**ACCOUNTABILITY NOW REPRESENTATIONS TO THE SOUTH AFRICAN CONSTITUTIONAL REVIEW COMMITTEE AND JUSTICE PORTFOLIO COMMITTEE:**

**NON-TRIAL RESOLUTIONS (NTRs)**

**SPEAKING NOTES**

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**Introduction**

1. South Africa has an immediate opportunity to increase its rate of anti-corruption enforcement in line with global best practice. Cross border corruption is a uniquely difficult crime to prosecute. Innovative legal tools are required to address the manifest challenges in prosecuting serious economic offences to ensure more effective use of the NPA’s limited resources and ensure concomitant redress for South Africa.
2. There is a gap in South African law. Our submission addresses ‘*the absence of a law, meaningfully enforced, which incentivises companies to enforce effective internal compliance measures at their own expense’*[[1]](#footnote-2) to ensure alignment with international best practice and arguably preclude a corporate culture of non-compliance with anti-corruption rules and norms.
3. Most notably, the implementation of a non-trial resolution (NTR) framework is, together with other tools such as an enhanced whistle-blower framework, essential if South Africa wishes to meaningfully combat corruption.
4. The US Department of Justice innovated a method for enforcing corruption charges in terms of the Foreign Corrupt Practices Act. Since then, other countries, including the UK, the Netherlands, Brazil, Argentina, France, Israel, Japan, Chile, Canada and Australia, have also developed a legal framework to provide for NTRs. NTR-type instruments are also used to settle corruption cases out of court in countries including Malaysia, Norway and Germany.[[2]](#footnote-3)
5. Research by the Organisation for Economic Co-operation and Development and [[3]](#footnote-4) the United Nations Office on Drugs and Crime[[4]](#footnote-5) states that NTRs are increasingly important in resolving corruption cases. The use of non-conviction based NTRs are a key driver of increased global anti-corruption enforcement.
6. Importantly, the use of NTRs is one of the key recommendation contained in the Report into State Capture issued by Chief Justice Zondo.[[5]](#footnote-6)
7. NTRs are also a central feature of the recently published 2021 OECD Anti-Bribery Recommendations.[[6]](#footnote-7) Per the Recommendations, Member States should consider using a “*variety of forms of resolutions*” in the resolution of “*criminal, administrative and civil cases with both legal and natural persons.*”[[7]](#footnote-8)
8. The OECD Recommendations serve to “*address challenges, good practices and cross-cutting issues that have emerged in the global anti-corruption landscape since 2009.*”[[8]](#footnote-9) As a Member State to the OECD Anti-Bribery Convention,[[9]](#footnote-10) South Africa would be well advised to implement the OECD Recommendation. The OECD Working Group has recommended that “*South Africa significantly step up efforts to detect, investigate and prosecute foreign bribery*”. [[10]](#footnote-11)

**What Are Non-Trial Resolutions?**

1. NTRs are ‘any agreement between a legal or natural person and an enforcement authority to resolve bribery cases without a full trial on the merits of the allegations either before or after conviction (e.g. plea deals) or a non-conviction mechanism (e.g. non-prosecution or deferred-prosecution agreements)’.[[11]](#footnote-12) Non-conviction-based NTRs are a system of structured, differential incentives for legal and natural persons implicated in corruption to voluntarily disclose corrupt conduct, disgorge and remediate.[[12]](#footnote-13)
2. NTRs are defined by the OECD Recommendations as “*mechanisms developed and used to resolve matters without a full court or administrative proceeding, based on a negotiated agreement with a natural or legal person and a prosecuting or other authority*.”[[13]](#footnote-14)
3. NTRs:
   1. reduce government resources to be spent on lengthy investigations and prosecutions.
   2. allow for resolution to be concluded simultaneously in multiple jurisdictions, which multi-jurisdictional resolutions are impossible without them.
4. The use of NTRs would provide South Africa the opportunity to participate in negotiations on the division of global penalties, which regularly amount to billions of US dollars.
5. Companies which receive NTRs typically disclose the results of their internal investigations to prosecutors. This information can be used to prosecute responsible individuals.
6. NTRs improve anti-corruption enforcement rates, strengthening the rule of law.
7. It is important to also understand the benefits of NTR’s from a company’s perspective. These include:
   1. providing corporations with certainty, allowing them to resolve cases of corporate crime timeously.
   2. enabling companies to resolve matters across multiple jurisdictions at once, avoiding the problem of double jeopardy.
   3. providing a framework which allows a company to cooperate with enforcement agencies.
   4. reducing a company’s exposure to bad publicity and reputational harm.
   5. rewarding companies for investing in effective anti-corruption compliance systems.

**The Position in South Africa and Way Forward**

1. Currently, South African law caters for one form of NTR, the guilty plea. Guilty pleas are governed under section 105A of the Criminal Procedure Act 51 of 1977. Non-conviction based NTRs would be a valuable addition to a prosecutor’s toolbox, suitable for companies that are capable of reform.
2. The choice of appropriate model should be based on empirical research on what could work best in the South African context, given the unique types of corruption prevalent in South Africa, our particular socio-economic context, political history and legal dispensation.
3. The Recommendation 6 Network of experts from civil society, academia, business and the legal profession, developed a list of principles which should govern the use of NTRs, summarised below:
   1. NTRs should embody principles including transparency, fairness and accountability.
   2. Countries should develop a clear and transparent framework for NTRs.
   3. Information about the contents of NTRs entered into between authorities and legal/natural persons should be published.
   4. Authorities should engage in public discussion and evaluation of NTRs.
   5. Criteria for voluntary self-disclosure of misconduct; cooperation with authorities and remediation measures should be clear and published in advance to satisfy the principle of the rule of law.
   6. Authorities should publish clear information regarding advantages that may be obtained by alleged offenders entering into NTRs, to serve as incentives for corporations to self-police and self-report.
   7. Sanctions must be ‘effective, proportionate and dissuasive’ in line with Article 3 of the OECD Convention.
   8. Countries should consider remediation for victims of corruption.
   9. NTRs must be subject to appropriate oversight and review.[[14]](#footnote-15)
4. Any NTR framework introduced in South Africa will have to comply with the strict precepts of our Constitution. NTRs should be underpinned by principles which promote legitimacy and should be premised on transparency, fairness and accountability.[[15]](#footnote-16) These principles must encapsulate “individual accountability, due process, non-derogation from fundamental freedoms, transparency and access to information about the settlements reached.”[[16]](#footnote-17) There should be clear criterion for the voluntary disclosure of misconduct, cooperation with authorities and the advanced publishing of remedial measures in order to satisfy the rule of law.[[17]](#footnote-18)
5. Another important principle that underpins the efficacy of any NTR framework is the oft quoted ‘carrot and stick’ analogy. NTR systems will only be effective in countries which have the capacity and ability to carry out enforcement actions and effectively prosecute wrongdoers. If a NTR framework is implemented in South Africa, businesses must be alive to real risk of prosecution by the NPA. Business must have an incentive to enter into an NTR.As such, an effective NTR framework goes hand in hand with an effective prosecuting agency. If effective investigation and prosecution is compromised, businesses will have little incentive to settle matters and instead take their chances in fully defending a matter.
6. An NTR framework that is poorly structured has the inherent risk of undermining the deterrence of corporate crime and may erode the public’s already tainted perception of the criminal justice system and NTRs should meet a certain criterion to be legitimately recognised amongst the public.
7. An effective system for NTRs should cater for judicial oversight in order to ensure complete transparency, accountability and separation of powers in enforcement agencies.

**Conclusion**

1. NTRs may occur at any stage of an investigation or prosecution of an offence and may impose significant sanctions on parties, including financial penalties, disgorgement of profits, compliance and reporting obligations for a multi-year period, disbarment, and any other relevant sanctions. Importantly, NTRs do not rule out the possibility of prosecution and imprisonment entirely and enforcement authorities may still impose criminal sanctions on individuals. They are simply a mechanism to resolve a matter before trial. NTR often allows a country to significantly increase its anti-corruption enforcement efforts, particularly with respect to legal entities, and has the additional positive effect of encouraging companies to cooperate with law enforcement and turn over evidence that can be used to prosecute individuals who engage in the wrongdoing.
2. An effective NTR framework will be dependent on an effective whistleblowing framework and, therefore, consideration of the implementation of a whistle-blower framework based on international best practice should be considered in conjunction with an NTR framework.
3. In concluding, it is important to note that public-private cooperation is the “invisible foot” method of combating corruption, which targets the weak points of corrupt networks.[[18]](#footnote-19) Weak trust exists in these networks, partly because corrupt bargains cannot be enforced using the legal system, and partly because members of these networks are aware that their co-conspirators are inherently untrustworthy. Law enforcement authorities should exploit this weak trust by providing strong incentives for people to come forward with information. This is the rationale for the UN’s endorsement of public-private cooperation as a method to combat corruption.[[19]](#footnote-20)

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1. Ashton, C.F. and Spalding, A. 2020. *The use of Non-Trial Resolutions to prosecute corruption in South Africa.* At p 3. [↑](#footnote-ref-2)
2. <https://www.dailymaverick.co.za/article/2022-07-06-corruption-amnesty-south-africa-must-look-to-non-trial-resolutions/> [↑](#footnote-ref-3)
3. OECD. (2019). *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and NonTrial*

   *Agreements by Parties to the Anti-Bribery Convention.* OECD. Available at:

   <https://www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm> [↑](#footnote-ref-4)
4. ‘Alternative legal mechanisms and non-trial resolutions, including settlements, that have proceeds of crime for confiscation and return’ note prepared by the Secretariat. CAC/COSP/WG.2/2021/CRP.1 (August 2021) available at: <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2021-September-6-10/CAC-COSP-WG.2-2021-CRP.1.pdf> [↑](#footnote-ref-5)
5. Part VI Vol IV of the State Capture Commission Reports explicitly recommends that *“government introduce legislation for the introduction of deferred prosecution agreements…”*. Deferred prosecution agreements are the most common form of NTR framework that the South African legislature may consider implementing in South Africa. [↑](#footnote-ref-6)
6. OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions,* OECD/LEGAL/0378. [↑](#footnote-ref-7)
7. The OECD Recommendations at XVII. [↑](#footnote-ref-8)
8. Ibid at 3. [↑](#footnote-ref-9)
9. By way of ratification as of August 2007 <<https://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf>> [↑](#footnote-ref-10)
10. https://one.oecd.org/document/DAF/WGB(2018)42/en/pdf [↑](#footnote-ref-11)
11. OECD. (2019). *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and NonTrial*

    *Agreements by Parties to the Anti-Bribery Convention.* OECD. Available at:

    <https://www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm> [↑](#footnote-ref-12)
12. Ashton, C.F. 2021. Dismantling ‘the Machine: A Role for Non-Trial Resolutions in Anti-Corruption Enforcement in South Africa? Masters Thesis. International Anti-Corruption Academy. At p. 204. [↑](#footnote-ref-13)
13. Ibid at 9. [↑](#footnote-ref-14)
14. Recommendation 6 Network. 2018. *Explanatory Notes Addressed to the Working Group on Bribery.* [Online]   
    Available at: tps://www.nhh.no/globalassets/centres/cce/recommendation-draft-final.pdf [↑](#footnote-ref-15)
15. Colette Ashton (2021) *Dismantling ‘The Machine’: a Role for Non-Trial Resolutions in Anti-Corruption Enforcement in South Africa?*’ International Anti-Corruption Academy, at 65. [↑](#footnote-ref-16)
16. Ibid. [↑](#footnote-ref-17)
17. Ibid. [↑](#footnote-ref-18)
18. Lambsdorff, J. G. 2015. Preventing Corruption by Promoting Trust - Insights from Behavioural Science. *Working Paper.* Passau: Universitat

    Passau at pp. 1-16. See also Lambsdorff, J. G. (2007). *The Institutional Economics of Corruption and Reform: Theory, Evidence and Policy.*

    Cambridge: Cambridge University Press. [↑](#footnote-ref-19)
19. UNODC; UNICRI, 2009. *Technical Guide to the United Nations Convention Against Corruption,* Vienna: United Nations at p. 118-119. Available at: <https://www.unodc.org/unodc/en/treaties/CAC/technical-guide.html> [Accesed 2 February 2021]. [↑](#footnote-ref-20)