidence and, as a consequence, the Tanzanian anti-corruption system has not functioned with any real effect and has completely lost public confidence.

***Position under the Bill:***
***Section 4 of the Bill provides for President to nominate both the Director and Deputy Director who are then to be confirmed by the National Assembly. I have argued above that there needs to be much broader consultation than simply within the ranks of those presently in power if the appointee is to enjoy widespread public confidence and not be seen simply as placed to protect the ruling elite. The Bill fails to make provision for such consultation although it may be that the President would act in this manner. This being so, a provision formally requiring consultation could usefully be added to the Bill.***

[6] In the past few months, the presidents of Peru, Argentina, the Philippines and Indonesia have all fallen from grace.

**Question 6: Who can be appointed as the Commission's head?**

Some countries have assumed that a judicial officer is the best person to head an anti-corruption commission. Alive to the legal niceties, to weighing and assessing evidence, and to the need to ensure respect for fundamental human rights, judges are well suited by their training to undertake this assignment. Unfortunately, in both South Africa and Kenya the constitutional courts have taken a contrary view. They have seen this as the executive intruding on the judicial power as such a post is a post in the executive and as such have deemed it to be unconstitutional. Nigeria has avoided this potential pitfall by appointing a retired Justice of the Supreme Court.

***Position under the Bill:***
***The Bill is silent on this matter. The matter of whom to appoint will have to be taken into account during the appointment process.***

**Question 7: Checks and balances in suspension or removal from office**

Removal from office should never be at the discretion of the powers that be but only in accordance with a prescribed and open procedure and only on the grounds of incompetence or misbehaviour.

***The position under the Bill:***
***The termination of tenure of the Director or the Deputy Director can be effected under Section 9. It is not simply in the power of the President or of the National Assembly to effect removal. A board must be appointed, comprising a person who either held office as judge of the Supreme Court or the High Court of Namibia or who is qualified to be so appointed, together with two other members who are "of good character and integrity". The question is whether this is adequate. It is not a sitting Judge who would chair the Board, but a retired judge or virtually any long-serving legal practitioner. The independence of mind of the chairman is therefore not assured.***

***To make matters worse, Section 9 (7) states that the President, upon receipt of the Board's recommendations, "may take such decision as the President may consider appropriate". The decision of the President requires "confirmation" by the National Assembly, presumably by a bare majority. Is this sufficient protection for an office-holder whose job inevitably involves him or her investigating people close to the seat of power? This section requires further consideration.***

**Question 8: Monitoring the assets of decision-makers**

A useful tool for the prevention of corruption is a well thought-out, strictly limited but effective system for monitoring the assets, income, liabilities and life-styles of certain public decision-makers and public service officials. In designing this system, particular attention should be paid to respecting legitimate aspects of personal privacy. Monitoring should be applied to those who hold positions where they transact with the public or are otherwise well-placed to extract bribes, for example, in the area of revenue assessment and collection and in the exercise of discretionary powers. Given that such a system should be implemented effectively, it must be decided whether the Commission should have responsibility for the random policing of the income tax returns of the officials whose incomes are being monitored.

The expectation is that such monitoring will act as a barrier to the acquisition of illicitly acquired

wealth, but at best this has not yet been proved. Creating a framework where persons are prosecuted when they make false declarations would only be really effective if they were then subject to a court ordering the forfeiture of the property which had not been declared. The real value of declarations such as these is that they can help identify actual and potential conflicts of interest.

***The position under the Bill:***
***This has not been provided for in the Bill.***

**Question 9: Possession of "unexplained wealth"**

The most effective provision in the Hong Kong legislation – and one which enabled its anti-corruption drive to succeed – was a provision which makes it an offence to be in possession of "unexplained wealth". This means that where persons under investigation are found to be in possession of assets or to be leading lifestyles which their known income could not possibly sustain, and if once these facts are established by the prosecution they do not offer credible explanations as to how they were acquired legally, they are guilty of an offence.

The prosecution does not have to show that the person under investigation obtained them from any particular person or in any particular way. It does not have to show a connection between a favour sought and a favour given. It is sufficient to establish that officials are sitting on a pile of assets they could not, beyond all reasonable doubt, have acquired lawfully. Does such a requirement that an individual in possession of unexplained wealth be required to give an explanation infringe the right of an accused to be presumed innocent until proven guilty? One superior court which examined these types of provisions observed:

> "Before the prosecution can rely on the presumption that pecuniary resources or property were in the accused's control, it has of course to prove beyond reasonable doubt the facts which give rise to it. The presumption must receive a restrictive construction, so that those facts must make it more likely than not that the pecuniary resources or property were held … on behalf of the accused or were acquired as a gift from him. And construed restrictively in that way, the presumption is consistent with the accused's fundamental right, being a measured response to devices by which the unscrupulous could all too easily make a mockery of the offences.[7]"

Only when it has been shown that the accused's wealth could not reasonably have come from his or her official salary would the accused have to provide an explanation.

Once there is sufficient evidence of guilt upon which to convict, it becomes appropriate (and is what in fact happens in courts around the world every day) for the accused to provide a credible explanation, without which he or she is likely to be convicted. This is not a question of "reversing the onus of proof" but of what lawyers call the "evidential burden shifting to the defence". The "burden of proof" remains on the prosecution throughout; there is no presumption of guilt. It is once the prosecutor has discharged this burden that it falls to the defence to give an explanation. Thus the expression "reversing the burden of proof" is misleading and unsatisfactory, and the need for a more appropriate description remains a challenge to the reformers' vocabulary. A better formulation would be that "a defendant owes a credible explanation".

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7 *Attorney-General v. Hui Kin Hong, Hong Kong Court of Appeal, No. 52 of 1995, at p. 16.*

In Section 26 the Bill contains a power to demand a statement of assets and an explanation as to their acquisition. It thus takes the first step in the right direction. Sadly, it does not take the second, and most vital one.

***Position under the Bill:***
***Without a stronger provision for such "unexplained wealth" modeled on the Hong Kong law (which has passed careful judicial scrutiny for its constitutionality), the new law will have a much reduced impact.***

**Question 10: Are the provisions for freezing assets, seizing travel documents, and professional privilege adequate?**

It is important that the Commission has the power to freeze those assets which it reasonably suspects may be held on behalf of people under investigation. It should be able to do so prior to getting a court order when speed is of the essence. Without this power, bankers could simply transfer money electronically in a matter of minutes. There should also be a corresponding right of application to the Court where a third party feels aggrieved.

It is also usual for a Commission to have the power to seize and impound travel documents to prevent a person from fleeing the country, particularly as its power of arrest arises only when there is reasonable cause to believe that an offence has been committed. If a suspect is under investigation and the Head of the Commission believes that he may flee the country, the Commission should be able to stop him, again without waiting for a court order.

Legislation should also ensure that legal practitioners, accountants and auditors can all be required to disclose certain information about their clients' affairs notwithstanding professional privilege. There are frequent instances of lawyers and accountants "closing their eyes" as to the origins of the funds they handle.

***The position under the Bill:***
***There are no specific powers authoring the Commission either to obtain court orders to freeze account or to impound travel documents. Still less is there any power to act in emergencies and serve appropriate orders on concerned individuals and institutions. If reliance is made on other empowering legislation, a check would have to be made to ensure that these are adequate. The Bill does not touch the question of "client confidentiality", leaving the existing law intact in this regard.***

**Question 11: Does the Commission have adequate access to bank records and tax information?**

The Commission will need timely access to bank records of all description. Any tax secrecy provisions should not prevail against the exercise of investigative powers, but views may differ as to whether the authorisation to inspect them should come from a court order or simply be given to an investigator by the head of the Commission. If others are to have responsibility for the monitoring processes, the Commission must still be afforded timely access to the disclosures.

***The position under the Bill:***
***The Commission has immediate access to bank accounts under Section 27. The position of tax returns has not been dealt with in the Bill. One imagines that tax returns are confidential under income tax legislation, and if they are the question of whether the***

***Commission would otherwise be barred from having access to tax returns would need to be examined.***

**Question 12: Is there adequate protection for whistleblowers?**

It is important for complainants to be able to deal with the Commission confident that the law will protect them against reprisals.

***The position under the Bill:***
***The protection of informers and whistleblowers is provided by Section 34. Their names can only be disclosed in court proceedings under Section 34 (2) in exceptional circumstances where deliberately false allegations have been made or where justice cannot be done as between the parties without disclosure – and then only with the leave of the court. Under Section 34 (3), informants are protected from disciplinary actions or civil or criminal proceedings where they have assisted the Commission except where he or she knew or believed an allegation to be false or did not believe it to be true. These provisions are appropriate, but consideration should be given as to whether a right to damages should be given to complainants or informants where their employers and others take reprisals against them.***

**Question 13: Anonymous complaints and reports in newspapers**

Some anti-corruption commissions around the world are effectively hamstrung by a requirement that any complaint made to them must be made in writing and the identity of the complainant disclosed. While this acts as a brake on malicious complaints, it also operates as a severe handicap. It means that whistleblowers cannot draw attention to illegalities without exposing themselves to reprisals. As such it makes it far less likely that people within organisations will complain about acts of corruption, as these tend to be carried out by their superiors and thus reporting them could be hazardous for the careers or their persons or both.

A second question is whether the Commission is entitled to act on the basis of newspaper reports. Some are effectively barred from doing this, as a formal written complaint is required. Others can act on their own initiative. The better practice is for a Commission to have the power to conduct an investigation howsoever facts worthy of investigation come to its knowledge. Indeed, it is bizarre for a Commission to be powerless to start an investigation at a time when the whole community may be being informed by their media that corrupt acts have taken place.

A third question is whether there is any "feedback" to those who do complain.

***The position under the Bill:***
***The Commission is empowered to initiate an allegation of corrupt practice of its own motion as well as on information supplied to it by a complainant. This means that it would be empowered to accept anonymous complaints if it treated them as "allegations" under Section 20, and not as "complaints" under Section 17 which are required to be in writing signed by the informant. However, complaints under Section 17 "must" be received and examined (Section 18) and the Commission "must" inform the complainant of the outcome (Section 19). It would be helpful to clarify the position and state that the Commission "may" (rather than "must") act on anonymous complaints. Without this, the Commission may hesitate to do so.***

**Question 14: Is there scope for empowering civil society and individuals to assist the state?**

An approach now being examined in several countries around the world is that of the "qui tam" action. Its roots lie in mediaeval England as early as 1424 where someone who uncovered evidence of illegal conduct was rewarded with a share of the penalties paid by the wrongdoer. Early in its own life, the US Congress imported the notion into almost all of the first 14 American statutes which imposed penalties. The present-day US False Claims Act had its origins in the American Civil War, where the large-scale fraud of government contractors cheated the Union out of resources it could ill afford to lose. Congress and the President sought to enlist the support of private individuals in the struggle to root out fraud and swell the state's coffers. Quite simply, the Government had neither the time nor the resources to address the issue effectively, and by empowering members of the public to act in its name and share in the proceeds recovered they increased the risk factor, unlocked private enthusiasm and, ultimately, recovered billions of dollars which would otherwise have been lost to the State. This would seem to be an attractive position to governments who find themselves in the same position today. The approach has been strengthened over the years, and in 1986 Congress described it as the Government's "primary litigative tool for combating fraud." Similar provisions also apply in other federal statutes, such as the area of patent infringement.

The US False Claims Act creates a civil liability where false transactions have taken place (which capture deliberate ignorance and reckless disregard of truth or falsity as well as actual knowledge), and there is no requirement of a specific intent to defraud. As the court actions are civil in nature – not criminal – the facts do not have to be established "beyond reasonable doubt" but to the slightly lower standard applicable in civil cases. Defendants face a minimum penalty of US$5,000 for every separate false claim, plus three times the amount of damage caused to the Government by the defendant's acts.

"Qui tam" actions can be started by individuals who do not have to wait for the Government to take action and there are protections for whistleblowers to safeguard them against reprisals. The Government is served with copies of the proceedings and has 60 days in which to decide whether the Department of Justice should intervene and take over primary responsibility for conducting the action. Even where it does, the original claimant has a right to remain as a party to the action, so it cannot be settled without the originator being heard on the issue. At the end of the day a successful private claimant receives either 10 per cent of the sum recovered (where the government takes the action over), or 25 per cent (where it has not).

There are safeguards against frivolous claims. The Government can intervene and settle the claim, or else can ask the court to strike it out. The court can also restrict the originator's part in the litigation where unrestricted participation would be for the purposes of harassment. And where the claim fails because the claim was frivolous or vexatious, the court may award reasonable legal fees and expenses against the claimant. Some claimants have received million-dollar awards, and the resulting publicity may encourage others to come forward.

***The position under the Bill:***
***No such provision has been made.***

**Question 15: Is the Commission itself sufficiently accountable?**

Special care must be taken in appointment procedures and in guaranteeing the security of tenure

for those at the top levels of the Commission to ensure that only those enjoying wide public confidence hold these positions. More than this, particular attention has to be paid to monitoring the performance of officers at all levels within the Commission. However, just as an Anti-Corruption Commission can be susceptible to those at the highest levels of government, it can also be misused as a weapon with which to persecute political opponents. Even where the independence of the office is respected and a Commission is able to operate freely, it occupies extremely difficult terrain.

Consideration has to be given as to how a powerful and independent anti-corruption body can itself be made accountable and corruption within the organisation minimised. One approach which has worked well in Hong Kong is to establish oversight committees on all aspects of the ICAC's work with participation from outside the Commission, including civil society and the private sector. A file cannot be closed or an investigation discontinued before one of these committees has been informed and has given its advice.

***The position under the Bill:***
***The Commission reports to the Prime Minister who then tables the report in Parliament and its head and deputy can be removed for cause but possibly at the discretion of the President. The Commission is accountable to the courts for the ways in which it exercises its powers, as is any other entity within Namibia. There are no special oversight provisions.***

**Question 16: Does the Bill respect fundamental human rights?**

It is axiomatic that any special powers be constitutional and have regard to fundamental rights and freedoms.

***The position under the Bill:***
***The Bill has paid special attention to fundamental human rights. When a person is questioned under compulsion, self-incriminating answers cannot be used against him or her in criminal proceedings (other than for perjury or knowingly supplying false information). The execution of warrants is restricted to between the hours of 6 a.m. and 6 p.m. other than in cases of emergency. Warrants are generally required, and lapse after one month. Officers executing warrants must have regard to decency and order, and have regard to each person's right to dignity, freedom, security and privacy. A search of a person may only be carried out by a person of the same gender. Officers must inform those on premises being searched of their rights to legal assistance, and to allow that right to be exercised.***

For readers interested in finding out more about corruption, please refer to the Transparency International website on **www.transparency.org**, the USAID website on **www.usaid.gov/democracy/anticorruption** and the article *"Almost All the Ingredients for Trouble Ahead: The Economics of Corruption and the Implications for Namibia"* on the IPPR website **www.ippr.org.na/publications**. Namibia's Anti-Corruption Bill can be downloaded from the Parliamentary website on www.parliament.gov.na/parliament/billsandacts/.

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