

# **RECOMMENDATIONS OF WORKING GROUP ON CRIMINALITY**

## **GENERAL PRINCIPLES**

- \* A new anti-corruption statute should be broadly formulated to cover a broad range of abuses of power or position.
- \* Both public and private sectors should be covered, but with some additional offences aimed at the public sector alone because of the higher degree of trust and responsibility in this sector.

# **OUTLINE OF A MODERN CORRUPTION STATUTE**

## **PUBLIC AND PRIVATE SECTORS**

These offences would apply to--

- \* all members of the public service, Members of Parliament, local and regional councillors, Ministers and Deputy Ministers, the Attorney-General and Prosecutor-General, judges and the Judicial Service Commission, the Ombudsman and the staff of the Ombudsman's Office, police officers, and members of the Namibian Defence Force and the Prisons Service
- \* employees, officials and members of any boards or bodies, parastatals or commissions established in terms of a statute
- \* employees and officials of corporations, close corporations, co-operatives, trusts, welfare organisations, societies, non-profit companies and voluntary associations
- \* trustees, assignees, executors, liquidators and curators
- \* legal practitioners and other professionals
- \* traditional authorities such as chiefs and headmen.
- \* contractors and subcontractors who carry out work on behalf of the government
- \* cases where a government service is contracted out to private parties

## **BRIBERY**

- ◆ a broadly defined offence which covers knowing intermediaries as well as "briber" and "bribee"
- ◆ not limited to the exchange of money or things, but including any benefit, advantage or favour intended to influence an agent
- ◆ applicable to both bribes in advance of the favour as well as rewards given after the favour is done
- ◆ drafted with an eye to closing all loopholes

## **CORRUPTION BY MEANS OF THREATS**

- ◆ pressuring an agent to act improperly by threatening the agent or his or her family members or dependants

## **CORRUPTION BY MEANS OF FRAUD OR DECEPTION**

- ◆ using fraud or deception to get an agent to act improperly, or to deceive the agent's principal (eg false documents and receipts)

## **"INFLUENCE-PEDDLING"**

- ◆ giving or accepting benefits to influence supposedly disinterested assessments or recommendations

## **PUBLIC SECTOR**

These offences would apply to--

- \* Members of Parliament
- \* officials and employees of the Office of the Ombudsman
- \* judges
- \* members, officials and employees of regional and local government
- \* traditional leaders
- \* officials and employees of parastatals
- \* government-controlled companies (ownership of 51% or more shares).

## **ABUSE OF OFFICE TO SHOW UNDUE FAVOUR OR DISFAVOUR**

- ◆ nepotism, tribalism and other forms of “favours to friends” which may not be accompanied by any tangible benefit

## **ACCEPTANCE OF UNAUTHORISED BENEFITS**

- ◆ unauthorised acceptance of benefits from person currently having dealings with the government, even if no improper intention to influence is proved
- ◆ would help to encourage openness and to maintain the appearance of integrity
- ◆ could be used to punish wrongdoers in cases where the purpose of a “bribe” cannot be proved
- ◆
- ◇ One committee member raised concerns about *PRACTICAL ENFORCEABILITY*. The other members highlighted three points in response:
  - (1) The offence *WOULD NOT APPLY TO ALL GIFTS*, but only to gifts received from a person or company with current business or contractual dealings with the government.
  - (2) It would be possible for responsible officials to issue *BLANKET CONSENTS* exempting certain categories of gifts -- such as gifts below a monetary value of N\$100, or free meals -- to reduce the administrative burden entailed.
  - (3) Part of the purpose of the offence would be to encourage a climate of *OPENNESS*, placing a duty on a person who received an unsolicited gift to disclose the gift immediately to the appropriate official and seek guidance on whether or not acceptance of the gift is appropriate.

## **TENDERS AND AUCTIONS**

- ◆ to be based on proposals from Working Group on Procurement

## **SELF-DEALING AND CONFLICTS OF INTEREST**

- ◆ failure to disclose conflicts of interest on the part of a member or employee of a public body, a spouse under civil or customary law, a family member, a member of the household, or a partner, agent or business associate

## **IMPROPER USE OF PUBLIC PROPERTY AND INFORMATION**

- ◆ improper use of any public property for personal benefit or to promote or prejudice the interests of any person or private business or private agency
- ◇ could possibly be extended to cover improper use of information as well, but committee was split on the practicality of this idea

## **EXTRA-TERRITORIAL JURISDICTION**

- ◆ statute should cover all cases where there is a harmful effect inside Namibia, or where some part of the transaction is committed in Namibia
- ◇ One committee member felt that Namibia should follow the international trend towards criminalising bribery with respect to foreign principals even where it takes place wholly outside the country. The rest of the committee rejected this approach, on the following grounds:
  - (1) making corruption close to home the highest priority at this stage given the *LIMITED HUMAN AND FINANCIAL RESOURCES*
  - (2) *HIGH COST AND IMPRACTICALITY* of investigating and prosecuting corruption farther afield
  - (3) *NAMIBIA NOT YET A HOME BASE FOR LARGE MULTINATIONAL CORPORATIONS* likely to resort to bribery to secure investment abroad

## **PROVING CORRUPTION**

- ◆ presumptions to be used to assist proof, as long as they are constitutionally permissible
- ◆ “Hong Kong option” of criminalising the possession of unexplained wealth could probably be utilised only in a limited way to avoid Constitutional problems

## **INVESTIGATION OF CORRUPTION**

- ◆ a small, but highly specialised office established by Act of Parliament
- ◆ independent and accountable only to Parliament

## **CONSTITUTIONAL ISSUES IN INVESTIGATIONS**

- ◆ *THE RIGHT NOT TO BE COMPELLED TO TESTIFY AGAINST ONESELF*: might prevent evidence from a person compelled to testify in a preliminary investigation from being admitted in a subsequent criminal case
- ◆ *THE RIGHT TO PRIVACY*: authorisation for searches of homes, individuals and possibly business premises must be carefully drafted; wiretapping should require prior judicial authorisation

## **ANCILLARY MATTERS**

- ◆ no minimum sentences; appropriate punishment left to court’s discretion
- ◆ forfeiture of proceeds of crime to be dealt with in a general statute applicable to all crimes, rather than just corruption
- ◆ pre-trial freezing of assets in a corruption case would probably be Constitutional, but should apply to a broader range of crimes