**Memorandum in support of the introduction of a constitutional amendment and enabling legislation for the establishment of constitutionally compliant anti-corruption machinery of state in South Africa.**

***Executive summary***

(a) *Serious forms of corruption like grand corruption, state capture and kleptocracy in South Africa are criminal violations of fundamental constitutional and human rights. They are literally killing many South Africans, mostly the poorest.*

*(b) The anti-corruption machinery of state in SA is currently not fit for purpose especially regarding serious corruption in all its forms. The NEC of the ANC has called for the urgent creation of a new entity that is permanent, specialised, independent and stands alone to deal with corruption.*

(c) *Our prosecutors and police, due to the ravages of attempted state capture, lack the required capacity to counter the corrupt efficiently and effectively*

(d) *The Constitutional Court, in the Glenister cases, has provided* binding *criteria for the establishment of functional corruption-busters who are fully able to carry out the international treaty obligations of SA*

(e) *That court has called upon parliament to make “the reasonable decision of a reasonable decision-maker in the circumstances” regarding the countering of corruption.*

(e) *The current circumstances in SA  dictate that a best practice reform is urgently required in order to bolster the country’s vulnerable culture of respect for human rights and boost confidence in its governance and economic prospects.*

(f) *The ANC, DA and IFP all favour the notion that a new body needs to be established to deal with corruption.*

(g) *Accountability Now has already prepared draft enabling legislation and a constitutional amendment so that the necessary* constitutionally-compliant *next steps can be taken to save the country from the scourge of serious corruption — and the imminent potential of failed state status. The current drafts accompany this memorandum*

1. Introduction

The ability of the SA state to deal with grand corruption, kleptocracy and state capture has been compromised during the two successive Zuma administrations following the election of Jacob G Zuma as leader of the ANC at Polokwane in December 2007. Despite his resignation on 14 February 2018, the legacy of the leadership of Zuma lives on in the criminal justice administration where his appointees in the police and prosecution services continue in office and perpetuate the agenda of Zuma and his cronies.

New leadership in the NPA, appointed by President Ramaphosa, describes the institution as “hollowed out” and infested with “saboteurs” intent upon protecting Zuma era malfeasance against investigation and prosecution. Many facets of the state capture project have emerged from the shadowy reaches of the Zuma administration and into the sanitizing light of the State Capture Commission. Much illuminating evidence has been given. The evidence has emerged from brave whistle blowers and various investigators The deceitful, deliberate and delinquent refusal of Zuma to co-operate with the commission has not prevented the commission from exposing industrial scale malfeasance. His refusal has led to his civil law incarceration due to his contempt for the order of the Constitutional Court that he comply with a summons from the commission.

The Ramaphosa administration supports the work of the commission and has contributed about a billion rand to its investigations in the form of fees for forensic investigators, the evidence leaders and the commission secretariat and venue. The head of the commission, Deputy Chief Justice Raymond Zondo, is due to report on his findings of fact and on his recommendations to government around the end of September 2021. His findings and recommendations are not of a binding nature. However, they will be instructive and informative to those who favour good governance under the rule of law and the Constitution in the place of the capture of the state by kleptocratic forces bent on satisfying their own greed rather than promoting the public good.

There is an urgent need to rake back the loot of state capture and to hold those responsible for grand corruption and kleptocracy associated with it to account in both the civil and criminal courts of the land.

Following the disturbances in Kwa Zulu Natal and Gauteng in July 2021, there is also a need to re-establish business confidence in the future of SA so that much needed investment in the rebuilding of the vision of the Constitution can be made from both local and foreign sources. While grand corruption holds sway all forms of confidence and investment wane, when corruption is dealt with decisively they wax.

The UN Sustainable Development Goals, to which SA subscribes, require strong institutions of government. The UN points out that:

*Conflict, insecurity, weak institutions and limited access to justice remain a great threat to sustainable development.*

Currently the SAPS and NPA are constitutionally mandated to deal with corruption. The police, via the post-Scorpions Hawks unit, must investigate all forms of corruption. The NPA must prosecute the corrupt identified in police investigations or in the work of its new Investigating Directorate, a body introduced by presidential proclamation to serve for up to five years with a limited mandate. Because it lacks independence and is under executive control, it is questionable that the ID passes constitutional muster.

The SAPS has been identified by the Institute for Security Studies and by Corruption Watch as the most corrupt of state institutions. Expecting the police to act as effective and efficient corruption busters is akin to asking Kaiser Chiefs supporters to vote for Pirates.

1. Constitutional requirements for countering corruption

The word “corruption” does not appear in the Constitution. However, the Constitutional Court has been obliged, in the Glenister trilogy of cases, inter alia, to consider the place of corruption in our legal dispensation. In its majority judgment in Glenister II, delivered in March 2011, the court identified corruption as a human rights issue due to the obligation of the state to respect and protect human rights guaranteed to all in the Bill of Rights which is Chapter Two of the Constitution. [C7(2)]. The court reasoned that delivery of the promises of the Bill of Rights is financially demanding. This was anticipated by the drafters of the Constitution as regards the provision of certain of the rights by the state “within its available resources, to achieve the progressive realization of each of these rights” [C 27(2)]

These words, quoted from the section dealing with health care, food, water and social security, make it plain that the diversion of available resources of the state to the pockets of the corrupt thwarts the progressive realization of rights to the detriment of poverty alleviation and the achievement of equality, a foundational provision of the Constitution [C1(a)].

In addition, the court identified solemn undertakings by the state in international treaties adopted by it and domesticated by parliament. These undertakings oblige the state to maintain adequately independent machinery of state to counter corruption effectively and efficiently. These obligations are reinforced by the values and principles of the Constitution as they apply to the public administration. [C195(1)]. Ethics, efficiency and accountability are all mentioned in this section.

In the course of the judgment in Glenister II the criteria by which to measure the constitutionality of anti-corruption bodies were set out in terms that are and remain binding on the state. The main criteria, there are others, set out in the majority judgment have become known as the STIRS criteria. This acronym identifies:

**Specialisation** in the sense of being dedicated to the issues around corruption to the exclusion of all else.

**Training** for recruits to empower and enable them to match the wiles of cunning corrupt operators.

**Independence** of the institution at both structural and operational levels to ensure that political influence and interference are not brought to bear on corruption-busters and that they are able to function without fear, favour or prejudice.

**Resources** that are adequate to the reasonable needs of the corruption-busters and are guaranteed so that their non-payment cannot be used as a means of stifling their functioning and performance.

**Secure** tenure of office for all corruption-busters so as to remove the threat of dismissal or disbandment such as happened to former NDPP Vusi Pikoli and the entire Scorpions unit of his NPA which was dissolved immediately Zuma came to power. Had the Scorpions enjoyed the protection of Chapter Nine status they would still be in existence and the whole trajectory of state capture in SA would have been less stellar. This happy state would have been due to the fact that a two thirds majority in parliament was needed to close them down had the Scorpions enjoyed Chapter Nine status. Instead, they were a mere creature of an ordinary legislation and could be dissolved with a simple majority. This in fact happened when, in the face of all parliamentary opposition and widespread public misgivings, the ANC used its majority to dissolve the Scorpions.

1. How to legislate using the STIRS criteria.

The court in Glenister II required parliament to make “the reasonable decision of a reasonable decision-maker in the circumstances” without the court being prescriptive as to the exact means used to comply with the STIRS criteria.

How to get to a reasonable decision when making laws or policy was discussed previously by the court in the Rail Commuters’ Action Group case, para 84 to 88, where a unanimous court observed that:

*[88] What constitutes reasonable measures will depend on the circumstances of each case. Factors that would ordinarily be relevant would include the nature of the duty, the social and economic context in which it arises, the range of factors that are relevant to the performance of the duty, the extent to which the duty is closely related to the core activities of the duty-bearer - the closer they are, the greater the obligation on the duty-bearer, and the extent of any threat to fundamental rights should the duty not be met as well as the intensity of any harm that may result. The more grave is the threat to fundamental rights, the greater is the responsibility on the duty-bearer.*

Corruption has always posed a grave threat to human rights. As Judge Navi Pillay has observed:

“Make no mistake about it, corruption kills.”

 In SA today, following the disturbances that took place after former president Zuma was incarcerated, the increased threat to fundamental human rights places a more onerous responsibility on parliament than has existed since the liberation of the country.

There is no doubt that the instigators of the July 2021 disorder in Kwa Zulu Natal and Gauteng fear being held to account for their corrupt activities and would much prefer that the culture of impunity put in place by Zuma should continue. If it does continue the prospects of SA failing as a state increase to the detriment of the vast majority of the people of SA.

It accordingly behoves parliament to consider the reform of the criminal justice administration to better deal with the corrupt who threaten constitutionalism and the rule of law in SA today. Parliament’s task is not only law-making, it also involves proper oversight of the criminal justice administration.

1. Some necessary constitutional amendments

The NPA is neither fish nor fowl in our current constitutional dispensation. While enjoined to function “without fear, favour or prejudice” [C179(4)] its independence is called into question by two features of section 179 that have no place in a successful constitutional democracy of the kind envisaged in our transformative dispensation. First, the requirement of the concurrence of the “Cabinet member responsible for the administration of justice” in prosecution policy is inconsistent with the independence of the NPA. Secondly, and in similar vein, the exercise of “final responsibility” over the NPA by the same minister [C179(6)] has served to undermine the independence of the NPA and to deprive it of its leadership in both the case of Vusi Pikoli, suspended for prosecuting Jackie Selebi and dismissed for charging Jacob Zuma, as well as Mxolisi Nxasana, for indicating his willingness to prosecute Zuma. Those provisions, in effect, politicise the prosecution policy of the NPA.

It is preferable, given this sorry history, that the NPA report directly to parliament and that the cabinet should have no role in its policy making and its independent operations. All of the Chapter Nine institutions are obliged by the Constitution to report only to parliament and not to cabinet.

 President Ramaphosa envisages (in his 2021 SONA) that a “new statutory body” reporting only to parliament will be established to deal with serious corruption after a proposed “advisory council” deliberates on its formation for at least two years. These two years are no longer available to SA. There is no good reason for this new body to be better off that the NPA when it comes to the creation of reporting lines.

The current hollowed out and compromised status of the NPA and the presence of many Zuma era “saboteurs” in its ranks will take many years to correct. The Zuma era freeze on recruitment of young prosecutors only serves to exacerbate this problem. Not only is there a lack of relevant experience, the presence of the saboteurs discourages all but the most idealistic prosecutors of the past from re-enrolling to serve as prosecutors again. SA simply does not have the time to allow the NPA to rebuild insofar as the countering of corruption is concerned. This is urgent business with neither the ID nor the NPA and certainly not the DPCI or Hawks is able to conduct.

No one is currently suggesting that the Hawks are up to the task of countering grand corruption. The Hawks are not STIRS compliant and never will be, even with the best will in the world.

In these currently applicable circumstances, the best practice means of complying with the constitutional requirements set by the courts in the Glenister litigation is to establish a new Chapter Nine Institution that is enabled to both investigate and prosecute grand corruption, kleptocracy and state capture.

President Ramaphosa called this notion “refreshing” when questioned about it during his question time in parliament in March 2019 by the IFP Chief Whip Narend Singh. He undertook to mull it over at the time.

In August 2020 the NEC of the ANC, its highest decision making body between conferences, passed a resolution calling on cabinet to establish urgently a single, permanent, independent and stand-alone body to deal with corruption. The best practice means of doing so in a constitutionally compliant way is to establish the new Chapter Nine Institution which has been dubbed “The Integrity Commission” by
Accountability Now in order to distinguish it from the “Anti-Corruption Commission” proposed to parliament in 2012, a body with only investigative powers and no prosecutorial powers.

The 2021 private members bills of the DA on this topic go further than the president did in SONA 2021 but not as far as the NEC in August 2020. The DA concedes that the NPA is in disarray, correctly so, but is not prepared to go so far as to remove the prosecution of grand corruption from its mandate. This is an error that will serve to create friction between the NPA and the DA’s envisaged new Chapter Nine investigative body. A single entity covering both the investigative and prosecutorial function is, in the submission of Accountability Now, the best way forward. It also accords with the stance taken by the ANC’s NEC as set out above.

The deterioration of the position on the ground as regards countering corruption within the NPA has driven Accountability Now to propose that the new Chapter Nine Institution should attend to prosecutions free of the interference of the “saboteurs” who still lurk within the NPA. A fresh start using sensible recruitment procedures of the kind deployed in the SIU is preferable to the long and drawn out process of cleaning up and reforming the NPA.

In order to draw bright lines between the work of the Ch9IC and the work that the NPA and SAPS will continue to do, it will be necessary for parliament to devise a definition of grand corruption and kleptocracy as the work of the new body. Accountability Now favours a cut-off point of R 5 million; all matters below that threshold can be dealt with by the Hawks and NPA, and those above that amount by the Ch9IC.

Means of achieving compliance with the criteria laid down in Glenister II are suggested in the draft enabling legislation and in the draft constitutional amendments to Chapters Eight and Nine of the Constitution. In Chapter Eight the revision of the mandate of the NPA is dealt with, in Nine the establishment of the Ch9IC

The legislated mandate of the Hawks will also have to be adjusted to exclude grand corruption from the ambit of the priority crimes it was created to investigate.

The draft enabling legislation has been prepared with a view to setting out the mandate of the new Ch9IC.

1. The way forward to constitutionally compliant anti-corruption machinery of state

The draft amendments to the Constitution and the draft enabling legislation for the Ch9IC accompany this memorandum. They are suggestions from Accountability Now which has, since 2009, done a considerable amount of anti-corruption work, not only in the Glenister cases but also on the arms deals of 1999, the collusive bread manufacturers cartel (which led to the development of a general class action in SA) and other matters concerning the probity of the current Minister of Police and Public Protector.

It must be stressed that the drafts are mere suggestions. It is the duty and function of parliament to apply itself to the task of complying properly with the international obligations of the country and with the binding rulings of its highest court in the Glenister litigation.

Making the reasonable decision of a reasonable decision-maker in the circumstances, which have changed considerably since the litigation ended, can obviously take various forms because there is no single reasonable way of dealing with the challenges of grand corruption. SA deserves, after nine wasted years, to have a best practice solution to the problems posed by corruption. In this way confidence in the probity of governance can be restored and with it the desire to invest in SA in ways that will serve to end poverty, create employment and ensure a better life for all.

The work of the Constitutional Review Committee and the Justice Portfolio Committee of the National Assembly on the necessary and urgent reform of the criminal justice administration involves properly processing the loud and clear messages from the Constitutional Court in Glenister II and III and applying them to the parlous state on the ground in SA in 2021. It is possible to bring SA back from the brink of failure and into the realms of a better life for all if the scourge of corruption can be conquered. This reform must be achieved by diligently and without delay [C237] attending to the various initiatives of the President, the NEC of the ANC, the DA and Accountability Now. They must be considered and synthesised into a coherent, and constitutionally compliant reform package of legislation of which the people of SA can be proud.

Accountability Now

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