



## TOWARDS A NATIONAL INTEGRITY SYSTEM

### Assessing the appropriateness and effectiveness of anti-corruption and related legislation in Namibia

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#### Key aspects of this paper

The Namibian anti-corruption armoury, which on the surface appears to be relatively well stocked and organised, at closer inspection reveals itself to be haphazard and lacking in key areas.

In this regard, the anti-corruption environment – law and practice – is not what it should be. The country is not only struggling to keep up with the continually evolving nature of corruption, but also international regulatory trends.

Considering this, the following recommendations are made:

- 1) Each Ministry, State Agency, Regional and Local Authority and State-owned Enterprise should be compelled to (in consultation with and on advice from the ACC) submit to Parliament annually an anti-corruption plan to be implemented and the following year report on its achievements in this regard. This would strengthen and give effect to Article 94A (1) of the Constitution, which states: “The State shall put in place administrative and legislative measures necessary to prevent and combat corruption.” This would also comply with the mandate of the ACC in terms of section 3(f) of the Anti-Corruption Act;
- 2) Whistle-blower/witness protection legislation should be implemented within a set and preferably short, time frame;
- 3) Senior officials (CEOs and senior management of State-owned Enterprises, Permanent Secretaries, Under-Secretaries, Directors and Deputy Directors of Ministries) should disclose outside business interests annually.
- 4) Senior officials (CEOs and senior management of State-owned Enterprises, Permanent Secretaries, Under-Secretaries, Directors and Deputy Directors of Ministries) should disclose gifts received from the private sector and foreign businesses annually.
- 5) With regard to points 3) and 4), a list of such outside interests and gifts be provided to the ACC as a matter of course, beyond complying with such disclosure requirements as such senior officials might have to fulfil;
- 6) Each Ministry, State Agency, Regional and Local Authority and State-owned Enterprise should annually publish a list of tenders awarded for goods and services. This should be submitted to the ACC for publication on its website.
- 7) The roles and responsibilities of the Auditor-General, Prosecutor-General and the ACC should be clarified and areas of co-operation should be detailed in annual and strategic plans.
- 8) The ACC’s co-operation with the Bank of Namibia similarly be clarified.
- 9) Access to information legislation should be prioritised and passed as soon as possible.
- 10) The ACC should have clear criteria for the referral of complaints and / or investigations to other authorities for investigation.
- 11) The reports of previous Presidential Commissions of Enquiry should be made publicly available.
- 12) The ACC together with the Receiver of Revenue should be empowered to undertake life-style audits, where it is clear that private persons and public figures are living beyond their means/reported incomes.

## How corrupt is Namibia?

If one is to look at Namibia's ranking on Transparency International's (TI) Corruption Perceptions Index (CPI)<sup>1</sup>, then at first glance it would appear as if Namibia isn't doing too badly. At present, according to the 2010 CPI, Namibia still ranks amongst the top third on the list of 178 countries surveyed for the 2010 CPI, coming in at 56<sup>th</sup> globally and a very respectable 6<sup>th</sup> out of 47 countries on the continent. However, a closer look at the CPI rankings reveals somewhat of a different picture. Since 2006 Namibia has been bobbing up and down the list with scores in the range of 4.1 to 4.5 with this bobbing trend tending more and more downward over the last few years. In fact, with its current score of 4.4<sup>2</sup>, the country continues to be aggregated amongst those countries considered highly corrupt.

The most recent Afrobarometer<sup>3</sup> survey suggests that government as a whole is tainted by the suspicion of widespread and endemic corruption.

In all, half of the 1,200 respondents countrywide for the 2008 Afrobarometer survey were of the opinion that all or most national government officials were corrupt. Compounding this worrying picture are suspicions of high levels of corruption within the law enforcement sector and amongst tax officials. Some 42 percent of respondents believed most or all police officials were corrupt and 38 percent believed most or all tax officials were corrupt.

In this context, perhaps the Bertelsmann Transformation Index (BTI) 2010<sup>4</sup> report appropriately sums up the corruption situation in Namibia at this point in time. The BTI 2010 states of Namibia: "In everyday life, corruption does not play a very significant role. Compared to other African countries, one can say that petty corruption is not as widespread. However, grand corruption cases are imposing serious threats to Namibia's small economy. It is also suggested that nepotism and favouritism are widespread but mostly go unproven and thus under-reported".

Without going into any further detail, it can thus probably be safely concluded that corruption, whatever the levels might be, is a very real concern for and within the still largely emerging Namibian democratic state and society, the danger and widespread fear, as expressed by Afrobarometer respondents, being that corruption, if it has not yet, could become ever more entrenched and pervasive and could derail the young country's potential future.

Against this backdrop then, the question necessarily becomes what the state is doing and has done to turn the tide against substantial graft? What measures and mechanisms of a legislative

and institutional nature have been introduced and implemented to uncover and punish acts of corruption wherever they might occur?

## Anti-corruption legislation in Namibia

Namibia is a constitutional democracy, meaning that the Constitution is the supreme law of the land and all branches of government and inhabitants are subject to the Constitution and the law.

The Constitution was adopted in 1990 and intrinsically encapsulates the principles of natural justice, rule of law, democracy and the concept of separation of powers.

The Constitution<sup>5</sup> established the Ombudsman and vested the office with the function and duty to investigate, amongst others, complaints concerning alleged or apparent instances of corruption or conduct by any official which could be regarded as unlawful, oppressive or unfair in a democratic society.

The Constitution was amended in 2010<sup>6</sup> to incorporate anti-corruption measures that oblige the state to "put in place administrative and legislative measures necessary to prevent and combat corruption"<sup>7</sup>.

The constitutional amendment also removes the power to investigate corruption from the functions of the Ombudsman and brought the Anti-Corruption Commission (ACC), which was established in terms of Section 2 of the Anti-Corruption Act of 2003<sup>8</sup>, under the ambit of the constitution. The ACC thus became a constitutionally enshrined institution in 2010.

Additionally, Namibia has ratified several regional, continental and international anti-corruption instruments, namely:

- the Southern African Development Community (SADC) Protocol against Corruption<sup>9</sup>;
- African Union (AU) Convention on Prevention and Combating Corruption<sup>10</sup>;
- United Nations (UN) Convention against Transnational Organised Crime<sup>11</sup>; and,
- the United Nations (UN) Convention against Corruption<sup>12</sup>.

5 Articles 89 and 91

6 Namibian Constitution Second Amendment Act, 2010 (Act No. 7 of 2010)

7 Article 94A

8 Act No. 8 of 2003

9 Namibia signed the Protocol on 14 August 2001 and it was ratified by Parliament on 27 April 2004.

10 Namibia signed the Convention on 09 December 2003 and it was ratified by Parliament on 28 April 2004.

11 Namibia signed the Convention on 13 December 2000 and it was ratified by Parliament on 16 August 2002.

12 Namibia signed the Convention on 09 December 2003 and it was ratified by Parliament on 28 April 2004

1 Corruption Perceptions Index 2010 at [www.transparency.org](http://www.transparency.org).

2 Countries are scored on a scale from 10 (very clean) to 0 (highly corrupt).

3 Afrobarometer Perceptions of Corruption in Namibia 2008 at [www.ippr.org.na](http://www.ippr.org.na).

4 BTI 2010 Namibia Country Report at [www.bertelsmann-transformation-index.de](http://www.bertelsmann-transformation-index.de).

Accordingly, the country is internationally obliged to fight corruption and money laundering domestically and to cooperate internationally in the fight against corruption and money laundering.

## The legislative vanguard

Especially over the last decade Namibia has adopted several pieces of legislation to combat corruption and give effect to its international treaty obligations.

These recent legislative initiatives constitute the sharp-end of the country's graft-fighting attempts and consist of the Anti-Corruption Act (2003), the Prevention of Organised Crime Act (2004) and the Financial Intelligence Act (2007).

While these laws are the primary weapons in the anti-corruption fight, they are complemented and supported by existing laws within the anti-corruption and money laundering framework, such as the Criminal Procedures Act (1977)<sup>13</sup>; Banking Institutions Act (1998)<sup>14</sup>; Bank of Namibia Act (1997)<sup>15</sup>; Prevention of Counterfeiting of Currency Act (1965)<sup>16</sup>; International Cooperation in Criminal Matters Act (2000)<sup>17</sup>; Customs and Excise Act (1998)<sup>18</sup>; and, the Namibia Financial Institutions Supervisory Authority Act (2001)<sup>19</sup>.

As can be seen, Namibia has made great strides in the adoption of explicit and focused anti-corruption legislation since 2000. However, there appear to be some loopholes in the enforcement of a general anti-corruption legislative framework

because overlapping of roles and functions between the Anti-Corruption Commission, the Namibian Police and the Office of the Prosecutor General. The fact that the Director of the Anti-Corruption Commission has discretionary power to refer allegations and complaints to other authorities for investigative consideration creates the impression that cases are not dealt with in the same manner, thus seemingly undermining the integrity of the anti-corruption effort.

In this regard, the Director of the ACC has pointed out that Namibia for instance lacks legislation addressing the issue of disclosure of assets by public officials involved in tender allocation and public procurement. He indicated that this not only hampers investigations, and the reporting of corrupt practices, but it might also entice officials to engage in corrupt activities<sup>20</sup>.

## 1. Anti-Corruption Act (2003)

The Anti-Corruption Act (2003) is the main piece of legislation dealing with the prevention and combating of corruption in Namibia. The Act was passed by Parliament in 2003 after exhaustive public consultations commencing in 1996. Then President Sam Nujoma signed the Act into law on July 16 2003. However, the Act only entered into force in 2006 and the ACC was launched on February 1 2006.

The Prevention of Corruption Ordinance (No. 2 of 1928), as amended by the Prevention of Corruption Amendment Act (No. 21 of 1985), was the forerunner to the current Anti-Corruption Act.

As stated, the primary function of the Anti-Corruption Act is the establishment of the Anti-Corruption Commission.

### 1.1 Anti-Corruption Commission

The Anti-Corruption Commission (ACC) is an independent and impartial body that consists of a Director, a Deputy Director and other staff. The term of office of the Director and Deputy Director is limited to five years. The National Assembly appoints the Director and Deputy Director upon nomination by the President<sup>21</sup>.

The Act provides for the powers and functions of the Commission to:

- Receive, initiate and investigate allegations of corruption;
- Decide whether an allegation should be investigated and whether the investigation should be conducted by the Commission or another authority;
- Consult, cooperate and exchange information with other bodies or authorities that investigate corrupt practices;
- Gather evidence and investigating corrupt practices;

13 Act No. 51 of 1977 the Act provides for the procedures regarding the prosecution of all criminal activities. A major overhaul of the Act, the Criminal Procedure Act, Act No. 25 of 2004, was adopted by Parliament and signed by the President on 09 December 2004.

14 Act No. 2 of 1998. The Act provides for the regulation of banking institutions; prohibits unauthorised persons from conducting a banking business and imposes obligations to report certain transactions.

15 Act No. 13 of 1997. The Act establishes the Bank of Namibia, as the State's principal instrument to control money supply, currency and financial institutions.

16 Act No. 16 of 1965. The Act deals with offences related to the counterfeiting of notes and coins. It includes the performance of any part of the process of counterfeiting, forgery, uttering, illegal importation and exportation of counterfeit coins and notes; the possession of counterfeit tools and equipment; and fraudulent conduct related to counterfeit currency. The Act also provides for extraditable currency offences in certain circumstances.

17 Act No. 9 of 2000. The Act provides a mechanism to facilitate the provision of evidence and enforcement of sentences from foreign jurisdictions. It also provides for the confiscation and transfer of proceeds of crime between Namibia and other countries.

18 Act No. 20 of 1998. The Act contains a number of provisions which can be used to combat transnational organised crime. Provision is made to deal with incidents of smuggling under section 14. Persons entering or leaving Namibia are required to declare unreservedly at the time of entry, all goods in their possession which were purchased or acquired outside Namibia, or were remodelled or repaired outside Namibia or which are prohibited, restricted or controlled under any law. On departure, all goods being exported must also be declared.

19 Act No. 3 of 2001. The Act provides for the establishment of the Namibia Financial Institutions Supervisory Authority and its powers to regulate the conduct financial institutions.

20 Paulus Noa, Director of the Anti-Corruption Commission, in his Keynote Address delivered at the Anti-Corruption Conference organised by the Institute for Public Policy Research, September 2010

21 Article 94A (5)

- Make referrals to the Prosecutor General in instances where there is evidence of a corrupt practice;
- Take measures to prevent corrupt practices in public and private bodies;
- Conduct public education on combating corrupt practices.

## 1.2 The investigation of corrupt practices

The Commission may receive information on any suspected matter of corruption from any person. Such information can be given in writing, but can also be given verbally, provided that it is reduced to writing and signed by the informant. The Commission might request further information from an informant, if necessary.

The Commission is required to inform a person who has made an allegation in writing whether an investigation is or is not justified or whether the matter has been referred to another appropriate authority for further action. The Commission may also initiate an investigation on its own accord.

A person questioned by an authorised officer during an investigation is obliged to answer each question truthfully, but does not have to answer any question if the answer is self-incriminating. The person has to be informed of his/her legal rights before questioning. During an investigation, the Director may require any person who is believed to have any information or evidence that relates to the investigation to be questioned or to deliver such evidence.

No self-incriminating statement can be used against a person during criminal proceedings, except in the case of perjury or offences against the Commission. An offence is committed against the Commission when a person in any way obstructs or sabotages an investigation or treats an authorised officer with disrespect or uses violence or the threat of violence against the authorised officer.

The Commission has search and seizure powers. An authorised officer has the power to enter any premises and begin his/her investigation, and is allowed to take anything that s/he believes is needed for the investigation. However, the officer is only allowed to enter with a warrant issued by a judge of the High Court or by a magistrate in whose area of authority the building or premises is situated.

The only time an authorised officer is allowed to enter and search premises except private homes without a warrant is if s/he has permission from the owner or the person who controls the premises, or if the officer believes that a warrant would be issued if applied for and the officer reasonably believes that a delay in obtaining a warrant could cause the investigation to fail.

The Director might require any suspected person to give a written declaration of all his/her assets both within and outside Namibia. S/he might have to give details of all business transactions and other agreements, or of all the people involved in the

alleged corrupt practices. The Commission also has the authority to access any account at any bank, building society or other financial institution in an investigation.

An authorised officer is permitted to arrest, without a warrant, any person who s/he reasonably suspects has committed or is about to commit an offence.

The powers of the Commission were dealt a potential blow in the recent case of the *State versus Simon Gaobab and Abraham George*.<sup>22</sup> In this matter the accused, two employees of the National Assembly, allegedly hired vehicles from a car rental company for private purposes, but requested payment from the National Assembly. They were charged with three counts of corruption in terms of section 43(1), read with sections 32, 43(2), 43(3), 46 and 49 of the Anti-Corruption Act. The court held that a narrow interpretation should be given to provisions of Section 43 of the Act.

In terms of the strict interpretation the court found that the state needed to prove that gratification was obtained from another person, i.e. that the public officer who allows himself to be corrupted was required to be corrupted by a corrupter. The evidence did not support the commission of the offence since there was no corrupter. The accused were found not guilty and were discharged in terms of Section 174 of the Criminal Procedure Act (1977). The state has however appealed the judgement and the matter will now be heard by the Supreme Court of Namibia<sup>23</sup>.

## 1.3 Protection of informers and information

A witness during an investigation does not have to identify an informer or give any information about that person that would result in the person being identified. The only exception to this is when it becomes clear that justice cannot be done without revealing the informer's identity or if the informer has lied.

In these instances, the court might continue with the proceedings *in camera*. The court might also prohibit the release of any information that could lead to the public knowing who the informer was. An informer or any person who assisted the ACC in an investigation is also protected from disciplinary, civil and criminal proceedings.

The Director of the ACC has pointed out that the present protection afforded to informants in terms of the Act is not sufficient and there is a need for more comprehensive legislative provisions to encourage greater disclosure of corrupt practices and the confidentiality and safety of informers<sup>24</sup>.

<sup>22</sup> Case No. CC44/2008 (unreported judgement of the High Court of Namibia delivered by Justice Tommasi on 09 August 2010.)

<sup>23</sup> Werner Menges, *The Namibian*, 22 March 2011 'Goabab trial on hold for at least 6 months'

<sup>24</sup> Paulus Noa, Director of the Anti-Corruption Commission, in his Keynote Address delivered at the Anti-Corruption Conference organised by the Institute for Public Policy Research, 2010

## 2. The Prevention of Organised Crime Act (2004)

The Prevention of Organised Crime Act (2004) was passed by Parliament in 2004 and signed by the President on December 19 2004. The Act only became operational on May 5 2009. The regulations of the Act were also published in the Government Gazette on May 5 2009<sup>25</sup>.

The Act falls under the auspices of the Minister of Justice. The Act provides for combating of organised crime, money laundering, racketeering, smuggling of migrants, trafficking in persons and criminal gang activities in Namibia and elsewhere. And most notably, it also provides for the forfeiture of assets used to commit offences or assets that are the proceeds of unlawful activities.

The definition of proceeds of unlawful activities is very broad and has been defined to mean:

“Any property or service, advantage, benefit or reward that was derived, received or retained, directly or indirectly in Namibia or elsewhere, at any time before or after the commencement of the Act in connection with or as a result of any unlawful activity, carried on by any person ...”

The High Court may also restrain any person from dealing with any property that is subject to a restraint order. After conviction and sentence of an offender, the court may issue a confiscation order against any benefit, which the defendant might have obtained from a criminal activity, in favour of the state.

## 3. The Financial Intelligence Act (2007)

Financial Intelligence Act was adopted by Parliament in 2007 and signed by the President on July 5 2007. The Act and its regulation commenced on May 5 2009. The main purpose of the Act is to combat money laundering by imposing a duty on accountable institutions to report certain transactions to the Bank of Namibia (BoN).

The Act falls under the auspices of the Ministry of Finance. In line with Namibia’s obligations under the United Nations Convention against Transnational Organised Crime, it has established a Financial Intelligence Unit that serves as a national centre for the collection, analysis and dissemination of information regarding potential instances of money laundering.

The Act empowers the Bank of Namibia with amongst others:

- Measures for the combating of money laundering by the government;
- To establishment the Anti-Money Laundering Advisory Council;
- To collect, assess and analyse financial intelligence data that may lead or relate to money laundering;

- Imposing certain reporting and compliance duties on banks, non-banking financial institutions and designated non-banking financial businesses and professions that may be used for money laundering; and
- Providing for other incidental matters dealing with money laundering.

The Bank of Namibia established the Financial Intelligence Centre in 2009, which acts as the anti- money laundering regulator. It is a specialist financial intelligence unit which performs the duty of a central, national agency responsible for:

- Receiving and analysing suspicious financial transaction reports pertaining to suspected proceeds of crime, and disseminating financial intelligence to law enforcement agencies; and
- Enforcing compliance by accountable institutions and supervisory bodies with the provisions of the Financial Intelligence Act of 2007.

## 4. Authority to prosecute offenders

The prosecutorial power vests in the Prosecutor-General of Namibia, which is constitutionally established in terms of Article 88 of the Namibian Constitution<sup>26</sup>. The Prosecutor-General is appointed by the President on recommendation of the Judicial Service Commission.

The question of the independence of the Prosecutor-General was addressed in the case of *Ex Parte: Attorney-General, Namibia. In re: The Constitutional relationship between Attorney-General and the Prosecutor General*.<sup>27</sup> Article 87(a) of the Constitution states that the Attorney-General exercises final responsibility for the office of the Prosecutor-General. It is because of this provision that, in August 1993, the Attorney-General instructed the Prosecutor-General to withdraw the prosecution in a certain matter. The Prosecutor-General refused to follow this instruction and the Attorney-General successfully applied for a postponement of the trial in order to seek an interpretation of the relationship between the two offices from the Supreme Court.

The Supreme Court held that the Attorney-General’s appointment was a political one and that his/her functions were executive in nature. It also held that the Prosecutor General, on the

26 In terms of Article 88(2) of the Constitution, the Prosecutor-General has powers-

- a To prosecute, subject to the provisions of this Constitution, in the name of the Republic of Namibia in criminal proceedings;
- b to prosecute and defend appeals in criminal proceedings on the High Court and the Supreme Court;
- c to perform all functions relating to the exercise of such powers;
- d to delegate to other officials, subject to his or her control or direction, authority to conduct criminal proceedings in any court;
- e to perform all such other functions as may be assigned to him/her in terms of any other law.

27 1998 NR 282 (SC)

other hand, was not a political appointee and exercised a quasi-judicial function. The court further held that the fundamental rights and freedoms would not be protected if a political appointee were allowed to dictate which prosecution were initiated or terminated, or how they should be conducted. This decision cemented the fact that the Prosecutor-General was independent and not subject to the supervision or direction by any body or organ of state, but is only subjected to the Constitution.

## 5. Criminal Procedures Act (No. 51 of 1977)

The constitutional powers and legitimacy of the Prosecutor-General is complemented by the Criminal Procedures Act. Section 2 (1) of the Act gives the Prosecutor-General the prerogative to institute criminal proceedings with regard to offences that fall under the jurisdiction of the Namibian courts. All such proceedings are to be instituted on behalf of the Namibian people and in the name of the state, save for private prosecutions<sup>28</sup>. The Act sets out the powers of the Prosecutor-General to withdraw charges before the accused has pleaded and to stop proceedings thereafter. A prosecution can only be stopped with the written consent of the Prosecutor-General. The Act further deals with the powers of the police to arrest, search and seize property and persons, the granting of bail to suspects and accused persons and generally the conduct of criminal proceedings.

The Criminal Procedures Act, 2004 (Act No. 25 of 2004), which is not implemented yet, repeals the 1977 Act.

The constitutionality of sections 245 and 332 (5) of the Criminal Procedures Act is currently being challenged by three of the accused in the Avid/SSC corruption case and has been transferred to the Supreme Court by the Prosecutor-General<sup>29</sup>.

In the Avid case, five persons, Ralph Blaauw (former Member of Parliament), his wife Sharon Blaauw (a legal practitioner), Otniel Podewiltz (former prosecutor and senior official in the Ministry of Labour), Paulus Kapia (MP and former Deputy Minister of Works, Transport and Communication) and Mathias Shiweda (retired Namibian Defence Force Brigadier) face several fraud and corruption charges. The charges relate to the alleged fraudulent and irregular investment of approximately N\$30 million of the Social Security Commission in a company called Avid Investment Corporation in 2005.

Section 245 of the Act provides that a person making a false statement in a criminal case is deemed to have known that the representation was false, once the state has proved that a misrepresentation has been made.

Section 332(5) provides that when an offence was committed by a corporate entity, any director shall be guilty of the offence unless he/she can prove that he/she did not take part in the commission of the offence and that he could not have prevented it. These sections place a reverse burden of proof on the accused and that is why they are challenging it, because the burden should be on the state to prove beyond reasonable doubt that the alleged offences were committed by the accused. The Avid case is one of the major high-profile corruption cases since independence, but has been dragging on since 2005. This case clearly demonstrates the lack of capacity to deal with high profile corruption cases.

## 6. The Banking Institutions Act (Act No. 2 of 1998)

This Act has several provisions that are useful in the detection and tracing of the proceeds of crime and helps to establish an audit trail in the event of criminal investigations.

The Act makes provision for the authorisation of persons to conduct business as a banking institution; the control, supervision and regulation of banking institutions; and the protection of the interests of depositors. In terms of the Act the Bank of Namibia has powers to grant banking licences and to investigate instances of illegal banking activities. In the exercise of such powers, the Bank can question persons including auditors, directors, members and partners, compel the production of books and documents, examine such documents and books and call for explanations, and order banking institutions to freeze accounts and retention of money pending further instructions. The Bank also has the power to suspend operations or, in the event of conviction under the Act for illegal banking activity, to close down the banking institution.

The Bank may also call upon the police for assistance in the enforcement of its powers, and has wide powers to enter, search and seize evidence. Banking institutions are also authorised to disclose information to a police officer investigating an offence under a law. The disclosure of such information is limited to the affairs or account of the customer who is a suspect in the investigation.

To protect the integrity of the financial sector, the Bank has the power to inquire into the integrity of any person seeking to acquire or control a banking institution. The Bank will only approve if it is satisfied that the person is fit and proper. The Bank can also prohibit a person from acquiring or exercising control by written notice if the individual concerned is not a fit and proper person in its opinion. The Bank also has the power to examine the financial affairs of any banking institution to ascertain the liquidity and viability of its operations.

The Bank has the power to require banking institutions to report to it or any person or authority specified by it any sus-

<sup>28</sup> As provided for in section 13(1) of the Act. The Prosecutor-General has the power to take over private prosecution and continue with the prosecution thereof.

<sup>29</sup> Werner Menges, *The Namibian*, 4 August 2009 'Criminal Procedure Act challenge could head to Supreme Court'

picious financial transaction that may indicate that the person involved in the transaction may be engaged in an illegal activity. Banking institutions are also required to obtain and maintain personal details of their customers.

## **7. Bank of Namibia Act (No. 15 of 1997)**

The Act establishes the Bank of Namibia (BoN) as the central bank of Namibia to serve as the state's principal instrument to control money supply, currency and institutions of finance.

The objectives of the BoN are to:

- (a) promote and maintain a sound monetary, credit and financial system in Namibia and sustain the liquidity, solvency and functioning of that system;
- (b) promote and maintain internal and external monetary stability and an efficient payments mechanism;
- (c) foster monetary, credit and financial conditions conducive to the orderly, balanced and sustained economic development of Namibia;
- (d) serve as the Government's banker, financial advisor and fiscal agent; and
- (e) assist in the attainment of national economic goals.

The BoN plays a pivotal role in the supervision of banking institutions under the Banking Institutions Act and the prevention and combating of money laundering in terms of the Financial Intelligence Act.

## **8. The Prevention of Counterfeiting of Currency Act (No. 16 of 1965)**

The Act deals with offences related to the counterfeiting of currency notes and coins. It includes the performance of any part of the process of counterfeiting, forgery, uttering, illegal importation and exportation of counterfeit coins and notes; the possession of counterfeit tools and equipment; and fraudulent conduct related to counterfeit currency. Severe prison terms are stipulated. There is no provision for fines.

## **9. International Co-operation in Criminal Matters Act (No. 9 of 2000)**

This Act deals with three main issues, namely, mutual provision of evidence; mutual execution of sentences and compensatory orders; and confiscation and transfer of the proceeds of crime between Namibia and foreign states. All requests by Namibia in connection with any of these matters are initiated through the issue of letters of request. The Court has a discretion when an application is made to issue a letter of request seeking the assistance of a foreign state in obtaining evidence for use at the proceedings, if it appears to the court that the examination of a person who is in a foreign

state is necessary in the interests of justice or if the attendance of the witness concerned cannot be obtained without undue delay, expense or inconvenience.

An application is made to a judge or magistrate for a letter of request to be issued for the purpose of a criminal investigation. In this case, the judge or magistrate has to be satisfied that there are reasonable grounds for believing that an offence has been committed in Namibia or that it is necessary for the purpose of determining whether an offence has been committed; a criminal investigation is in progress in Namibia and for the purpose of the investigation, it is necessary and in the interests of justice that information must be obtained from a person or authority in a foreign state.

Evidence obtained by way of a letter of request is deemed to be evidence under oath if it appears that the witness was warned to tell the truth, in accordance with the laws of the foreign state. Such evidence is admissible if the parties agree that it may be admitted; and the Court, having regard for the nature of the proceedings, the nature of the evidence, the purpose for which the evidence is tendered, the likelihood of prejudice, or any other factor which the court thinks should be considered, is of the opinion that it is in the interests of justice to admit the evidence.

The Act also provide for the handling of requests for evidence by foreign states. They must be received through the Permanent Secretary in the Ministry of Justice or in the case of urgent requests, may be forwarded to the magistrates' court within whose area of jurisdiction the witness is or resides. A request received through the Permanent Secretary must still be referred to a magistrate. The witness will then be subpoenaed to testify or produce any required record or exhibit and to be examined under oath or otherwise. The record of evidence will later be submitted to the foreign state through the Permanent Secretary.

## **10. Customs and Excise Act (Act No. 20 of 1998)**

The Act stipulates that persons entering or leaving Namibia are required to declare unreservedly at the time of entry, all goods in their possession which were purchased or acquired outside Namibia, or were remodelled or repaired outside Namibia or which are prohibited, restricted or controlled under any law<sup>30</sup>. On departure, all goods being exported must also be declared. Such persons are required to comply with any request or instruction of a customs officer and, where necessary, to pay the relevant duty. The controller has the power to detain persons suspected of violating the provisions of the Act until their appearance in court.

Failure to comply with the above provisions of the Act is a criminal offence and an offender may be liable to a fine of up to N\$8 000 or to an amount three times the value of the goods, whichever is the greater, or to imprisonment of up to two years,

<sup>30</sup> Section 14

or to both the fine and imprisonment. The goods involved are liable to forfeiture.

This Act could therefore be effectively used to combat transnational organised crime, corruption and money laundering.

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## 11. Namibia Financial Institutions Supervisory Authority Act (No. 3 of 2001)

The Act makes provision for the establishment of the Namibia Financial Institutions Supervisory Authority (Namfisa) as a juristic entity and sets out its powers and functions regarding the regulation and supervision of non-banking financial institutions.

In terms of Section 3 of the Act, the Authority's functions are as follows:

- to exercise supervision in terms of this Act or any other law, over the business of financial institutions and over financial services; and
- to advise the Minister on matters related to financial institutions and financial services, whether of its own accord or at the request of the Minister.
- Namfisa regulates and supervises a broad range of institutions, which include pension and retirement funds, long-term insurance, short-term insurance, medical aid schemes, friendly societies, unit trust management schemes, the stock exchange, asset managers, participation bond schemes, public accountants and auditors, micro lenders, and hire purchase outlets.

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## 12. Public Service Act (Act No. 13 of 1995)

The Act provides for the establishment, management and efficiency of the public service. It also regulates the employment, conditions of service, appointments, discipline and discharge of public servants.

The Act also deals with acts of misconduct by public officials<sup>31</sup>. Several acts of misconduct are described, but the following acts by an official could be regarded as amounting to corruption:

- accepting or demanding in respect of the performance of or the failure to perform his or her duties any commission, fee or reward, pecuniary or otherwise, to which he or she is not entitled by virtue of his or her office, or fails to report forthwith to the Permanent Secretary concerned the offer of any such a commission, fee or reward.
- using his/her position or utilises any property of the State to promote or prejudice the interest of any private business or private agency, except in the performance of his / her official duties.

- using his/her position to promote or prejudice the interest of any political party.
- misappropriate or improperly uses any property of the State.

These offences under the Act are dealt with as misconduct in the employment context, rather than criminal offences, but nothing prevents the state from laying a criminal charge in terms of the Criminal Procedures Act or the Anti-Corruption Act against an official suspected of having committed an offence.

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## 13. Tender Board Act (Act No. 16 of 1996)

The Act establishes the Tender Board of Namibia. The Tender Board is responsible for the procurement of goods and services for the letting or hiring or acquisition or grading of rights for or on behalf of and the disposal of property of the Government.

In terms of the Act a member of the Tender Board or an official dealing with a submission to the Tender Board, who has or intends to acquire a direct or indirect personal interest in a tender or an agreement, shall in writing declare the nature, extent and particulars of such interest to the Board and may not participate in the discussion or vote on such a tender. A person who fails to declare his/her interest shall be guilty of an offence and on conviction may be liable to a fine not exceeding N\$500,000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.<sup>32</sup>

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## 14. Weaknesses in the armour

As is evident, Namibia has a sizeable corpus of laws aimed at building the legislative and institutional infrastructure to combat corruption. However, questions linger around the efficacy of the anti-corruption framework, for many of the above discussed laws do not go far enough in regulating against the potential for corrupt behaviour.

These questions revolve around some issues already touched on earlier as well as others which have evolved since the various anti-corruption laws have come into effect, as well as how corrupt practices have evolved and become ever more sophisticated.

Notable amongst the issues which have surfaced over the last decade or so is the fact that Namibia still does not have an overarching national anti-corruption strategy or policy, which would and should clearly spell out the linkages between the various laws and agencies and thus create a coherent front against corruption, not to mention providing the citizenry with a clear indication a psychological booster so to speak of the state's intentions and actions towards all forms of nefarious behaviour undermining the socio-economic stability of the country.



The ACC, in its strategic plan<sup>33</sup>, has recognised this shortcoming that in effect there is no comprehensive battle-plan for the anti-corruption effort and states in this regard that “there is also need for a nationwide policy on corruption that permeates the whole public service as well as the private sector”.

As it stands, the various agencies and departments, such as the ACC, tasked with being the primary weapons against corruption appear to be operating in jurisdictional bubbles, with seemingly very little co-ordination and co-operation between them. The situation was succinctly phrased by the Commission in its current strategic plan, listing under weaknesses in a SWOT analysis, “poor relations with other law enforcement agencies”.

This lack of co-ordination and co-operation does not only exist between the law enforcement agencies, but contrary to the spirit of the legislative environment, appears to permeate the workings of the entire public sector as regards corruption.

In practice this was evident recently when the ACC was not approached for advice, or did not pro-actively involve itself, when the Ministry of Mines and Energy transformed and updated its licensing regime and the Ministry of Finance recalibrated the tender board regulations. The outcomes of both these processes had not been made public at the time of writing, but the supposed and stated purpose of these exercises was the closing of corruption inducing loopholes and to make these particular agencies and departments more accountable.

Given that in both instances, the ACC quite clearly had a very important advisory role to play, the omission of the Commission from these processes stands as another missed opportunity. This comes against the backdrop of the ACC legislatively having been empowered to insert itself into any process where systems and processes need strengthening in order to counter administrative abuse, mismanagement and borderline if not downright corrupt activities within strategic government departments.

What this probably accurately illustrates is a general lack of understanding of the role of the ACC, both within the institution and beyond, within the state structure, even though the law is actually quite clear and far-sighted.

In this regard, the Anti-Corruption Act states in Article 3<sup>34</sup>:

The functions of the Commission are –

- (f) to take measures for the prevention of corruption in public bodies and private bodies, including measures for –
- (i) examining the practices, systems and procedures of public bodies and private bodies to facilitate the discovery of corrupt practices and securing the revision of practices, systems or procedures which may be prone or conducive to corrupt practices;
- (ii) advising public bodies and private bodies on ways of preventing corrupt practices and on changes of practices, systems and procedures compatible with the effective

performance of their duties and which are necessary to reduce the likelihood of the occurrence of corrupt practices;

It is clear from this that the provisions of the legislation are being inadvertently undermined to some extent, through a combination of ignorance of the reach of the law, lack of information and communication between government departments and inadequate capacities to undertake such collaborative initiatives.

It is important to highlight and underline the effect of deficient capacity skills and expertise within the public sector, for it has become an increasingly serious concern, not just in the anti-corruption fight, but in service delivery in general. The lack of relevant and sufficient skills and resources at every and various junctures in the criminal justice chain charged with combating graft necessarily affects the quality of the state’s response to such destructive practices. The implementation of all the legal instruments discussed here have to some extent been affected to date by this particular issue.

Of course these are not the only concerns in need of attention, for as has been pointed out, the adequate protection of whistle-blowers and informers has become a serious concern and as yet the issue has not been sufficiently addressed, even though ACC Director Noa has intimated that it is something the Commission will be looking at strengthening a whole lot more in the foreseeable future.

This would appear to form part of a broader legislative review which the ACC has apparently identified as necessary in its current strategic plan, listing first under a range of “strategic issues”<sup>35</sup> the “inadequate legislation and national policies”. In this regard the strategic plan states: “Whilst the Anti-Corruption Act is clear as to what the mandate and powers of the Commission are, there are some aspects of the legislation that would need strengthening. There is need for amendments to certain existing laws and for provision of new laws which enhances (sic) and complements the fight against corruption.”

It is unclear from the strategic plan which provisions of the legislation need revisiting and review and what new laws are being considered or envisaged to complement those which already exists, but it is heartening and commendable that the Anti-Corruption Commission sees for itself a more elevated role, founded on strengthened legislation, going forward.

That said, in the context of anti-corruption it should probably go without saying that the laws and courts go hand-in-hand. However, the situation is such that it needs to be said and underlined, that the judicial system appears to have become a considerable stumbling block to the efficacy of anti-corruption efforts. For coupled to all or some of the institutional shortcomings already highlighted and needlessly compounding a somewhat already fraught inter-agency situation, the slow turning of the wheels of justice appear to not only undermine the integrity

33 ACC Strategic Plan 2010-2014.

34 See Chapter 2 (Establishment of Anti-Corruption Commission).

35 See ACC Strategic Plan 2010-2014.

of the work of such bodies as the ACC, as well as the applicability of the various laws, but also has a dampening effect on the public's faith in, support and enthusiasm for the overall anti-corruption fight.

Namibia's law courts have become clogged with a backlog of cases awaiting finalisation, a dire situation which the country's Judge President, Petrus Damaseb, has on various occasions stated will be remedied. However, it is not just the pace of judicial proceedings which has become increasingly worrisome over the years, for this is regularly compounded by shoddy and incomplete investigations by the Namibian Police, a situation that quite often leads to indefinite postponements of even relatively trivial cases, not to mention complex cases involving sophisticated fraudulent and other activities.

The point was recently highlighted when Justice Minister, Pendukeni Iivula-Ithana, publicly stated<sup>36</sup> that the application and implementation of the Prevention of Organised Crime Act has been hampered by not just poor and incomplete investigations by the police, but also the pace of prosecutions, a situation which has been further exacerbated by the financial costs to the state of unforeseen drawn-out cases, a burden which the Act does not provide for. Aside from the perceived poor functioning of the judicial and security services, the implication appears to be that the Prevention of Organised Crime Act, which is fairly new and came into force about two years ago, already needs amendment.

As can be seen the anti-corruption front appears to have some very glaring weak spots and a considerable degree of dysfunctionality seems to have become part and parcel of the state's response to corruption, which probably can be seen as being due to the various agencies and institutions operating in the earlier mentioned policy vacuum.

It should however be borne in mind that the anti-corruption fight is not merely the prerogative and limited to those agencies specifically created or empowered for the purpose, but is also ideally supported and strengthened by addressing pertinent ethical considerations on various other fronts, such as through the development and implementation of codes of ethics and conduct for public officials at various branches and levels of the state infrastructure. At present, regulating for and promoting ethical conduct through especially codes is a weakness, not just in practice, but in law as well, for such codes and the enforcement thereof are quite simply inadequate if not altogether absent.

Necessarily, should Namibia ever come around to creating an over-arching anti-corruption policy, such a policy should display a depth and breadth which would and should address and include such initiatives as codes of ethics and conduct, the enforcement of which could go a long way in considerably minimising if not completely strangling possible channels and conduits for corrupt behaviour and activities, for room for corruption is probably

mostly created where systems and procedures are at their weakest, creating the space for ethical ambiguity or laxity.

Also, for all its attempts at trying to not only appear concerted and determined in its efforts to stem the dismal tide of corruption, Namibia appears to be falling short, not just at state level, but arguably across the board, on the important issues of transparency and accountability. A culture of openness has yet to take hold within and between the state and broader society.

This is probably most evident by the continued centralisation of what should be national and public information at senior executive level within government, a state of affairs which often leads to suspicions of manipulation of data or the total blotting out of embarrassing, if not dangerously profligate, incidences of mismanagement and alleged corruption by senior politically appointed officials. The most jarring incidents in which transparency and accountability appear to have been sacrificed on the altar of political expediency are the ones involving state agencies or resources for which presidential commissions of inquiry have been instituted over the years. The reports of these commissions of inquiry have as yet to be made public, with no indication of when that might be.

Against this backdrop, there appears to be a glaring omission within the anti-corruption armoury, namely the absence of an access to information policy and law. This absence is also notable on the ACC's list of strategic concerns and things to be achieved over coming years.

That access to information is of critical concern is exemplified by the government's continued suppression of the findings of presidential commissions of inquiry into alleged corrupt practices at various parastatals over the last decade or so. These findings relate to the following investigations:

- Commission of Inquiry into the Activities, Affairs, Management and Operations of the Social Security Commission (2002);
- Commission of Inquiry into the Activities, Affairs, Management and Operations of the Roads Authority (2002); and
- the Commission of Inquiry into the Activities, Affairs, Management and Operations of the former Amalgamated Commercial Holdings (Pty) Ltd and the former Development Brigade Corporation (2004)<sup>37</sup>.

The design, promulgation and implementation of access to information legislation does not fall under the purview of the ACC but it could and should be an important lobbyist and advisor on the significance of such legislation in the anti-corruption fight, in line with the earlier discussed provisions of Article 3 (ii) of the Anti-Corruption Act. The departure point in this regard being that adopting a culture of openness in national affairs leaves very little space for the perpetration of corrupt practices.

36 Catherine Sasman, *The Namibian*, 27 April 2011 'Implementation of organised crime law costing Government'

37 See Hopwood, *Namibia's Anti-Corruption Strategy – Where Now?*, in Hopwood (2008) (ed.) *Tackling Corruption – Opinions on the Way Forward in Namibia*

On the face of it, the absence of access to information legislation would seem to be the single most visible weak spot of the country's considerable anti-corruption legal armour. With accountability and transparency being the parallel buzzwords to anti-corruption, not to mention the popular and preferred nomenclature in an age of called for ethical revival, the non-provision for the principle of access to information constitutes a major oversight of black-hole proportions, arguably considerably affecting the efficacy of the existing framework of the anti-corruption landscape.

## 15. Recommendations

- 1) Each Ministry, State Agency, Regional and Local Authority and State-owned Enterprise should be compelled to, in consultation with and on advice from the ACC, submit to Parliament annually an anti-corruption plan to be implemented and the following year report on its achievements in this regard. This would strengthen and give effect to Article 94A(1) of the Constitution, which states: The State shall put in place administrative and legislative measures necessary to prevent and combat corruption." This would also comply with the mandate of the ACC in terms of section 3(f) of the Anti-Corruption Act;
- 2) Serious attention should be paid and a time-frame should be adopted for the implementation of whistle-blower/witness protection legislation;
- 3) Senior officials (CEOs and senior management of State-owned Enterprises, Permanent Secretaries, Under-Secretaries, Directors and Deputy Directors of Ministries) should disclose outside business interests annually.
- 4) Senior officials (CEOs and senior management of State-owned Enterprises, Permanent Secretaries, Under-Secretaries, Directors and Deputy Directors of Ministries) should disclose gifts received from the private sector and foreign businesses annually.
- 5) That with regard to points 3) and 4), a list of such outside interests and gifts be provided to the ACC as a matter of course, beyond complying with such disclosure requirements as such senior officials might have to fulfil;
- 6) Each Ministry, State Agency, Regional and Local Authority and State-owned Enterprise should annually publish a list of tenders awarded for goods and services. This should be submitted to the ACC for publication on its website.
- 7) The roles and responsibilities of the Auditor-General, Prosecutor-General and the ACC should be clarified and areas of co-operation should be detailed in annual and strategic plans.
- 8) Co-operation with the Bank of Namibia similarly be clarified.
- 9) Access to Information legislation should be prioritised and passed as soon as possible.
- 10) The ACC should have clear criteria for the referral of complaints and / or investigations to other authorities for investigation.
- 11) The reports of previous Presidential Commissions of Enquiry should be made publicly available.
- 12) The ACC together with the Receiver of Revenue should be empowered to do life-style audits, where it is clear that private persons and public figures are living beyond their means/reported incomes.

A National Integrity System (NIS) is a concept which has been promoted by Transparency International. Under a NIS, principal institutions and actors work together to promote integrity, transparency and accountability in a society. A well-functioning NIS provides effective safeguards against corruption.

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- Anti-Corruption Commission. No date. ACC Strategic Plan 2010-2014. Windhoek: Namibia.
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## Newspaper Articles:

- The Namibian*, 22 March 2011, Werner Menges, 'Goabab trial on hold for at least 6 months'
- The Namibian*, 04 August 2009, Werner Menges, 'Criminal Procedure Act challenge could head to Supreme Court'
- The Namibian*, 27 April 2011, Catherine Sasman, 'Implementation of organised crime law costing Government'

## Online Resources:

- The various Acts of Parliament discussed in this paper can be accessed at [www.parliament.gov.na](http://www.parliament.gov.na).

## Additional Websites:

- The *BTI 2010 Namibia Country Report* can be viewed at [www.bertelsmann-transformation-index.de](http://www.bertelsmann-transformation-index.de).
- The *Afrobarometer - Perceptions of Corruption in Namibia 2008* – can be viewed at [www.ippr.org.na](http://www.ippr.org.na).
- Transparency International's *Corruption Perceptions Index 2010* can be viewed at [www.transparency.org](http://www.transparency.org).

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## About the Anti-Corruption Research Programme

The IPPR's Anti-Corruption Research Programme will focus on strengthening anti-corruption regulations, procedures and practices. The Programme will provide a stocktaking of anti-corruption efforts so far, examine policy options for the future and recommend ways in which Namibia can ensure that the anti-corruption campaign retains public confidence and political support and is ultimately successful in reducing corrupt practices in Namibia.

The programme will pursue the following objectives.

1. Produce rigorous, detailed and accessible research on issues that contribute to the strengthening of anti-corruption systems, procedures and practices in Namibia
2. Raise awareness and debate among Namibian policymakers, politicians, civil society activists, students, journalists, the business community and interested members of the public about effective anti-corruption strategies and policies that could be deployed in Namibia.
3. Seek to partner with agencies involved in tackling corruption in Namibia, in particular the ACC, other civil society groups active on the issue and policymakers who can play a role in ensuring anti-corruption mechanisms in Namibia are effective.

## About the IPPR

The Anti-Corruption Research Programme is a project of the Institute for Public Policy Research (IPPR). The IPPR can be contacted at PO Box 6566, Windhoek, Namibia. Tel: +264 61 240514, Fax: +264 61 240516, [info@ippr.org.na](mailto:info@ippr.org.na). The publication is also available as a PDF download from <http://www.ippr.org.na>. The IPPR's mission is to deliver independent, analytical, critical yet constructive research on social, political and economic issues that affect development in Namibia. The IPPR was established in the belief that development is best promoted through free and critical debate informed by quality research. The IPPR is a not-for-profit organization governed by a board of directors: Monica Koep (Chairperson), Daniel Motinga, Bill Lindeke, Pandu Hailonga-van Dijk, André du Pisani, Robin Sherbourne and Graham Hopwood (ex officio).