

# TABLE OF CONTENTS

<b>Foreword</b>	<b>4</b>
<b>Preface</b>	<b>5</b>
<b>Section 1</b>	<b>7</b>
Namibia’s Legislative and Policy Environment	
- Corruption Trends in Namibia	
- The Legal Environment for Tackling Corruption	
- The ACC Strategic Plan	
- Policy Framework	
- International and Regional Commitments	
<b>Section 2</b>	<b>27</b>
Review of Namibia’s Assessment of Chapter III: Criminalisation and Law Enforcement	
<b>Section 3</b>	<b>39</b>
Review of Namibia’s Assessment of Chapter IV: International Cooperation	
<b>Section 4</b>	<b>44</b>
Namibia and Other Provisions of UNCAC	
<b>Section 5</b>	<b>59</b>
Gaps, Incompatibilities and Recommendations	
<b>Bibliography</b>	<b>72</b>



## FOREWORD

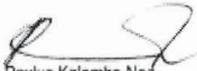
The United Nations Convention against Corruption which came into operation in December 2005 presented a remarkable corner stone in the world history in the fight against corruption.

The Convention provides for certain mandatory measures in terms of which States Parties are required to criminalise a wide range of forms of corruption. In order to fully comply with the Convention, it is necessary to conduct a gap analysis with the objective of examining the existing laws, regulations and the institutional mechanisms the country has put in place.

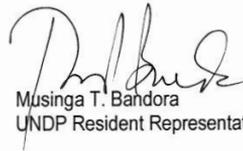
Namibia is not an exception in this regard. A plethora of Namibia laws were passed prior to the coming into force of the Convention. Namibia ratified the Convention on 3 August 2004, and since then, Namibia has carried out various anti-corruption measures demonstrating commitment to combat corruption and promote good governance.

The fight against corruption has become an urgent global concern, because of the corrosive harm caused by it. This gap analysis conducted by the Institute of Public Policy Research with the financial support from the United Nations Development Program helps the Government of the Republic of Namibia and other institutions to better understand the shortcomings that exist in the laws and the need of reforming or developing new laws in order to fully comply with the Convention.

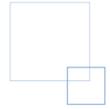
The report comes at an appropriate time when the Anti-Corruption Commission, in collaboration with stakeholders, is engaged in the process of developing a National Anti-Corruption Strategy aimed at strengthening transparency and public accountability.



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## PREFACE

The United Nations Convention Against Corruption (2003) entered into force on December 14 2005. The Convention was signed by Namibia on December 2003, ratified by parliament on April 28 2004 and deposited on August 3 2004.

The Convention introduces a comprehensive set of standards, measures and rules that all countries can apply in order to strengthen their legal and regulatory regimes to fight corruption. It calls for preventive measures and the criminalisation of the most prevalent forms of corruption in both public and private sectors. And it makes a major breakthrough by requiring Member States to return assets obtained through corruption to the country from which they were stolen.

The purposes of this Convention are:

- (a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
- (b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;
- (c) To promote integrity, accountability and proper management of public affairs and public property.

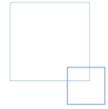
According to Article 44 of the Namibian Constitution: “International agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.” Hence Namibia is obliged to implement a wide and detailed range of anti-corruption measures affecting laws, institutions and practices in keeping with this first global convention against corruption.

The purpose of this Gap Analysis is to examine and analyse the extent to which Namibia has complied with the provisions in the Convention. This will help in the identification of gaps that will inform future decision-making and reforms in terms of Namibia’s national anti-corruption strategy.

It should be noted from the outset, that Namibia's self-assessment chapters prepared for the UNCAC assessment were incomplete when they were reviewed for this report. Many of the comments on various aspects of Chapters III and IV were awaiting further input from government officials while many of the conclusions that Namibia either did not or only partially complied with UNCAC clauses lacked clear justifications or explanations as to what kind of reforms and actions would be needed to fill gaps. Sections where Namibia was seen to comply lacked examples of implementation and details of relevant cases.

Namibia has made great strides in establishing a national, coordinated approach to tackling corruption since UNCAC was ratified in 2004. The Anti-Corruption Commission has been launched while a raft of key pieces of legislation have been put in place dealing with money laundering and organised crime among others.

It is hoped that this study will help Namibia to build on this momentum by moving into a new phase whereby a national anti-corruption policy will emerge which ensures the various legal mechanisms are working effectively and in harmony. This report does highlight some deficiencies in law and policy which should form the priority areas for reform.



## SECTION 1

# NAMIBIA'S LEGISLATIVE AND POLICY ENVIRONMENT

### 1. CORRUPTION TRENDS IN NAMIBIA

The issue of measuring corruption is a subject of some international debate as more and more surveys and reports are published using differing methodologies to assess governance across Africa and the world. Certainly there is no consensus on the level of corruption in Namibia or how it should be measured.

Probably the best known assessment of corruption levels on a global scale is Transparency International's Corruption Perceptions Index (CPI) which scores countries on a scale of 0 to 100 with 0 indicating very high levels of corruption and 100 indicating very low levels. Namibia's CPI score has gone down from 57 in 2002 to a low of 41 in 2004 and 2006 before recovering to 48 in 2012. In its Strategic Plan for 2010-14, the ACC benchmarks itself against the CPI, stating it wants to see Namibia's score reach an ambitious 7 by 2014.<sup>1</sup>

#### Summary of Namibia's performance on the Transparency International Corruption Perceptions Index 2002-12

	'02	'03	'04	'05	'06	'07	'08	'09	'10	'11	'12
TI CPI	57	47	41	43	41	45	45	45	44	44	48
No. of countries	102	133	146	159	163	180	180	180	178	183	178
Ranking	28	41	54	47	55	57	61	56	56	57	58

<sup>1</sup> See Anti-Corruption Commission Strategic Plan (2010 – 2014), p.4



The CPI is based on a ‘poll of polls’ system whereby a number of surveys and expert assessments such as those made by the African Development Bank, the World Bank and Freedom House contribute to the score.

While it is difficult to work out the exact reasons for the fluctuations it does appear that Namibia’s score improved following the establishment of the Anti-Corruption Commission (ACC) in 2006. However, Namibia is still seen as being on the cusp of becoming a country with a serious corruption problem.

Despite its lack of hard evidence, the CPI is the mostly widely published barometer of corruption levels. Transparency International contends that “...corruption – whether frequency or amount – is to a great extent a hidden activity that is difficult to measure. Over time, perceptions have proved to be a reliable estimate of corruption.”<sup>2</sup>

Citizen surveys, as long as they are based on population samples of a reasonable size and spread, are another means of assessing views about corruption ‘on the ground’. The Afrobarometer is a research project that measures public attitudes on economic, political and social matters in sub-Saharan Africa. The results of Round 4 from 2008 show that perceptions of corruption in Namibia are quite high. For example 42 percent of respondents said that “most” or “all” police were involved in corruption. However, the actual experience of corruption was much lower with only 3 percent of respondents saying they had paid a bribe to the police to avoid some kind of penalty.<sup>3</sup>

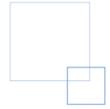
Business surveys can also provide a useful indicator as to whether corruption is increasing or decreasing. In the World Economic Forum’s Global Competitiveness Report 2012 corruption was rated as the third most problematic factor for doing business in Namibia (up from fourth in 2011) after ‘inadequately educated workforce’ (1) and ‘access to financing’ (2).<sup>4</sup>

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2 See TI, Corruption Perceptions Index 2010.

3 See Afrobarometer Summary of Results, Round 4 Afrobarometer Survey in Namibia 2009

4 See The Global Competitiveness Report 2012-13, World Economic Forum



The Namibia Institute for Democracy's regular Actual Instances of Corruption reports, which tally print media reports on corruption cases, have found that reporting spiked in 2006-07 when 709 articles covered 240 separate cases of corruption, but has declined and levelled off since then with 442 articles covering 125 cases in 2009-10.<sup>5</sup>

It seems likely that reporting on corruption surged after the formation of the ACC as the media mainstreamed the issue but then reduced in terms of articles and cases cited as the ACC became part of the everyday architecture of the state and corruption stories became more 'run of the mill'.

The ACC carried out its own 'Urban Corruption Perception Survey' in 2011. The survey dealt with issues such as perception on corruption, reporting corruption, and the institutional image of the ACC.

Asked about the level of corruption in Namibia, 54.3 percent of the respondents indicated that it was very high, 17.7 percent said moderate, and 3.4 percent low. Some 24.8 percent of respondents felt the level of corruption had decreased since the formation of the ACC in 2006 as compared to 21.5 percent who thought it remained the same at the same level while 16.9 percent believed that corruption had increased.<sup>6</sup>

A high-profile governance survey was launched by Sudan-born businessman Mo Ibrahim in 2006. The Ibrahim Index of African Governance ranks sub-Saharan African nations according to governance quality. These measurements are based on national data on a range of criteria within each category. Namibia came seventh on the inaugural index, scoring 69.6. Since then the country's score has improved marginally to 69.8 in 2011 when it came sixth on the African continent. Since the quality of governance is not directly measurable, the Ibrahim Index uses proxy indicators based on available national data sets.<sup>7</sup>

These various approaches have their strengths and weaknesses. Surveys like the Ibrahim Index, which seek to be "more objective" in approach, have

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5 See <http://www.nid.org.na>

6 See <http://www.accnamibia.org>

7 See <http://www.moibrahimfoundation.org/namibia/>



noted that the problem with the CPI survey and opinion polls is that they are mainly based on perceptions, whether held by 'experts' or broader samples of the population. However, the accuracy of the Ibrahim Index is very much dependent on the accessibility and reliability of data, which can also be out of date or the result of poor or inappropriate research methods.

Only by comparing and assessing the range of the available tools for measuring corruption can one gain a sense of where a country stands. In general the perception about Namibia arising from these various surveys and rankings is that while corruption is not endemic in Namibia it is still a serious problem which has the potential to grow apace unless firm action is taken on several fronts which both plug loopholes and demonstrate political will.

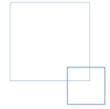
The conclusion of the 2010 Bertelsmann Transformation Index's assessment on Namibia still appears to be pertinent: "In everyday life, corruption does not play a very significant role. Compared to other African countries, one can say that petty corruption is not as widespread. However, grand corruption 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".<sup>8</sup>

But it is not only important to be able to have a sense of the level of corruption in a particular country. It is also crucial that measurements assess gaps, loopholes, and weaknesses in a country's national integrity system. Such assessments can then recommend actions and reforms that can be made.

It is in this context that Namibia's attempts to assess itself against the benchmarks and standards set out in UNCAC becomes a highly informative and useful means of measuring the country's efficacy in battling corruption.

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<sup>8</sup> As quoted in the IPPR briefing paper 'Towards National Integrity: assessing the appropriateness and effectiveness of anti-corruption and related legislation in Namibia' (2011).



## 2. THE LEGAL ENVIRONMENT FOR TACKLING CORRUPTION

### a. The Constitution

Namibia's Constitution, adopted in 1990, establishes the country as a multi-party democracy operating under the rule of law. The Constitution follows the principle of separation of powers with the State divided into three parts – the Executive, the Legislature and the Judiciary. The Constitution seeks to provide a system of checks and balances, which are crucial in creating an environment in which anti-corruption strategies can be effective.

On its adoption, the Constitution did not specifically set up an anti-corruption agency but rather established an Office of the Ombudsman vested with a wide-ranging set of functions including a duty to investigate complaints about corruption.

The Constitution was amended in 2010 to incorporate anti-corruption measures.<sup>9</sup> The constitutional amendment removed the power to investigate corruption from the functions of the Ombudsman and brought the Anti-Corruption Commission (ACC), which had been established in 2006 in terms of Section 2 of the Anti-Corruption Act of 2003, under the ambit of the Constitution. The ACC thus became a constitutionally-enshrined institution in 2010.

As a result of the amendment, Article 94A stipulates that:

- The State shall put in place administrative and legislative measures necessary to prevent and combat corruption.
- There shall be established by an Act of Parliament an Anti-Corruption Commission with its powers and functions provided for in such Act.
- The Anti-Corruption Commission shall be an independent and impartial body.
- The Anti-Corruption Commission shall consist of a Director, a Deputy Director and other staff members of the Commission.

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<sup>9</sup> See Namibian Constitution Second Amendment Act, 2010 (Act No. 7 of 2010)

- The National Assembly shall appoint the Director of the Anti-Corruption Commission and
- the Deputy Director upon nomination by the President.
- The Director of the Anti-Corruption Commission and the Deputy Director shall be appointed
- for a period of five years and their qualifications for appointment and conditions and termination of service shall be determined in accordance with an Act of Parliament.

### **b. The Anti-Corruption Act**

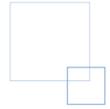
The Anti-Corruption Act (2003) is the key piece of legislation dealing with the prevention and combating of corruption in Namibia. The Act was passed by Parliament in 2003 following public consultations that had commenced in the mid-1990s. Then President Sam Nujoma signed the Act into law on July 16 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.

The Act establishes the Anti-Corruption Commission (ACC) as 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.

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;
- 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.

The Commission may receive information on any allegation of corruption from any person. 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 authority for further action. The Commission may also initiate an investigation on its own accord. 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. 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 an investigation, and is allowed to take anything 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 the officer 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. The



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

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.

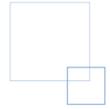
If after an investigation, it appears that a person is guilty of corruption, the Director refers the matter together with the evidence to the Prosecutor General.

### **c. Other Constitutional Bodies**

The Ombudsman – The Ombudsman Act (No 7 of 1990) defines the powers, duties and functions of the Ombudsman in accordance with Chapter 10 of the Constitution. The Ombudsman has a wide-range of responsibilities relating to the conduct of public officials, fair and effective administration in the public service, human rights, and protecting the environment. Although investigating complaints about corruption was removed from this list of responsibilities in 2010, the Ombudsman maintains the responsibility “to investigate vigorously all instances of alleged or suspected misappropriation of public monies by officials and to take appropriate steps, including reports to the Prosecutor-General and the Auditor- General pursuant thereto.”<sup>10</sup>

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<sup>10</sup> See Article 91 (f) of Constitution



In practice, the Ombudsman appears to refer any complaints that involve alleged corruption to the ACC.

The Auditor General – The Auditor General audits government spending and presents annual reports on ministries and government institutions to the National Assembly. The Auditor-General is appointed in terms of the Constitution and the powers and duties of the office are set out in the State Finance Act (No. 31 of 1991). The Auditor General has no specific powers to investigate corruption, but if audits uncover irregularities they are reported to parliament and/or the line ministries. However, the Auditor General does not have the power to force government to investigate irregularities. The Auditor General can only be removed from office if the two-thirds of the members of the National Assembly vote for this on the grounds of mental incapacity or gross misconduct.

Prosecutor General - 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.

Article 87(a) of the Constitution states that the Attorney-General exercises final responsibility for the office of the Prosecutor-General. However a court case in 1993 in which the then Attorney General clashed with the then Prosecutor General over their respective roles. The resulting Supreme Court judgement clarified that the Attorney-General was politically-appointed and his functions were executive in nature while the Prosecutor General was independent and not subject to the supervision or direction by the state, but is only subject to the Constitution.

#### **d. The Prevention of Organised Crime Act**

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.



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. The Act allows for the seizure of property used in offences and profits made, which is then transferred to a Criminal Assets Recovery Fund and used to fund crime prevention activities.

The definition of proceeds of unlawful activities is very broad:

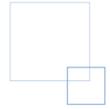
“Any property or service, advantage, benefit or reward that was derived, received or retained, directly or indirectly in Namibia or elsewhere, at any time before or after the commencement of the Act in connection with or as a result of any unlawful activity, carried on by any person ...”

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.

#### **e. The Financial Intelligence Act**

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 was 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 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 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.

In 2012 financial institutions that were not yet in compliance with the Financial Intelligence Act were given more time as the cut-off date compliance date was extended from 4 May 2012 to 5 October 2013.

In late 2012 the Financial Intelligence Act (Act 3 of 2007) was repealed and replaced with a new Act with the same name. The replacement of the original Act followed a targeted review by the Financial Action Task Force (FATF), an inter-governmental organisation seeking to develop policies to combat money laundering and terrorism financing. The review identified strategic weaknesses in the 2007 legislation. As a result a new bill was brought before parliament. Namibia was also reviewed by FATF because the country lacked legislation that criminalized terrorism and terrorism financing. In order to address this, the parliament passed the Prevention and Combatting of Terrorist Activities Act (Act 12 of 2012). Both these Acts became law on 21 December 2012.

The 2012 Financial Intelligence Act differed from the original law in that it specifically addressed the financing of terrorism and provided for the establishment of the Anti-Money Laundering and Combating of the Financing of Terrorism Council. The new Act also empowered the Minister of Finance to appoint an appeal board to hear appeals against decisions of the Financial Intelligence Centre.

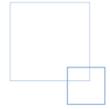
## **f. Criminal Procedure Act**

The constitutional powers and legitimacy of the Prosecutor-General are 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. 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 Act also deals with the protection of witnesses. The Criminal Procedure Act (Act No. 25 of 2004), which is not implemented yet, repeals the 1977 Act.

## **g. Banking Institutions Act**

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.



## **h. Bank of Namibia Act**

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 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.

## **i. Namibia Financial Institutions Supervisory Authority Act**

The Act makes provision for the establishment of the Namibia Financial Institutions Supervisory Authority (Namfisa) as a State-owned company to exercise supervision over the business of financial institutions and services. Namfisa is responsible for the regulation and monitoring of a wide range of institutions including 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.

## **j. Public Service Act**

The Act establishes the public service and 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. An official is guilty of misconduct if he or she accepts or demands a commission, fee or reward to which he or she is not entitled by virtue of his or her office or fails to report any such offer to the permanent secretary. A public official is liable to a disciplinary penalty for misconduct, as well as a possible criminal charge. The Act also deals with conflicts of interest. A staff member can be charged with misconduct if he or she undertakes private work related to the field of operations of the office, ministry or agency in which he or she employed, without the necessary approval. Additionally, a staff member

is open to disciplinary action if she or he fails to declare that member of his or her household operates or undertakes such private work. The Act also covers the misappropriation or improper use of any property of the state. Public servants are barred from engaging in other remunerative work without permission.

In addition, the Act prohibits public servants from using their position or state property to promote or prejudice the interests of any political party. This is seen as grounds for disciplinary action.

### **k. Tender Board Act**

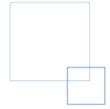
The Act establishes the Tender Board of Namibia. The Tender Board is responsible for the procurement of goods and services for the letting or hiring or acquisition or grading of rights for or on behalf of and the disposal of property of the government.

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.

The Tender Board and the public procurement system have been criticised on several fronts: lacking transparency, being open to political manipulation, giving too much power to permanent secretaries, and allowing many public contracts to be exempt from the tender process without good reason.<sup>11</sup>

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<sup>11</sup> For a thorough critique the tender system see The Tender Board: The Need for Root and Branch Reform (IPPR Anti-Corruption series, paper 3, September 2011).



## **I. Companies Act**

The Companies Act regulates companies, including the judicial management and liquidation of companies. The Act obligates a director of a company to disclose a direct or indirect interest in a proposed contract entered into by the company or a contract already entered into by the company. Failure to do so constitutes a criminal offence. The same is true for officers of the company who have been authorised to enter into a contract on behalf of the company. The Act also deals with the offence of insider trading, which is the practice of dealing in the securities of a company with the intent of profiting on the strength of information not yet disclosed to shareholders.

## **3. THE ACC STRATEGIC PLAN**

The ACC has adopted a Strategic Plan for 2010-14 which identifies a number of strategic issues that need to be addressed by 2014, including:

- Inadequate legislation and national policies
- Inadequate investigative capacity
- Poor governance in external institutions
- Poor public awareness of what constitutes a corrupt practice
- External communication
- General perception of the ACC
- Insufficient funding
- Centralised office
- Organisational/institutional capacity
- Public and media perception of the ACC
- Relations with other agencies and institutions

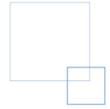
- Bureaucratic procedures
- Corruption prevention
- Information management

**Among serious challenges identified by the ACC are:**

- The need for amendments to existing laws and new laws
- The need to create an attitude of public trust in the Commission
- The need to increase funding levels
- The need to decentralise operations
- Unrealistic expectations about the ACC among the public and the media
- Need to interact with relevant agencies including the police, the Prosecutor General's office, the Auditor General's office, the Ombudsman's office, Interpol, and civil society.
- Bureaucracy in the public sector slowing down responses
- The need for ACC staff to have effective security to prevent becoming targets of perpetrators organised crime.

The Strategic Plan identifies 19 initiatives to be executed in order to achieve the ACC's strategic goals by 2014. These initiatives aim to address institutional capacity issues, improve the institution's image, enhance relations with other institutions, propose new legislation and amendments to existing legislation and create a national strategy for fighting corruption.

The initiatives identified in the Strategic Plan are undoubtedly highly relevant and in many respects crucial to ensuring effectiveness in the fight against corruption. While they are linked to a timeline that ends in 2014, the means of achieving certain targets is somewhat vague. While the ACC acknowledges that it requires



The ACC identifies the “need for a nationwide policy on corruption that permeates the whole public service as well as the private sector” and goes on to state it will submit a National Anti-Corruption Strategy (NACS) for adoption by Cabinet by 2014.

The ACC also commits itself to proposing new laws and amendments. 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.

In statements to public forums, the ACC Director has been more specific mentioning whistleblower protection legislation;

But the ACC will have to be adequately resourced and capacitated to achieve such ambitions, particularly within the short-time frame of two years. The adoption of National Anti-Corruption Strategy would require some form of national consultations, for instance.

In its strategic plan the ACC does recognise that it would have to substantially increase its budgetary support from central government. The ACC envisages that over the next five years it will require approximately N\$133 million in order to execute the initiatives in the Strategic Plan. However, the much of these funds would be spent on infrastructure with N\$45 million being spent on building and setting up new Anti-Corruption Commission headquarters, while about N\$5 million would be spent on leasing offices in regions outside the Khomas region. About N\$7 million will go towards setting up an approved, robust and efficient information management system. Over five years only N\$732,000 would be spent on public education while \$60,000 would be spent on a new recruitment drive to fill existing vacancies. Aside from the building plans, these are mostly conservative figures which do not seem to match ambitions set out within the strategic plan – which would inevitably require a larger staff component than the 49 posts that currently feature on the ACC’s staffing structure.

## 4. POLICY FRAMEWORK

As pointed out above Namibia has no national anti-corruption policy. There are, however, references to tackling corruption in the government's national development plans and its Vision 2030 document.

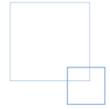
Vision 2030, government's overarching long-term plan for the country, which was published in 2004 has a strong emphasis on good governance. The document's overall aim is to create "a prosperous and industrialised Namibia developed by her human resources and enjoying peace, harmony and political stability" by 2030.

Vision 2030 foresees that: "Corruption, tribalism, intolerance, racism and poverty on the part of officials and the citizenry in general have virtually disappeared from Namibian society" by 2030. (3.9.4)

While containing many admirable goals Vision 2030 has been criticised for lacking a 'road map' that would indicate the stages that would have to be achieved on the way to the optimum scenarios envisaged for 2030. This is also the case with its goals for good governance. To some extent such a road map could be provided by the five-yearly national development plans.

The Fourth National Development Plan (NDP4) was published in mid 2012 and runs from 2012 to 2017. NDP4 re-emphasises the governance goals of Vision 2030 and goes on to state in a short section on good governance that:

"The government is also required to be fully committed to addressing corruption at all levels. In this regard, the Anti-Corruption Commission, in liaison with existing structures such as the Namibian Police, the courts, the Ombudsman, and Parliament, should forcefully deal with corruption with a view to root it out. In addition, institutions within the public and private sectors should constantly be encouraged to adhere to the principles of good corporate governance. Moreover, a code of ethical conduct should be set up as regards service delivery, which emphasises adherence to the principles of good corporate governance, increased transparency,



openness, accountability and increased participation by citizens in order to prevent and expose corrupt practices.” (Page 41).

This section of NDP4 does not correlate with the ACC’s Strategic Plan. In particular, there is no specific reference in the ACC’s plan to introducing a code of ethical conduct regarding service delivery. NDP4 also does not refer to the ACC being better resourced and capacitated – a key aspect of its strategic plan to be achieved by 2014. In contrast NDP3 did include a goal of strengthening the capacity of anti-corruption institutions.

Overall, these various policy references tend to confirm the lack of a coordinated response to the threat of corruption and, as a result, re-emphasise the need for a National Anti-Corruption Strategy.

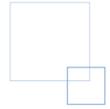
## 5. INTERNATIONAL AND REGIONAL COMMITMENTS

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

- The Southern African Development Community (SADC) Protocol against Corruption. Namibia signed the Protocol on August 14 2001 and parliament ratified it on April 27 2004. The Protocol aims to encourage the development of anti-corruption mechanisms at national level, promote cooperation in the fight against corruption among governments, and harmonise anti-corruption legislation on the region. Although the Protocol is in force, a committee consisting of states parties which is supposed to oversee the Protocol’s implementation has not yet been set up.
- The African Union (AU) Convention on Prevention and Combating Corruption. This came into force internationally on August 5 2006. Namibia signed the Convention on December 9 2003 and parliament ratified it on April 27 2004. The Convention aims to strengthen the development of anti-corruption mechanisms; facilitate and regulate cooperation among governments; and develop and harmonise policies and domestic legislation relating to corruption.



- The United Nations (UN) Convention against Transnational Organised Crime. This came into force internationally on September 29 2003. Namibia signed the Convention on December 13 2000 and ratified it on August 16 2002. The Convention commits states to introduce a range of measures including the creation of domestic criminal offences; the adoption of frameworks for mutual legal assistance; extradition; law enforcement; law enforcement cooperation; technical assistance and training.
- The United Nations (UN) Convention against Corruption came into force internationally on August 5 2006. Namibia signed the Convention on December 9 2003 and parliament ratified it on April 27 2004. The Convention aims to strengthen the development of anti-corruption mechanisms; facilitate and regulate cooperation among governments; and develop and harmonise policies and domestic legislation relating to cooperation.



## SECTION 2

# REVIEW OF NAMIBIA'S ASSESSMENT OF CHAPTER III: CRIMINALISATION AND LAW ENFORCEMENT

According to Namibia's own review of its compliance with Chapter III, of the 28 articles assessed only 16 were fully complied with. The remaining 12 were either complied with in part or not all. The following table indicates, Namibia's responses on the various articles:

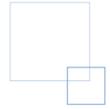
Article No.	Title	Compliance
15	Bribery of national public figures	Yes
16	Bribery of foreign public officials and officials of public international organisations	In part
17	Embezzlement, misappropriation or other diversion of property by a public official	Yes
18	Trading in influence	Yes
19	Abuse of functions	Yes
20	Illicit enrichment	No
21	Bribery in the private sector	Yes
22	Embezzlement of property in the private sector	In part
23	Laundering of proceeds of crime	In part
24	Concealment	Yes
25	Obstruction of justice	Yes
26	Liability of legal persons	Yes



27	Participation and attempt	Yes
28	Knowledge, intent and purpose as elements of an offence	Yes
29	Statute of limitations	Yes
30	Prosecution, adjudication and sanctions	Yes
31	Freezing, seizure and confiscation	In part
32	Protection of witnesses, experts and victims	In part
33	Protection of reporting persons	In part
34	Consequences of acts of corruption	Yes
35	Compensation for damage	Yes
36	Specialised authorities	In part
37	Cooperation with law enforcement authorities	In part
38	Cooperation between national authorities	Yes
39	Cooperation between national authorities and the private sector	In part
40	Bank secrecy	Yes
41	Criminal record	No
42	Jurisdiction	In part

The main areas where Namibia came up short of the standards and benchmarks set out in Chapter III's articles concerned illicit enrichment, disqualification from public office, the protection of witnesses, experts, victims and reporting persons and the consequences of acts of corruption.

The IPPR's observations on how Chapter III relates to the current Namibian situation and, in particular, Namibia's self-assessment of its record is outlined below:



### **Article 16: Bribery of foreign public officials and officials of public organisations**

The bribing of a foreign public official is a criminal offence in Namibia, according to Section 40 of the Anti-Corruption Act. However, the solicitation or acceptance of a bribe by a foreign public official is not a specific offence. Legislation on this is often considered crucial in addressing the 'supply' side of corruption.

This gap appears to have been an omission in the drafting of the Anti-Corruption Act. Namibia's self-assessment points out that an amendment to Section 40 would be required. There are a number of examples of legislation from beyond Namibia's borders which make the acceptance or solicitation of bribes by foreign public officials and officials of public international organisations a criminal offence. India currently (as of January 2013) has a Prevention of Bribery of Foreign Public Officials and Officials of Public Organisations Bill before its parliament.<sup>12</sup>

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions is also a useful reference point.<sup>13</sup>

It is necessary to underpin such clauses with powers for government to enter into agreements with other countries for enforcing such laws and for exchanging investigative information. Namibia currently has no agreements with countries that are aimed specifically at cooperating on the investigation of corruption.

### **Article 20: Illicit enrichment**

Article 20 of Chapter III stipulates that,

Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when

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<sup>12</sup> See <http://www.prsindia.org/billtrack/the-prevention-of-bribery-of-foreign-public-officials-and-officials-of-public-international-organisations-bill-2011-1601/>

<sup>13</sup> See <http://www.oecd.org/investment/briberyininternationalbusiness/anti-briberyconvention/38028044.pdf>



committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

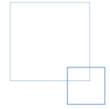
Namibia currently has no laws that criminalise illicit enrichment per se. The Anti-Corruption Act (Section 26) gives the ACC the power to demand a statement of assets and an explanation as to their acquisition, but does not make it an offence to be in possession of unexplained assets or to be leading a lifestyle which the person's known income could not possibly sustain and for which there is no credible explanation. If the scope of Article 20 is to be addressed, Section 26 would need strengthening to allow the ACC to investigate potential criminal offences on the grounds of unexplained wealth. However, this would still not be enough as Article 20 calls for the possession of unexplained wealth to be made a criminal offence.

In its self-assessment Namibia says it would like to receive examples of illicit enrichment legislation from other countries and also indications of whether such laws been effective. South Africa's Prevention and Combating of Corrupt Activities Act provides for an investigation into a person who appears to own property disproportionate to their income.<sup>14</sup> However, the South African law only allows for an investigation to proceed rather than making illicit enrichment itself a crime.

The argument for including illicit enrichment as a crime is usually based on the fact that corruption is a clandestine offence and direct evidence of a crime can be hard to obtain. Identifying an official who has immense wealth well beyond what could be explained by the official's salary almost becomes a proxy indicator for a criminal offence involving corruption. By having a crime of illicit enrichment some of the problems of gathering evidence and proof can be circumvented. However, this does raise significant legal and potentially constitutional questions as it can be difficult to pinpoint where a crime has taken place: is it in the possession of unexplained wealth or the omission of being able to explain how the wealth was obtained? In addition, some legal scholars argue that these loose definitions of what

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<sup>14</sup> See <http://www.dac.gov.za/acts/Prevention%20and%20Combating%20of%20Corrupt%20Activities%20Act.pdf>



constitutes a ‘crime’ could undermine the human rights of an accused and the right to a fair trial in which there is a presumption of innocence.<sup>15</sup> This may be why Namibia in a self-assessment response on the question of illicit enrichment states that there are unspecified “constitutional concerns” related to the introduction of legislation on illicit enrichment.

Namibia should investigate how a criminal offence of illicit enrichment could be introduced in conformity to the country’s constitution.

Namibia currently has very weak systems in place for the declaration of assets by public officials.<sup>16</sup> The main characteristic of the current approach in Namibia is blatant non-adherence to requirements for regular disclosure where such requirements exist and lack of disclosure requirements in key sectors. Only the legislature has an asset declaration requirement but this is not adhered to; while the executive, the judiciary and the senior levels of the public service are not required by any law to file disclosure forms.

In addition it is important that Namibia introduces and enforces comprehensive and effective asset declaration provisions and penalizes false declarations.

In addition, Namibia should consider instituting a system of lifestyle audits. In South Africa, the South African Revenue Service (SARS) carries out investigations into people who appear to be living beyond their means. These investigations are prompted by income tax returns but also information received from the public, including via the SARS anti-corruption and fraud hotline. Accumulated wealth has to be explained by the taxpayer under investigation. Any unexplained wealth will then be taxed. If there is a mismatch between what the taxpayer had declared and what SARS uncovers during an investigation, the case is referred for an audit. Tax evasion is dealt with through various penalties and interest that can be imposed. However, SARS can also hand over information to the South African Police and a specialised tax unit for criminal prosecution within the National Prosecuting Authority.

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15 See <http://www.kenyalaw.org/klr/index.php?id=426>

16 See Asset Disclosure in Namibia: The Need for Reform and Enforcement (IPPR Anti-Corruption Research Series, Paper 12 August 2012)



In view of the South African experience it would seem sensible for the Namibian tax authorities, the ACC and the Namibian police to establish a system for working together – whereby information about any suspicious levels of income detected by the Receiver of Revenue can be passed on to the appropriate investigating authorities.

***Article 22: Embezzlement of property in private sector***

The current Anti-Corruption Act does not cover embezzlement committed intentionally in the course of economic, financial or commercial activities by a person in a private sector by virtue of his or her position. This would appear to be a major omission. Namibia’s self-assessment on Chapter III states, somewhat vaguely, that “common law (fiduciary) principles prohibit the embezzlement of property in the private sector”.

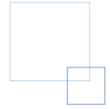
However, if the embezzlement of property in the public sector is covered in Section 45 (1), Section 43 (1) and Section 38 (b) of the Anti-Corruption Act (according to the Namibia’s response to Article 17 in its self-assessment) then there seems to be no reason why the same crime in the private sector should not be covered.

***Article 23: Laundering of the proceeds of crime***

The Namibian self-assessment does not take into account two pieces of legislation passed at the end of 2012: the Financial Intelligence Act (Act 13 of 2012) The Prevention and Combatting of Terrorist Activities Act (Act 12 of 2012). Instead the self-assessment quotes the 2007 version of the Financial Intelligence Act, which has been substantially re-drafted and tightened in the new law. Parliament passed the new Financial Intelligence Act and the Prevention and Combatting of Terrorist Activities Act in some haste in late 2012 in a bid to comply with requirements from the Financial Action Task Force (FATF) on money laundering and the financing of terrorism. Both Acts were signed into the law before the end of 2012.

***Article 29: Statute of limitations***

This is not adequately answered in the self-assessment. The Convention is looking for an indication that the statute of limitations would be used as



an avoidance measure against serious charges if, for example, a suspect had evaded justice for a long time. This would be through an extension of the statute of limitations and/or an option to suspend it in certain cases.

Section 18 of the Criminal Procedure Act of 1977 states that Namibia's statute of limitations is a period of twenty years from the date when the offence was committed to the initiation of a prosecution, except in cases where the charges are so serious the death penalty could be imposed. The obsolete nature of the 1977 Act is underlined by the fact that Namibia abolished the death penalty in 1990.

Namibia passed a new Criminal Procedure Act in 2004. However, this Act has not yet been made operational.<sup>17</sup> Article 16 deals with the prescription of the writ to prosecute and states that the statute of limitations remains twenty years except for the following alleged crimes: treason; murder; rape; kidnapping; childstealing; or robbery. However, no mention is made of criminal offences related to corruption in relation to an exemption from the statute of limitations. In view of Article 29 of Chapter III, Namibia should consider amending the Criminal Procedure Act to include crimes of corruption in this list. It seems likely that 2004 Act will never come into force but will be replaced by a new Act, as according to the Law Reform and Development Commission the 2004 version has numerous deficiencies.<sup>18</sup>

### ***Article 30: Prosecution, adjudication and sanctions***

Although Namibia's self-assessment indicated there was compliance with this Article of Chapter III, there are concerns with paragraph 7(a), which deals with disqualification from public office, and 7 (b) which deals with qualification from holding office in an enterprise owned in whole or part by the state. The intention here is to ensure that people found guilty of corruption can be barred from public office. Therefore it is not appropriate for Namibia's self-assessment to only cite the section of the Anti-Corruption Act that deals with the appointment of the Director and Deputy Director as they are only two of many public officials for whom this

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17 See <http://www.superiorcourts.org.na/high/legislation/criminal.html>

18 See <http://www.namibiansun.com/content/national-news/rape-law-changes-mooted-tackle-namibia's-shame>



Article is relevant. In addition, the sections of the Public Service Act cited in the self-assessment only deal with the discharge of public servants found guilty of misconduct and not their disqualification from holding future positions in the public service. There have been cases of public servants who have been found guilty in both disciplinary and criminal processes being dismissed and then later re-appointed to even more senior positions in the public service.<sup>19</sup> Article 47 of the Constitution is also relevant here as it sets out that members of parliament can be disqualified if they have been convicted of an offence for which they have served a sentence of more than 12 months without having an option of paying a fine.

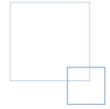
In terms of paragraph 7 (b), Namibia does not have provisions that deal with disqualifying people from holding office in a state-owned enterprise aside from stipulations in the Companies Act and any equivalent clauses in laws setting up parastatals such as the NamWater Act cited in the self-assessment, which refers to the barring of directors who have been convicted of criminal offences and imprisoned with no option of a fine.

Article 225 of the 2004 Companies Act deals with the disqualification of directors. A person can be disqualified from serving on company boards if they have been previously found guilty of misconduct; if they have been convicted of insider trading or any other fraud-on-the-market offence; if they have been convicted, whether in Namibia or elsewhere, of theft, fraud, forgery or uttering a forged document, perjury, an offence under any law for the prevention of corruption, or any offence involving dishonesty or in connection with the promotion, formation or management of a company, and have been sentenced to imprisonment without the option of a fine or to a fine to the equivalent of or exceeding N\$1,000.

While the Companies Act is quite comprehensive on the disqualification of directors, the appointment of senior staff to state-owned enterprises is not covered by the legislation and there is nothing that prevents those with track records of corruption from being appointed to senior management positions.

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<sup>19</sup> See <http://www.namibian.com.na/news-articles/national/full-story/archive/2012/december/article/justice-ministry-probes-convicted-director/>



### ***Article 31: Freezing, seizure and confiscation***

In order to fulfil all aspects of Article 31 there needs to be congruence between the roles of the ACC and other authorities operating under the Prevention of Organised Crime Act. As Namibia's self-assessment points out "The mandate of the Anti-Corruption Commission under the Prevention of Organised Crime Act (POCA) is limited. For example, under section 28 of the POCA only a member of the police may seize property upon the reasonable belief that such property will be disposed of or removed before a restraint order can be made. This frustrates the effective exercise of functions by law enforcement agencies."

The self-assessment calls for POCA to be amended to expand the definition of "authorised member of police" to include the Anti-Corruption Commission. In addition, the Anti-Corruption Commission should be given a direct mandate to enforce POCA.

### ***Article 32: Protection of witnesses, experts and victims***

Namibia does not have the kind of comprehensive and effective protection of witnesses, experts and victims as envisaged in Article 32. Protection provisions envisaged in Article 32 include relocation, non-disclosure of information such identity and location, the relay of testimony via video or other protective measures. The Criminal Procedure Act of 1977 does provide for identities to be protected and for testimony to be given behind closed doors in circumstances where there might be the threat of danger to a witness. The Prevention of Organised Crime Act 2004 contains similar provisions, while the Anti-Corruption Act of 2003 also partly covers this area. The Financial Intelligence Act of 2007 provides informers with protection of their identity as well as making them not liable for any damages. However, it is still clear that Namibia should have an integrated, holistic system that provides for witness protection, including relocation if deemed necessary. Namibia has not entered into any international agreements on witness protection. Namibia's self-assessment implies that one of the main reasons why witness protection is not developed in Namibia is the cost factor. Witness protection is only provided within the means of the state i.e. on a limited basis. Despite the budgetary constraints Namibia should still consider expanding its witness protection



mechanisms. The ACC's Namibia National Urban Corruption Perception Survey of 2011 found that 67.5 percent of respondents who were aware of an act of corruption did not report it while 43 percent of respondents when asked why they had not reported an act of corruption they knew of answered that they feared victimisation. Extensive and well-funded witness protection measures across the relevant legislation would build confidence among potential witnesses and victims and help them to come forward with evidence of corruption.

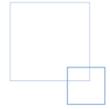
### ***Article 33: Protection of reporting persons***

As stated above the ACC's Urban Perceptions Survey indicates that one of the main reasons for Namibians not reporting corruption is a fear of victimisation. Despite this Namibia has so far not introduced legislation aimed at protecting those who report corruption, sometimes known as protection of whistleblower legislation. Article 33 of Chapter III calls for appropriate measures to ensure protection from unjustified treatment for people who report corruption to the authorities.

There is currently no dedicated law for the protection of whistleblowers. During his State of the Nation address in April 2012, President Hifikepunye Pohamba directed the Ministry of Justice to expedite the tabling of "strong and comprehensive legislation on the protection of whistleblowers", adding that such a law would "greatly enhance anti-corruption efforts by protecting persons who disclose information on corrupt activities from victimisation." However, as of January 2013, no draft bill on the issue had emerged. The ACC has called for the introduction of a law protecting whistleblowers for the past several years and the issue is reported to be on the agenda of the Law Reform and Development Commission. Currently, there is limited protection for those who report corruption provided for in a number of laws including the Anti-Corruption Act, the Labour Act, the Criminal Procedure Act and the Diamond Act.<sup>20</sup> However, other laws act as a deterrent to people coming forward with information on acts of corruption. The Public Service Act makes the disclosure of information without the permission of the permanent secretary a disciplinary offence.

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20 See Protected Disclosure: Informing the Whistleblowing Debate in Namibia (IPPR Anti-Corruption Research Series, Paper 10 August 2012)

**Article 34: Consequences of acts of corruption**

In general Namibia does not keep registers of companies and individuals who are barred from bidding for or accepting government contract work due to previous transgressions, including involvement in acts of corruption. The current Tender Board Act does not explicitly bar companies from future bidding. New legislation on public procurement should create a register of companies and individuals who are barred from undertaking government-related work. This approach should be extended to other government concessions such as mining licences and fishing quotas.

**Article 36: Specialised Authorities**

Article 36 commits state parties to ensure the existence of a body or bodies or persons specialised in combating corruption through law enforcement. Such bodies should be independent and have the resources and training to be able to carry out their tasks. Namibia's self-assessment says it only complies in part with this Article. It is clear (as the self-assessment states) that Namibia requires "capacity-building and training for its law enforcement personnel, in particular staff in the Anti-Corruption Commission, the Namibian Police, Prosecutor General's office, Financial Intelligence Centre in the Bank of Namibia, the Customs and Excise Department and immigration officials on the full implementation of the Financial Intelligence Act and Anti-Corruption Act, including handling and investigating corruption cases, depriving offenders of the proceeds of corruption, and sensitizing staff to international best practices."

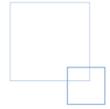
In addition, there are some questions about the independence of the ACC given that the President plays overriding role in the appointment of the Director and the Deputy Director.

**Article 39: Cooperation between national authorities and the private sector**

Article 39 refers to state parties taking measures to ensure "cooperation between national investigating and prosecuting authorities and entities of the private sector, in particular financial institutions". Such cooperation appears to ad hoc in Namibia. There is a need for such bodies (private



sector bodies, chambers of commerce etc) to be incorporated into a national anti-corruption task force which could prevent disconnects and enhance synergies.



## **SECTION 3**

# **REVIEW OF NAMIBIA'S ASSESSMENT OF CHAPTER IV: INTERNATIONAL COOPERATION**

According to Namibia's own review of its compliance with Chapter IV of eight articles assessed only one was fully complied with. The remaining seven were either complied with in part or not all. The following table indicates, Namibia's responses on the various articles:

Article	Title	Compliance
43	International cooperation	Yes
44	Extradition	In part
45	Transfer of sentenced persons	In part
46	Mutual legal assistance	In part
47	Transfer of criminal proceedings	No
48	Law enforcement cooperation	In part
49	Joint investigations	In part
50	Special investigative techniques	In part

Namibia's self-assessment document indicates that a number of key pieces of legislation relevant to Chapter IV are currently under review including the Extradition Act and the International Cooperation in Criminal Matters Act. The stipulations within UNCAC should be taken into account when reviewing these laws.



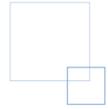
### **Article 44: Extradition**

Namibia's extradition procedures are long and drawn out as the case of Hans Juergen Koch illustrated. Koch, a German national, was arrested in 2002. Koch was wanted in Germany on 203 charges of fraud, involving the equivalent of some N\$440 million, 12 counts of tax evasion, involving the equivalent of some N\$24 million, and four charges of falsifying documents. The alleged crimes were committed between 1987 and 2000. Koch moved to Namibia in 1990s and became as Namibian citizen in 2002. An extradition hearing was heard before a Magistrate in Tsumeb in 2003, when the Magistrate ordered that Koch should be kept in prison until the Minister of Justice issued an extradition order for his return to Germany. Koch spent four years in prison as he fought decisions by both the Magistrate's Court and the High Court that he should be extradited. Ultimately the case went to the Supreme Court in 2006 which ordered his release as it found the Extradition Act had not been followed properly. The documents that the State used in support of Germany's extradition request did not meet the standards set by Namibia's Extradition Act, the Supreme Court ruled. In short, the Supreme Court indicated that the law placed a heavy burden on the state to demonstrate that there is sufficient evidence against a person on the charges on which an extradition is requested. Back in 2006, the Supreme Court said that the extradition Act should be reviewed with a view to simplifying Namibia's extradition procedures.<sup>21</sup> To date, some six years later, the Extradition Act is still under review with no new version being brought before parliament. In his judgement Acting Judge of Appeal Johann Strydom said: "What is supposed to be a relatively simple and speedy procedure, because it is only an enquiry and not a trial where guilt or innocence play a part, inevitably develops into an all-out fight and the making of a last stand to attempt to avoid the consequences of criminal behaviour in another country."

The case history of Hans Juergen Koch is relevant here because UNCAC specifically in Article 44.9 refers to state parties endeavouring to "expedite extradition procedures" and "simplify evidentiary requirements". This has not yet happened in Namibia despite the recommendation of the Supreme

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<sup>21</sup> For the full judgement see <http://www.saflii.org/na/cases/NASC/2006/6.html>



Court six years ago. Delays are also common in Namibian extradition cases due to the heavy burden of proof on the state, which in turn requires the Namibian authorities to make a series of requests for evidence to the state seeking extradition.

A second high-profile extradition case, that of US and Israeli citizen, Jacob 'Kobi' Alexander, who is wanted in the US on 35 criminal charges relating to alleged stock market fraud, also indicates the manner in which extradition matters have been handled in Namibia. Alexander arrived in Namibia in 2006 and the US requested his extradition shortly thereafter. However, since Namibia has no extradition agreement with the US it was necessary for Namibian President Hifikepunye Pohamba to issue a proclamation in terms of subsection 4 (1) (b) of the 1996 Extradition Act to specify the US as a country to which the extraditions of persons in Namibia may be effected.<sup>22</sup>

In practice this is the manner in which Namibia expects to deal with extradition requests from other countries due to the fact that very few extradition agreements with other agreements have been signed. Such bilateral arrangements are in place with the governments of China, Zimbabwe and Angola. However, the agreements with Zimbabwe and Angola are not yet in force. As a result a designation/proclamation approach is used (as in the Kobi Alexander case) instead of bilateral extradition treaties.

There is clearly a case for making Namibia's extradition rules much simpler. In the self-assessment, the Namibian authorities suggest that the state requesting extradition supply a certificate indicating that there is prima facie evidence that an offence has been committed and that therefore the extradition request should be granted. A new Extradition Act to replace the 1996 version should address this. In addition, the new Act could set deadlines to ensure that a case does not drag on for several years, as in the Koch case, while several appeals are heard.

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<sup>22</sup> See Government Gazette, 27 September 2006, Proclamation No.10 Extradition Act 1996: Country specified for purposes of extradition

The system for specifying countries to which people found in Namibia can be extradited should also be reviewed. Entering into bilateral agreements appears to be a slow and cumbersome process – one that has been circumvented by having the President issue proclamations when cases arise. However, this reactive process also has its weaknesses since it is highly dependent on an executive decision by the head of state, which could be viewed, at least by the courts, as prejudicial or biased in some way.

A new extradition law should also address the manner in which Namibia could effectively seek the extradition of a person from another country. The bilateral treaty approach could place restrictions on Namibia's requests for extradition. This was illustrated in the case of Lazarus Shaduka who is wanted in Namibia to serve a prison term for murder. It is believed he fled to Angola at the end of 2012. It was reported at the time that Namibia's existing extradition agreement with Angola was not valid.<sup>23</sup> Although there is limited case history in this area, the Shaduka example does indicate that it could be difficult, even impossible, for Namibia to extradite persons wanted for offences that are established as part of UNCAC.

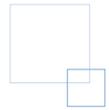
#### ***Article 46: Mutual legal assistance***

Namibia has a comprehensive law on this in the form of the International Cooperation in Criminal Matters Act (CCMA) of 2000. Like the Extradition Act of 1996, the CCMA is also currently under review. This process should take into account aspects of Article 46 not covered by the existing Act.

This includes gaps noted in Namibia's self assessment in terms of Article 46.3 (j and k) which deals with mutual legal assistance on the issue of identifying, freezing and tracing proceeds of crime and the recovery of assets. According to the self-assessment Namibia does not currently have laws that allow for the identifying, freezing and tracing of proceeds of crime or recovery of assets at the request of another state.

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23 <http://www.namibian.com.na/news/full-story/archive/2013/january/article/extradition-agreement-between-namibia-and-angola-not-valid/>



Article 46.18 refers to video conferencing as a technique for ensuring witnesses in other territories can give evidence at hearings. The technical facilities at Namibian courts should be upgraded to ensure this can happen while the Criminal Procedure Act should be amended to allow for testimony to be delivered in this manner.

Article 46.24 deals with the necessity of state parties dealing expeditiously with requests for mutual legal assistance including taking account of any deadlines facing the requesting authority. As Namibia's self-assessment often notes, Namibian responses, particularly regarding international requests, can be marred by delays caused by lack of coordination among agencies combined with skills gaps and capacity problems.

#### ***Article 48: Law enforcement cooperation***

References in Namibia's self-assessment indicate that while Namibia does cooperate with other state parties to enhance the effectiveness of law enforcement, the arrangements often appear to be ad hoc and informal. Cooperation could be formalised – an issue that could be addressed by an inter-agency task force in Namibia.

#### ***Article 49: Joint investigations***

Due to crimes of corruption increasingly having a transnational character, it is crucial that Namibia has in place mechanisms and arrangements which allow for joint investigations involving other states. Namibia's experience with the Offshore Development Corporation case – which spread its tentacles to Botswana and South Africa – indicates that such joint investigation arrangements need to be set up timeously.

## **SECTION 4**

# **NAMIBIA AND OTHER PROVISIONS OF UNCAC**

This section of the report will examine other relevant article of UNCAC that were not included in Namibia's self-assessment review of Chapters III and IV.

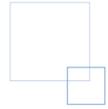
### **CHAPTER II: PREVENTIVE MEASURES**

#### ***Article 5: Preventive anti-corruption policies and practices***

Article 5.1 addresses the need for state parties to develop, implement and maintain effective, coordinated anti-corruption policies that promote the participation of society.

It is arguable that Namibia still lacks effective coordinated anti-corruption policies. Namibia now has a formidable armoury of anti-corruption laws. Several key pieces of legislation have been passed in the last decade – starting with the Anti-Corruption Act in 2003. This was followed by the Prevention of Organised Crime Act in 2004 and the Financial Intelligence Act in 2007. Yet some key aspects of the legal environment necessary for tackling corruption are missing – in particular whistleblower protection, more extensive witness protection measures and a comprehensive and workable system for the declaration of assets by public officials. In addition, key pieces of legislation that would greatly aid the fight against corruption in Namibia are not in place – for example an Access to Information law.

There are also indications that policy frameworks are not aligned or integrated in terms of tackling corruption. Hence the Fourth National



Development Plan does not correlate with the ACC's own Strategy Plan. There is also a lack of synergy between the different laws – with, for example, the Prevention of Organised Crime Act not explicitly recognising the role of the ACC in investigating corruption. The various key role players – the ACC, the police, the Financial Intelligence Centre, and the Office of the Auditor-General – do not have mechanisms for cooperation in place while inter-agency communication appears weak. Even the relationship between the ACC and the Office of the Prosecutor General appears to be problematic at times – with dockets having to be sent back for further information while some proposed prosecutions are declined by the Prosecutor General for lack of evidence.<sup>24</sup>

Namibia is a long way from having a fully-functioning national integrity system with key pillars such as the legislature, executive, and judiciary working effectively to hold corruption in check. In addition other key agencies and sectors – such as civil society, political parties and the private sector – are not fulfilling their potential roles in leading the charge against corruption.

The ACC's effectiveness is also constrained by its limited capacity and resources. For example its role in preventing corruption is minimal due to the fact that its Directorate for Public Education and Corruption Prevention has only four staff members out of a total ACC staff complement of 49, according to the ACC's Organisational Structure.<sup>25</sup> As a result the ACC's public education role is restricted while civil society organisations are hamstrung by a lack of funds and in some cases commitment. As a result, Namibia is sorely lacking public champions in terms of battling corruption. Consequently, public participation as envisaged in Article 5 is circumscribed by these circumstances.

Overall, the ACC could be said to be under-staffed and under-resourced. Its budget has never exceeded more than 0.2 percent of the national budget since its inception in 2006. Increases in the ACC's budget (see

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24 From 2006 to 2011 the ACC submitted 262 cases to the Prosecutor General for prosecution. The Prosecutor General declined to proceed with 36 cases. For further details see *The ACC in Action: What Does The Track Record Say?* (IPPR Anti-Corruption Series Paper 6 November 2011)

25 See *The ACC in Action: What Does The Track Record Say?* (IPPR Anti-Corruption Series Paper 6 November 2011)



table below) have largely been due to infrastructure projects such as the construction of the ACC's new office in Windhoek. The ACC's full staff complement of 49 is a woefully low number when compared to the size of the corruption problem in Namibia (only 22 people work in the Directorate of Investigations and Prosecutions).

**Table on ACC funding 2006-12:**

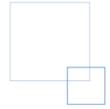
Financial Year	Total Budget N\$
2012	50 million
2011	63 million
2010	30 million
2009	26 million
2008	21 million
2007	17 million
2006	14 million

Source: ACC

In order to achieve the necessary level of coordination it is vital that Namibia not only has a national anti-corruption strategy but also a national anti-corruption task force.

Article 5.3 states that each state party should endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption. There is clearly a need for review of existing legislation and also the formulation of new laws to fill existing gaps and ensure compliance with UNCAC.

The Law Reform and Development Commission (LRDC) has stated that it is ready to research and draft legislation on whistleblower protection, systems for the declaration of assets and prevention of conflict of interest, and access to information. The LRDC should be encouraged to fulfil this role and given the resources to complete these responsibilities effectively.



### **Article 6: Preventive anti-corruption body or bodies**

Article 6.1 states there should be “a body that prevents corruption by implementing the policies referred to in Article 5 and increasing and disseminating knowledge about the prevention of corruption.”

The ACC is the only body with a direct role in terms of dealing with corruption. While its legal mandate may cover many if not most of these requirements, it is not clear in practice if can play the necessary public education role as envisaged in Article 6.1 due its current staffing structure and access to state resources (as outlined above).

In essence the ACC, according to its founding Act, has three main functions:

- Investigating complaints of corrupt practices received or initiating independent investigations;
- Preventing corrupt practices by examining mechanisms that may be prone to corruption and providing advisory services for reducing corruption
- Educating the public on the dangerous effects of corruption and soliciting public support in the fight against corruption.

While it is clear that the ACC is investigating cases and passing them on for prosecution, it lacks the capacity to fulfil its other two major functions. As outlined above, it can only play a limited role in public education due its current budgetary constraints and staffing structure, while its advisory role in terms of reducing corruption has been even more minimal – largely due to the fact that it hardly has any research capacity through which it could come up with policy and legal changes and reforms. This point also has reference to Article 6.2 which says that a state party should ensure the national anti-corruption body has the “necessary material resources and specialised staff, as well as the training that such staff may require to carry out their functions.”

Article 6.2 deals with the independence of the anti-corruption body. In Namibia the independence and impartiality of the ACC is guaranteed in the Constitution (Article 94A (3)) and in its founding law (Article 2 (1)).

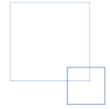
However, there are sections of the Anti-Corruption Act which could be used to undermine the independence of the ACC. According to Article 4 (1) of the Anti-Corruption Act, the President nominates both the Director and Deputy Director who are later appointed by the National Assembly. This raises the possibility of the President appointing a loyal party cadre who may not be independent with the appointment then being rubber-stamped by a National Assembly nominated by the ruling party. Another option would be for an advisory board drawn from civil society, professional bodies and the private sector to recommend names to parliament which can then approve them and appoint them or forward the names to the President for confirmation.

### ***Article 7: Public Service***

Namibia's Public Service is governed by the Public Service Commission, established in terms of Articles 112 and 113 of the Constitution. The Public Service Act of 1995 provides for establishment, management and efficiency of the Public Service, the regulation of employment, conditions of service, discipline, retirement and discharge of staff members. The Public Service Act and the work of the Public Service Commission go a long way towards meeting the standards outlined in Article 7 as regards recruitment, promotion and retired of public officials, as well as promoting adequate remuneration, and training.

Namibia does set some criteria as regards candidature for and election to public office (see Article 7.2). The Constitution states that no person can become a member of parliament should if they have been convicted of a crime that carries a sentence of longer than 12 months in prison without the option of a fine; if they have been declared an unrehabilitated insolvent; are of unsound mind as declared by a court; are public servants; or already serving as an elected person in another tier of government.

The current Electoral Act simply restates these constitutional requirements for candidature. The current system is passive in that it does not make would-be candidates fill out disclosure forms. However, Namibian law could go much further in ensuring that certain standards and requirements are met as regards people standing for public office. The Law Reform and Development Commission (LRDC), in its work on electoral reform,



has pointed out that “transparency also applies to political candidates. When they are nominated for any election they should provide detailed information about their educational qualifications, make asset and liabilities declarations, and disclose any criminal convictions.”<sup>26</sup>

The LRDC should consider setting further requirements for candidates as it undertakes the drafting of new election laws (expected on 2013), particularly to ensure candidates do not have track records of corruption. There are currently a number of people convicted of corruption who have paid fines to avoid jail time or have only been fined.<sup>27</sup> Such people should also be barred from being elected to public office by a general ban on people found guilty of corruption being introduced in the new electoral laws.

Article 7.3 raises highly pertinent issues for Namibia. It requires that state parties should also take measures to ensure transparency in the funding of candidatures for elected public office and the funding of political parties. This is also an issue on the agenda of the LRDC and it is expected that a new bill will be drafted regarding the functioning of political parties, which will include their funding. At present, even though parties in Namibia do receive state funding, there is no requirement for these parties to produce or publish any financial reports in which they might have to list donors and also publish details of their income and expenditure. The only current requirement in law is that any donations to political parties from foreign sources must be declared (although the exact mechanism for this is not clear) as per Article 46 of the Electoral Act of Namibia.

The funding of political parties and candidates requires urgent attention and it is to be hoped that the LRDCs’ recommended laws cover this gap. Maintaining sound financial records, declaring donations above a certain amount and publishing audit accounts should be mandatory for political parties and required by law.

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<sup>26</sup> See page 22 of the Report on the Revision and Reform of the Namibian Electoral Act (Act 24 of 1992) compiled by Prof. Gerhard Töttemeyer, April 2012, LRDC

<sup>27</sup> See <http://allafrica.com/stories/201211290559.html>



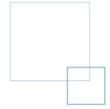
Article 7.4 addresses the need to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest. Namibia does not have a clear, comprehensive watertight regulatory environment for dealing with conflict of interest. This has much to do with the absence or non-enforcement of codes of conduct. (see below).

***Article 8: Codes of conduct for public officials***

Namibia's codes of conduct and systems for asset declaration are either in a parlous state or non-existent. The Privileges and Immunities Act of 1996 states that MPs should not participate in any parliamentary proceedings if they have a direct or indirect interest in the subject matter which might prevent them performing in a proper manner. In addition, the Constitution states in Article 42 (1) that ministers cannot take up other paid employment or "expose themselves to any situation which carries with it the risk of a conflict developing between their interests as ministers and their private interests."

While these clauses may have noble intentions there is no working system of checks and balances in place to monitor public officials interests or institute action if a conflict of interest does develop. National Assembly MPs have ignored the stipulation in their own Code of Conduct (which has never been approved by parliament) to declare assets annually. In fact the Registers of Members' Interests has only been published twice – in 2003 and 2009. The National Council has performed better – managing to publish an annual assets register in recent years.

In the public service there is a requirement in the Public Service Act that prohibits staff members from undertaking private work unless they have the permission of the permanent secretary. The staff rules for the public service note that the purpose of this clause is partly to prevent conflicts of interest developing." The system depends on honest public servants reporting their outside interests to the permanent secretary and is therefore passive in nature. There are no mechanisms for proactively monitoring whether public servants comply with the provisions of the Public Service Act.



There should be a national law that sets out clearly the principles that should govern a sound conflict of interest policy. This should be used as guidance for developing particular codes of conduct and asset declaration systems for different tiers of government.

For parliamentarians the intervals and requirements for asset disclosure should be spelt out in law, while a commission within parliament should be charged with monitoring the process of asset declaration.

The Public Service Act should be amended to ensure the management cadre declare their assets and interests annually. A commission within the Office of the Prime Minister should be set up to administer the register of assets for senior public servants.

In addition, the judiciary should also have a system for asset and interest disclosure. These new registers for assets and interests should be available for public inspection.

### ***Article 9: Public procurement and management of public finances***

Article 9 calls for state parties to have systems of procurement based on transparency, competition and objective criteria in decision-making and that ultimately effective in preventing corruption.

The Tender Board Act of 1996, which governs public procurement in Namibia, has been acknowledged as out of date and in need of fundamental reform. Government has produced at least two drafts for a new public procurement bill in three last year, but a bill has yet to be brought before parliament.

From an anti-corruption perspective, the situation calls for drastic and urgent overhaul. In view of recent tender scandals in Namibia<sup>28</sup>, the need for the finalisation of a new law and the general strengthening and improvement of the procurement environment is paramount.

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28 See for example 'ACC investigates N\$20m Omusati toilets', *The Namibian* September April 6 2010 or 'Neckartal tender cancelled', *New Era*, January 30 2012.



At present the Tender Board is chaired by the permanent secretary of the Ministry of Finance and consists of representatives each Ministry – who are normally the permanent secretaries. The Tender Board should be downsized and made more technical in approach. In addition appropriately skilled individuals who are not in government should be included on the board.

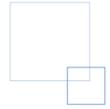
At present there is a limited requirement for Tender Board members to disclose any interests they might have in matters on the agenda of the Board. This should be replaced by a more comprehensive code of ethical conduct for Tender Board members and Secretariat staff. This would include a disclosure of interests process. An appropriate independent body should be appointed to supervise and monitor the application of the code of conduct and the disclosure process. Similarly, all tenderers should be required to comply with an integrity system.

Most public contracting in Namibia is not formally discussed by the Tender Board. Instead ministries apply for tender exemption. There are concerns that this process has been abused to allow favouritism and nepotism to influence tender allocation. A new public procurement law should ensure that tenders are only exempted from the full review of a tender board if they extremely e.g. a response to a emergency situation like a flood. Alternative procurement mechanisms should be developed for such instances which still require some monitoring and checking.

A register of excluded tenderers should be maintained, so that those companies involved in corrupt practices previously cannot continue to bid for contracts. A review panel should be set up to deal with tender disputes.

Transparency should be given effect by making the various stages of the procurement process public.

Article 9.2 deals with measures required for promoting transparency and accountability in the management of public finances including the national budget, reporting on revenue and expenditure, and a system of accounting and auditing standards among others.



Namibia's level of budget transparency was rated at 55 out of 100 in the 2012 Open Budget Index (OBI).<sup>29</sup> This placed Namibia at 32<sup>nd</sup> out of 100 countries surveyed. The OBI pointed out that Namibia could improve its level of budget transparency and accountability by publishing a pre-budget statement, a mid-year report, and in-year monitoring reports. Namibia could also strengthen its auditing of accounts by ensuring these are produced on time.

In addition, the enforcement of corrective action and penalties could be introduced by an Audit Act which would create an effective 'court of audit' to deal with officials found to have broken treasury rules and been responsible or overspending or other irregularities. At present the National Assembly's public accounts committee does not have the power to summon witnesses, obtain evidence under oath, and impose penalties. The State Finance Act should be reviewed to ensure the public accounts committee has the teeth to follow up on errant officials and irregular spending.

### ***Article 10. Public reporting***

Namibia nor does not have any access to information legislation – nor does access to information feature explicitly in the Constitution's Bill of Rights. Historically, Namibia's legal environment is predominantly skewed in favour of promoting secrecy with apartheid-era legislation such as the Protection of Information Act of 1982 still on the statute books. The current Public Service Act makes it a disciplinary offence to release unauthorised information. While there has been some progress in certain areas – such as the Statistics Act of 2011, which enables access to official data – Namibia lacks an overarching legal framework that guarantees access to information. The links between access to information and corruption prevention and detection have been made in Namibia, not least by the Director of the ACC. As a result, the Law Reform and Development Commission do have the issue on their agenda. It is recommended that Namibia introduce access to information legislation following the basic principles in the African Union's model law on the issue. Namibia should

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<sup>29</sup> See <http://www.namibian.com.na/news/marketplace/full-story/archive/2013/january/article/budget-watchdog-open-your-books/>



also consider adding access to information to Chapter 3 of the Constitution as a fundamental right.

The development of access to information legislation in Namibia has long been delayed. In fact, the national consultative meetings in the late 1990s which proposed the setting up an anti-corruption agency and a specific anti-corruption law also recommended that a freedom of information law be passed. However, while Anti-Corruption Act was passed in 2003, a law on access to information has never emerged even though government remains committed to the issue in principle.

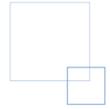
Although Article 10 of UNCAC does not specifically call for the introduction of access to information legislation, such a law would best serve its calls for the adoption of regulations and procedures to enhance transparency as regards public administration – particularly by allowing members of the public to obtain information regarding the organisation, functioning and decision-making of a country's public administration, as well as facilitating public access.

***Article 11. Measures relating to the judiciary and prosecution services***

As iterated in the section on codes of conduct above – the judiciary should also have a code of conduct that includes a system for declaration of assets. There is no such system currently in place in Namibia. Similarly, the office of the Prosecutor General should have a code of conduct that aims to prevent the possibility of corruption and conflicts of interest developing.

***Article 12. Private sector***

Namibia's business organisations have so far failed to come up with a code of ethical conduct that their members could subscribe to. There is a need for the private sector to pro-actively promote sound business ethics – by adopting codes of conduct that seek to prevent corruption in the business world. At the same time, representative private sector bodies (along with civil society representatives) should be included in any national anti-corruption task force to be launched.



## CHAPTER V: ASSET RECOVERY

Namibia passed a new Financial Intelligence Act at the end of 2012. The Act was signed into law by the President just before the end of the year.

The Financial Intelligence Act of 2012 sets up a Financial Intelligence Centre as the national centre responsible for collecting, requesting, receiving and analysing suspicious transaction and activity reports which may relate to money laundering or the financing of terrorism. The Act provides for the combating of money laundering and financing of terrorism activities and establishes an Anti-Money Laundering and Combating of the Financing of Terrorism Council. The Act also provides for the registration of accountable and reporting institutions, sets out the powers and functions of supervisory bodies, empowers the Minister of Finance to appoint an appeal board to adjudicate on appeals against decisions of the Centre or supervisory bodies.

The Bank of Namibia provides administrative services for the Financial Intelligence Centre. Its object is to combat money laundering and financing of terrorism activities in collaboration with the other law enforcement agencies. The Centre has the power to request and collect reports from relevant institutions.

The new Act does empower the Financial Intelligence Centre (FIC) to require financial institutions to carry out various checks to ascertain the identities of account holders. It also requires such institutions to carry out risk assessment to identify accounts where suspicious transactions and activity taking place. However, the new law does not specifically empower financial institutions to undertake enhanced scrutiny of accounts linked to individuals with prominent public functions and their close families and associates as required in Article 52.1.

The Financial Intelligence Act makes it the responsibility of accountable institutions to identify risky clients through their risk management and monitoring systems rather than the FIC issuing advice on what types of clients whose accounts should come under enhanced scrutiny. It is not among the FIC's powers and functions to offer accountable institutions guidance on what kinds of clients should be monitored closely. In general

the FIC should issue guidelines, directives, determinations, circulars or notices to accountable and reporting institutions to ensure compliance with this Act. The Anti-Money Laundering and Combating of the Financing of Terrorism Council can consult with accountable or reporting institutions on policy matters but is not specifically empowered to advise them on potential risks.

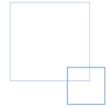
In terms of international cooperation with other similar institutions in other states, the FIC can disseminate information to competent authorities and foreign agencies with powers and duties similar to that of the Centre. The Act does not specifically state that that this should be information about accounts which might require enhanced scrutiny but it is fair to assume it does include them. The FIC is also bound to analyse reports received from other foreign agencies. The Act empowers the FIC to collect statistics and records of suspicious transactions reports, suspicious activity reports and requests for Information received and intelligence disseminated.

Accountable institutions are also required to keep appropriate records of accounts and transactions. In addition, the FIC should also entertain requests for mutual legal assistance or other international requests for cooperation.

Although the Act seeks to ease the way for cooperation and information sharing with similar foreign agencies, it does not explicitly require public officials with foreign bank accounts to report to the authorities on that banking relationship.

Articles 53, 54 and 55 deal with the recovery assets obtained with the proceeds of corruption and the rights to other state parties to recover such assets. Article 54 calls for each State Party to take measures to give effect to an order of confiscation issued by another State Party.

International asset recovery is a complex area of law – it includes processes such as the tracing, freezing, confiscation, and repatriation of proceeds kept in foreign jurisdictions.



There are indications that asset recovery processes are working well in Namibia.<sup>30</sup> In January 2013 it was reported that assets worth more than N\$4.5 million have been forfeited to the Namibian State through the use of the Prevention of Organised Crime Act (POCA). N\$2.4 million has been deposited in the Criminal Assets Recovery Fund, which was created in terms of POCA. A forfeited amount of N\$2.13 million would be paid directly to a company which has suffered a loss as a result of the crime committed against it. In addition, the Prosecutor General has obtained orders for the preservation of assets valued at about N\$8.7 million, she added. POCA came into operation in May 2009.

In terms of POCA, money in the Criminal Assets Recovery Fund may be allocated by Cabinet to Namibia's law enforcement agencies or to give assistance to witnesses and victims of crime. None of the recovered funds were reportedly paid to another state party. However, POCA has only been in operation for three years.

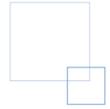
The International Cooperation in Criminal Matters Act of 1994 makes provision for the confiscation and transfer of the proceeds of crime between Namibia and other countries. Article 13 of the Act enables the State to recover money for the payment of a fine or damages from property a convicted person might own in a foreign country. Article 15 enables the permanent secretary in the Ministry of Justice to register a foreign compensatory order and submit it to the Minister of Justice for approval. Similar rules apply for the lodging of a foreign confiscation order, while Article 20 also sets the process to be followed when Namibia requests foreign States for assistance in enforcing confiscation orders.

Article 16 allows the Namibian Justice Minister to turn down a foreign compensatory order from another state party if it is deemed that such an order would not have been issued in Namibia. Under Article 17 the permanent secretary shall pay over to a requesting state any amount recovered in relation to a foreign compensatory order less any expenses incurred in executing the order.

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<sup>30</sup> See <http://allafrica.com/stories/201301210847.html>

There is also some evidence that money that flowed out of Namibia due to corruption can return. The Attorney General Albert Kawana told parliament in November 2012 that government had recovered N\$37.4 million out of a missing N\$100 million that was lost when a state-owned company, the Offshore Development Company (ODC), invested it in investment schemes in South Africa and Botswana that turned out to be scams. The money was recovered after the government applied for the liquidation of properties in foreign countries that belonged to individuals involved in embezzling the ODC funds. No one has been convicted for the crime which has yet to come to court. The case gives some encouragement that the principles of asset recovery and mutual legal assistance enshrined in UN-CAC can work in practice to obtain the return of stolen funds.



## SECTION 5

# GAPS, INCOMPATIBILITIES AND RECOMMENDATIONS

### ISSUE 1:

**Gap:** Namibia lacks effective, coordinated anti-corruption policies.

**Recommendation:** Government should adopt a national anti-corruption policy that seeks to align and coordinate existing policies and promote reforms where necessary. Government should also form a national anti-corruption task force, involving all key stakeholders (state and non-state) to help implement the policy.

Government should immediately move to fill the gaps in its anti-corruption legislative armoury by developing and passing laws on whistle protection; declaration of assets/conflict of interest and access to information.

**UNCAC reference:** Article 5

### ISSUE 2:

**Gap:** The Anti-Corruption Commission (ACC) does not currently have the capacity or resources for 'increasing and disseminating knowledge about the prevention of corruption'. No other official body has this mandate.

**Recommendation:** Government should ensure that the ACC is adequately resourced so that in particular its Directorate of Public Education and Corruption Prevention can fulfil the ACC's legal mandate for 'educating the public and disseminating information on the evil and dangers of corruption, including through the publication and distribution of brochures and pamphlets or the holding of public conferences'.

**UNCAC reference:** Article 6.1 (b)



**ISSUE 3:**

**Gap:** The ACC does not have the resources and capacity – and is currently not structured – to carry out a key part of its mandate: that is to advise public bodies and private bodies on ways of preventing corrupt practices and on changes of practices, systems and procedures aimed at reducing corrupt practices. As a result its effectiveness as a ‘preventive anti-corruption body’ is weakened.

**Recommendation:** Government should ensure that the ACC is adequately resourced, particularly to enable the ACC to develop a research capacity, so that it can fulfil its legal mandate to advise public and private sectors on strategies and policies for preventing corruption.

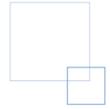
**UNCAC reference:** Article 6

**ISSUE 4:**

**Incompatibility:** Although established as an independent and impartial body more could be done to strengthen the ACC’s independence in line with UNCAC.

**Recommendation:** The Anti-Corruption Act should be amended to allow for an advisory panel representing various state and non-state stakeholders to nominate candidates for the Director and Deputy Director posts for approval by the National Assembly instead of the Head of State playing a direct role in the appointments. Parliament (rather than the Head of State) should also be given the final approval on the removal of the ACC Director or Deputy Director if that is the recommendation of the board envisaged in Article 9 of the Anti-Corruption Act.

**UNCAC reference:** Article 6.2

**ISSUE 5:**

**Gap:** Namibia does not prescribe criteria (related to corrupt practices) concerning candidature for and election to public office.

**Recommendation:** The electoral law should be amended to specify such criteria including reference to candidates who have past convictions for corruption-related crimes being regarded as not eligible for elected public office.

**UNCAC reference:** Article 7.2

**ISSUE 6:**

**Gap:** Namibia does not have legislative and administrative measures that enhance transparency in the funding of political candidates and political parties.

**Recommendation:** Namibia should develop and pass legislation that requires political parties to account for their use of state funds as well as publish annual accounts and a list of significant donors.

**UNCAC reference:** Article 7.3

**ISSUE 7:**

**Gap:** Namibia lacks a holistic, comprehensive policy and legal approach to conflict of interest.

**Recommendation:** There should be a national law that sets out clearly the principles that should govern a sound conflict of interest policy. This should be used as guidance for developing particular codes of conduct and asset declaration systems for the legislature, different tiers of government and other public agencies.

**UNCAC reference:** Article 7.4 and 8

**ISSUE 8:**

**Gap:** Namibia lacks a holistic, comprehensive policy and legal approach to the declaration of assets by parliamentarians

**Recommendation:** The intervals and requirements for asset disclosure should be spelt out in law, while a commission within parliament should be charged with monitoring the process of asset declaration, its adherence to the law and imposing any penalties required. The register of assets and interests for MPs should be available for public inspection.

**UNCAC reference:** Article 8

**ISSUE 9:**

**Gap:** Namibia lacks a holistic, comprehensive policy and legal approach to the declaration of assets by public servants

**Recommendation:** The Public Service Act should be amended to ensure the management cadre declare their assets and interests annually. The Public Service Commission or a body within the Office of the Prime Minister should be set up to administer the register of assets for senior public servants and any penalties to be imposed. The register of assets and interests for MPs should be available for public inspection.

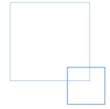
**UNCAC reference:** Article 8

**ISSUE 10:**

**Gap:** Namibia has no judicial code of conduct or system for declaration of assets for the judiciary

**Recommendation:** The Ministry of Justice in consultation with the Judicial Service Commission, the Law Society of Namibia and other stakeholders should develop and introduce a code of conduct for the judiciary and a register of assets and interests which is available for public inspection. A similar system should be drawn up for the prosecution service.

**UNCAC reference:** Article 8 and Article 11



## ISSUE 11:

**Gap:** Namibia's public procurement decision-making is not always based on transparency, competition and objective criteria.

**Recommendation:** Wide-ranging reform of Namibia's public procurement system is necessary. A new public procurement law is currently being formulated. This law should be based on the principles of transparency and fair competition and include: a reduction in the size of the tender board and move away from the system of using permanent secretaries; inclusion of individuals not in the employ of the state but with appropriate qualifications and skills on the tender board; introduction of a code of conduct and declaration of assets/interests system for tender board members and secretariat staff; creation of an oversight body to monitor assets and incomes of tender board members and secretariat staff; introduction of an integrity system for tenderers and contractors; the ending of the extensive use of tender exemptions through tighter

controls and alternative procurement procedures; the publication of a list of companies that are excluded from

tendering due to past irregularities and malpractice; the strengthening of penalties and sanctions; the creation of a review panel to mediate disputes; provision of a national oversight body for local and regional

tendering processes; greater transparency concerning tender deliberations and decisions, including the publication of tender details on a dedicated website in the spirit of the right to access information.

**UNCAC reference:** Article 9

**ISSUE 12:**

**Incompatibility:** Namibia could still do more to enhance budget transparency and therefore improve management of public finances.

**Recommendation:** Government should publish a pre-budget statement, a mid-year report, and in-year monitoring reports in order to improve the amount of accessible information available on the budget. Namibia could also strengthen its auditing of accounts by ensuring these are produced on time.

**UNCAC reference:** Article 9

**ISSUE 13:**

**Gap:** The National Assembly Public Accounts Committee is relatively powerless in terms of dealing with irregularities it becomes aware of concerning the national finances.

**Recommendation:** The State Finance Act should be reviewed to ensure the public accounts committee has the necessary powers to summon and sanction errant officials if necessary.

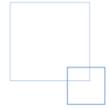
**UNCAC reference:** Article 9

**ISSUE 14:**

**Gap:** The Auditor-General's reports are often not followed by corrective accounts or any attempt to hold officials to account

**Recommendation:** Government should expedite the development and introduction of an Audit Bill which will create an independent adjudicating body with power to seek corrective actions and penalise officials for errors and malpractice regarding expenditure of government funds.

**UNCAC reference:** Article 9



## ISSUE 15:

**Gap:** Namibia does not have an access to information law

**Recommendation:** In order to realise the commitments contained in Article 10 on public reporting and Article 13 on participation of society, Namibia should have an overarching legal framework that guarantees access to information. Namibia should develop and introduce access to information legislation based on the principles of the African Union's model law on the issue. Namibia should also consider adding access to information to Chapter 3 of the Constitution as a fundamental right.

**UNCAC reference:** Article 10 and Article 13

## ISSUE 16:

**Gap:** Namibia's business umbrella bodies have not adopted codes of ethical conduct.

**Recommendation:** There is a need for the private sector to pro-actively promote sound business ethics – by adopting codes of conduct that seek to prevent corruption in the business world. At the same time, representative private sector bodies (along with civil society representatives) should be included in any national anti-corruption task force to be launched.

**UNCAC reference:** Article 12

## ISSUE 17:

**Gap:** Namibia does not have legislation outlawing the acceptance of or solicitation for a bribe by a foreign public official or an official of a public international organisation.

**Recommendation:** Section 40 of the Anti-Corruption Act should be amended to include the solicitation for or acceptance of a bribe by a foreign public official or an official of a public international organisation as a criminal offence.

**UNCAC reference:** Article 13.2



**ISSUE 18:**

**Gap:** Namibia does not have a crime of illicit enrichment on its statute books.

**Recommendation:** Namibia should investigate how a criminal offence of illicit enrichment could be introduced in conformity with the country's constitution. At the same time consideration should be given to introducing a comprehensive and watertight system for the declaration of assets by public officials (as outlined in Issues 8 and 9). Namibia should consider other means of conducting 'lifestyle audits' by enabling the tax authorities to track unexplained wealth by investigating income and property declarations made to the receiver of revenue.

**UNCAC reference:** Article 20

**ISSUE 19:**

**Gap:** The Anti-Corruption Act does not specifically criminalise embezzlement when committed by a person in the private sector.

**Recommendation:** Namibia should amend the Anti-Corruption Act so that includes the crime of embezzlement by a person who directs or works, in any capacity, in a private sector entity.

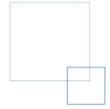
**UNCAC reference:** Article 22.

**ISSUE 20:**

**Incompatibility:** Namibia has reviewed itself against legislation that has since been repealed (the Financial Intelligence Act of 2007) in terms of assessing its progress on preventing the laundering of the proceeds of crime.

**Recommendation:** In terms of its UNCAC commitments, Namibia should measure itself against the most recent legislation – Financial Intelligence Act and the Prevention and Combatting of Terrorist Activities Act, both of 2012.

**UNCAC reference:** Article 23



## ISSUE 21:

**Gap:** Namibia's statute of limitations cannot be extended in relation to crimes of corruption.

**Recommendation:** Namibia should ensure that any provisions on the statute of limitations cannot be used by people who have evaded justice on corruption allegations for a long time. Namibia should amend the Criminal Procedure Act to include crimes of corruption in the list of offences for which a time period of 20 years between the committing of the alleged offence and prosecution cannot be used to prevent the case going ahead.

**UNCAC Reference:** Article 29

## ISSUE 22:

**Gap:** Namibia lacks clear comprehensive policies and laws on the disqualification of people from public office and positions in state-linked agencies and companies.

**Recommendation:** Namibia should introduce a holistic, comprehensive system that disqualifies people convicted of corruption from public office, either through new legislation and/or amendments to existing laws such as the Public Service Act and the laws establishing parastatals. At present, only people wanting to become members of parliament or directors of companies face being barred due to previous convictions.

**UNCAC Reference:** Article 30

## ISSUE 23:

**Incompatibility:** The mandate of the ACC is not recognised in the Prevention of Organised Crime Act.

**Recommendation:** The Prevention of Organised Crime Act should be amended to ensure it is aligned with the Anti-Corruption Act in particular that the definition of "authorised member of police" should include officers

of the Anti-Corruption Commission. In addition, the Anti-Corruption Commission should be given a direct mandate to enforce POCA.

**UNCAC Reference:** Article 31

#### **ISSUE 24:**

**Gap:** Namibia lacks a comprehensive witness protection programme that ensure witnesses and experts are effectively protected from intimidation and retaliation.

**Recommendation:** Namibia should expand its current witness protection measures in order to build confidence among potential witnesses and encourage them to come forward with evidence of corruption. This would mean introducing strengthening amendments to the relevant legislation, principally the Anti-Corruption Action, the Prevention of Organised Crime Act and the Criminal Procedure Act.

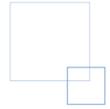
**UNCAC reference:** Article 32

#### **ISSUE 25:**

**Gap:** Namibia does not keep public registers of companies and individuals that are excluded from bidding for government contracts and concessions due to past malpractice including convictions for corruption.

**Recommendation:** New legislation on public procurement should include the creation a register of companies and individuals who are barred from undertaking government-related work due to previous irregularities and dishonesty, including any corruption convictions. This approach should be extended to other government concessions such as mining licences and fishing quotas.

**UNCAC Reference:** Article 34

**ISSUE 26:**

**Gap:** Namibia lacks whistleblower protection legislation that would encourage public reporting

**Recommendation:** The Ministry of Justice in tandem with the Law Reform and Development Commission should be encouraged to come up with draft whistleblower protection legislation as soon as possible following the direction from President Pohamba in this regard in April 2012.

**UNCAC reference:** Article 33

**ISSUE 27:**

**Gap:** Namibia's extradition law is in need of review and amendment if it is to meet UNCAC standards.

**Recommendation:** Namibia should urgently complete its review of its existing legislation on extradition and introduce a new bill which addresses the following issues: Inclusion of offences established in accordance with UNCAC as extraditable offences; Simplified extradition procedures; Deadlines aimed at expediting the extradition process.

**UNCAC reference:** Article 44

**ISSUE 28:**

**Gap:** Namibia does not currently have laws that allow for the identifying, freezing and tracing of proceeds of crime or recovery of assets at the request of another state.

**Recommendation:** Namibia should introduce legislation which enables mutual legal assistance to be afforded to other states in terms of identifying, freezing and tracing proceeds of crime and the recovery of assets.

**UNCAC reference:** Article 46

### ISSUE 29:

**Gap:** Coordination problems, skills gaps and capacity problems are limiting and delaying mutual legal assistance.

**Recommendation:** An inter-agency task force should address these issues so that requests for assistance are dealt with expeditiously.

**UNCAC reference:** Article 46

### ISSUE 30:

**Gap:** Namibia does not have mechanisms and arrangements in place to enable the effective organisation of joint investigations involving other state parties.

**Recommendation:** Namibia should introduce mechanisms and arrangements for joint investigations involving other states.

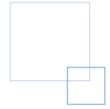
**UNCAC reference:** Article 49

### ISSUE 31:

**Incompatibility:** There is no ministry or other arm of the executive responsible for ensuring UNCAC is complied with and which can act as a liaison point, particularly with the Office of the UN Secretary General.

**Recommendation:** Namibia should identify a central authority which will be responsible for making sure that UNCAC is complied with and will notify the Office of the UN Secretary General of developments as required by UNCAC

**UNCAC reference:** Various articles



### ISSUE 32:

**Gap:** Namibia does not have a law which authorises financial institutions to undertake enhanced scrutiny of accounts linked to individuals with prominent public functions and their immediate families and friends.

**Recommendation:** The Financial Intelligence Act should be amended so that the Financial Centre has the power to instruct financial institutions to undertake such enhanced monitoring of the finances of public figures and their immediate circle of associates.

**UNCAC reference:** Article 52

### ISSUE 33:

**Incompatibility:** The Financial Intelligence Act and related banking laws and regulations, while comprehensive in many respects, may not comply all aspects of UNCAC including requirements for the monitoring of public officials' foreign bank accounts

**Recommendation:** Namibia's banking laws and regulations and the Financial Intelligence Act of 2012 should be reviewed against the provisions of UNCAC Article 52 to ensure compatibility.

**UNCAC reference:** Article 52

### ISSUE 34:

**Incompatibility:** The Prevention of Organised Crime Act of 2004 and the International Cooperation on Criminal Matters Act of 2000 , while comprehensive in many respects, may not comply in all respects with Articles 53, 54, 55 and 56 of UNCAC.

**Recommendation:** The Prevention of Organised Crime Act and the International Cooperation on Criminal Matters Act should be reviewed against the provisions of UNCAC Articles 53, 54, 55 and 56 to ensure compatibility.

**UNCAC reference:** Article 53, 54, 55 and 56.

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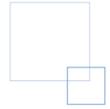
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