SUBMISSION TO THE ANTI-CORRUPTION INTER-MINISTERIAL COMMITTEE ON THE DRAFT NATIONAL

ANTI CORRUPTION STRATEGY

AUGUST 2018

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1. INTRODUCTION

Corruption Watch (CW) is a civil society organisation registered as a non-profit company in terms of the Companies Act. We are the South African chapter of Transparency International (TI) and form part of a global network of civil society organisations leading the fight against corruption. CW aims to expose corruption and the abuse of funds in both the public and private sector. We encourage and enable the public to report incidents of corruption to us and we use these reports as an important source of information to fight corruption in South Africa and to hold leaders accountable for their actions. We achieve this through policy advocacy, public mobilisation, strategic litigation and select investigations.

At the 2016 UK Anti-Corruption Summit, the South African government made a commitment to reduce increasing levels of corruption in both the country's public and private sectors by developing a National Anti-Corruption Strategy (NACS) and a supporting implementation plan. The draft document was officially released in May 2017, and subsequently, there has been a stated commitment to engage the public on the nature of the proposals contained within the strategy. As an organisation, Corruption Watch values public participation as a key instrument that can aid in reducing alarming levels of corruption in the country, and thus a substantial amount of our work is directed towards developing or improving avenues for public engagement around anti-corruption initiatives.

In 2018, Corruption Watch launched a public awareness campaign that focused on the draft NACS. The objective of the campaign was to increase awareness about the document, as well as to encourage and enable a public discussion centred on the nine pillars of the strategy. Our campaign activities included: developing an online public survey related to the NACS; hosting community engagements in Alexandra (Gauteng), Khayelitsha (Western Cape), and Mogwase (North West); hosting roundtable discussions with civil society organisations (CSOs) and the private sector; and finally, engaging local and international anti-corruption experts on the draft strategy document. We have also attempted to raise the profile around the

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NACS through a communications strategy that involved media releases, radio interviews, and website stories. The contents of this submission include the feedback that we have received from our various engagements with the public, civil society organisations, business sector and anti-corruption experts. The opinions expressed in this submission are that of the stakeholders that were engaged and, in some instances, do not necessarily reflect the views of Corruption Watch. The concluding section of this submission highlights a list of recommendations that Corruption Watch proposes should be included in the final NACS.

2. PUBLIC SURVEY

In June 2018, Corruption Watch released an online survey that consisted of 14 short questions. The intention of the survey was to gain public feedback on the nine pillars of the draft NACS. The survey was published on the Corruption Watch website[1] and promoted via our various social media platforms. Participants[2] were posed with the following questions:

- Is it important for South Africa to have a National Anti-Corruption Strategy?
- Have you read / engaged with the draft National Anti-Corruption Strategy?
- In South Africa, are whistleblowers protected when reporting corruption?
- If you come across corruption, how likely are you to report the incident?
- Do you think partnerships between government the private sector and civil society will succeed in addressing corruption?
- Are the current laws and policies in place to address transparency in all sectors of society effective?
- Will publicly releasing data on procurement in all spheres of government enable the public, civil society and business to monitor the integrity of the public procurement system and reduce corruption?
- Will frequent training of government employees in supply chain management, public finance and human resources significantly reduce corruption?
- Will holding the private sector accountable for not preventing bribery and other forms be effective?
- Does the government have sufficient disciplinary processes in place to address corruption?

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[1] www.corruptionwatch.org.za

[2] It is important to note that the participants of this survey constitute is purely random sample of online users who access Corruption Watch's website and social media platforms. It is by no means a representation or reflection of the population demographics of South Africa.

- Chapter 9 and Chapter 10 bodies can only fulfil their constitutional mandate if they have effective leadership in place?
- Should leadership appointments to all Chapter 9, Chapter 10, anti-corruption and crime fighting bodies be transparent and solicit some form of public participation?
- Does South Africa have independent anti-corruption agencies that investigate and prosecute corruption effectively?
- Will a multi-sectoral anti-corruption strategy programme be effective in reducing corruption?

2.1. Analysis of survey results

To date, we have received 510 responses, with a 95% completion rate of the survey. In summary, the overwhelming response from participants (99.6%) believe that it is important for South Africa to have a National Anti-Corruption Strategy. Only 23% of the respondents have read / engaged with NACS prior to participating in the survey. The majority, 77%, have not read / engaged with the document; however, 83% believe that a multi-sectoral anti-corruption strategy programme can be effective in terms of reducing corruption in South Africa. Sixty-six percent (66%) of respondents believe that whistleblowers in South Africa are not safe or protected when they report corruption, but a large percentage (75%) noted that they will be willing to report corruption if they come across it.

The majority of respondents (63.6%) believe that partnerships between government, the private sector and civil society are important to reduce the high levels of corruption in South Africa, with 80% of the participants stating that the current laws and policies in place to address transparency in all sectors of society are ineffective. A majority of 87% believe that publicly releasing data on procurement will improve accountability mechanisms of the public procurement system and significantly reduce corruption. Seventy-four percent (74%) agree that businesses should be held accountable for not preventing bribery and other forms of corruption that take place within their sector.
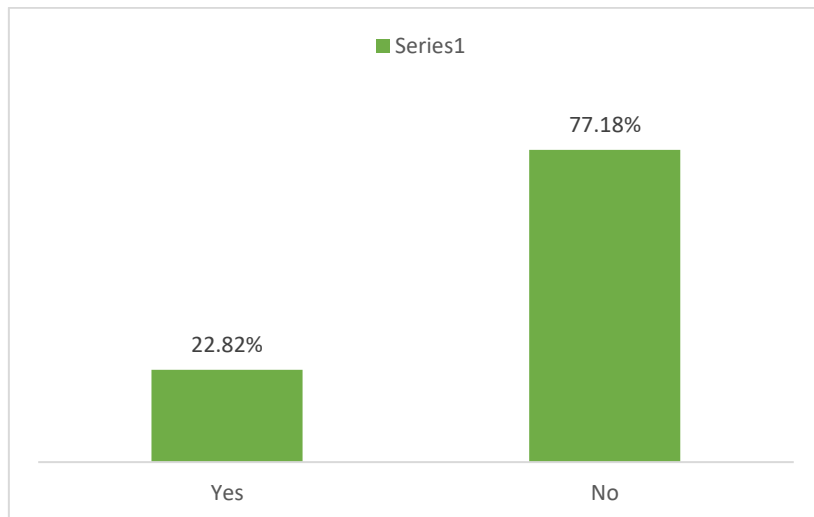
With regards to the training of government employees on supply chain policies and public finances, 61% note that this would be effective in reducing corruption in the public sector. However, 80% of respondents believe that the government does not have sufficient disciplinary policies and procedures in place to effectively address corruption. Fifty-eight percent (58%) of respondents also believe that South Africa does not have independent anti-corruption agencies that investigate and prosecute corruption successfully. An overwhelming 95% of respondents note that in order for Chapter 9 and Chapter 10 bodies to fulfil their constitutional mandate, ethical leadership should be a priority. On the same note, 97% of respondents also feel that the appointments of leadership to Chapter 9, Chapter 10 and anti-corruption / crime fighting agencies must be transparent and solicit some form of public participation.
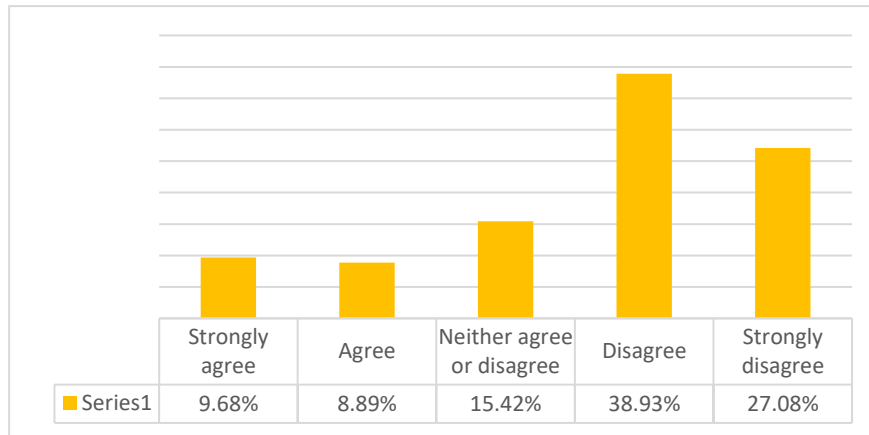
2.2. Data Presentation

Question one: Is it important for South Africa to have a National Anti-Corruption Strategy?
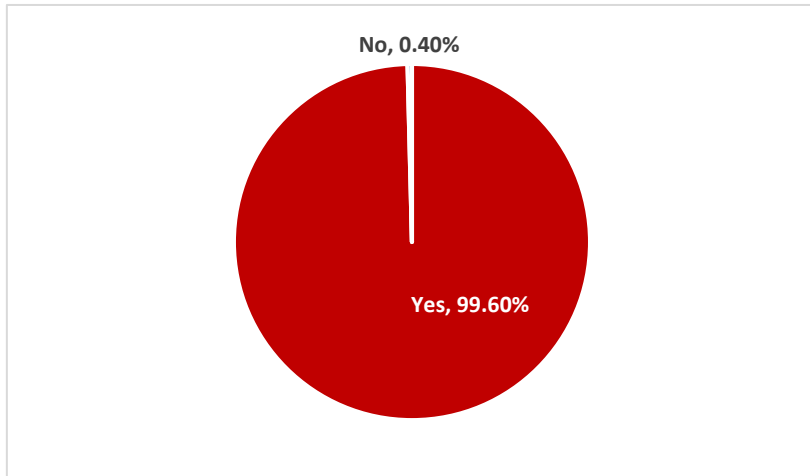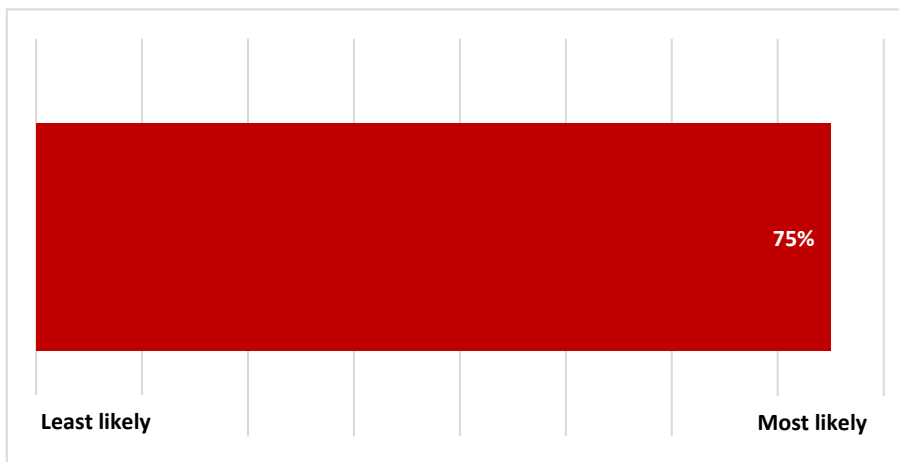

Question two: Have you read / engaged with the draft National Anti-Corruption Strategy?

Question three: In South Africa, whistleblowers are protected when reporting corruption

	Strongly agree	Agree	Neither agree or disagree	Disagree	Strongly disagree
■ Series1	9.68%	8.89%	15.42%	38.93%	27.08%

Question four: If you come across corruption, how likely are you to report it?

75%

Least likely   Most likely

Question five: Do you think partnerships between government, the private sector and civil society will succeed in addressing corruption?

■ Yes ■ No

36%

64%
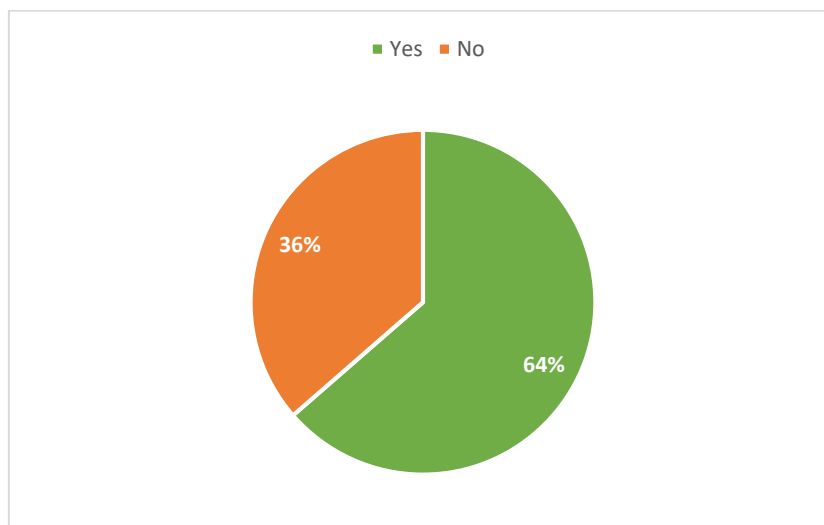
Question six: The current laws and policies in place to address transparency in all sectors of society are effective

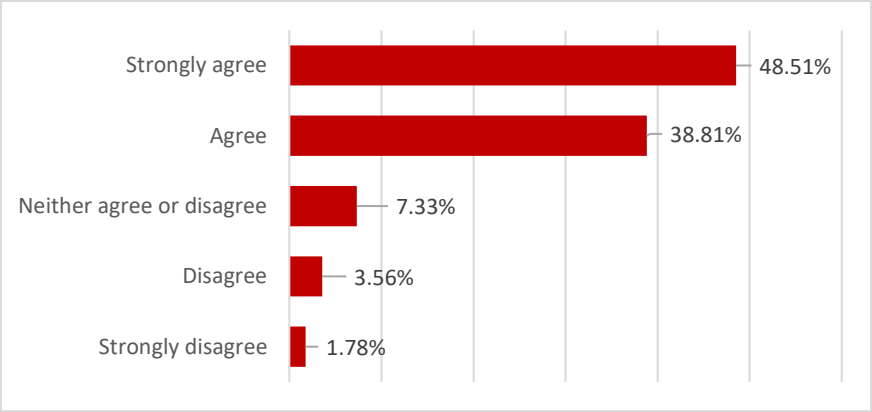| Response	Percentage
Strongly agree	1.39%
Agree	5.38%
Neither agree or disagree	10.76%
Disagree	46.22%
Strongly disagree	36.25%
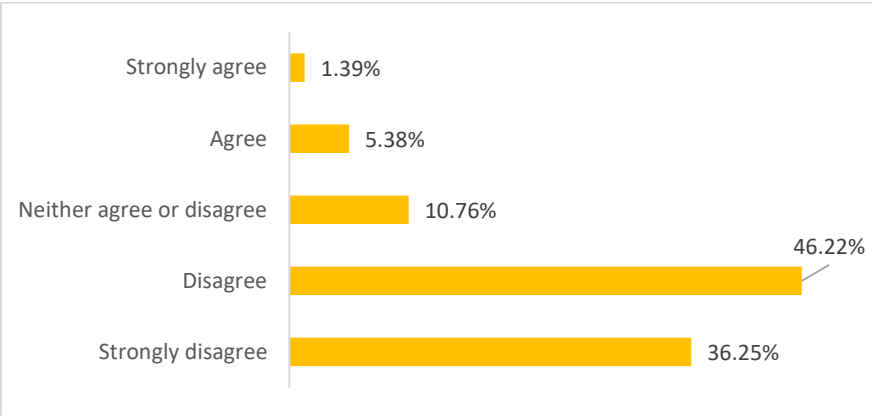
Question seven: Publicly releasing data on procurement in all spheres of government will enable the public, civil society and business to monitor the integrity of the public procurement system and reduce corruption

Response	Percentage
Strongly agree	48.51%
Agree	38.81%
Neither agree or disagree	7.33%
Disagree	3.56%
Strongly disagree	1.78%

Question eight: Frequent training of government employees in supply chain management, public finance and human resources will significantly reduce corruption

Response	Percentage
Strongly agree	23.12%
Agree	38.14%
Neither agree or disagree	19.76%
Disagree	14.82%
Strongly disagree	4.15%
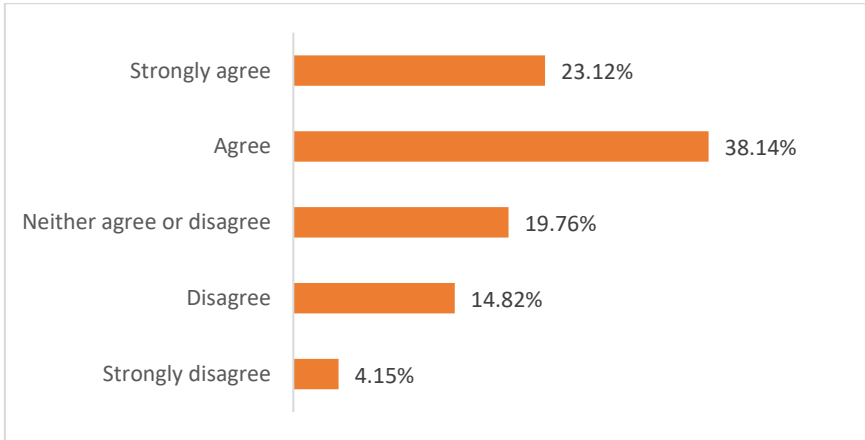
Question nine: Holding the private sector accountable for not preventing bribery and other forms of corruption will be effective

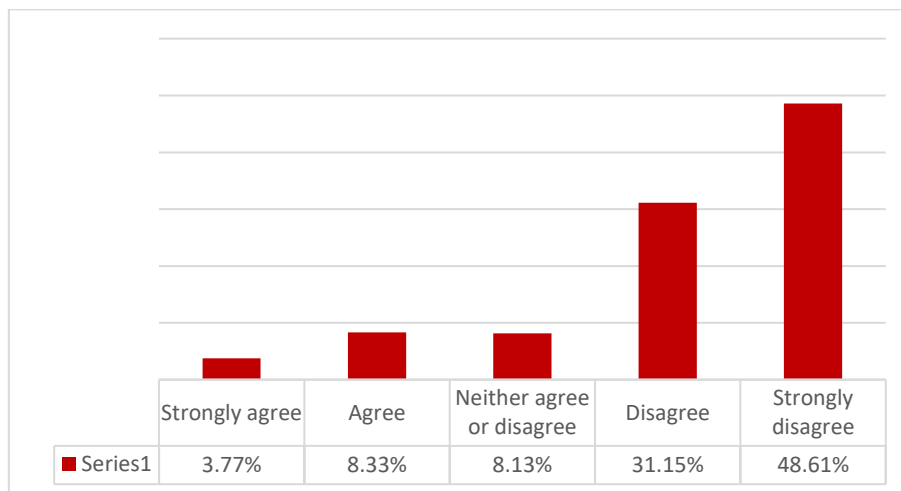| Response	Percentage
Strongly agree	35.25%
Agree	39.21%
Neither agree or disagree	10.50%
Disagree	11.29%
Strongly disagree	3.76%
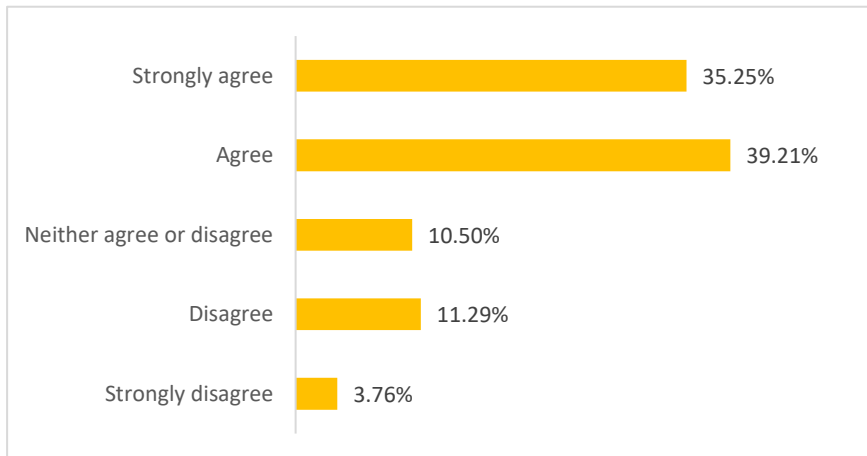
Question ten: Government has sufficient disciplinary processes in place to address corruption

	Strongly agree	Agree	Neither agree or disagree	Disagree	Strongly disagree
Series1	3.77%	8.33%	8.13%	31.15%	48.61%

Question eleven: Chapter 9 bodies such as the Public Protector and SA Human Rights Commission, as well as Chapter 10 bodies such as the Public Service Commission can only fulfil their constitutional mandate if they have ethical leadership in place

	Strongly agree	Agree	Neither agree or disagree	Disagree	Strongly disagree
Series1	72.27%	17.98%	2.37%	0.99%	1.38%
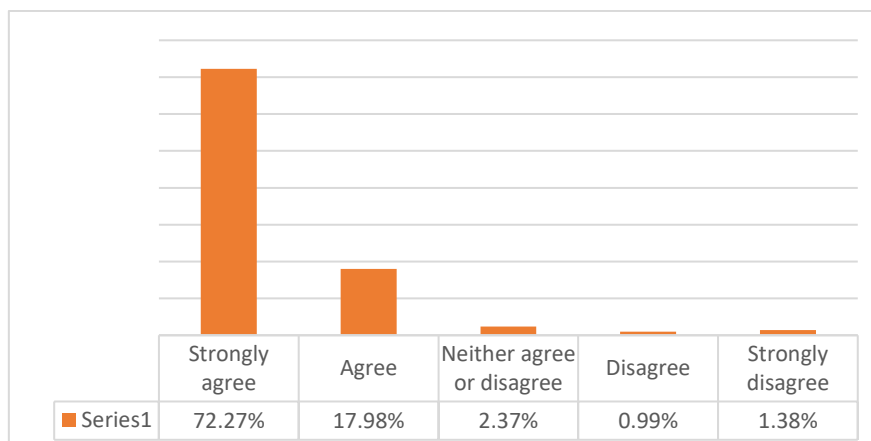
Question twelve: Leadership appointments to all Chapter 9, Chapter 10, anti-corruption and crime fighting bodies must be transparent and solicit some form of public participation

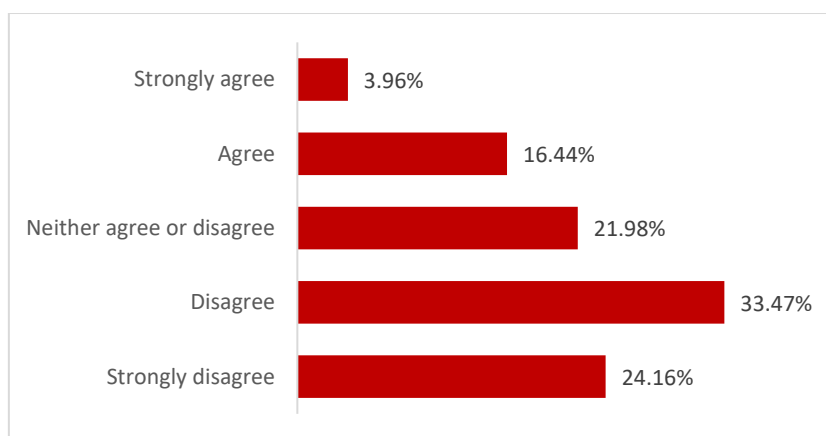|	Strongly agree	Agree	Neither agree or disagree	Disagree	Strongly disagree
■ Series1	75.94%	20.68%	1.99%	0.40%	0.99%
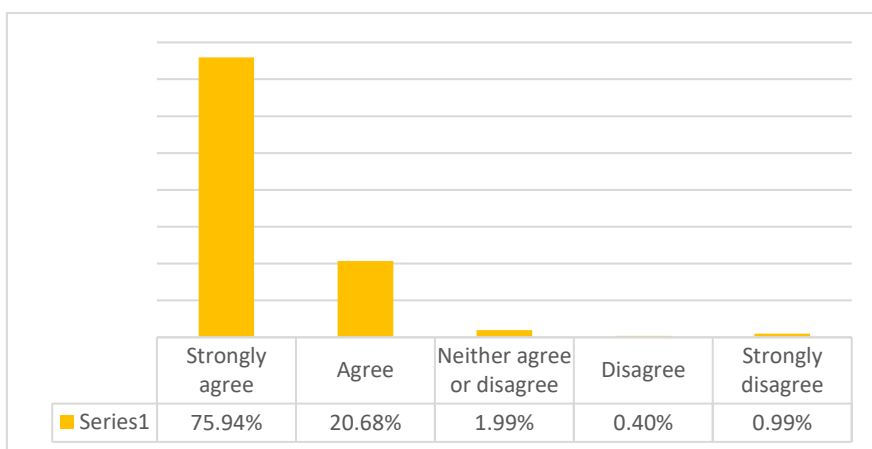
Question thirteen: South Africa has independent anti-corruption agencies that investigate and prosecute corruption effectively

- Strongly agree — 3.96%
- Agree — 16.44%
- Neither agree or disagree — 21.98%
- Disagree — 33.47%
- Strongly disagree — 24.16%

Question fourteen: A multi-sectoral anti-corruption strategy programme can be effective in reducing corruption

- Strongly agree — 27.89%
- Agree — 55.18%
- Neither agree or disagree — 12.95%
- Disagree — 3.19%
- Strongly disagree — 0.80%
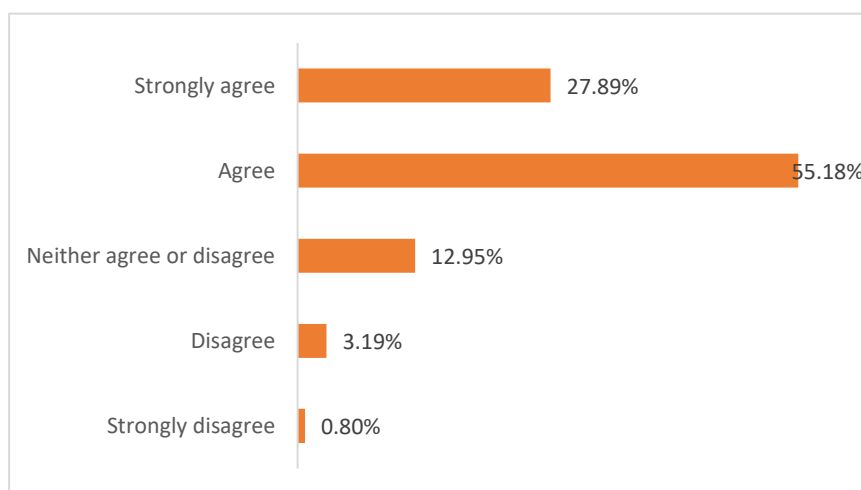
3. COMMUNITY ENGAGEMENTS

Corruption Watch hosted three community engagements around the nine pillars of the NACS. These engagements took place in the communities of Alexandra in Gauteng, Khayelitsha in the Western Cape and Mokgwase in the North West. The format of the engagements was to introduce the strategy to the participants and thereafter through a facilitated discussion, gain their feedback, understanding and experiences of corruption and how these issues could be addressed through the NACS.

3.1. Alexandra engagement – 26 July 2018

Alex is an urban community in Johannesburg and one of the oldest townships in the Gauteng province. Its community members raised their daily experiences with various forms of corruption which include corruption in the policing sector, court systems, and the allocation of houses. Community members were generally well-informed around the definition of corruption and had a good understanding of the nature of the problem, however, they raised their reluctance to report on these issues because often their issues are not addressed and perpetrators escape consequences for their corrupt actions. The workshop was attended by approximately 80 community members, which included ward councillors, religious leaders and members of the Community Works Programme – however, only two participants had heard about the strategy prior to our engagement.

3.2. Mogkwase engagement – 7 August 2018

Mokgwase is a rural mining community in the North West province. The community raised specific issues in relation to corruption in the mining sector which included the lack of social and development plans, as well as traditional authorities entering into contracts with mining companies without these benefits extending to the community at large. Participants were angered at the fact that despite them having millions of rands worth of minerals beneath the soil on which they live, they are not able to reap the benefits and rewards. There were about 60 participants who attended the engagement, all of whom had no prior knowledge of the existence of the draft NACS. The general morale was low, with a large majority believing that their situation would remain unchanged irrespective of the implementation of the NACS. Participants felt that a specific pillar that focuses on corruption in the mining sector and its impact on mining communities should be included in the final strategy document.

3.3. Khayelitsha engagement – 14 August 2018

Khayelitsha is an urban community in the Western Cape and our engagement was attended by over 30 participants. Community members raised concerns relating to corruption in the policing, healthcare and schooling sectors as the most prevalent form of corruption that is currently being experienced in Khayelitsha. The participants had no prior knowledge about the NACS, however they expressed positive sentiment that such an anti-corruption strategy is being developed and will subsequently be implemented.

3.4. Recommendations on amendments to the draft NACS resulting from the CW community engagements

The section below highlights the proposed suggestions for amendment or inclusion to the draft NACS by community members that were engaged through Corruption Watch's campaign. Their submissions are listed as follows:

Pillar one – Support citizen empowerment in the fight against corruption, including increased support for whistleblowers:

- Establishment of an independent anti-corruption reporting channel – participants noted that a central, independent anti-corruption reporting platform should be developed to receive complaints from the public. As it stands, there are various channels that exist and often the public are unsure or unaware of the platforms that should be used when reporting on corruption-related matters. Participants also noted that existing government anti-corruption channels should be better capacitated, as the public often don't receive feedback after they have reported a matter.

- Online reporting channel – a website or online portal should be developed where individuals can report incidents of corruption. In a technological era and with the increase of use of mobile technology, participants believe that this will be an easier way to report corruption, as well as the element of anonymity and safety when reporting online.

- Confidentiality and anonymity – community members noted that whistleblowers are generally fearful of reporting corruption as they do not believe that they would be protected or that their information would be dealt with in a confidential manner. There was an overall sense that fear and safety for one's life would prevent people from blowing the whistle, and that more needs to be done to promote the safety of whistleblowers.

- Sustainability – due to the many anti-corruption initiatives launched by government and whistleblower hotlines, participants noted the need for these activities / programmes to be sustainable and continuous. Some felt that these programmes are often used to serve a certain political agenda. Participants in Mokgwase noted that an anti-corruption tribunal was established in the Office of the Speaker, however this initiative was short-lived.

- Traditional House of Leadership – participants, particularly those in the North West, raised concerns that communities do not have a mechanism in place to report traditional leaders or issues relating to traditional matters. The normal channels for reporting cannot be used in such instances due to the fact that they are certain customary laws in place that have to be followed, and as result a mechanism for reporting corruption that relates to customary law=related matters should be taken into consideration.

- Identification of police officers – in communities that have a problem with police misconduct, such as Khayelitsha, participants raised that it should be mandatory for police officials to wear visible nametags for easy identification when reporting an issue of police corruption such as bribery or abuse of power. Identification of police officials and vehicles will lend itself to citizen empowerment when holding police officials accountable for their actions.

Pillar two – Develop sustainable partnerships with stakeholders to reduce corruption and improve integrity management:

Participants raised that formal partnerships should be established between:

- Government and community media – community media, such as broadcast and print, are powerful mediums to communicate with the public around anti-corruption initiatives.
- Government and school governing bodies (SGBs) – adequate training of SGBs is necessary to ensure that school finances are managed adequately and that learners benefit from the resources allocated to the school. Parents need to be made aware of their rights and responsibilities with regards to serving on SGBs, as well as reporting on corruption in schools.
- Traditional authorities and ward councillors – participants noted that particularly in rural areas, ward councillors and traditional authorities should work together to combat corruption in communities.
- Government and community policing forums (CPFs) – there was a general consensus that there needs to be an effective relationship between government and CPFs in order to combat the petty corruption, especially bribery of police officials by criminals, that takes place in communities across the country.

Pillar three – Improve transparency by government, business and civil society sectors:

- Effective communication – community members raised that ward councillors need to better communicate the integrated development plans (IDPs) of community in order for there to be meaningful public participation and that the outcomes of these engagements are shared publicly in order to promote transparency.
- De-politicisation of community engagements – participants are concerned that when community engagements are held, they are overtly politicised and as a result, only members of the community that hold certain party interests attend such gatherings. At these meetings, decisions are taken that only cater to some political agendas, and as a result transparency is compromised.
- Public participation – participants stated that local government structures need to ensure that there is meaningful public engagement when new developments take place in the community. Community members should be advised of the budget allocation beforehand to ensure that the annual IDPs are publicised and easily accessible.

Pillar four - Improve the integrity of the public procurement system to ensure fair, effective and efficient use of public resources:

- Firmer legislation – community members raised concerns relating to nepotism, bribery, and sextortion in relation to securing government tenders. This has resulted in companies being hired to execute work in communities without any proper quality assurance or due diligence, which gives rise to incomplete infrastructure or community developments. Participants noted that there should be stricter legislation in place in order to prevent nepotism, which is a common form of corruption in the procurement sector. Participants also raised that in the event that companies complete substandard work, work is incomplete, or there was a misappropriation of funds – these businesses should be blacklisted and prevented from doing work with the state.

- Political preference – participants noted that there is extensive political interference when it comes to procurement of goods and services for all spheres of government, and as a result, it is perceived that only companies affiliated with the ruling party will be given tenders.

- Redefining pillar four – community members in Mokgwase noted that pillar four of the NACS should be rephrased to include both public and private procurement, as the emphasis on public procurement is limiting and suggests that there is little or no corruption in the private sector concerning procurement.

- Training – community members have requested training to understand how the public procurement system functions and what are the requirements and best practices to ensure proper tender processes take place. This knowledge will enable community members to report corruption in relation to public procurement if they come across any red flags.

Pillar five – Support for the professionalization of employees

- Ethics training – community members noted that all public officials should be subjected to mandatory ethics training and that any unethical behaviour should warrant immediate dismissal.

- Training – community members raised that public officials must be adequately skilled in order to complete the functions of their office. This includes ministers, who often have no prior background to the portfolios that have been mandated to oversee. In Khayelitsha, community members have also noted the inexperience of police officers to effectively deal with the high levels of crime and corruption that takes place in informal settlements. This usually leads to incompetency and the police not being able to execute their mandate effectively.

Pillar six – Improve adherence to integrity management and anti-corruption mechanisms, as well as consequence management for non-compliance for those across government, civil society and the private sector

- Professional bodies – participants noted that where an individual, who is part of a professional body, has behaved in an unethical manner – such a person should be removed from the profession

for an extended period of time. This could curb corruption as it would prevent individuals from engaging in untoward activities if the sanction was their livelihood.

- Prohibition on re-employment – community members submitted that if individuals who hold public office are found guilty of corruption or unethical behaviour, they should be sanctioned and not be allowed to be in the employ of the public service.

Pillar seven – strengthening oversight mechanisms in the government sector:

- Awareness raising – participants raised concerns that they are not aware of the mandate and functions of the various Chapter 9 and Chapter 10 bodies that exist. Those who did know of the existence of these bodies noted that they found these institutions to be 'toothless organisations'.

- Independence of Chapter 9 and 10 constitutional bodies – community members noted that due to the appointments of leadership to these institutions being done by Parliament and in some instances, the president, the independence of these institutions is comprised by political agendas. It was submitted that a different mechanism for appointments should be put in place.

Pillar eight – Strengthen the resourcing, co-operation and independence of dedicated anti-corruption agencies:

- Training – community members requested that the government develop a public awareness campaign around the various anti-corruption agencies that exist. The public should be made aware of the mandate of these bodies and how ordinary citizens can engage with these institutions to report incidents of corruption.

Pillar nine – Vulnerable sector management: build specific programmes to reduce corruption and improve integrity in sectors particularly vulnerable to corruption, with an initial focus on the justice, crime prevention and security cluster:

- Participants raised concerns about the high volume of corruption that takes place at local courts. In these instances, dockets are "lost" because police officers and prosecutors are bribed, and as a result, criminals are not facing consequences for their actions. It was suggested that courts have a visible corruption reporting mechanism/channel where these matters can be reported.

4. ROUNDTABLE DISCUSSION WITH CIVIL SOCIETY ORGANISATIONS

Corruption Watch hosted a dialogue with various civil society organisations (CSOs) on the draft NACS. Over 10 civil society organisations were present, however the majority were unaware of the existence of the NACS. Many of the participants were disgruntled at the fact that they were not made aware or invited to the public engagements held by government, and that they were only being consulted on the strategy just before the deadline for public submissions comes to a close. Questions were raised as to whether or not government valued meaningful public participation into this process, or if this was seen as just another tick-box exercise. The CSOs raised relevant concerns pertaining to the realistic adoption of such a strategy and whether or not there is a political appetite to ensure an effective implementation plan. The submissions from CSOs are listed below as follows:

Pillar one – Support citizen empowerment in the fight against corruption, including increased support for whistleblowers:

- Participants noted that there are weak reporting channels within CSOs that relate to various forms of misconduct, and that the establishment of a CSO Ombudsman may be beneficial in terms of aiding whistleblowers. An example was given of the Life Esidemeni crisis and that there was no internal oversight mechanism governing the NGOs that were implicated.
- With regards to whistleblower protection, CSOs raised that many people are fearful of reporting corruption because of the threat that it poses to one's life and livelihood. Adequate measures must be put in place in order to ensure the protection of whistleblowers.

Pillar two – Develop sustainable partnerships with stakeholders to reduce corruption and improve integrity management:

- It was noted that CSOs, the private sector and government need to have cross sectoral bi-annual meetings which will assist in understanding what work is being done in the different sectors to tackle corruption.
- Participants noted that the Department of Basic Education should partner with CSOs to develop a school curriculum that focuses on human rights and ethics training.
- Faith based organisations (FBOs) hold substantial power within communities across various levels of society, and thus participants submitted that FBOs should be engaged as a possible partner to engage their constituencies on issues of anti-corruption.

Pillar three – Improve transparency in the government, business and civil society sectors:

- CSOs submitted that there should be an amendment to the Promotion of Access to Information Act as well as the Promotion of Administrative Justice Act, to lean towards a more proactive disclosure of information. Furthermore, sanctions should be put in place for not adhering to the requirements of this legislation.

Pillar four – Improve the integrity of the public procurement system to ensure fair, effective and efficient use of public resources:

- Participants noted that an open tender process should become mandatory practice in all spheres of government where open contracting principles are applied. The successful bidder, as well as the amount of the bid award, should be disclosed in the interest of transparency. It was further suggested that there need to be stricter guidelines and regulations in terms of government officials accepting gifts of hospitality, and there should be harsher sanctions for non-disclosure.

Pillar five – Support for the professionalization of employees:

- CSOs stated that the National School of Governance should be required to give compulsory ethics training for officials in government. Universities should also consider establishing academic courses that deal with corruption, for example a post-graduate degree in anti-corruption law.

- It was also noted that all high-level public sector appointments should be based on a set of requirements and criteria for that particular post, instead of being appointed to gain political favour.

Pillar six – Improve adherence to integrity management, and anti-corruption mechanisms, as well as consequence management for non-compliance of these across government, business and civil society sectors:

- Dismissals in the public sector should be made public, as this would help address the trust deficit in government and prevent further corruption from occurring as public officials would be afraid to be named and shamed. Participants also noted that those found guilty of corruption should be prevented from being employed in the public service.

Pillar seven – Strengthen oversight and governance mechanisms in the government sector

- CSOs note that some Chapter 9 bodies have overlapping functions, and thus they should be merged in order to focus their resources and capacity.

- The appointments of leadership to these institutions remains a concern for CSOs as they are based on political preference instead of stringent criteria – which inevitably hinders the independence of these institutions.

Pillar eight – Strengthen the resourcing, co-operation and independence of dedicated anti-corruption agencies:

- Participants suggested that one synergised coordinating body should be created which is dedicated to anti-corruption work. This institution should operate similarly to Chapter 9 Institutions.

Pillar nine – Vulnerable sector management: build specific programmes to reduce corruption and improve integrity in sectors particularly vulnerable to corruption, with an initial focus on the justice, crime prevention and security cluster:

- Participants were of the opinion that legislation focused supply chain management needs to be aligned with stricter regulations as it has a direct impact on service delivery of basic services and has an effect on the socio-economic rights of vulnerable groups.

5. ROUNDTABLE DISCUSSION WITH THE BUSINESS COMMUNITY

In late August, Corruption Watch convened a roundtable discussion with members who form part of the National Business Initiative (NBI), Business Leadership South Africa (BLSA) and Business Unity South Africa (BUSA). In total, 25 participants who represent various private sector interests attended the engagement. Members from the Anti-Corruption Inter-Ministerial Committee (ACIMC), as well as the NACS drafting team attended the roundtable discussion and thus the submission below focuses on high-level themes / concerns that were raised, instead of specific points relating to each of the nine pillars:

5.1. Alignment and collaboration on anti-corruption initiatives

- Participants raised that in order for the NACS and other anti-corruption initiatives to be successful, there has to be a clear intention and willingness by government to collaborate with all sectors of society, including the private sector and civil society organisations. BUSA raised an example of an anti-corruption communications campaign that it is currently running in partnership with the Government Communications and Information Service (GCIS), and encouraged more opportunities for collaboration with the public sector.

- There was a general support for the re-establishment of the National Anti-Corruption Forum (NACF), however it was highlighted that in order for the NACF to be successful and viewed as a credible authority, it would need to have some form of statutory power. The mandate, operational matters and leadership of the NACF is of critical importance in terms of the sustainability and integrity of the body, and thus interested stakeholders must be engaged with to solicit input on the re-establishment and functioning of the forum.

5.2. Visible leadership, ethics and transparency

- Members of the business community felt that the private sector needs to have visible leadership that is vocal about corruption and addresses the concerns raised by the public about the complicity of the private sector in instances of grand corruption.

- Participants added that an improved transparency framework be established for the private sector, and that senior members of the business community take direct responsibility for ethics and integrity in the sector and provide public feedback reports.

- It was suggested that a "back to basics" programme be introduced in both the public and private sector that trains employees on ethics, integrity and transparency. The professionalization of employees, mentioned in pillar five of the NACS, should apply to employees in all sectors.

5.3. Procurement

- Participants raised that a new trend has emerged with regards to procurement in the public sector; with each new instance of corruption, the government attempts to put more regulations in place which makes it difficult to conduct business in a timeous and effective manner. Members from the business community believe that the current legislation in place is sufficient, however a focused programme around the adherence and implementation of the legislation must be put in place.

- It was noted that the SMMEs are the most vulnerable in the private sector with regards to encountering and being complicit in corrupt practices. SMMEs often have to pay bribes to conduct business with the state, and thus a formalised programme should be developed to deal with these specific issues. Participants noted that large corporations should attempt to do more with regards to training SMMEs around understanding the procurement system, as well as on matters relating to ethics and integrity.

5.4. Consequence management

- Participants added that adequate systems need to be established to ensure that individuals who have been complicit in corrupt practices are not allowed to be re-deployed within their sector, or move across sectors from public to private and vice versa. Systems within human resourcing need to be introduced to ensure that proper reference checks are conducted.

- It was further suggested that professional bodies need to introduce systems of accountability for members who resign from their positions before engaging in disciplinary proceedings in order to avoid sanction or criminal prosecution. This practice often allows individuals to act with a sense of impunity and tarnishes the reputation of the profession.

5.5. Engaging with organised labour

- Participants raised the concern of the lack of engagement with trade unions and organised labour movements around the draft NACS. They noted that it cannot be taken for granted that labour unions form part of civil society organisations, and thus they should be viewed as a specific target audience as many whistleblowers are from within those structures.

5.6. Party political funding

- Whilst participants were aware that there are processes in place to legislate and regulate the private funding of political parties, they noted that the absence of party political funding as a strategic pillar in the NACS is glaring and problematic.

6. **Expert opinions on the NACS**

In addition to the engagements with the public, private sector and civil society organisations, Corruption Watch sought the counsel of anti-corruption experts who were able to provide their opinion and recommendations with regards to the draft NACS. Three anti-corruption experts were engaged and their submissions are included in the following appendices:

- Mr Adam Graycar, Professor of Public Policy, Finders University, Australia – Appendix A
- Thomas Beale, Director of Beale Consulting and Attorney at Law (Indiana) – Appendix B
- Gareth Newham, Head of Justice and Violence Prevention Programme at the Institute for Security Studies – Appendix C

7. CORRUPTION WATCH'S RECOMMENDATIONS

Based on the public engagement campaign conducted by Corruption Watch in relation to the NACS, we have developed a list of recommendations that should be considered in the development of the final National Anti-Corruption Strategy and implementation plan.

7.1. Ownership of the NACS

In South Africa, corruption has become a pervasive problem across all sectors of society and thus the ownership of the NACS by all citizens is imperative to ensure that the outlined pillars and programmes are effective. We do however note that in order for the strategy to be wholly embraced and adopted by the general public, the private sector and civil society organisations, there must be sufficient political will by key officials in government, in particular the president of the Republic of South Africa, to take ownership of the NACS and accept accountability for the implementation of the strategy. In the current political climate, it will boost the public's confidence and aid societal buy-in of the strategy, as well as anti-corruption initiatives on a whole, if the president openly endorses the NACS and calls for support across all sectors to ensure that the vision of the strategy is achieved.

7.2. Whistleblowing

A large part of the fight against corruption is rooted in the information received from whistleblowers and encouraging people with information to speak out. Part of the proposed NACS awareness and communications campaign around whistleblowing needs to deal with behaviour change and changing the narrative and stigma associated with blowing the whistle. It is our view that whistleblowers are the true heroes of our society and more needs to be done to protect their identities and livelihoods through necessary legislation, but also to introduce focused initiatives around celebrating whistleblowers as anti-corruption champions.

Corruption Watch also believes that in order to effectively deal with corruption in the public sector, each government department should have an internal anti-corruption unit (ACU) to which employees or

members of the public can confidently report issues of graft pertaining to that specific department. The members who form part of the ACUs must be trained officials in anti-corruption policies, ethics and compliance, and can investigate matters or escalate it to the necessary law enforcement agencies if necessary. The ACUs must provide feedback in their departmental annual reports, as well as to the necessary parliamentary portfolio committees, about the number and nature of the complaints that they receive, as well as the action that they took with regards to those matters. Consideration for consequences must also be given with regards to inaction on matters of corruption.

7.3. Professional associations

The recent state capture saga exposed the complicity of some private sector firms such as KPMG and McKinsey, as well as lawyers and other professional authorities who were seen to be facilitating and abetting corrupt practices. Despite some of these matters being reported for criminal investigation, the slow pace with which our local law enforcement agencies proceed with the investigation and prosecution of matters has contributed to the culture of impunity in South Africa.

However, professional associations should be required to have stringent accountability mechanisms in place to ensure that their members are fully compliant with the law and anti-corruption policies, as well as subscribe to the values and ethics of the profession. Consequences for inaction by professional associations to hold their members accountable for corruption and unethical practices must be considered, as it is often the case that perpetrators hide behind the cloaks of the public credibility that is given when associated with a professional body.

7.4. Abuse of professional ethics and of confidentiality

We are concerned at the practice whereby companies and entities in both the private and public sectors who are alleged to be involved in corrupt and unethical conduct seek to sanitise their conduct by commissioning 'independent' investigations from law firms or auditing and forensic firms but then assert legal privilege or confidentiality claims in order to prevent public disclosure of the outcome of these investigations. This is a gross abuse of the standing of the professions affected.

7.5. Appointment processes to heads of constitutional bodies, anti-corruption and law enforcement agencies, and boards of SOEs

Corruption Watch and various civil society partners have engaged in numerous processes around the appointments of heads to Chapter 9 and Chapter 10 bodies, the SAPS national commissioner, the head of the Directorate of Priority Crime Investigations, as well as boards of SOEs. In each of the above mentioned instances, the intention was to facilitate public participation and transparency in the appointment processes. If the public have been given an opportunity to participate and view the appointment process of the heads to these institutions, it is our belief that there would be increased public confidence in the

person occupying the position. Listed below are a set of recommendations that should be considered in the appointments of heads to the abovementioned institutions:

Appointments conducted by Parliament (Chapter 9, Chapter 10 and SOEs):

- The notices calling for applications / nominations should be widely circulated across various communications platforms;
- The CVs of all candidates who applied for the position must be publicised on Parliament's website to facilitate a process whereby the public can comment / object to individuals who have applied;
- The parliamentary committee responsible for conducting the appointment processes must allow for sufficient time in which the public can communicate to the committee their comments and/or objections to certain candidates;
- Proper, stringent criteria must be used when shortlisting candidates. In our experience, Members of Parliament do not follow formal human resourcing (HR) practices and often act based on their own political party agenda. Our recommendation is that private HR consultants are hired to establish a set of criteria for each position, as well as conduct a preliminary short-listing process based on their expertise and the requirements for the position. This list can then be handed over to the parliamentary committee for discussion and approval; and lastly.
- In the interests of transparency, all committee meetings and interview processes must be televised for public consumption.

Appointment of heads of law enforcement agencies

In relation to the SAPS national commissioner, as well as the national director for public prosecutions (NDPP), there are no adequate appointment mechanisms in place to ensure that the best possible candidate is selected to occupy these important crime and corruption fighting positions. However the National Development Plan (NDP) proposes a process of appointment in relation to the SAPS national commissioner, which could be replicated in the appointment of the NDPP. The NDP states the following[3]:

"The National Commissioner of Police and Deputies should be appointed by the President on a competitive basis. A selection panel, established by the President, should select and interview candidates for these posts against objective criteria. The President should appoint the National Commissioner and Deputies from recommendations and reports received from the selection panel. This would enhance the incumbents' standing in the eyes of the community and increase the respect accorded to them by their peers and subordinates."

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[3] NDP 2030 -Our Future Make it Work, pg. 391

7.6. Issues relating to corruption in mining

As per the feedback received from our community engagement in Mokgwase in the North West, as well as Corruption Watch's own work relating to mining royalties and the system's vulnerability to corrupt practices, we believe that a separate pillar should be established to deal with this specific, but evasive, form of corruption. Corruption in the mining sector has a unique manifestation, thus incorporating it into one of the existing nine pillars will not have the desired impact in changing the landscape of graft in this particular area.

In 2016, Corruption Watch published a research report titled the *Mining for Sustainable Development Research Programme*. Our research found that the online application process which is managed by the South African Mineral Resources Administration System, has not had the desired effect of streamlining the application process, but instead has resulted in the system being a major catalyst for corruption, when mining licenses and permits are applied for. Our research also highlighted that issues like irregular community consultations and improper monitoring and evaluation of social and labour plans are breeding grounds for corrupt activity. Corruption Watch believes that specific programmes that address the loopholes in the mining sector which give rise to corruption needs to be established and implemented.

7.7. Petty corruption

Since our establishment in 2012, Corruption Watch has received over 24 000 complaints of alleged corruption across the country. The majority of these complaints are deemed as "petty" corruption. Incidents of petty corruption typically occur in the provision of basic public services – hence education, health, policing, housing and various licensing services feature prominently in the reports that we receive.

Relative to incidents of "grand" corruption, the amounts of money involved in each incident of petty corruption is small, however the impact on the lives of ordinary South Africans is significant – they may determine whether school learners receive the daily meal to which they are entitled or whether a family gains access to public housing or is forced to live in an informal settlement. Official inaction in the face of petty corruption influences the attitude of citizens towards their public representatives and public officials. It is, we believe, directly responsible for the declining levels of trust reposed by the public in their public representatives and public officials. Thus, Corruption Watch motivates that a separate pillar focusing specifically on petty corruption and activities to combat this form of graft be considered in the final strategy.

7.8. State owned enterprises

As evident from the central place of SOEs in state capture, Corruption Watch believes that a separate pillar focusing on the governance framework and compliance with anti-corruption policies in SOEs should be inserted as an additional pillar. Governance issues essentially relate to ensuring that the respective roles and responsibilities of shareholding ministry, the boards and the executive management be clearly

understood and respected, these include clearly specifying responsibility for the appointment of the CEO and CFO (the responsibility of the board) and for procurement decisions (the province of the executive management).

7.9. Political party funding

Corruption Watch welcomes the recent passing of the political party funding bill, but would like to stress the importance of formulating the regulations and setting up the institutions necessary to ensure timeous implementation of the legislation. We flag this as an issue of paramount importance.

7.10.   Communication of the strategy

In conclusion of our recommendations, Corruption Watch is concerned at the manner in which the draft NACS was communicated to the broader public, and the lack of public participation in the engagement processes. This is an important strategy to assist the country in dealing with the various pervasive forms of corruption – however, we can confidently note that the vast majority are completely unaware of the draft strategy. Whilst we understand the frustration of the ACIMC in relation to organising the logistics of the public events and waiting on funding to publicise the document, we do believe that the committee must consider innovative communication approaches and relationships with partners in drawing attention to the final National Anti-Corruption Strategy.

APPENDIX A

Opinion by Mr Adam Graycar; *Professor of Public Policy; Finders University, Australia*

Adam Graycar provided a brief opinion on the NACS, with a focus mainly on its implementation thereof Graycar supports the strategy and its nine pillars and termed the pillars as 'excellent and fairly comprehensive'. In his view, the real challenge with the NACS will be the implementation. Graycar notes that a diagnosis of the problem is required in order to know where to intervene, as it must be determined whether corruption is stems from a lack of political will, poor leadership, public service incompetence, or the capture of public institutions. He notes that because corruption is seen to be embedded in the culture of South African society, stakeholders need to stop corruption from being a norm and instead being the exception.

Graycar notes that for effective implantation of the NACS, the strategy will need to be staged, and costed as the possible programmes referred to will not be cheap. He does however note that the benefits will outweigh the costs if the NACS is successful. Graycar further states that it is important to focus on who owns the problem, as well as who owns whatever solutions are proposed, because it is imperative that not all potential owners of the solutions will be equally skilled or willing to participate. Thus, the ACIMC will have to map the relevant stakeholders, and assess and negotiate their capacity and willingness to implement the NACS.

"There is a multitude of issues that need to be implemented, and consequently a number of different owners", says Graycar. He notes that the following areas will require ownership throughout the pillars, citing that some pillars will be owned by several different stakeholders:

- Education and training
- Information and community engagement
- Staff development
- New policies in government agencies. procedures, regulations and legislation
- New structures (an anti-corruption agency)
- Better practice and management in sectors (and in government)
- Sanctions and penalties

Due to the fact that different departments will own different areas, Graycar adds that there is a serious issue of coordination that needs to be addressed and dealt with. Furthermore, he notes as not all the programmes can be implemented at once and thus an action plan should be developed to strategically address which programmes to commence with as well as which programmes can be achieved in the short term as opposed to which ones can be achieved in the long term.

APPENDIX B

Opinion by Mr Thomas J. Beale; BA MA JD (Indiana University), Director: Beale Consulting (Pty) Ltd; Attorney at Law (Indiana)

INTRODUCTION

This submission was prepared at the request of Corruption Watch as part of its consultation process with civil society, business and other interested parties on the proposed National Anti-Corruption Strategy (NACS). The commentator is a professional ethics and compliance officer with significant experience working for two multinational telecommunications companies operating in Africa and Eurasia,[4] and comments are thus made from a business sector perspective.

Part B of the Discussion Document is used as the framework for the commentary, but there are occasional references to Part A of the Discussion Document and the Diagnostic Report. Due to the short time given for comment, the commentator was unable to thoroughly analyse and correlate the findings and recommendations in Part A and the Diagnostic Report with the proposed strategic pillars and programmes. Also, it should be noted that the commentator last worked in South Africa in 2013, and is thus not up to date with developments in the anti-corruption field. The commentator apologizes for any resulting oversights, omissions or other errors in the commentary that follows.

COMMENTS ON SECTIONS 1 - 4

Strategies are either short, medium or long term. This appears to be a medium-term (five year) strategy and, if so, that should be expressly stated and the programmes tailored accordingly. The basic framework of pillars and programmes is clear but the multi-sector or cross-cutting dimension could be better explained or illustrated. Furthermore, one key sector seems to be missing, namely, political parties, unless they are regarded as a subsector of civil society. In that case, they need to be added into the definition of civil society in the glossary. There is also a need for a pillar to "Improve coordination and cooperation on matters in scope but not in focus", which will be explained below. Thus, the conceptual framework behind this commentary is as follows:

Pillars	Citizens and Sectors				
	Citizens	Government	Civil Society	Political Parties	Business
Pillar 1	Programmes	Programmes	Programmes	Programmes	Programmes
Pillar 2	Programmes	Programmes	Programmes	Programmes	Programmes
Pillar 3	Programmes	Programmes	Programmes	Programmes	Programmes
Pillar 4	Programmes	Programmes	Programmes	Programmes	Programmes

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[4] Thomas J. Beale BA MA JD (Indiana University).

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Pillar 5	Programmes	Programmes	Programmes	Programmes	Programmes
Pillar 6	Programmes	Programmes	Programmes	Programmes	Programmes
Pillar 7	Programmes	Programmes	Programmes	Programmes	Programmes
Pillar 8	Programmes	Programmes	Programmes	Programmes	Programmes
Pillar 9	Programmes	Programmes	Programmes	Programmes	Programmes
+Pillar 10	Programmes	Programmes	Programmes	Programmes	Programmes

It would be helpful to introduce, in this section of the Discussion Document and the final Strategy, the programme elements set forth to Appendix B, namely *prevention; detection; enforcement; and monitoring, evaluation and improvement*. These should actually be called "programme areas" or "goals" not programme elements, which are already listed on page 20. Finally, it should be stated that the list of programme elements and actions is not exhaustive.

COMMENTS ON SECTION 5: STRATEGIC PILLARS AND PROGRAMMES

Pillar 1: Support citizen empowerment in the fight against corruption

The Discussion Document states, in respect of the conceptual framework for the Strategy, that "ensuring people have knowledge about anti-corruption regulations, ethics frameworks, etc. is a first important step towards reducing corruption and supporting ethical practice. It is however not sufficient. The aim of programmes initiated under the National Anti-Corruption Strategy should be to provide guidance on how to shift the incentives and constraints under which people and organisations operate, and build institutions that provide public servants, private sector professionals, citizens and others with a blueprint for ethical practice." It is submitted that the Strategy should not skip the first step; rather, people should be given the opportunity to take it. It is recommended that this pillar include a programme on the provision of ethics training in all South African schools, training colleges other educational institutions.

Pillar 2: Develop sustainable partnerships with stakeholders

Programme 2.1, which calls for the rejuvenation of the National Anti-Corruption Forum (NACF) is strongly supported. The body must have the fresh commitment of the leadership of all sectors as well as the required organizational framework and financial and human resources to carry out its tasks. Individual businesses and business organizations should participate in and support its activities through contributions and secondments of financial and human resources, including internships. Without a fully functioning NACF, there is little chance of success in combating corruption in South Africa.

Based on what is stated above in respect of Pillar 1, it is recommended that Programme 2.2 activities should also be expressly "in support of ethics, anti-corruption..." as such. Ethics and integrity management are interrelated but not the same. It is further recommended that that the business sector be called upon to

sponsor the development of private and public sector ethics and anti-corruption courses in tertiary education institutions.

While not expressly mentioned in Strategic Programme 2.3, large businesses and the organized business sector should join in these efforts and provide funding as part of their corporate responsibility programmes (CSR).

The role of business in Programme 2.4 is supported.

Pillar 3: Improve transparency (by government, business and civil society sectors)

Strategic Programme 3.4

This is one of the most important programmes in the proposed Strategy and merits full support. It is impossible for any sector to manage corruption risk—and particularly for the business sector to manage the risk of bribery involving government officials[5]—without having accurate information regarding the ultimate beneficial ownership of companies. This information is also critical for the management of money laundering and terrorist financing risk. This database should provide a full picture of registered company structures and holdings.

It is recommended that this programme be extended to SOEs and the civil society and political party sectors to make the same or corresponding information (depending the type of entity) publicly available, as they also present and encounter an equal level of bribery and corruption risk.

Strategic Programme 3.5

The broad elements of this programme for improving the transparency of governance in business and civil society sectors are supported. They should be extended to SOEs and possibly other entities in the government sector, and to the proposed political party sector.

Strategic Programme 3.6

Comments on this Pillar—to the extent that it refers to compliance with section 34 of the Prevention of Corrupt Activities Act, 2004 (as amended, PRECCA)—are made under Pillar 6[b] below.

From a business perspective, a number of guidelines on how to report on anti-corruption programme implementation are already available, e.g. the Global Compact's guidance on reporting on Principle 10 and the GR4 and <IR> guidelines. However, the country representative bodies for these reporting standards should be asked to engage more actively with, and give further guidance to, companies on anti-corruption reporting. It would also be helpful if government would provide the social and ethics committees of

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[5] In this document, "government official" is intended cover at least those persons referred to in the definition of the government or public sector in the Discussion Document: "Government or public sector: includes employees and elected and nominated officials in all three spheres of government (including those of state-owned and state-controlled entities)" and more broadly to cover all public/government officials included in the scope of South African and other national and international anti-corruption law.

businesses falling under section 43 of the Companies Act, 2008 (as amended) with specific guidance in this regard. A reporting standard for small and medium-sized businesses would also be helpful.

However, as noted in the Diagnostic Report, the problem is that many companies are simply not reporting, or at least not at best practice levels. The best way to encourage greater business transparency is for organizations like Trialogue and Corruption Watch (particularly as the local Transparency International affiliate) to conduct research and produce country or sector reports like those of TI on *Transparency in Corporate Reporting* (see e.g. TI's *TRAC: Assessing the World's Largest Telecommunications Companies*), *Exporting Corruption* and the like) and to discuss them in the media. South African multinationals such as MTN, Bidvest, Sasol and Vodacom's parent company, Vodafone, have featured in these reports. TI states that public self-reporting on anti-corruption programmes "cannot be equated with actual performance, but public reporting provides an opportunity for companies to focus on their practices, and drives improvement. Good public reporting supports and promotes good behaviour."

It is recommended that Companies Act Regulation 43 be amended as follows:

(5) A social and ethics committee has the following functions:

(a) To monitor the company's activities, having regard to any relevant legislation, other legal requirements or prevailing codes of best practice, with regard to matters relating to –

 (i) social and economic development, including the company's standing in terms of the goals and purposes of––

(aa) the 10 principles set out in the United Nations Global Compact Principles; and

(bb) the OECD recommendations regarding corruption, with particular reference to adherence to the Good Practice Guidance for Companies in Annex II of the OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions;

(cc) the Employment Equity Act; and

(dd) the Broad-Based Black Economic Empowerment Act;

(ii) good corporate citizenship, including the company's ––

(aa) promotion of equality, and prevention of unfair discrimination, and reduction of corruption;

(bb) contribution to development of the communities in which its activities are predominantly conducted or within which its products or services are predominantly marketed; and

(cc) record of sponsorship, donations and charitable giving; and

(dd) reduction of corruption, with particular reference to the company's implementation of an anti-corruption compliance programme under section 34 of the Prevention of Corrupt Activities Act, 2004;

See also the comments under Pillar 6 below.

Consideration could also be given to amending Regulation 26(2) of the Companies Act, which sets the formula for calculating a company's public interest score, so as to assign a higher point value per Rand of revenue obtained from contracts with state entities. This would bring more companies facing high public sector corruption risk within its scope.

Proposed Pillar 3.7: Transparency in political party funding
It is recommended that transparency in political party funding be identified as a Pillar even though the recent Political Party Funding Bill/Act may have addressed some or all of the identified issues. While the legislative programme has perhaps been completed, programmes for implementation and monitoring (by civil society and media) should now get under way.

Pillar 4: Improve the integrity of the public procurement system to ensure fair, effective and efficient use of public resources

Supported. It is recommended that there be an additional "Programme 4.4: Government and organized business to encourage and provide guidelines for integrity pacts in public tendering" and an additional "Programme 4.5: Changes to public procurement law". It is recommended that consideration be given to amending public procurement law to require persons tendering for contracts in excess of a specific rand value or in high risk activity areas—e.g. those requiring high levels of interaction with licencing authorities—to have anti-corruption programmes. Alternatively, companies who have such programmes could perhaps be given a measure of preference in tender evaluations and awards of contracts involving high corruption risk. Finally, it is recommended that the process for completion of a state contract include a requirement that the contractor certify that it has complied with all applicable anti-corruption laws and the related terms of contract. (Perhaps all or part of this is already being done; if so, the relevant comments should of course be ignored.)

Pillar 5: Support the professionalisation of public sector employees
Supported; no comment.

Pillar 6[a]: Improve adherence to integrity management and anti-corruption mechanisms and improved consequence management for non-compliance [in the government sector]

Programmes 6.1 to 6.5, which focus on the government sector, are supported.

The commentator does not share what appears to be the view taken in the Diagnostic Report that rules governing the acceptance and declaration/registration of gifts, hospitality etc. received by government officials are satisfactory and need only be more stringently monitored and enforced. It is recommended that there be an additional programme under this pillar to carry out a centralized review of all government sector codes of conduct and to develop/refine one or more sets of comprehensive and consistent regulations and guidelines on the receiving of gifts and hospitality—as well as on the acceptance of invitations (and associated travel and hospitality) for official attendance at events—by government officials. This effort should also review and develop/refine regulations and guidelines governing payment or reimbursement of the costs of *bona fide* expenditures such as government official travel and accommodation in the context of promoting or demonstrating products or services or the execution of performance of a contract with a government body. Finally, the programme should also review and develop/refine regulations and guidelines on various forms of voluntary and solicited sponsorships, donations and grants made by business to government bodies (or made in cooperation with government bodies to third parties) to cover the costs of putting on various industry events; celebrating designated national "youth", "world anti-corruption" and other "days"; hosting delegations of international organizations; putting on awareness and training programmes and the like. (Again, it is possible that all or part of this is already being done; if so, the relevant comments should be ignored.)

It is also recommended that the monitoring and enforcement of the abovementioned regulations and guidelines relating to the acceptance of gifts and hospitality by government officials be expressly included in Programme 6.3.

Pillar 6[b]: Improve adherence to integrity management and anti-corruption mechanisms and improved consequence management for non-compliance [in the civil society, political party and business sectors]

Programmes 6.1 – 6.5

Programmes 6.1 – 6.5 are supported; no comment. Programme 6.6 is supported and should be extended to the civil society and political party sectors as well. Comments on Programme 6.7 follow the comments on Programme 6.8 immediately below.

The Diagnostic Report and Discussion Document assert that a significant portion of the South African business sector is not responding to the existing encouragements, incentives and implicit requirements[6] to implement best practice anti-corruption compliance programmes, particularly in respect of the bribery of government officials at home and abroad. They indicate that some companies—presumably those falling under section 43 of the Companies Act and those with sufficient US, UK or other OECD nexus to bring them under the extraterritorial reach of civil or criminal enforcement actions in those countries—are doing better than most; but overall, the situation remains unsatisfactory. Thus, it is concluded that additional pressures and incentives to implement anti-corruption programmes and develop an anti-corruption culture in companies are required, and it is proposed that a new PRECCA offence based on the UK Bribery Act, "i.e. failure by a commercial organisation to prevent bribery and possibly other forms of corruption" be created.

As identified in the Diagnostic Report, the underlying cause of the problem is probably lack of enforcement. The Report notes that robust US FCPA enforcement is what brought US and US-listed companies into line, and that is 100% correct. The robust enforcement of the UK Bribery Act is having the same effect. Thus, it is recommended that emphasis should rather be placed on enhanced investigation and enforcement by the addition of an appropriate programme in Pillar 6[a].

It is further recommended that consideration rather be given to adopting some elements of the US FCPA enforcement approach, i.e. to amend PRECCA and relevant prosecution and sentencing guidelines so as to "reward" companies who have implemented such programmes (and particularly those who have self-reported under section 34) with non-prosecution or deferred prosecution agreements (NPA/DPAs) and/or penalty-reductions. It may also be prudent to add the adequate financial controls and books and records offences for listed companies and SOEs, similar to the civil jurisdiction of the SEC under the US FCPA. But again, in order for US-style measures to be effective, the risk of investigation and civil or criminal enforcement action must—to use enterprise risk management terms—be *very likely* and present potentially *high, negative financial, reputational and other impacts* on the company and its directors, officers, employees and agents in order to prompt the necessary risk-avoiding or risk-mitigating response.

However, if enforcement levels remain low, it may be necessary to consider adopting the UK Bribery Act approach with a specific "failure to prevent" offence and "adequate procedures" defence, and including

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[6] The reference here is to the functions of a social and ethics committee set forth in subsection 43(5) of the Companies Regulations promulgated under section 72(5) of the Companies Amendment Act, as mentioned above. A company that does not have an anti-corruption compliance programme will probably not achieve a high standing in terms of the applicable standards or make much progress in reducing corruption, but the requirement to have a programme is implicit, not explicit, and neither a failure to have one nor poor performance in the two evaluation areas can attract any formal sanction.

NPA/DPA mechanisms. The offence should definitely be made applicable to SOEs; and consideration should be given to making it applicable to some civil society entities and political parties.

In the meantime, a new subsection 34(7) of the PRECCA Amendment Bill of 2017 provides that "All institutions referred to in subsection (4) must implement appropriate internal compliance programmes in order to ensure that the offences referred to in subsection (2) are in fact detected and reported." Unfortunately, given this cross-reference, the requirement appears to refer only to the offence of failing to report. In the Explanatory Memorandum, the cross-reference is to subsection (1), which refers to the various substantive corruption offences, and it is hoped that this error was corrected prior to enactment. (The Bill/Act is believed to be awaiting Presidential assent.) It is also unfortunate that the requirement is embedded in section 34, does not refer to prevention (only detection and reporting), and non-compliance does not appear to constitute a separate offence or attract a specific or general sanction. Nevertheless, its enactment is worthy of praise and full support by the business sector.

Finally, it is submitted that citizens and the other sectors should continue to encourage and incentivise companies to voluntarily comply with domestic and international governance, ethics and anti-corruption compliance codes and guidelines, to annually evaluate and periodically audit their performance, and to report fully in accordance with those standards.

Programme 6.7

Official guidance or regulations on adequate procedures (i.e. anti-corruption compliance measures) would be issued under PRECCA, not the Companies Act. There are a number of existing guidelines issued by the OECD; the US, UK and other countries; the World Bank; Transparency International; and other international inter-governmental and business organizations that can inform this effort. They are quite consistent, and the development of a set of South African regulations or guidelines should not be a difficult or time-consuming task.

Programme 3.6

This programme is listed under Pillar 3, which address the issue of improving transparency. However, it is commented upon under Pillar 6 because section 34 of PRECCA is not voluntary and the decision to self-report a known or suspected violation of the Act that exposes the company, reporter or other persons to civil liability, criminal investigation, enforcement action and significant penalties and fines (as well as shareholder derivative and other forms of civil action) is not made in the same manner as decisions on

reporting in the context of voluntary commitments to transparency to stakeholders.[7] The Discussion Document twice states that too little reporting on corruption in the private sector takes place, but it is not clear whether that refers to section 34 reports because no statistics were given in this regard.

The 2017 PRECCA Amendment Bill made changes to section 34 such that a new subsection 34(5) now provides that "A court may find that any person who *bona fide* filed a report as contemplated in subsection (1) may not be held liable to any civil, criminal or disciplinary proceedings in respect of the content thereof." This immunity will help encourage reporting, but the fact that the immunity is discretionary will very likely limit that effect. In respect of disciplinary action and civil liability, the prospect of protection in cases where e.g. one believes that one reasonably knows or suspects that an offence has been committed and this turns out (upon further investigation) not to be the case. Its application in respect of possible criminal liability of the reporter seems less clear (the Explanatory Memorandum refers only to immunity from civil liability). Perhaps it is intended to provide some protection to reporters who are somehow complicit in an offence. Hopefully, some better-informed commentators will clarify this matter in the course of public consultations on the Strategy.

Notwithstanding the above, it is submitted that, until one of the approaches mentioned in the comment on Pillar 6[b] above is adopted, companies may continue (if that is in fact the case) to be hesitant to self-report. Lessons can be taken from the US experience, where (1) increasing numbers of consistent case-by-case settlements, (2) increasingly clarity in enforcement policy statements, (3) the carrying out of a self-reporting pilot programme, and (4) recent amendments e.g. to the United States Attorney's Manual based on the results of that programme have resulted in more companies having the confidence to self-report, ***because the results of self-reporting are increasingly more predictable and favourable***. This should be a key goal of the proposed changes referred to above.

Finally, awareness-raising campaigns and the publication of guidelines (beyond the existing regulations/forms) regarding what and how to report would be helpful. Guidelines should also address when one is required to report, e.g. what constitutes a reasonable suspicion versus, say, a mere apprehension. Large companies take advice of counsel; sole proprietors and small businesses need less costly but still reliable advice.

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[7] Compliance with statutory and listed company auditing and reporting requirements also have to be carefully considered.

Directors: AL Brown, A Hassim, DH Lewis (executive director), T Leoka, M Msimang (chairperson), SN Mbete, M Qobo

Proposed Programme 6.9: State capture and the rehabilitation of SOEs

It is recommended that the Government's ongoing efforts to deal with state capture and the rehabilitation of SOEs be listed as a specific, ongoing programme.

Proposed Programme 6.10: Public-private sector cooperation on managing corruption risk in operations abroad

As mentioned in the Diagnostic Report, South Africa has been criticized for inadequate levels of investigation and enforcement in terms of its OECD commitments and the related section 35 extra-territorial jurisdiction of PRECCA. That is fair criticism and needs to be addressed by government. However, it is equally important for the South African government—mainly DIRCO—to work more closely with the South African business sector to combat corruption—***particularly bribery, solicitation and extortion***—while doing business abroad. Programme elements could include

- establishing public-private sector consultation groups in respect of corruption challenges in specific countries, government/administrative functions (e.g. customs) and/or business sectors (e.g. banking, retail or telecommunications);
- diplomatic (high commission/embassy/consulate) initiatives to make submissions to foreign governments on SA business's behalf;
- SA government initiatives to provide institutional capacity building assistance in anti-corruption to foreign governments, e.g. anti-corruption training for customs officials; and
- SA businesses and business organizations initiatives to organize, sponsor and co-host (together with the foreign government and its local business and civil society sectors) anti-corruption conferences in their countries of operation.

Pillar 7: Strengthen oversight and governance mechanisms in the government sector
Supported; no comment.

Pillar 8: Strengthen the resourcing, cooperation and independence of dedicated anti-corruption [enforcement] agencies
Supported; no comment.

Pillar 9: Vulnerable sector management: build specific programmes to reduce corruption and improve integrity in sectors particularly vulnerable to corruption
Supported; no comment.

Proposed Pillar 10: Improve coordination and cooperation on matters in scope but not in focus

As noted in the Discussion Document, corruption can be broadly defined and manifests in many forms. This Strategy focuses the forms related to "abuse of entrusted power or authority for private gain" and which are found in South Africa's UNCAC, SADC anti-corruption protocol and OECD anti-bribery convention commitments. However, as noted in the Discussion Document, a comprehensive Strategy against corruption requires coordination and cooperation on matters in scope but not in focus, e.g. business collusion dealt with under competition law and illicit financial flows dealt with in financial intelligence and banking law. Furthermore, there are the business-related issue areas (as nicely presented on the Transparency International website) of base erosion and profit-shifting, transfer (miss) pricing, tax evasion and avoidance (the latter being a moral rather than a legal issue), and state capture. Finally, there is the general problem of the laundering of money and other proceeds of crime (specifically addressed in the UNCAC) where any of these types of corruption is the predicate offence.

Possible generic programmes for this proposed Pillar 10 (similar to those in Pillar 9) include the following:

10.1   Consultation with government ministries to identify who is taking the strategic and programming lead on a matter and who is playing a supporting role

10.3   Establishment of government department/subsector and enforcement agency coordination and cooperation forums, including consultation committees for obtaining inputs and cooperation from the business and civil society sectors

10.2   Development of coordination and cooperation plans within and between these ministries and forums.

CONCLUSION

The commentator thanks Corruption Watch for the opportunity to make this submission.

APPENDIX C

Opinion by Mr Gareth Newham, Head of Justice and Violence Prevention Programme at the Institute for Security Studies

The ISS welcomes the opportunity to make an input to the National Anti-Corruption Strategy (NACS) discussion document. Below are a few suggestions and issues for consideration with regards to the content of the document. Please note that this is by no means a comprehensive response to the issues raised in the discussion document. Due to limited time available, this is a short response based on a quick reading of the pillars and thoughts on implementation.

Brief Inputs relating to the Pillars

This section will highlight a few key issues with regards to a few of the pillars

Pillar 1

- Greater attention should be given to the factors that promote or hinder people from reporting corruption. Ideally, there should be regular assessments of the mechanisms for reporting corruption to determine the extent to which the public know about them, trust that there reports will be taken seriously and whether they are sufficiently user-friendly or not.

Pillar 3

- The strategy should seek to explain the purpose of gathering data on corruption. For example, it is to enable the identification of risk areas and to promote transparency and accountability for tackling corruption.
- With regard to government data, in addition to investigations and prosecutions, the following data should also be provided:
  - Amounts involved in each investigation (including information on the subject of the investigation – private individual, public servants (including department, level/ rank and designation, etc.)
  - Convictions and sentences – categorised by private individuals, public servants (including department and level/rank, and designation.
  - Amounts recovered for each case
- Ideally, the National Anti-Corruption Task Team should be responsible for maintaining a publicly accessible data base and releasing monthly reports of the above-mentioned data. Note, that the names of the officials investigated could be withheld but should be included once they are formally charged in court.

- The National Anti-Corruption Forum should have a sub-committee or structure that engages with the available data and assists in interpreting it or assessing its reliability and utility.
- For example, the 2016/17 SAPS Annual report states that 65 cases in terms of PRECCA were opened by the police resulting in 19 arrests and one conviction for the amount of R2000. Clearly, some investigation is required into why an organisation of 191 000 employees can only secure a single conviction using legislation designed to make it easier for the state to prosecute corruption.

Pillar 5

- In line with the National Development Plan recommendations, there needs to be clear measures to de-politicise the appointment of Director Generals and top management – particular in the criminal justice departments.
- There also need to be measures to ensure that public servants who resign from positions while facing disciplinary action are prohibited from being recruited anywhere else in the public sector.
- One option may be to ensure that when public servants who hold posts of top or senior management face disciplinary proceedings, these proceedings are not terminated if they resign. Rather the proceedings should continue despite a resignation so that a clear finding can be arrived at. Those who choose not to participate after resigning will have to accept that negative finding against them is likely. Of course, they could review the findings in court but would have to explain why they did not take steps to provide their side of the story.

Pillar 6

- There needs to be a greater focus on the Public Finance Management Act to hold accounting officers accountable for failing to manage public funding effectively. The act allows for criminalisation of serious breaches, but to date has never been used. Perhaps a study needs to be undertaken as to why this is the case?
- There also needs to be greater focus on recovering resources for failure to secure public funds. Gross negligence that costs the state money should be recovered directly from the assets of the public managers.

Pillar 8

- It may be necessary to refine the performance indicators and incentive structures for those that investigate and prosecute corruption.
- Currently, the SAPS and NPA performance indicators mitigate against taking on complicated cases that may involve substantial time and resources and incentivise taking on less serious and easy to

prove cases. The consequence is that most of the corruption cases dealt with in the criminal justice system involve relatively low-ranking people and small amounts.

Implementation

South Africa has many great strategies and policies, but implementation is usually where most challenges arise. There are a variety of reasons that undermine the implementation of national strategies, policies and plan. Below are a few examples of these factors and may likely apply to this strategy:

- There is a lack of political will or inadequate institutional arrangements to drive, monitor and report on the implementation of the strategy.
- There is insufficient detail as to the specific and measurable objectives that different government agencies must achieve and in which time frame
- There is no accountability for non-compliance with the strategy.
- There are competing department specific strategies.

The discussion document provides a page on the "Institutional mechanisms to implement the strategy." We welcome the suggestion that it suggests a specific structure to support implementation, coordination and monitoring its implementation is housed in the Presidency. Given that various departments will be responsible for implementing different components, it will require someone no less than the President to oversee its implementation.

Perhaps this section, or the process of thinking through implementation could be strengthened by reflecting on the following:

- Clearly identify the key factors that hindered the effective implementation of other national strategies, policies and plans (i.e. the 1996 National Crime Prevention Strategy - NCPS, the 1999 White Paper on Safety and Security, the various other anti-corruption or integrity orientated public sector strategies, the 2011 Integrated Crime Prevention Strategy - ICPS, the South African Integrated Programme of Action addressing Violence against Women and Children 2013 to 2018, etc.)
- The implementation of the ICPS is currently being evaluated and the results of this process could prove instructive for refining the final NACS.
- While the document calls for the re-establishment of the National Anti-Corruption Forum, it would be instructive to identify how effective this forum was when it was in existence, and why did it cease to exist? The answers to these questions would point towards key requirements that need to be in place before re-establishing such a structure.

- Coordination with other departmental anti-corruption strategies. Different departments have developed their own strategies – for example the South African Police Service (SAPS) has recently developed their own Anti-Corruption Strategy. A process will have to be undertaken to assess existing strategies and identify the extent to which they align with the NACS.

Ideally, substantial attention will be given to designing the institutional arrangements to ensure that the strategy can be measurably implemented and monitored across the public sector. This will need to include a costing exercise and identifying options for funding its implementation.