Overall Score:

79 - Moderate

Legal Framework Score:

86 - Strong

Actual Implementation Score:

70 - Weak

Category I. Civil Society, Public Information and Media

I-1. Civil Society Organizations

1. Are anti-corruption/good governance CSOs legally protected?

67

1a. In law, citizens have a right to form civil society organizations (CSOs) focused on anti-corruption or good governance.

YES | NO

Comments:
The right to assemble is enshrined and guaranteed in Chapter 2, Section 17 of the Constitution, which specifies that everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petition.

Civil society organizations are legally protected by the Non-Profit Organizations Act of 1997 and the Non-Profit Organizations Amendment Act of 2000. The Non-Profit Organizations Act of 1997 creates a conducive environment for CSOs, and also prescribes standards of accountability and transparency. CSOs and other related institutions are further empowered and encouraged to work on anti-corruption issues through various laws aimed at combating corruption, i.e. Prevention and Combating of Corrupt Activities Act of 2004, so as to encourage good governance principles.

References:


YES: A YES score is earned when freedom to assemble into groups promoting good governance or anti-corruption is protected by law, regardless of political ideology, religion or objectives. Groups with a history of violence or terrorism (within last ten years) may be banned. Groups sympathetic to or related to banned groups must be allowed if they have no history of violence.

NO: A NO score is earned when any single non-violent group is legally prohibited from organizing to promote good governance or anti-corruption. These groups may include non-violent separatist groups, political parties or religious groups.

1b. In law, anti-corruption/good governance CSOs are free to accept funding from any foreign or domestic sources.

YES | NO

Comments:
The Non-Profit Organizations Act of 1997 permits civil society organizations (CSOs) to obtain funding from either domestic or foreign sources. CSOs are, however, obliged to have systematic accounting practices aimed at upholding and promoting transparency and accountability. CSOs also need to conduct their financial business through the use of bank accounts.

References:

YES: A YES score is earned if anti-corruption/good governance CSOs face no legal or regulatory restrictions to raise or accept funds from any foreign or domestic sources. A YES score may still be earned if funds from groups with a history of violence or terrorism (within last ten years) are banned.

NO: A NO score is earned if there are any formal legal or regulatory bans on foreign or domestic funding sources for CSOs focused on anti-corruption or good governance.

1c. In law, anti-corruption/good governance CSOs are required to disclose their sources of funding.

YES | NO

Comments:
The Non-Profit Organisations Act of 1997 governs the activities of registered non-profit organisations in South Africa. While the Act requires registered non-profit organizations to keep accounting records of income, expenditure, assets and liabilities, they are not required to disclose the sources of their income.

Non-profit organisations may also apply to the South African Revenue Services (SARS) for tax exemption, which requires specific accounting and financial practices, including the disclosure of income above a specified threshold, as per Sections 10 and 30 of the Income Tax Act (Act 58 of 1962) and subsequent amendments. However, again disclosure of sources of income is not required.
YES: A YES score is earned if anti-corruption/good governance CSOs are required to publicly disclose their sources of funding.

NO: A NO score is earned if no such public disclosure requirement exists.

2. Are good governance/anti-corruption CSOs able to operate freely?

83

2a. In practice, the government does not create barriers to the organization of new anti-corruption/good governance CSOs.

100  |  75  |  50  |  25  |  0

Comments: In practice, the government does not create any deliberate barriers to prevent CSOs from taking part in anti-corruption related activities. This is largely due the fact that the institutional and legal frameworks in place prevent government from deliberately impeding anti-corruption activities carried out by CSOs.

South African CSOs must be legally registered, and could pursue legal action against any suspicious activities or impediments imposed by government.

Many CSOs working on issues related to corruption participate in the Civil Society Network Against Corruption (CSNAC), which comprises organizations committed to an open and democratic society based on human dignity, equality and freedom, and believe that combating corruption is important to achieving democracy and social justice. The CSNAC also works in conjunction with government and the business in the National Anti-Corruption Forum (NACF), which is chaired by the Minister for the Public Service and Administration.

References:


100: CSOs focused on promoting good governance or anti-corruption can freely organize with little to no interaction with the government, other than voluntary registration.

75:
CSOs focused on promoting good governance or anti-corruption must go through formal steps to form, requiring interaction with the state such as licenses or registration. Formation is possible, though there is some burden on the CSO. Some unofficial barriers, such as harassment of minority groups, may occur.

Other than pro-government groups, CSOs focused on promoting good governance or anti-corruption are effectively prohibited, either by official requirements or by unofficial means, such as intimidation or fear.

In practice, anti-corruption/good governance CSOs actively engage in the political and policymaking process.

Comments:
Anti-corruption/good governance CSOs do engage in the political and policymaking process to a certain extent, but there is room for more and better quality policy engagement, particularly through the National Anti-Corruption Forum.

References:

Civil society organizations focused on anti-corruption or good governance are an essential component of the political process. CSOs provide widely valued insights and have political power. Those CSOs play a leading role in shaping public opinion on political matters.

Anti-corruption/good governance CSOs are active, but may not be relevant to political decisions or the policymaking process. Those CSOs are willing to articulate opinions on political matters, but have little access to decision makers. They have some influence over public opinion, but considerably less than political figures.

Anti-corruption/good governance CSOs are effectively prohibited from engaging in the political process. Those CSOs are unwilling to take positions on political issues. They are not relevant to changes in public opinion.

In practice, no anti-corruption/good governance CSOs have been shut down by the government for their work on corruption-related issues during the study period.
Comments:
There have been no reports of anti-corruption/good governance CSOs that have been shut down by the government for their work on corruption-related issues. The 2007 African Peer Review Mechanism (APRM) South Africa Country Report also confirms that there have been no incidences of anti-corruption CSOs shut down by government.

References:


YES: A YES score is earned if there were no CSOs shut down by the government or forced to cease operations because of their work on corruption-related issues during the study period. YES is a positive score.

NO: A NO score is earned if any CSO has been effectively shut down by the government or forced to cease operations because of its work on corruption-related issues during the study period. The causal relationship between the cessation of operations and the CSO's work may not be explicit, however the burden of proof here is low. If it seems likely that the CSO was forced to cease operations due to its work, then the indicator is scored as a NO. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

3. Are civil society activists safe when working on corruption issues?

100

3a. In practice, in the past year, no civil society activists working on corruption issues have been imprisoned.

Comments:
There have been no reports of any civil society activists being imprisoned in the last year.

References:


YES: A YES score is earned if there were no CSO activists imprisoned because of their work covering corruption. YES is a positive score.

NO: A NO score is earned if any activist was jailed in relation to work covering corruption. The causal relationship between the official charges and the person's work may not be explicit, however the burden of proof here is low. If it seems likely that the person was imprisoned due to his or her work, then the indicator is scored as a NO. Corruption is defined broadly to include any abuses of power, not just the passing of bribes. Imprisoned** is defined here as detention by the government lasting more than 24 hours.

3b. In practice, in the past year, no civil society activists working on corruption issues have been physically harmed.

YES | NO

Comments: There have been no reports of any civil society activists being physically harmed in the last year.

References:


YES: A YES score is earned if there were no documented cases of CSO activists covering corruption being assaulted in the specific study period. A YES score can be earned if there was an attack but it was clearly unrelated to the activist’s work. YES is a positive score.

NO: A NO score is earned if there were any documented cases during the study period of assault to an activist who covers corruption. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

3c. In practice, in the past year, no civil society activists working on corruption issues have been killed.

YES | NO
Comments:
There have been no reports of any civil society activists being killed in the last year.

References:


YES: A YES score is earned if there were no documented cases of CSO activists being killed because of their work covering corruption in the specific study period. YES is a positive score.

NO: A NO score is earned if there were any documented cases during the study period where a person was killed related to a corruption trial, scandal or investigation. The relationship between a mysterious death and an individual's history may not be clear, however the burden of proof here is low. If it is reasonable that a person was killed in relation to his or her work on corruption issues, then the indicator is scored as a NO. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

4. Can citizens organize into trade unions?

100

4a. In law, citizens have a right to organize into trade unions.

Comments:
The right to assemble and organize is guaranteed by the Constitution. Section 17 of Chapter 2 guarantees everyone the right to assemble peacefully and unarmed, to demonstrate, to picket or present petitions, which are important rights for trades unions.

In addition, Section 22 of the Constitution specifically provides inter alia that every worker has the right to form and join a trade union, to participate in its activities, to engage in collective bargaining, and to strike.

These rights are elaborated in the Labor Relations Act.

References:

YES: A YES score is earned when trade unions are allowed by law, regardless of political ideology, religion or objectives. Groups with a history of violence or terrorism (within last ten years) may be banned. Groups sympathetic to or related to banned groups must be allowed if they have no history of violence.

NO: A NO score is earned when any single non-violent trade union is legally prohibited by the government from organizing.

4b. In practice, citizens are able to organize into trade unions.

| 100 | 75 | 50 | 25 | 0 |

Comments:
Having formed an important part of the struggle against apartheid, South Africa's trade unions continue to be very influential, with large numbers of members across the country. COSATU, an umbrella organization with unions from multiple sectors and over 2 million members, is also part of the ruling ANC Tripartite Alliance. Recent strikes protesting rising food and electricity prices have served as a reminder of the unions' large support base and influence.

References:

Congress of South African Trade Unions (COSATU),
http://www.cosatu.org.za


100: Trade unions are common and are an important part of the political process and political discourse. Trade union organizers have widely understood rights. Trade unions are free from intimidation or violence.

75:

50: Trade unions exist, but are not always relevant to politics or policy debates. Barriers to organizing trade unions exist, such as intimidation at work, or retribution firings. Trade union organizers have some rights, but these may not be commonly known, or are difficult to defend.

25:

0: Trade unions are rare. Significant barriers to organization exist, including direct violence. Rights of union organizers are not widely known, or are ineffective in protecting organizers.

I-2. Media

5. Are media and free speech protected?
5a. In law, freedom of the media is guaranteed.

YES | NO

Comments:
Freedom of expression is guaranteed by Section 16 of the Constitution, which provides that everyone has the right to freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research. These rights are limited by proscriptions on propaganda for war; incitement of imminent violence; or advocacy of hatred based on race ethnicity, gender or religion, and that constitutes incitement to cause harm.

References:

YES: A YES score is earned if freedom of the press is guaranteed in law, including to all political parties, religions, and ideologies.

NO: A NO score is earned if any specific publication relating to government affairs is legally banned, or any general topic is prohibited from publication. Specific restrictions on media regarding privacy or slander are allowed, but not if these amount to legal censorship of a general topic, such as corruption or defense. A NO score is earned if non-government media is prohibited or restricted.

5b. In law, freedom of speech is guaranteed.

YES | NO

Comments:
Freedom of expression is guaranteed by Section 16 of the Constitution, which provides that everyone has the right to freedom of expression, which includes freedom of the press and other media; freedom to receive or impart information or ideas; freedom of artistic creativity; and academic freedom and freedom of scientific research. These rights are limited by proscriptions on propaganda for war; incitement of imminent violence; or advocacy of hatred based on race ethnicity, gender or religion, and that constitutes incitement to cause harm.

References:

YES: A YES score is earned if freedom of individual speech is guaranteed in law, including to all political parties, religions, and ideologies.

NO: A NO score is earned if any individual speech is legally prohibited, regardless of topic. Specific exceptions for speech linked with a criminal act, such as a prohibition on death threats, are allowed. However, any non-specific prohibition earns a NO score.
6. Are citizens able to form print media entities?

100

6a. In practice, the government does not create barriers to form a print media entity.

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Comments:  
The government does not create barriers to form print media entities, even though other barriers, such as necessary capital investment, may make it difficult.

References:  
Interview with Brett Davidson, independent media consultant, Aug. 20, 2008, Cape Town

100: Print media entities can freely organize with little to no interaction with the government. This score may still be earned if groups or individuals with a history of political violence or terrorism (within last ten years) are banned from forming media entities.

75:

50: Formation of print media groups is possible, though there is some burden on the media group including overly complicated registration or licensing requirements. Some unofficial barriers, such as harassment of minority groups, may occur.

25:

0: Print media groups are effectively prohibited, either by official requirements or by unofficial means, such as intimidation or fear.

6b. In law, where a print media license is necessary, there is an appeal mechanism if a license is denied or revoked.

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Comments:  
A license is not necessary for print media.

References:  
Interview with Brett Davidson, independent media consultant, Aug. 20, 2008, Cape Town
**YES:** A YES score is earned if there is, in law or in accompanying regulations, a formal process to appeal a denied print media license, including through the courts. A YES score is also earned if no print license is necessary.

**NO:** A NO score is earned if there is no appeal process for print media licenses.

6c. In practice, where necessary, citizens can obtain a print media license within a reasonable time period.

| 100 | 75 | 50 | 25 | 0 |

Comments:
A license is not necessary for print media.

References:

Interview with Brett Davidson, independent media consultant, Aug. 20, 2008, Cape Town

6d. In practice, where necessary, citizens can obtain a print media license at a reasonable cost.

| 100 | 75 | 50 | 25 | 0 |

Comments:
A license is not necessary for print media.

References:

Interview with Brett Davidson, independent media consultant, Aug. 20, 2008, Cape Town

100: Licenses are not required or can be obtained at minimal cost to the organization. Licenses can be obtained on-line or through the mail.
Licenses are required, and impose a financial burden on the organization. Licenses may require a visit to a specific office, such as a regional or national capital.

Licenses are required, and impose a major financial burden on the organization. Licensing costs are prohibitive to the organization.

7. Are citizens able to form broadcast (radio and TV) media entities?

81

7a. In practice, the government does not create barriers to form a broadcast (radio and TV) media entity.

Comments:
The barriers to entry are primarily in the form of acquiring licenses from the Independent Communications Authority of South Africa (ICASA), the independent broadcast regulator. There are limited amounts of bandwidth made available periodically by ICASA for different regions and the process of applying can be extensive. However, the processes are largely bureaucratic and not political. The Media Diversity and Development Agency, established to promote media access and ownership amongst marginalized communities, will often provide support for broadcast entities that serve excluded or marginalized communities and groups.

References:
Interview with Brett Davidson, independent media consultant, Aug. 20, 2008, Cape Town

100: Broadcast media entities can freely organize with little to no interaction with the government. Media groups have equal access to broadcast bandwidth through a reasonably fair distribution system. This score may still be earned if groups or individuals with a history of political violence or terrorism (within last ten years) are banned from forming media entities.

75:

50: Formation of broadcast media groups is possible, though there is some burden on the media group including overly complicated registration or licensing requirements. Some unofficial barriers, such as harassment of minority groups, may occur. Division of broadcast bandwidth is widely viewed to be somewhat unfair.

25:

0: Broadcast media groups are effectively prohibited, either by official requirements or by unofficial means, such as intimidation or fear. This score is appropriate if the division of broadcast bandwidth is widely viewed to be used as a political tool.
7b. In law, where a broadcast (radio and TV) media license is necessary, there is an appeal mechanism if a license is denied or revoked.

**YES | NO**

**Comments:**
Decisions regarding the denial or revoking of licenses can be challenged through the Independent Communications Authority of South Africa (ICASA).

**References:**

**YES:** A YES score is earned if there is, in law or in accompanying regulations, a formal process to appeal a denied broadcast media license, including through the courts. A YES score is also earned if no broadcast license is necessary.

**NO:** A NO score is earned if there is no appeal process for broadcast media licenses.

7c. In practice, where necessary, citizens can obtain a broadcast (radio and TV) media license within a reasonable time period.

**100 | 75 | 50 | 25 | 0**

**Comments:**
The South African Government Services web site ([http://www.services.gov.za](http://www.services.gov.za)) indicates that a television broadcast license take six to 12 months to obtain, while community radio licenses take three to four months. However, the process for acquiring a community license typically takes considerably longer, when the time from the announcement of available bandwidth to the actual acquisition of a license is taken into account.

**References:**

Interview with Brett Davidson, independent media consultant, Aug. 20, 2008, Cape Town


**100:** Licenses are not required or licenses can be obtained within two months.

**75:**
50: Licensing is required and takes more than two months. Some groups may be delayed up to six months.

25:

0: Licensing takes close to or more than one year for most groups.

7d. In practice, where necessary, citizens can obtain a broadcast (radio and TV) media license at a reasonable cost.

Comments:
Television broadcast licenses cost R32,500 (US$3,260) and a Community Radio license costs approximately R3,250 (US$326). Neither of these costs is particularly significant for the entities involved.

References:

Interview with Brett Davidson, independent media consultant, Aug. 20, 2008, Cape Town


100: Licenses are not required or can be obtained at minimal cost to the organization. Licenses can be obtained on-line or through the mail.

75:

50: Licenses are required, and impose a financial burden on the organization. Licenses may require a visit to a specific office, such as a regional or national capital.

25:

0: Licenses are required, and impose a major financial burden on the organization. Licensing costs are prohibitive to the organization.

8. Can citizens freely use the Internet?

100

8a. In practice, the government does not prevent citizens from accessing content published on-line.
The South African government does not engage in online censorship. Access to the Internet, however, remains limited amongst citizens, although this is changing as a result of the proliferation of cell phones able to access the Internet.

References:
Interview with Brett Davidson, independent media consultant, Aug. 20, 2008, Cape Town.

Privacy International, 2003. Silenced – South Africa*. Available at:
http://www.privacyinternational.org/article.shtml?cmd%5B347%5D=x-347-103781

100: The government does not prevent Internet users from accessing online content. While some forms of content may be illegal to download or own (such as child pornography), the government does not manipulate networks to prevent access to this information. This indicator addresses direct government intervention in the transfer of information, not indirect deterrents such as intimidation, surveillance or technical difficulties in countries with poor infrastructure.

75: Internet users are prevented by the government from reaching online content in some cases. Government tactics may include firewalls preventing access to networks in other countries, or manipulating search engine results to exclude politically sensitive topics.

50: Internet users are routinely prevented from accessing online content. Government restrictions are in place at all times for certain topics. Government tactics may include firewalls preventing access to networks in other countries, or manipulating search engine results to exclude politically sensitive topics.

0: Internet users are routinely prevented from accessing online content. Government restrictions are in place at all times for certain topics. Government tactics may include firewalls preventing access to networks in other countries, or manipulating search engine results to exclude politically sensitive topics.

100: The government never removes online information or disables servers due to their political content. All political speech is protected with limited exceptions, such as legitimate intellectual property restrictions; direct calls to violence; or pornography.

75:
In some cases, the government restricts political speech by its citizens on the Internet. This is accomplished either directly by controlling servers hosting restricted content, or indirectly through threats or intimidation against the persons posting political content.

The government regularly restricts political speech by its citizens on the Internet. This is accomplished either directly by controlling servers hosting the restricted content, or indirectly through threats or intimidation against the persons posting political content.

9. Are the media able to report on corruption?

YES | NO

9a. In law, it is legal to report accurate news even if it damages the reputation of a public figure.

Comments:
Potential damage to the reputation of a public figure does not legally limit the reporting of news. However, some factors threaten this in practice. Politicians and other public figures have demonstrated willingness to sue media companies on grounds of libel and breaches of privacy. One example of this in the past year is in the case of Health Minister Manto Tshabalala-Msimang, who successfully sued a newspaper that published claims that she had consumed alcohol and received privileged treatment while in hospital, on the basis that confidential medical records had been obtained without her consent. Finance Minister Trevor Manuel has also threatened a lawsuit over the publication of stories on the proceedings of a civil case in which he is involved, related to government's controversial arms deal.

Further, new legislation currently under debate (Protection of Information Bill B28-2008) provides for a broad limitation on the holding and publication of classified information, if such a restriction is in the national interest. Many newspaper and media groups have objected to the broad definition of national interest", claiming that news information is relevant to the national interest, and that allowing government to classify large amounts of information would limits their ability to report to the public on important stories.

References:


Interview with Brett Davidson, independent media consultant, Aug. 20, 2008, Cape Town.


YES: A YES score is earned if it is legal to report accurate information on public figures regardless of damage to their reputations. Public figures are defined broadly, including anyone in a position of responsibility in the government or civil service; any political leader; leaders of civil society groups including religious groups, trade unions, or NGOs; leaders or officers of large businesses. A YES score can still be earned if a reckless disregard for the truth (i.e. slander) is prohibited.
NO: A NO score is earned if privacy laws protect any public figures (as defined in the YES coding) from accurate information.

9b. In practice, the government or media owners/distribution groups do not encourage self-censorship of corruption-related stories.

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<th>Score</th>
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<tr>
<td>100</td>
<td>The government, its proxies, or media ownership/distribution groups make no attempt to restrict media coverage of corruption-related issues through unofficial means.</td>
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<tr>
<td>75</td>
<td>The government, its proxies, or media ownership/distribution groups make some attempts to restrict media coverage of corruption-related issues through unofficial means, such as restricting access by disfavored media outlets, or other short-term consequences. Violent reprisals against media outlets are rare.</td>
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<tr>
<td>50</td>
<td>The government, its proxies, or media ownership/distribution groups actively use illegal methods to restrict reporting of corruption-related issues. This may include harassment, arrests, and threats. Journalists and publishers take a personal risk to report on corruption, and media outlets who commonly report on corruption face long-term consequences or violent reprisals.</td>
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<tr>
<td>0</td>
<td>The government, its proxies, or media ownership/distribution groups actively use illegal methods to restrict reporting of corruption-related issues. This may include harassment, arrests, and threats. Journalists and publishers take a personal risk to report on corruption, and media outlets who commonly report on corruption face long-term consequences or violent reprisals.</td>
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Comments:
Media owners and distribution groups do not encourage self-censorship and there is a relatively strong culture of investigation in the media. Government, however, often responds strongly to reports of corruption in the media, claiming that the latter’s focus is too often on negative reporting in the country, rather than on progress that has been made. Politicians have also demonstrated a willingness to take journalists and newspapers to court over damaging articles. The ruling ANC party has suggested that a statutory Media Appeals Tribunal should be established to adjudicate the balance between freedom of speech and the rights of privacy and dignity to individuals. The government has also threatened to withdraw lucrative advertising from newspapers that publish stories damaging to the government.

References:


Interview with Brett Davidson, independent media consultant, Aug. 20, 2008, Cape Town.

9c. In practice, there is no prior government restraint (pre-publication censoring) on publishing corruption-related stories.
Comments:
The government is often resistant to the publication of stories related to corruption, although it does not actively involve itself in prior restraint as a standard course of action. Frequent lawsuits from politicians have however dampened the media's willingness to publish such stories. Other newspapers that have reported on corruption related stories, for example, Grocott's Mail and the Sunday Times, have been threatened with government advertising boycotts.

Grocott's Mail published news of an Auditor General's report about missing money in the Grahamstown municipality. The Municipality later backed down in the face of a court application for its threatened boycott to be set aside.

During 2007, there was an increase in instances of courts granting interdicts against publications, but the decision on an appeal against such an interdict against a private television broadcaster (Midi Television vs. Director of Public Prosecutions) has limited the instances in which courts will grant such pre-publication interdicts, thus strengthening press freedom.

Other pre-publication censorship concerns were fueled by the initial version of the Film and Publication Amendment Bill which was widely criticized for the significant threat it posed for media freedom in the country. The Bill was widely perceived as offering wide scope for pre-publication censorship. The initial version of the Bill did not include the exemption that newspapers had enjoyed in the past and this worried many in the media who felt that publishing some stories would be impractical. The final version of the bill which was finally passed by the National Assembly has broadened the exemption to include all members recognized, regulated and adhering to a code of conduct enforced by the Press Ombudsman. However, the South African National Editors Forum (SANEF) is still not happy with the Bill, arguing that it will not pass the constitutional test. They have resolved to make a written submission to President Thabo Mbeki asking him to refer it to the Constitutional Court.

References:


Sanef wants Mbeki to wait. Article accessed on Sept. 18, 2008, Available at: http://www.news24.com/News24/South_Africa/Politics/0,,2-7-12_2389822_00.html

Interview with Brett Davidson, independent media consultant, Aug. 20, 2008, Cape Town.

Midi Television vs. Director of Public Prosecutions Case 100/2006 [2007] (SCA) 56

100: The government never prevents publication of controversial corruption-related materials.

75:

50: The government prevents publication of controversial corruption-related material in cases where there is a strong political incentive to suppress the information. This score is appropriate if in countries where illiteracy is high, the government may allow a free print press but censor broadcast media.

25:

0: The government regularly censors material prior to publication, especially politically sensitive or damaging corruption-related material. This score is appropriate even if the government restricts only politically damaging news while allowing favorable coverage.

10. Are the media credible sources of information?
10a. In law, print media companies are required to publicly disclose their ownership.

**YES | NO**

**Comments:**
All companies are required to list themselves at the Companies and Intellectual Properties Registration Office (CIPRO) of the Department of Trade and Industry. Further, in line with the government's prerogative to make media accessible to all sections of the population, a new initiative called the Media Development and Diversity Authority (MDDA) has been launched to enable historically disadvantaged communities and persons not adequately served by the media to gain greater access. The MDDA's stated objectives include the encouragement of ownership, access to and control of media by historically disadvantaged communities and historically diminished indigenous language and cultural groups.

**References:**
Companies Act (Act 61 of 1973). Available at:
http://www.acts.co.za/company/index.htm

Companies and Intellectual Properties Registration Office, Department of Trade and Industry.
http://www.cipro.co.za

Interview with Brett Davidson, independent media consultant, Aug. 20, 2008

Media Development and Diversity Authority (MDDA),
http://www.mdda.org.za

**YES:** A YES score is earned if print media companies are required by law to publicly disclose all owners of the company.

**NO:** A NO score is earned if there is no such requirement or if the requirement is optional, only partially applicable, or exempts certain types of entities or agents from being publicly disclosed.

10b. In law, broadcast (radio and TV) media companies are required to publicly disclose their ownership.

**YES | NO**

**Comments:**
Broadcast companies are required to disclose their ownership to the Independent Communications Authority of South Africa (ICASA), the broadcasting regulator, when applying for a license. All companies are required to list themselves at the Companies and Intellectual Properties Registration Office (CIPRO) of the Department of Trade and Industry. Further, in line with the government's prerogative to make media accessible to all sections of the population, a new initiative called the Media Development and Diversity Authority (MDDA) has been launched to enable historically disadvantaged communities and persons not adequately served by the media to gain greater access. The MDDA's stated objectives include the encouragement of ownership, access to and control of media by historically disadvantaged communities and historically diminished indigenous language and cultural groups.

**References:**
Companies and Intellectual Properties Registration Office, Department of Trade and Industry.
http://www.cipro.co.za
Interview with Brett Davidson, media consultant, Aug. 20, 2008

Media Development and Diversity Authority (MDDA),

**YES:** A YES score is earned if broadcast media companies are required by law to publicly disclose all owners of the company.

**NO:** A NO score is earned if there is no such requirement or if the requirement is optional, only partially applicable, or exempts certain type of entities or agents from being publicly disclosed.

10c. In practice, journalists and editors adhere to strict, professional practices in their reporting.

| 100 | 75 | 50 | 25 | 0 |

**Comments:**
Journalists and editors in South Africa generally follow professional codes of conduct. However, there have been some issues related to accuracy, largely due to young and inexperienced journalists, the shrinking size of newsrooms, and increased pressure on remaining staff as a result. The last three years have also seen a dramatic rise in tabloid publications in South Africa, giving rise to concerns about journalistic standards. Overall, however journalists and editors at major newspapers conduct themselves professionally.

**References:**

Interview with Brett Davidson, independent media consultant, Aug. 20, 2008, Cape Town

100: Editors and journalists at the major media outlets abide by a strict journalistic code of conduct and are unwilling to alter their coverage of a particular issue, event or person in exchange for money, gifts, or other favors or remuneration.

75: 

50: Editors and journalists at the major media outlets generally avoid altering coverage in exchange for favors but some exceptions have been noted. Not all newsrooms abide by a formal journalistic code of conduct.

25: 

0: Editors and journalists are widely known to sell favorable or unfavorable coverage in exchange for money, gifts, or other remuneration. The major media outlets do not abide by any formal journalistic code of conduct.

10d. In practice, during the most recent election, political parties or independent candidates received fair media coverage.

| 100 | 75 | 50 | 25 | 0 |

**Comments:**
In general media are fair and even-handed in covering elections in South Africa.
All political parties and independent candidates have some access to media outlets. Individual media outlets may have biases, but on balance, the national media coverage reflects the interests of the electorate. Media groups generally act as disinterested parties in an election. In places where a government is popular with the public, opposition viewpoints can access the public via media outlets.

Major popular media outlets have a persistent bias regarding some parties or independent candidates. Some major parties may be partially excluded from media coverage, or draw more negative coverage. Media sectors may have distinct biases, such as newspapers favoring one party, while radio favors another.

The mass media, on balance, have clear preferences in election outcomes and coverage is driven to achieve these goals. Some major parties or independent candidates are excluded or consistently negatively portrayed by mass media. Dissenting political opinions are only found on fringe or elite media outlets, such as Web sites.

In practice, political parties and candidates have equitable access to state-owned media outlets.

Prior to all elections, the Independent Communications Authority of South Africa (ICASA) produces guidelines for the coverage of elections. In spite of this, there have been some allegations of bias on the part of the public broadcaster, the South African Broadcasting Corporation (SABC), in favor of the ruling African National Congress (ANC) party, and in particular in terms of coverage of the ANC's campaign launch. For the future, there is concern amongst some about new legislation that allows Parliament greater control over the SABC's executive board. There were also extensive allegations of the SABC blacklisting certain commentators, which resulted in a report on the issue and the resignation of a number of journalists including veteran radio presenter John Perlman.
The government ensures that equal access and fair treatment of election contestants is provided by all state-owned media outlets, including all electronic and print media. This obligation extends to news reports, editorial comment, and all other content. All parties and candidates are offered consistent and equivalent rates for campaign advertising on state-owned media outlets.

The government generally ensures equal access and fair treatment of all candidates and parties by state-owned media outlets but some exceptions exist. State-owned media may occasionally discriminate against particular parties or candidates and advertising rates may be confusing or non-transparent.

The government uses state-owned media to routinely discriminate against opposition candidates and parties. Advertising space may be denied to opposition candidates and parties or higher rates may be charged.

11. Are journalists safe when investigating corruption?

100

11a. In practice, in the past year, no journalists investigating corruption have been imprisoned.

YES | NO

Comments:
No journalist has been imprisoned while investigating corruption. Reporters Without Borders monitors media freedom around the world, but has not considered it necessary to express concern about South Africa, which it ranks at 43 (and improving) out of 169 countries monitored.

References:


Telephonic interview with Manana Stone, Media and Advocacy Officer, Media Institute of Southern Africa, Sept. 8, 2008

YES: A YES score is earned if there were no journalists imprisoned related to work covering corruption during the study period. A YES score is positive.

NO: A NO score is earned if any journalist was jailed because of his/her work covering corruption during the study period. The causal relationship between the official charges and the journalist's work may not be explicit, however the burden of
proof here is low. If it seems likely that the journalist was imprisoned due to his or her work, then the indicator is scored as a NO. Corruption is defined broadly to include any abuses of power, not just the passing of bribes. Imprisoned* is defined here as detention by the government lasting more than 24 hours.

11b. In practice, in the past year, no journalists investigating corruption have been physically harmed.

**YES | NO**

**Comments:**
Reporters Without Borders monitors media freedom around the world, but has not considered it necessary to express concern about South Africa, which it ranks at 43 (and improving) out of 169 countries monitored.

According to the International Research and Exchanges Board (IREX), journalists in South Africa are not targeted on the basis of the work they undertake, but only fall victims of general random crimes. Thus it is noted that crimes against journalists in South Africa are rare. Journalists are not victims of crime because of their profession, but because of the rate crime in the country is high and rising, as the most statistics show. Any attacks the panelist said, were random criminal activities.

**References:**


Telephonic interview with Manana Stone, Media and Advocacy Officer, Media Institute of Southern Africa, Sept. 8, 2008

YES: A YES score is earned if there were no documented cases of journalists being assaulted during the specific study period for their work covering corruption issues. A YES score is positive.

NO: A NO score is earned if there were any documented cases of assault to a journalist covering corruption during the study period. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

11c. In practice, in the past year, no journalists investigating corruption have been killed.

**YES | NO**

**Comments:**
There have not been any reported incidents in which any journalist investigating corruption had been killed or injured. The International Research and Exchanges Board (IREX) also reported no incidents of such nature. However, it reports that journalists in South Africa are increasingly falling victim to general random crimes.

**References:**
YES: A YES score is earned if there were no documented cases of journalists being killed because of their work covering corruption-related issues during the study period. A YES score is positive.

NO: A NO score is earned if there were any documented cases where a journalist was killed in relation to his or her work covering corruption-related issues in the study period. The relationship between a mysterious death and an individual’s work may not be clear, however the burden of proof here is low. If it is a reasonable guess that a person was killed in relation to his or her work on corruption issues, then the indicator is scored as a NO. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

I-3. Public Access to Information

12. Do citizens have a legal right of access to information?

YES | NO

100

12a. In law, citizens have a right of access to government information and basic government records.

Comments:
Chapter 2 of the Constitution guarantees citizens the right of access to government information. Section 32(1)(a) stipulates that, everyone has the right of access to any information held by the state.” The Promotion of Access to Information Act of 2000, and the 2002 Amendment Act, gives effect to the constitutional right of access to any information and records held by government. The 2002 Amendment Act specifies procedural requirements that need to be adhered to when implementing the right of access to government information. For instance, Section 11 (1) states:

“A requester must be given access to a record of a public body if-

(a) that requester complies with all the procedural requirements in this Act relating to a request for access to that record; and

(h) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part.

(2) A request contemplated in subsection (1) includes a request for access to a record containing personal information about the requester.

(3) A requester’s right of access contemplated in subsection (1) is, subject to this Act, not affected by-

(a) any reasons the requester gives for requesting access; or

(b) the information officer’s belief as to what the requester’s reasons are for requesting access.”
The right of access to government information is further strengthened by Section 195(1) (g) of the Constitution, which requires that public administration must be governed by the principles of openness and transparency. Section 195(1)(g) of the Constitution states that, "transparency must be fostered by providing the public with timely, accessible and accurate information."

The White Paper on the Transformation of Public Service Delivery (Batho Pele) gives effect to the citizens’ constitutional right of access to government information by requiring that government departments (both national and provincial) implement the principles of openness and transparency. The Batho Pele White Paper requires that government departments publish information through Annual Reports available to citizens, which contain comprehensive departmental information presented in a reader-friendly form.

References:


YES: A YES score is earned if there is a formal right to access government documents, including constitutional guarantees. Exceptions can be made for national security reasons or individual privacy, but they should be limited in scope. All other government documents should be available upon a public request.

NO: A NO score is earned if there is no such right.

12b. In law, citizens have a right of appeal if access to a basic government record is denied.

YES | NO

Comments:
Section 74 of the Promotion of Access to Information Act guarantees citizens the right to lodge an internal appeal against any government agency in cases where the right of access to government information is denied. The Act further prescribes procedural requirements that need to be followed when lodging an internal appeal. For instance, section 75 (1) (a) (i) requires that an internal appeal be lodged within 60 days of the decision or incidence.

The Promotion of Administrative Justice Act of 2002 promotes procedurally fair administrative actions, and can be used to request detailed written reasons for an official decision, and to institute legal action in a court of law in order to review a decision taken by an official.

References:


YES: A YES score is earned if there is a formal process of appeal for rejected information requests. A YES score can still be earned if the appeals process involves redress through the courts rather than administrative appeal.

NO: A NO score is earned if there is no such formal process.

12c. In law, there is an established institutional mechanism through which citizens can request government records.

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Comments:
The Promotion of Access to Information Act (PAIA)(Act 54 of 2000) establishes legal mechanisms, requirements and procedures regulating access to information from both public and private bodies.

Section 10 of the PAIA mandated the South African Human Rights Commission (SAHRC) to produce a comprehensive Guide to the PAIA, published in all official languages, distributed to government departments, and available to the public.

Section 3 of the SAHRC Guide details procedures for requesting access to information, and includes the relevant forms required for requests to public and private bodies. The Guide explains procedural requirements for requesters, costs involved, appeals mechanisms, and grounds for refusal of requests. Individuals who are unable to read or write can also make oral requests from the information officer of a public body.

Section 14 of the PAIA also requires public bodies to develop manuals, within six months of establishment, which detail the function of that body, and provide an index of records held. Manuals must be published in at least three of the official languages, and must contain: a description of the structure and its functions; contact details of all deputy information officers; a description of the SAHRC guide, and details on how to access it; details to facilitate a request for access to a record; categories of records available without a request; details of services available from the public body, and how these can be accessed; descriptions of arrangements for participating in policy formulation or performance of duties; remedies available in respect of an act, or failure of an act by the body; and, other information as prescribed.

Section 14 also specifies that public bodies must update and publish manuals, if necessary, at intervals of no more than one year.

Section 16 of the PAIA also requires that the Department of Government Communication and Information Systems (GCIS) must, at its own cost, ensure the publication of the contact details of every information officer of every public body in every telephone directory issued to the public, as prescribed.

Section 17 (1) of the PAIA also specifies that each public body, subject to legislation governing the employment of personnel of the public body concerned, designate such number of persons as deputy information officers as are necessary to render the public body as accessible as reasonably possible for requesters of its records.

In spite of the framework created within the PAIA, legal remedies do exist in cases where requesters of information have complied with the requirements of the PAIA, but access to information is refused. Within public bodies, an internal appeal procedure is in place, failing which a requester may also approach the courts. Requesters may also approach the courts in cases where information is refused by private bodies.

Nonetheless, challenges still exist with respect to accessing information. The independent Public Service Commission (PSC) reported in 2007 that the capacity of the Public Service to provide information is still a challenge, and that this is particularly the case with information requested by individuals (compared to general information released through reports).

In analyzing departmental implementation of the PAIA, the PSC found that 23 percent of departments did not have Deputy Information Officers (DIO) (the Director-General or executive director is automatically considered to be the Information Officer). Further, 47 percent of departments had only one DIO, while 6 percent had more than ten DIOs.
The PSC also reported that 44 percent of departments had not developed PAIA manuals as required by the Act, often because DIOs had not been appointed. The PSC additionally found that 21 percent of manuals in place had never been updated, and this was of concern, as just over one-third (38 percent) contained outdated information.

Regarding the refusal of access to information, the PSC reported that 35 percent of departments indicated that clients were not informed of their right to an appeal.

Nonetheless, the PSC has identified a number of departments with good practices in terms of implementing the PAIA, including the South African Police Services (SAPS), the Department of Environmental Affairs and Tourism (DEAT) and the Department of Water Affairs and Forestry (DWAF).

The PSC reports that the SAPS has appointed a DIO at each police station, and that unambiguous guidelines describe what is required of the DIO. Each DIO submits a monthly PAIA return to Head Office, and these reports are consolidated by the national DIO, who in turn submits an annual report to the SAHRC.

The DEAT uses a system of reference numbers for each information request submitted to the relevant Chief Director. The Chief Director then submits the request to a Contact Centre through a task list. Responses from the Contact Centre in the requested format provide a basis for a monitoring and reporting system.

The DWAF requires that information requests are registered with the DIO and Office of the Chief Information Officer. Each file is given a reference number and a control sheet, and a central register assists with monitoring the progress made and time taken to respond to requests for information.

References:
Interview with Mukelani Dimba, Deputy Chief Executive Officer, Open Democracy Advice Centre (ODAC), Oct. 16, 2008.


YES: A YES score is earned if there is a formal government mechanism/institution through which citizens can access government records available under freedom of information laws. This mechanism could be a government office (or offices within agencies or ministries) or an electronic request system.

NO: A NO score is earned if there is no such formal mechanism or institution.

13. Is the right of access to information effective?

13a. In practice, citizens receive responses to access to information requests within a reasonable time period.
Comments:
In general, government bodies reportedly take substantial periods of time to respond to requests for access to information, if they respond at all, although this is sometimes dependent on the nature of the information requested. Failure to comply can result in legal action, although this is costly and time-consuming. According to Allison Tilley of the Open Democracy Advice Center (ODAC), the Promotion of Access to Information Act (PAIA), which is supposed to facilitate public access to official information, is so misunderstood in government circles that officials deny applications for fear of disclosing more than they are allowed to. This forces people to go to court, and the government has already lost so many of these cases. It is like a soccer team that just keeps losing. At some point, the coach must realize that there is something wrong."

Research conducted by ODAC in 2007 found that: “One in five respondents (21 percent) said that they had used their right to access information, in terms of the Promotion of Access to Information Act. The majority (79 percent) said that they had not done so. Almost two-thirds (62.7 percent) of those that had used their right to access information, received the information that they had requested. Another 37.3 percent said that they had not received the information they had requested.”

References:


100: Records are available on-line, or records can be obtained within two weeks. Records are uniformly available; there are no delays for politically sensitive information. Legitimate exceptions are allowed for sensitive national security-related information.

75:

50: Records take around one to two months to obtain. Some additional delays may be experienced. Politically-sensitive information may be withheld without sufficient justification.

25:

0: Records take more than four months to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records. National security exemptions may be abused to avoid disclosure of government information.

13b. In practice, citizens can use the access to information mechanism at a reasonable cost.
The costs of accessing information are prescribed by the Regulations to the Promotion of Access to Information Act (PAIA) (Act 2 of 2000).

Costs are also listed in The Guide on how to use the Promotion of Access to Information Act – Act 2 of 2000 developed by the South African Human Rights Commission (SAHRC). The Regulations to the PAIA specify that this Guide must be made available in each official language to: the head of the national department responsible for Government Communications and Information Services (GCIS); to every place of legal deposit, as defined by the Legal Deposit Act (Act 54 of 1997), and every tertiary institution established under law; and, upon request, to the head of a private body.

The Regulations also require that the Guide be made available in each official language to the information officers of public bodies, and the Director-General of Communications. The Guide must be published in each official language in the government Gazette, made available in each official language for public inspection during at the SAHRC during office hours, and made available on the SAHRC web site.

The costs of accessing information from a public body are reasonable, and are not prohibitive. A fee of R35 (US$3.5) is payable by all requesters, with the exception of individuals requesting personal information about themselves.

The Regulations also prescribe the following costs in respect of information from public bodies: photocopies, R0.60 (US$0.06) per A4-page; printing, R0.40 (US$0.04) per A4-page; copy onto a stiffy disc, R5.00 (US$0.5); copy onto a compact disc, R40 (US$4); transcription of visual images, R22 (US$2.2) per A4-page; copy of visual images, R60 (US$6); transcription of an audio record, R12 (US$1.2) per A4-page; copy of an audio record, R17 (US$1.7).

In addition, an access fee of R15 (US$1.5) is applicable for each hour or part of an hour, excluding the first hour, reasonably required for search and preparation of a record for disclosure. A deposit must be paid where search and preparation will exceed six hours, and one-third of the fee is payable as a deposit by the requester.

Further, the actual postage is payable when a copy of a record must be posted to a requester.

Fees prescribed by the Regulations in terms of accessing information from private bodies are marginally higher, but still reasonable. Again, a general requester s fee of R50 (US$5) is applied, except in cases where individuals are requesting personal information about themselves. The Regulations also specify that the head of a private body to whom the request is made will notify you in writing to pay the prescribed request fee, if any, before processing the request. If you require access to records of your personal information, you do not have to pay a request fee.

The structure used to determine fees related to a request for access to a record of a private body is as follows: photocopies, R1.10 (US$0.1) per A4-page; printing, R0.75 (US$0.07) per A4-page; copy onto a stiffy disc, disc R7.50 (US$0.75); copy onto a compact disc, R70 (US$7); transcription of visual images, R40 (US$4) per A4-page; copy of visual images, R6 (US$6); transcription of an audio record, R2 (US$2) per A4-page; copy of an audio record, R3 (US$3).

An additional fee of R30 (US$3) is levied for each hour or part of an hour reasonably required for searching and preparing the record for disclosure. As with public bodies, six hours must be exceeded before a deposit is payable, and in such cases, one third of the access fee is payable as a deposit by the requester. Postage is also payable when a copy of a record must be posted to a requester.

It is important to note that, according to the Open Democracy Advice Center (ODAC), an exemption has also been introduced, whereby individuals who are unemployed or earn below a determined annual income no longer have to pay any fees associated with accessing information from either a public or private body.

However, while the costs specified are reasonably low, a requester may incur other costs, for example, in terms of communication and travel to access information from either a public or private body. Also, if a requester was denied information and initiated legal proceedings, costs would likely increase substantially.

References:

Interview with Mukelani Dimba, Deputy Chief Executive Officer, Open Democracy Advice Centre (ODAC), Oct. 16, 2008.


100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or CSOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or CSOs trying to access this information.

13c. In practice, citizens can resolve appeals to access to information requests within a reasonable time period.

| 100 | 75 | 50 | 25 | 0 |

Comments:
The Promotion of Access to Information Act (PAIA)(Act 54 of 2000) establishes legal mechanisms, requirements and procedures regulating access to information from both public and private bodies.

Section 10 of the PAIA mandated the South African Human Rights Commission (SAHRC) to produce a comprehensive Guide to the PAIA, published in all official languages, distributed to government departments, and available to the public.

Section 3 of the SAHRC Guide details procedures for requesting access to information, and includes the relevant forms required for requests to public and private bodies. The Guide explains procedural requirements for requesters, costs involved, appeals mechanisms, and grounds for refusal of requests.

Requesters who have complied with the provisions of the PAIA and are refused information by a public body have the right to lodge an internal appeal. Appeals may also be lodged on the basis of dissatisfaction with fees charged, with the time taken to deal with the request, or the form of information required.

The SAHRC Guide states that in accordance with the PAIA, an internal appeal must be lodged within 60 days of the decision to refuse access to information. Public bodies must then decide on the outcome of the appeal within 30 days.

Time frames differ to some extent when a third party is involved and must be notified, for example, in cases where the disclosure of information sought would involve the unreasonable disclosure of personal information about a third party, certain records of the South African Revenue Services (SARS), confidential information of a third party, specific commercial information of a third party, and research information of a third party or of a public body. In such cases, the PAIA specifies that the internal appeal must in fact be lodged within 30 days.

However, the PAIA also compels authorities to allow for late appeals in cases where there is good cause, and to give notice if a late appeal is disallowed.
After an internal appeal has been concluded, the PAIA instructs the relevant authority to notify the requester and all third parties immediately, following which there is a period of 60 days in which an application may be lodged within the courts against the decision of the internal appeal. In cases where third party notice is required, this period is reduced to 30 days.

However, the Open Democracy Advice Center (ODAC) also observes that in practice, the entire process of requesting information and initiating an appeal can be time-consuming, in spite of the periods prescribed in legislation and the accompanying regulations, ODAC estimates that this process may take up to six months on average, not including any subsequent court proceedings.

Once court proceedings are initiated, it is difficult to anticipate the waiting period that an applicant might face, particularly given substantial backlogs in South African courts. The Public Service Commission (PSC) has observed that while citizens can turn to the High Court to compel government bodies to release information, legal processes take time and can be very costly, effectively excluding poor people from exercising their right of access to information.

The PSC has also reported, based on research conducted in 1997, about 35 percent of departments have not advised clients of their right to appeal. Departments responding to the PSC have generally claimed that they had no opportunity to inform the public about this entitlement because they had not dealt with any appeals. The PSC maintains, however, that this is an unfortunate perspective because it ignores the fact that the public should be informed of their rights as a matter of course, and suggests that lack of public awareness may reduce the impetus to improve compliance with the PAIA.

In respect of private bodies, where internal appeals processes do not apply, an individual requesting information or a third party may make an application to the courts in response to an unfavorable decision, within 30 days. According to the SAHRC Guide, the court will then review the request and decide whether in fact the head of the private body should give you the information you requested or not. However, again, it is difficult to anticipate the possible duration of court proceedings, particularly given current backlogs.

References:


Interview with Mukelani Dimba, Deputy Chief Executive Officer, Open Democracy Advice Centre (ODAC), Oct. 16, 2008.


The agency/entity acts on appeals quickly but with some exceptions. Some appeals may not be acknowledged, and simple issues may take more than two months to resolve.

The agency/entity does not resolve appeals in a timely fashion quickly. Appeals may be unacknowledged for many months and simple issues may take more than three months to resolve.

In practice, citizens can resolve appeals to information requests at a reasonable cost.

Comments:
The Promotion of Access to Information Act (PAIA) (Act 54 of 2000) establishes legal mechanisms, requirements and procedures regulating access to information from both public and private bodies.

Requesters who have complied with the provisions of the PAIA and are refused information by a public body have the right to lodge an internal appeal. Appeals may also be lodged on the basis of dissatisfaction with fees charged, or with the time taken to deal with the request, or the form of information required.

Although Section 75 (3) of the PAIA does specify that a requester lodging an internal appeal against the refusal of his or her request for access must pay the prescribed appeal fee (if any), such a fee has not been prescribed through the Regulations to the Act, and is therefore not applied.

Requesters, therefore, are only liable for the basic access fee of R35.00 (US$3.50), as well as any costs of reproducing records as specified in the Regulations, if their appeal is successful. These costs are generally reasonable.

However, if the requester is unsatisfied with the outcome of the internal appeal and initiates legal proceedings, costs would potentially increase significantly.

Similarly, an individual denied information from a private body does not have the recourse of an internal appeal, and must rather approach the courts. It is difficult to estimate the potential costs involved with litigation, particularly given substantial backlogs in South African courts.

The Open Democracy Advice Centre (ODAC) observes that generally, cases involving access to information are heard at the High Court level. The associated costs, which would include fees for both an advocate and attorney, are estimated to range from R300,000 (US$30,000) to upwards of R2 million (US$200,000).

There have been growing calls for the Rules Board to finalize rules for the use of the PAIA, and to develop an adjudication system for speedy resolution of contested decisions to withhold release of records. The rules as developed by the Rules Board have been tabled in Parliament for consideration by the Justice Committee, but are unlikely to be passed during the current (2008) session.

The adjudication authority has been endorsed by the findings of a Parliamentary Ad Hoc Committee investigation into the functioning of the state institutions supporting democracy, but the Committee’s report has not yet been discussed by Parliament, and it is unlikely that it will be discussed this session.

The Regulations also do not anticipate other costs that may arise in the appeals process: for example, the costs of communicating with a public body, and possibly travel.

References:

Interview with Mukelani Dimba, Deputy Chief Executive Officer, Open Democracy Advice Center (ODAC), Oct. 16, 2008.


100: In most cases, the appeals mechanism is an affordable option to middle class citizens seeking to challenge an access to information determination.

75:

50: In some cases, the appeals mechanism is not an affordable option to middle class citizens seeking to challenge an access to information determination.

25:

0: The prohibitive cost of utilizing the access to information appeals mechanism prevents middle class citizens from challenging access to information determinations.

13e. In practice, the government gives reasons for denying an information request.

Comments:
The Promotion of Access to Information Act (PAIA)(Act 54 of 2000) establishes legal mechanisms, requirements and procedures regulating access to information from both public and private bodies.

Section 10 of the PAIA mandated the South African Human Rights Commission (SAHRC) to produce a comprehensive Guide to the PAIA, published in all official languages, distributed to government departments, and available to the public.

The Guide details procedures for requesting access to information, and includes the relevant forms required for requests to public and private bodies. The Guide explains procedural requirements for requesters, costs involved, appeals mechanisms, and grounds for refusal of requests.

Chapter 4 of the PAIA details grounds for refusal of access to records held by public bodies. These include protection of: the privacy of a third party who is a natural person; certain records of the South African Revenue Service (SARS); commercial information of a third party; confidential information of a third party; safety of individuals and protection of property; police dockets in bail proceedings, and law enforcement and legal proceedings; records privileged from production in legal proceedings; defense, security and international relations of the Republic; economic interests and financial welfare of the Republic and commercial activities of public bodies; and, research information of a third party or public body; operation of public bodies. Section 46 also specifies that a request may be refused on the grounds that it is frivolous or vexatious, or if the work involved in processing the request would substantially and unreasonably divert the resources of the public body.

Section 25(3) of the PAIA also states that if a request for information is refused, the notice informing the requester of such refusal must state adequate reasons for the refusal, including the provisions of this Act relied upon.
In addition, the Promotion of Administrative Justice Act (PAJA) (Act 3 of 2000) can be used to obtain an explanation for a refusal of access to information, but cannot be used to request information in the first instance.

The Open Democracy Advice Center (ODAC) contends that responses to requests for information are poor in general. ODAC suggests that in cases where a request for information is denied, a reason for this is almost always given. However, the problem lies in a very poor rate of response to the information request in the first instance, meaning that many requesters do not receive any response, nor do they receive any explanation for the granting or denial of their request.

The Public Service Commission (PSC) also reported in 2007 that the capacity of the Public Service to provide information is still a challenge, and that this is particularly the case with information requested by individuals (compared to general information released through reports).

In analysing departmental implementation of the PAIA, the PSC found that 23 percent of departments did not have Deputy Information Officers (DIO) (the Director-General or executive director is automatically considered to be the Information Officer). Further, 47 percent of departments had only one DIO, while 6 percent had more than ten DIOs.

The PSC also reported that 44 percent of departments had not developed PAIA manuals as required by the Act, often because DIOs had not been appointed. The PSC also found that 21 percent of manuals in place had never been updated, and this was of concern, as just over one-third (38 percent) contained outdated information.

Regarding the refusal of access to information, the PSC reported that 35 percent of departments indicated that clients were not informed of their right to an appeal.

References:


Interview with Mukelani Dimba, Deputy Chief Executive Officer, Open Democracy Advice Center (ODAC), Oct. 16, 2008.


100: The government always discloses to the requestor the specific, formal reasons for denying information requests.

75:

50: The government usually discloses reasons for denying an information request to the requestor, with some exceptions. The reasons may be vague or difficult to obtain.

25:

0: The government does not regularly give reasons for denying an information request to the requestor.
Category II. Elections

II-1. Voting & Citizen Participation

14. Is there a legal framework guaranteeing the right to vote?

100

14a. In law, universal and equal adult suffrage is guaranteed to all citizens.

YES | NO

Comments:
The Constitution guarantees political rights, including the right to vote, to every citizen. Section 19(2) stipulates that, every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.” Section 19(3) (a) further provides that, “every adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret.”

References:
Constitution of the Republic of South Africa (Act 108 of 1996). Available at:

YES: A YES score is earned if the right to vote is guaranteed to all citizens of the country (basic age limitations are allowed). A YES score can still be earned if voting procedures are, in practice, inconvenient or unfair.

NO: A NO score is earned if suffrage is denied by law to any group of adult citizens for any reason. Citizen is defined broadly, to include all ethnicities, or anyone born in the country. A NO score is earned if homeless or impoverished people are legally prohibited from voting.

14b. In law, there is a legal framework requiring that elections be held at regular intervals.

YES | NO

Comments:
The Constitution requires that elections be held at regular intervals. Section 19 specifies that every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution.”

Section 49 of the Constitution provides that elections for the National Assembly must be held every five years.
15. Can all citizens exercise their right to vote?

92

15a. In practice, all adult citizens can vote.

Comments:
Every adult citizen has the constitutional right to vote. The Independent Electoral Commission (IEC) also works to address obstacles related to voter participation, including challenges of physical access, and lack of education. For example, the IEC often uses mobile voting stations for citizens in rural areas to ensure that the voting process is inclusive and effective. The use of mobile voting stations is legally permitted under section 67 (1) of the Electoral Act (Act 73 of 1998).

A survey conducted by the Human Science Research Council (HSRC) found that a majority (85 percent) of respondents indicated that free transport was made available to the public to improve the accessibility of the voting station.

However, hindrances such as lack of necessary documents, and bar-coded Identity Documents in particular, sometimes prevent people from voting, especially in remote rural areas. The HSRC study also found that practical problems, such as time and money, are among the main reasons people choose not to vote.

References:


100: Voting is open to all citizens regardless of race, gender, prior political affiliations, physical disability, or other traditional barriers.

75:
50: Voting is often open to all citizens regardless of race, gender, prior political affiliations, physical disability, or other traditional barriers, with some exceptions.

25:

0: Voting is not available to some demographics through some form of official or unofficial pressure. Voting may be too dangerous, expensive, or difficult for many people.

15b. In practice, ballots are secret or equivalently protected.

100 | 75 | 50 | 25 | 0

Comments:
There have been no serious cases reported of voter confidentiality being compromised, in either the voting or vote counting processes.

A 2006 survey conducted by the Human Science Research Council (HSRC) found that 89 percent of South Africans perceive the country’s election process to be free and fair.

According to Brigalia Bam, chairperson of the Independent Electoral Commission (IEC), the HSRC survey found that two-thirds of respondents believed the counting of ballot papers and reporting of votes was accurate during the last elections.

References:


100: Ballots are secret, or there is a functional equivalent protection, in all cases.

75:

50: Ballots are secret, or there is a functional equivalent protection, in most cases. Some exceptions to this practice have occurred. Ballots may be subject to tampering during transport or counting.

25:

0: Ballot preferences are not secret. Ballots are routinely tampered with during transport and counting.

15c. In practice, elections are held according to a regular schedule.
Comments:
Elections in all three spheres of government (National, Provincial and Local) have been held according to a regular schedule, as prescribed by the Constitution.

References:


100: Elections are always held according to a regular schedule, or there is a formal democratic process for calling a new election, with deadlines for mandatory elections.

75:

50: Elections are normally held according to a regular schedule, but there have been recent exceptions. The formal process for calling a new election may be flawed or abused.

25:

0: Elections are called arbitrarily by the government. There is no functioning schedule or deadline for new elections.

16. Are citizens able to participate equally in the political process?

90

16a. In law, all citizens have a right to form political parties.

YES  |  NO

Comments:
Section 19 (1) of the Constitution states that every citizen is free to make political choices, which explicitly includes the right to form a political party.

References:

YES: A YES score is earned if citizens have the right to form political parties without interference from government. A YES score may still be earned if groups or individuals with a history of violence or terrorism (within last ten years) are banned.
from forming political parties. Non-discriminatory minimal criteria (e.g. minimum age) are also allowed.

**NO:** A NO score is earned if there are any legal or regulatory restrictions or prohibitions barring any types of political parties from being formed.

16b. In law, all citizens have a right to run for political office.

**YES | NO**

**Comments:**
Section 19 (3) of the South African Constitution states that every adult citizen has the right to stand for public office and, if elected, to hold office.

**References:**
Constitution of the Republic of South Africa (Act 108 of 1996). Available at:  

**YES:** A YES score is earned if all citizens (citizen is defined broadly, to include all ethnicities, or anyone born in the country) have the right under law to run for political office. A YES score may still be earned if individuals with a history of violence, terrorism, or criminality are banned from running for office.

**NO:** A NO score is earned if there are any legal restrictions barring certain individuals or groups from running for political office.

16c. In practice, all citizens are able to form political parties.

100 | 75 | 50 | 25 | 0

**Comments:**
There are no constraints on the formation of political parties in terms of legislation. Section 19 of the South African Constitution guarantees the right of all South African citizens to form a political party. Registering a party requires a ‘deed of foundation’ signed by 50 registered voters and a payment of R500 (US$50) to the Independent Electoral Commission. However, in practice lack of access to resources could prevent registration of parties and the ability to fund expensive election campaigns, as could lack of information or understanding of political rights guaranteed in the Constitution.

**References:**
Constitution of the Republic of South Africa (Act 108 of 1996). Available at:  
Global Integrity, 2006. Country Report: South Africa”. Available at:  
http://www.iknowpolitics.org/  
Manson, P., 2005. “Ministerial communism and ANC corruption”, Weekly Worker No 582, June 23, 2005. Available at:  
http://www.cpgb.org.uk/worker/582/ statafrica.htm
While there is no guarantee of electoral success, political parties can form freely without opposition. Some barriers to formation are present, such as burdensome registration requirements that may not be fairly applied. Some parties' political viewpoints may draw pressure from the government, such as surveillance or intimidation. Some political parties or organizations may have extra barriers to getting on a ballot. Some political parties are effectively barred from forming through some manner of official or unofficial pressure. This may include threats, arrest, or violence from competing parties or other groups.

In practice, all citizens can run for political office. However, there are costs and other expenses involved for those wishing to register and contest an election, which pose challenges to citizens without access to resources, and may effectively lead to exclusion from running for political office. The amount required for registering for elections varies according to levels of contestation (municipal, provincial and/or national elections). Section 26 of the Electoral Act (Act 73 of 1998) states the requirements for parties to contest in an election and this involve a deposit prescribed by the Independent Electoral Commission. Political parties contesting the 2004 Elections had to pay a deposit of R150,000 (US$15,000) to participate in the national elections and R30,000 (US$3,000) per province.

Comments:
All citizens have a right to run for political office. However, there are costs and other expenses involved for those wishing to register and contest an election, which pose challenges to citizens without access to resources, and may effectively lead to exclusion from running for political office. The amount required for registering for elections varies according to levels of contestation (municipal, provincial and/or national elections). Section 26 of the Electoral Act (Act 73 of 1998) states the requirements for parties to contest in an election and this involve a deposit prescribed by the Independent Electoral Commission. Political parties contesting the 2004 Elections had to pay a deposit of R150,000 (US$15,000) to participate in the national elections and R30,000 (US$3,000) per province.

References:
Citizens can effectively be barred from the ballot through government abuse of official rules and/or unofficial pressure. The costs of running a campaign are extremely high and result in most average citizens being unable to run an effective campaign for office.

16e. In practice, an opposition party is represented in the legislature.

| 100 | 75 | 50 | 25 | 0 |

Comments:
Opposition parties are represented in all the legislative structures. Currently, 17 opposition parties are represented in the National Assembly. The Democratic Alliance is the official opposition party in the National Assembly.

References:


100: The opposition party always has some influence on the proceedings of the legislature. The opposition party can introduce legislation or bring pending matters to a vote without the consent of the ruling party.

75:

50: The opposition party has influence on the proceeding of the legislature, but it is limited in scope. The opposition's ability to force votes or publicly debate certain topics may be limited.

25:

0: The opposition party has only token participation in the legislature's proceedings and cannot advance legislation or force a debate.

II-2. Election Integrity

18. Is the election monitoring agency effective?

100

18a. In law, the agency or set of agencies/entities is protected from political interference.
Comments:
The Electoral Commission Act (Act 51 of 1996) constitutes the Independent Electoral Commission (IEC) as independent and subject only to the Constitution and the law. As one of the state Institutions supporting democracy, Section 181 (4) of the South African Constitution of 1996 states that no person or organ of State may interfere with the functioning of these institutions.

References:


YES: A YES score is earned only if the agency or set of agencies/entities has some formal organizational independence from the bodies contesting in the election. A YES score is still earned even if the entity is legally separate but in practice staffed by partisans.

NO: A NO score is earned if the election monitoring agency or set of agencies/entities is legally tied to bodies contesting the election (i.e. an executive branch agency such as the Interior Ministry, or a committee of the legislature). A NO score is automatically earned if there is no domestic election monitoring agency.

18b. In practice, agency (or set of agencies/entities) appointments are made that support the independence of the agency.

100 | 75 | 50 | 25 | 0

Comments:
Conditions for the appointment of a Commissioner to the Independent Electoral Commission (IEC) are regulated by the Electoral Commission Act (Act 51 of 1996). The Acts specifies that the Commission must consist of five members, one of whom must be a judge. The Act also stipulates that candidates for appointment to the IEC should not have a high party political profile. This qualification is unique to the IEC, and is not required in appointments to other state institutions supporting constitutional democracy, or Chapter 9 institutions.

In accordance with Section 193 of the Constitution, the President of the Republic appoints commissioners upon recommendation of the National Assembly. Recommendations are made by a Parliamentary Committee proportionally composed of all parties represented in the Assembly. Candidates are drawn from a list of no fewer than eight individuals, who are recommended by a special high-profile panel constituted for that purpose. The panel consists of: the President of the Constitutional Court, as chairperson; a representative from the Human Rights Commission; a representative from the Commission for Gender Equality; and the Public Protector.

The 2007 report of the parliamentary Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions noted that while this panel arrangement is cumbersome, expensive and demanding on the panelists, the exigencies of democracy require continued support for this process. The Ad Hoc Committee also noted that three of the four required panelists are members of human rights bodies, and that this is a unique arrangement reflective of the special requirements of the Commission as far as appointments are concerned. The Committee also reported that while at first sight it may appear inappropriate to have special arrangements for the appointment of Commissions, after due consideration the Committee believes it proper to maintain the present arrangements.

The five current IEC Commissioners are: Dr. Brigalia Bam, Chairperson; Ms. Thoko Mpumlwana, Deputy Chairperson; Mr. Fanie van der Merwe; Judge Herbert Cueduzi Msimang; and, Mr. Terry Tselane. None of these Commissioners have a particularly high party political profile, as shown in the biographies published on the IEC web site.
Given the relatively strong framework in place, there have been no known incidents of political interference in the functions of, or appointments to the IEC.

However, in a recent media article, leader of the United Democratic Movement (UDM) Mr. Bantu Holomisa raised questions about the independence of the IEC, given that it is institutionally and financially dependent on government. Holomisa has also raised the potentially disproportionate influence of the ruling African National Congress (ANC) party in IEC appointments, given that it is the majority party in Parliament. Holomisa has also called for a new legal framework that would ensure greater independence of funding for the IEC.

Thus far, there is no substantive evidence to suggest that the IEC lacks independence, or that Commissioners lack impartiality in fulfilling their duties. However, the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions has also found that the location of budgets of independent institutions, including the IEC, within government departments impacts negatively on the perceived independence of the institutions and creates a false impression that the institutions are accountable to the respective government departments for the use of their finances. The Committee has recommended that the budgets of such institutions could be provided for in Parliament’s Budget Vote, specifically in the case of the IEC and other institutions whose mandate requires express independence from the Executive.

References:

100: Appointments to the agency or set of agencies/entities are made based on professional qualifications. Individuals appointed are free of conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed usually do not have clear political party affiliations.

75:

50: Appointments are usually based on professional qualifications. However, individuals appointed may have clear party loyalties.

25:

0: Appointments are often based on political considerations. Individuals appointed often have conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

18c. In practice, the agency or set of agencies/entities has a professional, full-time staff.

100  |  75  |  50  |  25  |  0

Comments:
The Independent Electoral Commission (IEC) has professional full-time staff members. The IEC’s 2007 Annual Report for the
period ending on March 31, 2007, states that staff turnover remained low and a number of vacancies were not filled in the light of the review of the organization’s structure.

References:


| 100: The agency or set of agencies/entities has staff sufficient to fulfill its basic mandate. |
| 75: |
| 50: The agency or set of agencies/entities has limited staff, or staff without necessary qualifications to fulfill its basic mandate. |
| 25: |
| 0: The agency or set of agencies/entities has no staff, or such a limited staff that is clearly unqualified to fulfill its mandate. |

18d. In practice, the agency or set of agencies/entities makes timely, publicly available reports following an election cycle.

Comments:
In terms of Section 14(3) of the Electoral Commission Act (Act 51 of 1996), the Independent Electoral Commission (IEC) is required to publish a report as soon as possible after an election. This is done through the IEC Media Center, although results are broadly disseminated through the national media as well. Reports are also made available on the IEC web site and can be accessed by the public. The IEC normally take between three to six months to compile and make these reports available to the public.

References:


Reports are released to the public on a predictable schedule, without exceptions.

Reports are released, but may be delayed, difficult to access, or otherwise limited.

The agency or set of agencies/entities makes no public reports, issues reports which are effectively secret, or issues reports of no value.

In practice, when necessary, the agency or set of agencies/entities imposes penalties on offenders.

Comments:
The Electoral Commission Act (Act 51 of 1996) gives the Independent Electoral Commission (IEC) the right to deal accordingly with parties and candidates that breach the electoral code and or other electoral procedures. In practice this happened in 2004 when the Liberal Party attempted to submit its list of candidates after the prescribed time for submission of candidates' lists had elapsed. After the Chief Electoral Officer refused to accept the list the party took its case to the Electoral Court. They lost the case and were also not successful in the Constitutional Court.

Another case involved the African Christian Democratic Party (ACDP) when the Commission refused the party the right to contest elections in the Cape Metropole, after failing to pay relevant election fees. However, in this case the IEC's decision was overturned by the Constitutional Court and the ACDP was allowed to contest the 2006 local government elections in Cape Town.

References:


When rules violations are discovered, the agency or set of agencies/entities is aggressive in penalizing offenders and/or in cooperating with other agencies in penalizing offenders.

The agency or set of agencies/entities enforces rules, but is limited in its effectiveness. The agency may be slow to act, unwilling to take on politically powerful offenders, reluctant to cooperate with other agencies, or occasionally unable to enforce its judgments.

The agency or set of agencies/entities does not effectively penalize offenders and/or cooperate with other agencies in penalizing offenders. The agency may make judgments but not enforce them, or may fail to make reasonable judgments against offenders. The agency may be partisan in its application of power.
19. Are elections systems transparent and effective?

```
100
```

19a. In practice, there is a clear and transparent system of voter registration.

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**Comments:**
The Independent Electoral Commission (IEC) publicizes voter registration through public awareness campaigns, and using different media platforms and sources, including radio, television, print and electronic media, pamphlets, and the web site. The IEC’s voter education program also explains the registration process and the recent use of technology like Short Messaging Service (SMS) and Wireless Application Protocol (WAP) allow voters to verify their voter status and check where they are registered. Registration is on a common voters roll by the Chief Electoral Officer and is performed by IEC registration officers. Present voter registration methods are quick, secure and transparent. There have been some complaints, however, about the time allocated for the registration process, and inspection and accuracy of the voters’ roll.

**References:**


```
100: There is a transparent system of voter registration that provides voters with sufficient time to understand their rights, check the accuracy of their registration, and ensure that errors are corrected before they vote.
```

```
75: There is a transparent voter registration system that provides voters with sufficient time to understand their rights, check the accuracy of their registration, and ensure that errors are corrected before they vote but there are some problems. Voters may have not access to registration lists with sufficient time to correct errors before voting or registration lists may at times be inaccessible.
```

```
50: The system of voter registration is incomplete or does not exist. Government may routinely falsify registration lists to affect voting patterns and limit access to the polls. Double voting and ghost" voting by non-existent voters is common.
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19b. In law, election results can be contested through the judicial system.
```
Chapter 5 of the Electoral Commission Act (Act 51 of 1996) establishes the Electoral Court, which is tasked with reviewing decisions made by the Independent Electoral Commission (IEC). Any party or candidate may bring complaints to the Electoral Court and any appeal must be made in terms of the rules of the Electoral Court.

References:


YES: A YES score is earned if citizens or political parties can challenge allegedly fraudulent election results through the courts or other judicial mechanisms.

NO: A NO score is earned if there is no legal right for citizens or political parties to challenge allegedly fraudulent election results in the courts or other judicial mechanisms.

19c. In practice, election results can be effectively appealed through the judicial system.

100  |  75  |  50  |  25  |  0

Comments:
The African Christian Democratic Party (ACDP) successfully challenged the first official results of the 2004 national elections. As a result, the ACDP gained one of two seats previously awarded to the Azanian People’s Organization (AZAPO), which it claimed had been incorrectly allocated. The IEC acknowledged the error and the seat was given to the ACDP, leaving AZAPO with only one seat.

It has also been argued that through Party Liaison Committees at national, provincial and local levels, the IEC ensures that all political parties are fully engaged and knowledgeable about the electoral process and procedures. This structure helps in resolving local disputes and is said to be a contributing factor in reducing legal challenges to electoral procedures and results. Party agents also monitor the voting and counting process.

References:


The electoral appeals mechanism takes cases from both candidates complaining of flaws in the electoral process as well as citizens bringing complaints related to denial of suffrage or registration errors. There is an expedited process for resolving such complaints to avoid delaying a timely announcement of electoral results.

The electoral appeals mechanism takes complaints from both candidates and voters but may not always act on complaints promptly. The appeals mechanism may be abused at times by parties or candidates seeking to delay the announcement of electoral results.

The electoral appeals mechanism rarely or never acts on complaints brought by candidates or citizens. Citizens may not be able to bring complaints related to denial of suffrage or voter registration errors.

19d. In practice, the military and security forces remain neutral during elections.

Comments:
Both the military and security forces have been present in all general elections to protect the security of the ballot and the electorate. They have supported the integrity of the electoral process and there has been no recorded incident in which security forces interfered with elections.

References:


The military, military officers, and other security forces refrain from overtly supporting or opposing political candidates or commenting on elections. The military or security forces refrain from physically interfering with political campaigns, rallies, or voting.

The military, military officers, and security forces may be known to unofficially support or oppose particular candidates or parties. The military or security forces generally refrain from the use of force to support or oppose particular candidates or parties but there are exceptions.

The military or other security forces are an active and explicit player in politics and overtly support or oppose particular candidates or parties. The military or security forces routinely exercise the use of force to support or oppose parties or candidates.

19e. In law, domestic and international election observers are allowed to monitor elections.
Comments:
In South Africa, the accreditation of election observers is governed by Section 84 of the Electoral Act of 1998, as amended in 2003, and by the Regulations concerning Accreditation of Election Observers and the Code of Conduct for Accredited Observers. According to the Act, any juristic person may apply to the Independent Electoral Commission (IEC) for accreditation as an observer.

In 2004, the IEC invited various international bodies to send election observers to South Africa. Some including the European Union, the Commonwealth and the United Nations, opted not to send observers, citing confidence in South Africa’s ability to run free and fair elections. Groups like the KwaZulu-Natal Elections and Democracy Forum and the South African Civil Society Organisations’ Coalition contributed the highest numbers of domestic observers. The Electoral Institute of Southern Africa (EISA) also deployed a Regional Mission to observe the 2004 South African elections, and concluded that the elections were conducted in a peaceful, orderly, efficient and transparent manner.

References:


YES: A YES score is earned if domestic and international election observers are allowed to monitor the electoral process.

NO: A NO score is earned if there are any legal or regulatory prohibitions on the monitoring of the electoral process by domestic or international election observers.

YES

100  75  50  25  0

Comments:
According to the Electoral Act (Act 73 of 1998) as amended in 2003, any juristic person may apply to the Commission for accreditation as an observer.

The 1999 elections were observed by about 11,000 observers, 369 of whom were from other countries. International observer groups were deployed to some 700 voting stations in all nine provinces, while domestic observers covered almost all voting stations. The United Nations Electoral Assistance Division helped the Independent Electoral Commission (IEC) with co-ordinating the international observers, while the South African Council of Churches co-ordinated local observers.

For the 2004 elections, organizations like the European Union, the Commonwealth and the United Nations opted not to send observers, stating their confidence in South Africa’s ability to run free and fair elections. Groups like the KwaZulu-Natal Elections and Democracy Forum and the South African Civil Society Organisations’ Coalition were among the biggest domestic observers. The Electoral Institute of Southern Africa (EISA) also deployed a Regional Mission and concluded that the elections were conducted in a peaceful, orderly, efficient and transparent manner.

For all elections, political parties contesting the elections have a right to send their own monitors to various voting stations around the country to ensure compliance with voting procedures. Party agents and observers are there to monitor both the voting and the counting process.
References:


100: Election observers have unfettered access to polling sites, counting stations, and voters themselves. The government does not interfere with the observers’ activities.

75:

50: Election observers generally have access to polling sites, counting stations, and voters but encounter restrictions in certain areas. The government may impose burdensome regulatory or bureaucratic requirements on observers to discourage their involvement.

25:

0: Election observers’ movements are significantly limited by the government and many polling and counting sites are restricted or barred from observers. The government imposes so many bureaucratic or regulatory burdens on the observers that their mission is rendered ineffective.

17. Is there an election monitoring agency or set of election monitoring agencies/entities?

100

17. In law, is there an election monitoring agency or set of election monitoring agencies/entities?

YES | NO

Comments:
The Independent Electoral Commission (IEC) is established in terms of Chapter 2 of the Electoral Commission Act, 51 of 1996. Chapter 9 of the Constitution of the Republic of South Africa (Act 108 of 1996) further establishes the Electoral Commission as one of six independent state institutions supporting constitutional democracy. The IEC is responsible for managing the elections of national, provincial and municipal legislative bodies in accordance with national legislation. The duties and functions of the Electoral Commission are further defined in section 5 of the Electoral Commission Act, 1996. Elections are held every five years.

References:


YES: A YES score is earned if there is a domestic agency or set of domestic agencies/entities formally assigned to ensure the integrity of the election process.

NO: A NO score is earned if no domestic agency or set of domestic agencies/entities exists that monitors elections. A NO score is earned if elections are only monitored by an agency informally, such as poll booth monitoring by the police, only by international observers, or only by NGOs. A NO score is earned if the domestic election agency or set of domestic agencies simply facilitates the process of voting but is not empowered to report violations or abuses.

II-3. Political Financing

20. Are there regulations governing the financing of political parties?

0

20a. In law, there are regulations governing private contributions to political parties.

YES | NO

Comments:
The private funding of political parties in South Africa is unregulated. Political parties do not have to disclose the identity of their donors.

References:


YES: A YES score is earned if there are any formal rules (by law or regulation) controlling private contributions to political parties, including prohibitions against foreign donations.

NO: A NO score is earned if there is no regulation of private contributions to political parties.
20b. In law, there are limits on individual donations to political parties.

YES | NO

Comments:
There is no law imposing limits on individual donations to candidates and political parties. IDASA has been advocating that political parties open their books on donations, especially if donations exceed the amount of R50,000 (US$5,000) annually.

References:
High Court of South Africa, Judgement: IDASA Court Application on the Disclose of Particulars of Substantial Donations Received by Political Parties, April 2005*. Available at: http://www.whofundswho.org.za/pubs/papersmedia/idasacourt.pdf

YES: A YES score is earned if there are any limits in size on individual contributions to political parties. A YES score is also earned if individual contributions are prohibited.

NO: A NO score is earned if there are no limits on contributions from individuals. A NO score is also earned if limits are applied by the government on opposition parties in a discriminatory manner.

20c. In law, there are limits on corporate donations to political parties.

YES | NO

Comments:
There is no law regulating or imposing limits on corporate donations to candidates or political parties. IDASA has been advocating that political parties open their books on donations, especially if donations exceed the amount of R50,000 (US$5,000) annually.

References:

YES: A YES score is earned if there are any limits in size on corporate contributions to political parties. A YES score is earned if corporate contributions are prohibited.

NO: A NO score is earned if there are no limits on corporate contributions to political parties. A NO score is also earned if limits are applied by the government on opposition parties in a discriminatory manner.

20d. In law, there are limits on total political party expenditures.
YES | NO

Comments:
There are no limits in law on political party expenditure. However, a party must account for the money allocated to it under the following classifications: personnel expenditure, accommodation, travel expenses, arrangement of meetings and rallies, administration, and promotions and publications.

References:


YES: A YES score is earned if there are any limits in size on political party expenditures. A YES score is earned if all party expenditures are prohibited.

NO: A NO score is earned if there are no limits on political party expenditures. A NO score is also earned if limits are applied by the government on opposition parties in a discriminatory manner.

20e. In law, there are requirements for the disclosure of donations to political parties.

YES | NO

Comments:
There are no legal requirements for disclosure of donations to political parties. IDASA has been advocating that political parties open their books on donations, especially if donations exceed the amount of R50,000 (US$5,000) annually.

References:


YES: A YES score is earned if there are any requirements mandating the disclosure of financial contributions to political parties.

NO: A NO score is earned if there are no requirements mandating the disclosure of contributions to political parties, existing regulations do not require a donor’s name or amount given, or the regulations allow for anonymous donations.
20f. In law, there are requirements for the independent auditing of the finances and expenditures of political parties.

**YES | NO**

**Comments:**
There are no legal requirements for the independent auditing of political parties’ finances and candidates, in respect to private party financing. In respect of public party financing, the Public Funding of Represented Political Parties Act, 1997 makes such provision. Funds to political parties allocated in terms of this Act are audited by the Chief Executive Officer of the Independent Electoral Commission (IEC).

**References:**


**YES:** A YES score is earned if there is a legal or regulatory requirement for the independent auditing of party finances and expenditures. The auditing is performed by an impartial third-party.

**NO:** A NO score is earned if there are no legal or regulatory requirements for the independent auditing of political parties’ finances and expenditures or if such requirements exist but allow for parties to self-audit.

20g. In law, there is an agency or entity that monitors the financing of political parties.

**YES | NO**

**Comments:**
There is no agency tasked with monitoring private political party financing. In respect of public financing, the Independent Electoral Commission (IEC) is mandated to initiate investigations independently.

**References:**


**YES:** A YES score is earned if there is a domestic agency or set of domestic agencies/entities formally assigned to monitor and enforce laws and regulations around the financing of political parties. A YES score is earned even if the agency/entity is ineffective in practice.

**NO:** A NO score is earned if there is no such agency or entity.

21. Are there regulations governing the financing of individual political candidates?
21a. In law, there are regulations governing private contributions to individual political candidates.

**YES | NO**

**Comments:**
There are no regulations governing the financing of private political candidates in South Africa. Private political candidates only exist at local government level and they are not funded by the Independent Electoral Commission. Any person who wants to run for elections at provincial and national level has to form a political party.

**References:**

Interview with Pieter Schoeman, Independent Electoral Commission, Assistant Manager for Logistics, Western Cape Province, Aug. 27, 2008

**YES:** A YES score is earned if there are any formal rules (by law or regulation) controlling private contributions to individual political candidates, including prohibitions against foreign donations.

**NO:** A NO score is earned if there is no regulation of private contributions to individual political candidates.

21b. In law, there are limits on individual donations to political candidates.

**YES | NO**

**Comments:**
There are no regulations governing individual donations to political candidates. Private political candidates only exist at the local government sphere of government and are not funded by the Independent Electoral Commission.

**References:**

Interview with Pieter Schoeman, Independent Electoral Commission, Assistant Manager for Logistics, Western Cape Province, Aug. 27, 2008

**YES:** A YES score is earned if there are any limits in size on individual contributions to political candidates. A YES score is also earned if individual contributions are prohibited.

**NO:** A NO score is earned if there are no limits on contributions from individuals. A NO score is also earned if limits are applied by the government on opposition candidates in a discriminatory manner.
21c. In law, there are limits on corporate donations to individual political candidates.

**YES | NO**

**Comments:**
There is no law regulating or imposing limits on corporate donations to individual political candidates.

**References:**

Interview with Pieter Schoeman, Independent Electoral Commission, Assistant Manager for Logistics, Western Cape Province, Aug. 27, 2008

**YES:** A YES score is earned if there are any limits in size on corporate contributions to individual political candidates. A YES score is earned if corporate contributions are prohibited.

**NO:** A NO score is earned if there are no limits on corporate contributions to individual political candidates. A NO score is also earned if limits are applied by the government on opposition candidates in a discriminatory manner.

21d. In law, there are requirements for the disclosure of donations to individual political candidates.

**YES | NO**

**Comments:**
There are no legal requirements for disclosure of donations to individual political candidates.

**References:**

Interview with Pieter Schoeman, Independent Electoral Commission, Assistant Manager for Logistics, Western Cape Province, Aug. 27, 2008

**YES:** A YES score is earned if there are any requirements mandating the disclosure of financial contributions to individual political candidates.

**NO:** A NO score is earned if there are no requirements mandating the disclosure of contributions to individual political candidates, existing regulations do not require a donor’s name or amount given, or the regulations allow for anonymous donations.

21e. In law, there are requirements for the independent auditing of the campaign finances of individual political candidates.
Comments:
There are no legal requirements for the independent auditing of the campaign finances of individual political candidates, in respect to private party financing.

References:

Interview with Pieter Schoeman, Independent Electoral Commission, Assistant Manager for Logistics, Western Cape Province, Aug. 27, 2008

YES: A YES score is earned if there is a legal or regulatory requirement for the independent auditing of an individual candidate’s campaign finances and expenditures. The auditing is performed by an impartial third-party.

NO: A NO score is earned if there are no legal or regulatory requirements for the independent auditing of an individual candidate’s campaign finances and expenditures or if such requirements exist but allow for candidates to self-audit.

21f. In law, there is an agency or entity that monitors the financing of individual political candidates’ campaigns.

Comments:
There is no agency tasked with monitoring private political party financing.

References:

Interview with Pieter Schoeman, Independent Electoral Commission, Assistant Manager for Logistics, Western Cape Province, Aug. 27, 2008

YES: A YES score is earned if there is a domestic agency or set of domestic agencies/entities formally assigned to monitor and enforce laws and regulations around the financing of individual political candidates’ campaigns. A YES score is earned even if the agency/entity is ineffective in practice.

NO: A NO score is earned if there is no such agency or entity.

22. Are the regulations governing the political financing of parties effective?

22a. In practice, the limits on individual donations to political parties are effective in regulating an individual’s ability to financially support a political party.
Comments:
There are no limits on individual donations to political parties.

References:
Global Integrity, 2006. Country Report: South Africa”. Available at:
https://last.globalintegrity.org/reports/2006/index.cfm

IDASA, 2003. “IDASA Position Paper: Regulation of Private Funding to Political Parties”. Available at:


Who Funds Who?,
http://www.whofundswho.org.za/

100: Existing limits represent the full extent to which an individual can directly or indirectly financially support a political party. Limits are reasonably low enough in the context of the total costs of running a campaign.

75:

50: Existing limits generally represent the full extent to which an individual can directly or indirectly financially support a political party. However, exceptions and loopholes exist through which individuals can indirectly support political parties above and beyond those formal limitations. Such loopholes could include making donations to third-party groups that advocate on behalf of (or against) a particular party; unregulated loans to parties (rather than direct donations); or in-kind support that is not explicitly regulated by laws or regulations. The limits may be too high in the context of the overall costs of running a campaign.

25:

0: Existing limits are routinely bypassed or willfully ignored. The vast majority of individual contributions to a political party are made outside of the formal limitation system. There is no enforcement of violations. Limits are so high that they are meaningless in the context of the overall costs of running a campaign.

22b. In practice, the limits on corporate donations to political parties are effective in regulating a company’s ability to financially support a political party.

Comments:
There are no limits on corporate donations to political parties.

References:
Global Integrity, 2006. Country Report: South Africa”. Available at:
https://last.globalintegrity.org/reports/2006/index.cfm


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<td><strong>100:</strong> Existing limits represent the full extent to which a company can directly or indirectly financially support a political party. Limits are reasonably low enough in the context of the total costs of running a campaign to be meaningful.</td>
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22c. In practice, the limits on total party expenditures are effective in regulating a political party’s ability to fund campaigns or politically-related activities.

| 100 | 75 | 50 | 25 | 0 |

**Comments:**
There are no limits on total party expenditures.

**References:**


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<td><strong>100:</strong> Existing limits represent the full extent to which political parties are able to finance their activities. Limits are reasonably low enough in the context of the total costs of running a party to be meaningful.</td>
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<td><strong>50:</strong> Existing limits generally represent the full extent to which a political party can finance its activities. However, exceptions and loopholes exist through which parties can generate revenue or finance their activities beyond the scope of existing regulations. Such loopholes could include taking loans that are outside of the scope of regulations covering direct donations; links to revenue-generating business activities that are beyond the scope of electoral or campaign-related regulations; or accepting in-kind support that is not explicitly regulated by laws or regulations. The limits may be too high in the context of the overall costs of running a party.</td>
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Existing limits are routinely bypassed or willfully ignored. The majority of expenditures are made outside of the formal limitation system. Limits are so high that they are meaningless in the context of the overall costs of running a party.

In practice, when necessary, an agency or entity monitoring the financing of political parties independently initiates investigations.

There is no agency tasked with monitoring private political party financing. In respect of public financing, the Independent Electoral Commission (IEC) is mandated by the Electoral Act (Act 73 of 1998) to initiate investigations independently.

References:


Interview with Pieter Schoeman, Independent Electoral Commission, Assistant Manager for Logistics, Western Cape Province, Aug. 27, 2008

The agency or entity aggressively starts investigations into allegations of wrong doing with respect to the financing of political parties. The agency is fair in its application of this power.

The agency or entity will start investigations, but often relies on external pressure to set priorities, or has limited effectiveness when investigating. The agency, thought limited in effectiveness, is still fair in its application of power.

The agency or entity rarely investigates on its own, or the agency or entity is partisan in its application of this power.

In practice, when necessary, an agency or entity monitoring the financing of political parties imposes penalties on offenders.

In respect to public political party funding, the Independent Electoral Commission (IEC) is empowered by the Electoral Act (Act 73 of 1998) to impose penalties when necessary on offenders. In practice, this is rare. There is no agency tasked with monitoring private party financing, and therefore no penalties can or have been imposed.
References:
Electoral Act (Act 73 of 1998). Available at:

Global Integrity, 2006. Country Report: South Africa”. Available at:
https://last.globalintegrity.org/reports/2006/index.cfm

Interview with Pieter Schoeman, Independent Electoral Commission, Assistant Manager for Logistics, Western Cape Province, Aug. 27, 2008

100: When rules violations are discovered, the agency or entity is aggressive in penalizing offenders.

75: 

50: The agency or entity enforces rules, but is limited in its effectiveness. The agency or entity may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

25: 

0: The agency or entity does not effectively penalize offenders. The agency or entity may make judgments but not enforce them, or may fail to make reasonable judgments against offenders. The agency or entity may be partisan in its application of power.

22f. In practice, contributions to political parties are audited.

Comments:
Private financing to political parties is not disclosed or audited, and there is no regulation. Public financing is audited in terms of Public Funding of Represented Political Parties Act, 103 of 1997. The chief electoral officer is responsible for the management and administration of the fund, while the party will appoint an accounting officer to report to the chief electoral officer.

References:
Global Integrity, 2006. Country Report: South Africa”. Available at:
https://last.globalintegrity.org/reports/2006/index.cfm

IDASA, 2003. “IDASA Position Paper: Regulation of Private Funding to Political Parties”. Available at:

Interview with Pieter Schoeman, Independent Electoral Commission, Assistant Manager for Logistics, Western Cape Province, Aug. 27, 2008

Public Funding of Represented Political Parties Act (Act 103 of 1997). Available at:

Who Funds Who?,
http://www.whofundswho.org.za/

100: Political party finances are regularly audited using generally accepted auditing practices. This includes the auditing of nominally independent financial organizations that act as financial extensions of the party.

75:
50: Political party finances (as defined) are audited, but audits are limited in some way, such as using inadequate auditing standards, or the presence of exceptions to disclosed contributions. Contributions to the political party may be sufficiently audited, but the auditing of nominally independent extensions of the party may not be.

25:

0: Party finances are not audited, or the audits performed have no value in tracking contributions. Audits may be performed by entities known to be partisan or biased in their practices.

23. Are the regulations governing the political financing of individual candidates effective?

0

23a. In practice, the limits on individual donations to political candidates are effective in regulating an individual's ability to financially support a particular candidate.

100 | 75 | 50 | 25 | 0

Comments:
There are no regulations governing the political financing of particular candidates in South Africa. Private political candidates only exist at local government level and they are not funded by the Independent Electoral Commission (IEC).

References:

Interview with Pieter Schoeman, Independent Electoral Commission, Assistant Manager for Logistics, Western Cape Province, Aug. 27, 2008

100: Existing limits represent the full extent to which an individual can directly or indirectly financially support a political candidate. Limits are reasonably low enough in the context of the total costs of running a campaign.

75:

50: Existing limits generally represent the full extent to which an individual can directly or indirectly financially support a particular candidate. However, exceptions and loopholes exist through which individuals can indirectly support particular political candidates above and beyond those formal limitations. Such loopholes could include making donations to third-party groups that advocate on behalf of (or against) a particular candidate; unregulated loans to candidates (rather than direct donations); or in-kind support that is not explicitly regulated by laws or regulations. The limits may be too high in the context of the overall costs of running a campaign.

25:

0: Existing limits are routinely bypassed or willfully ignored. The vast majority of individual contributions to a particular political candidate are made outside of the formal limitation system. There is no enforcement of violations. Limits are so high that they are meaningless in the context of the overall costs of running a campaign.

23b. In practice, the limits on corporate donations to individual candidates are effective in regulating a company’s ability to financially support a candidate.
Comments:
There are no limits on corporate donations to individual candidates.

References:


100: Existing limits represent the full extent to which a company can directly or indirectly financially support an individual candidate. Limits are reasonably low enough in the context of the total costs of running a campaign to be meaningful.

75: Existing limits generally represent the full extent to which a company can directly or indirectly financially support an individual candidate. However, exceptions and loopholes exist through which companies can indirectly support individual candidates above and beyond those formal limitations. Such loopholes could include making donations to third-party groups that advocate on behalf of (or against) a particular candidate; unregulated loans to candidates (rather than direct donations); or in-kind support that is not explicitly regulated by laws or regulations. The limits may be too high in the context of the overall costs of running a campaign.

50:

25:

0: Existing limits are routinely bypassed or willfully ignored. The majority of corporate contributions to individual candidates are made outside of the formal limitation system. There is no enforcement of violations. Limits are so high that they are meaningless in the context of the overall costs of running a campaign.

23c. In practice, when necessary, an agency or entity monitoring the financing of individual candidates’ campaigns independently initiates investigations.

Comments:
There is no agency tasked with monitoring the financing of individual candidates.

References:

Interview with Pieter Schoeman, Independent Electoral Commission, Assistant Manager for Logistics, Western Cape Province, Aug. 27, 2008

100: The agency or entity aggressively starts investigations into allegations of wrong doing with respect to the financing of individual candidates’ campaigns. The agency is fair in its application of this power.

75:
The agency or entity will start investigations, but often relies on external pressure to set priorities, or has limited effectiveness when investigating. The agency, thought limited in effectiveness, is still fair in its application of power.

The agency or entity rarely investigates on its own, or the agency or entity is partisan in its application of this power.

In practice, when necessary, an agency or entity monitoring the financing of individual candidates’ campaigns imposes penalties on offenders.

There is no agency tasked with monitoring individual candidates financing, and therefore no penalties can be or have been imposed.

References:

Interview with Pieter Schoeman, Independent Electoral Commission, Assistant Manager for Logistics, Western Cape Province, Aug. 27, 2008

When rules violations are discovered, the agency or entity is aggressive in penalizing offenders.

The agency or entity enforces rules, but is limited in its effectiveness. The agency or entity may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

The agency or entity does not effectively penalize offenders. The agency or entity may make judgments but not enforce them, or may fail to make reasonable judgments against offenders. The agency or entity may be partisan in its application of power.

In practice, the finances of individual candidates’ campaigns are audited.

Financing of individual candidates is not disclosed or audited; there is no regulation stipulating this.

References:
The finances of individual candidates’ campaigns are regularly audited using generally accepted auditing practices.

The finances of individual candidates’ campaigns are audited, but audits are limited in some way, such as using inadequate auditing standards, or the presence of exceptions to disclosed contributions.

The finances of individual candidates’ campaigns are not audited, or the audits performed have no value in tracking contributions. Audits may be performed by entities known to be partisan or biased in their practices.

24. Can citizens access records related to the financing of political parties?

24a. In practice, political parties disclose data relating to financial support and expenditures within a reasonable time period.

Comments:
In respect of public funding only, political parties and candidates disclose data relating to financing support and expenditure within a reasonable time period.

In terms of the public fund administered by the Independent Electoral Commission (IEC), parties must file audited annual financial statements by June 30 every year. However, different financial statements and the closing of books are required, for example, before a general election and/or after a floor crossing window period. In respect to private funding, there are no legal requirements for disclosure of data.

References:


Interview with Pieter Schoeman, Independent Electoral Commission, Assistant Manager for Logistics, Western Cape Province, Aug. 27, 2008

100: Political parties disclose their sources of funding and expenditures at least every quarter.

75:

50: Political parties disclose their sources of funding and expenditures only one or two times per year. Delays may occur when sensitive political information is involved.
Political parties never publish their sources of funding or expenditures or publish that information only rarely with more than a year in between publication. Politically sensitive information is regularly withheld from public disclosure.

24b. In practice, citizens can access the financial records of political parties within a reasonable time period.

Comments:
Citizens can access reports of the Independent Electoral Commission (IEC) on public funding given to political parties for free, and within a reasonable time period.

However, political parties are not required to allow citizens access to information on private funding. IDASA’s attempts to gain access to financial records of political parties by litigation in terms of the Promotion of Access to Information Act (Act 2 of 2000) proved unsuccessful.

References:


Interview with Pieter Schoeman, Independent Electoral Commission, Assistant Manager for Logistics, Western Cape Province, Aug. 27, 2008


100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take two to four weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. There may be persistent delays in obtaining politically sensitive records.

24c. In practice, citizens can access the financial records of political parties at a reasonable cost.

Comments:
Citizens can access reports of the Independent Electoral Commission (IEC) on public funding given to political parties for free. However, political parties are not required to allow citizens access to information on private funding.
25. Can citizens access records related to the financing of individual candidates’ campaigns?

0

25a. In practice, individual political candidates disclose data relating to financial support and expenditures within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:
There are no regulations governing the financing of individual candidates.

References:
Global Integrity, 2006. Country Report: South Africa”. Available at:
https://last.globalintegrity.org/reports/2006/index.cfm

Interview with Pieter Schoeman, Independent Electoral Commission, Assistant Manager for Logistics, Western Cape Province, Aug. 27, 2008

100: Individual candidates disclose their sources of funding and expenditures at least every quarter.

75:

50: Individual candidates disclose their sources of funding and expenditures only one or two times per year. Delays may occur when sensitive political information is involved.

25:
Individual candidates never publish their sources of funding or expenditures or publish that information only rarely with more than a year in between publication. Politically sensitive information is regular withheld from public disclosure.

25b. In practice, citizens can access the financial records of individual candidates (their campaign revenues and expenditures) within a reasonable time period.

| 100 | 75 | 50 | 25 | 0 |

Comments:
There are no regulations governing the financing of individual candidates.

References:

Interview with Pieter Schoeman, Independent Electoral Commission, Assistant Manager for Logistics, Western Cape Province, Aug. 27, 2008

25c. In practice, citizens can access the financial records of individual candidates (their campaign revenues and expenditures) at a reasonable cost.

| 100 | 75 | 50 | 25 | 0 |

Comments:
There are no regulations governing the financing of individual candidates.

References:

Interview with Pieter Schoeman, Independent Electoral Commission, Assistant Manager for Logistics, Western Cape Province, Aug. 27, 2008
Category III. Government Accountability

III-1. Executive Accountability

27. Can the chief executive be held accountable for his/her actions?

94

27a. In practice, the chief executive gives reasons for his/her policy decisions.

Comments:
The executive is constitutionally obliged to account to Parliament. Section 92 (2) and (3) of the Constitution prescribes the roles and responsibilities of the executive towards Parliament. It states:

(2) Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.

(3) Members of the Cabinet must –

(b) provide Parliament with full and regular reports concerning matters under their control.

Since 1994, Parliament has introduced various mechanisms to hold the executive to accountable. One of these mechanisms is question time”, during which members of parliament and provincial legislatures have the opportunity to question members of the executive. Other measures for ensuring accountability include scrutiny of departmental reports, the annual budget process and briefings before Parliamentary committees. However, since 1994, there have also been some concerns over Parliament’s poor oversight record, although some committees have been more robust in performing oversight functions, particularly since the 2007 ANC National Conference in Polokwane.
The chief executive and/or cabinet ministers give formal explanations of all policy matters. The chief executive regularly takes critical questions from journalists or an opposition party, usually at least once a month. There is no censoring of such sessions.

The chief executive and/or cabinet ministers give explanations of policy, but not always in a timely or complete way. The chief executive occasionally takes critical questions from journalists or an opposition party, but not in a regular or formalized process. Particular issues of political sensitivity may be censored by government broadcasters.

The chief executive and/or cabinet ministers do not give substantial justifications for policy. Public appearances by the chief executive offer no exposure to critical questions. The government and government-run media routinely sensor such sessions.

In law, the judiciary can review the actions of the executive.

The Constitution is the highest law in South Africa, and binds all people and organs of the state. Any action or decision by government has to stand up to constitutional scrutiny and can be declared to be unconstitutional by courts in terms of section 172(1) of the Constitution. Section 167(3)(a) of the Constitution provides that the Constitutional Court is the highest court in the land, while section 165(5) provides that orders of the courts bind ‘all persons to whom and organs of state to which they apply and section 165(2) asserts that the courts are subject only to the Constitution and the law. Section 165(4) requires all organs of state to assist and protect the independence of the courts.

Section 239 of the Constitution contains a definition of ‘organs of state’ that includes the executive branch of government.

The Promotion of Administrative Justice Act (Act 3 of 2000) also sets out the procedures and grounds for challenging government’s administrative actions. Under the Act any person can approach a court for a judicial review of government’s decision if they feel is unlawful and unreasonable.

References:


YES: A YES score is earned if there is a formal process by which the judiciary can pass judgments on the legality or constitutionality of actions taken by the executive.

NO: A NO score is earned if no such mechanism exists. A NO score is earned if judicial review is vaguely established in law or regulation without formal procedures. A NO score is earned if general exemptions exist with respect to executive actions that are reviewable (a national security exemption, for example).

27c. In practice, when necessary, the judiciary reviews the actions of the executive.

100 75 50 25 0

Comments:
In the past, South African courts have successfully delivered judgments challenging executive decisions, and in some cases this has led to the re-writing of laws. For example, the Constitutional Court has in the past reviewed an exercise of the President’s power to pardon prisoners.

Another case concerned the National Department of Health's Operational Plan for Comprehensive HIV/AIDS Care Management and Treatment for South Africa, which excluded the prisoners of Westville Correctional Center from accessing anti-retroviral treatment at an accredited public health facility. The matter was taken to court by the Treatment Action Campaign, where the executive policy on HIV/AIDS was successfully challenged. The court ordered the respondent, namely the Ministers of Health and Correctional Services and the KwaZulu-Natal MEC for Health, to immediately remove the restrictions that prevented the applicants, and all other similarly situated prisoners at Westville Correctional Center, from gaining access to the treatment.

The ‘judgments’ page on the Legal Resources Center web site – http://www.lrc.org.za – contains numerous judgments where executive action has been successfully challenged.

References:


President of the RSA and Another v Hugo (1997) 1 SA 1 (CC). Available at: http://www.constitutionalconcourt.org.za/


100: When constitutional or legal questions or possible violations are raised, the judiciary is aggressive in reviewing executive actions and can void illegal or unconstitutional actions. The judiciary is fair and nonpartisan in its application of this power. It does not need to rely upon the executive to initiate a constitutional or legal review.
75: The judiciary will review executive actions, but is limited in its effectiveness. The judiciary may be slow to act, unwilling to take on politically sensitive issues, or occasionally unable to enforce its judgments.

25: The judiciary does not effectively review executive policy. The judiciary may make judgments but not enforce them, or may fail to pass judgments on executive abuses. The judiciary may be partisan in its application of power. It must rely on instructions from the executive in order to initiate a legal or constitutional review.

27d. In practice, the chief executive limits the use of executive orders for establishing new regulations, policies, or government practices.

100 75 50 25 0

Comments:
According to Section 101 of the South African Constitution, a decision by the President must be in writing if it is taken in terms of legislation or has legal consequences. Section 101 (2) of the Constitution further states that a written decision by the President must be countersigned by another cabinet member, if that decision concerns a function assigned to that other cabinet member. Recently, Minister of Finance Trevor Manuel took over the administrative powers of the state-owned agricultural finance house, the Land Bank, from embattled Lulu Xingwana, Minister of Agriculture and Land Affairs, with immediate effect.

Generally, the President’s preferred mode of conducting government business is by Cabinet consensus and through legislation.

References:


100: The chief executive utilizes executive orders only when there is no constitutional or legal requirement for official legislative action or approval. Executive orders are limited in number and narrow in scope.

75: The chief executive sometimes relies on executive orders to implement policies and regulations opposed by the legislature. Some executive orders are overly broad in scope and are designed to circumvent constitutional or legal requirements for legislative action or approval.

25: The chief executive routinely abuses executive orders to render the legislature practically useless. Executive orders are the norm, not the exception, and directly contravene constitutional or legal requirements for legislative action or approval.

28. Is the executive leadership subject to criminal proceedings?

100
28a. In law, the heads of state and government can be prosecuted for crimes they commit.

YES | NO

Comments:
No one is above the law in South Africa. Sections 7(1) and 9(1) of the Constitution provide for equality before the law and equal protection of the law. The law applies to all, irrespective of their positions in society. Members of the executive are not immune from prosecution while in office and there is currently no law that provides special exemptions and treatment for individual members of government.

For example, former Deputy President Jacob Zuma was charged and acquitted of rape while in office. Recently, the Directorate of Special Operations (DSO), known as the Scorpions, part of the National Prosecuting Authority (NPA) has charged National Police Commissioner Jackie Selebi with corruption, fraud, racketeering and defeating the ends of justice. The NPA's indictment against Selebi includes receiving corrupt payments totaling R1,2million (US$120,000) from Glenn Agliotti, a convicted drug smuggler accused of playing a role in the murder of mining magnate Brett Keble in 2005.

References:

S v Zuma 2006 (7) BCLR 790 (W)


YES: A YES score is earned if the heads of state and government can be investigated, charged or prosecuted for criminal allegations. Figurehead officials (symbolic figures without day-to-day authority) may be exempt.

NO: A NO score is earned if either the head of state or government cannot be investigated, charged or prosecuted for criminal allegations or the executive branch controls whether investigative or prosecutorial immunity can be lifted on the heads of state or government.

28b. In law, ministerial-level officials can be prosecuted for crimes they commit.

YES | NO

Comments:
One of the most important principles contained in the Constitution is the rule of law, enshrined in section 1(c). The law applies to all; ministerial level officials are treated like any other citizen. No-one is above the law or immune from prosecution. 7(1) and 9(1) of the Constitution provide for equality before the law. The law applies to all, irrespective of their positions in society. For example, section 6 of the Executive Members Ethics Act, 82 of 1998, states that nothing contained in the Act may prevent or delay the
prosecution of a cabinet member, deputy minister or MEC in a court. At present, no current Cabinet members are facing prosecution.

References:


YES: A YES score is earned if ministerial-level officials, or their equivalents, can all be investigated, charged or prosecuted for criminal allegations.

NO: A NO score is earned if any ministerial-level official, or equivalent official, cannot be investigated, charged or prosecuted for criminal allegations or the executive branch controls whether investigative or prosecutorial immunity can be lifted on ministerial-level officials.

29. Are there regulations governing conflicts of interest by the executive branch?

53

29a. In law, the heads of state and government are required to file a regular asset disclosure form.

YES | NO

Comments:
In terms of sections 5 of the Executive Ethics Code, prescribed by section 2 of the Executive Members Ethics Act, every member of the executive, including the President, is required to disclose to the secretary of cabinet (currently the director-general in the Presidency) particulars of all financial interests. The first disclosure must be made within 60 days after the promulgation of the Code or of assumption of office or of becoming aware of such interest, and thereafter annually.

References:

YES: A YES score is earned if the heads of state and government are required by law to file an asset disclosure form while in office, illustrating sources of income, stock holdings, and other assets. This form need not be publicly available to score a YES. Figurehead officials (symbolic figures without day-to-day authority) may be exempt.

NO: A NO score is earned if either the head of state or government is not required to disclose assets.
29b. In law, ministerial-level officials are required to file a regular asset disclosure form.

| YES | NO |

**Comments:**
In terms of sections 5 of the Executive Ethics Code, prescribed by section 2 of the Executive Members Ethics Act, every member of the executive, including the President, Ministers and Deputy Ministers, is required to disclose to the secretary of cabinet (currently the director-general in the Presidency) particulars of all financial interests. Members of Provincial executives, including Premiers and MECs, are also subject to the Act and Code, and must disclose to a senior official in the offices of the Provincial Premiers. The first disclosure must be made within 60 days after the promulgation of the Code or of a member’s assumption of office or of a member becoming aware of such interest, and thereafter annually.

**References:**

**YES:** A YES score is earned if ministerial-level officials, or their equivalents, are all required by law to file an asset disclosure form while in office, illustrating sources of income, stock holdings, and other assets.

**NO:** A NO score is earned if ministers are not required to disclose assets. A NO score is earned if some ministers must disclose assets, but other ministers are not required.

29c. In law, there are regulations governing gifts and hospitality offered to members of the executive branch.

| YES | NO |

**Comments:**
According to the Executive Ethics Code of 2000, a member may not solicit or accept a gift or benefit in return for any benefit received from the member in the member’s official capacity. The Code adds the proviso that a member may not solicit or accept only those gifts or benefits that constitute improper influence on the member, or an attempt to do exert such influence. When a member, in the course of the member’s duties, receives or has been offered a gift with a value of more than R1,000 (US$100) the member may request permission from the President or the Prime Minister to retain or accept it. If a member is given permission, s/he must disclose particulars of the gift. Where such permission has not been requested or granted, the member must return the gift, decline the offer or donate the gift to the state.

**References:**

**YES:** A YES score is earned if there are formal guidelines regulating gifts and hospitality offered to members of the executive branch of government.

**NO:** A NO score is earned if there are no guidelines or regulations with respect to gifts and hospitality offered to members of the executive branch. A NO score is earned if the guidelines are overly general and do not specify what is and is not appropriate.
29d. In law, there are requirements for the independent auditing of the executive branch asset disclosure forms (defined here as ministers and heads of state and government).

| YES | NO |

**Comments:**
There are no legislative provisions requiring the auditing of executive branch asset disclosure forms. However, the Auditor-General can, within his discretion, audit these records in terms of section 4 of the Public Audit Act.

In addition, in terms of section 7 of the Public Protector Act, the Public Protector can conduct own initiative investigations, which includes the possibility of monitoring compliance with the provisions of the Executive Code of Ethics.

**References:**


**YES:** A YES score is earned if there is a legal or regulatory requirement for independent auditing of executive branch asset disclosures. The auditing is performed by an impartial third-party. Figurehead officials (symbolic figures without day-to-day authority) may be exempt.

**NO:** A NO score is earned if there are no legal or regulatory requirements for the independent auditing of executive branch asset disclosures or if such requirements exist but allow for self-auditing.

29e. In law, there are restrictions on heads of state and government and ministers entering the private sector after leaving the government.

| YES | NO |

**Comments:**
There are currently no legal restrictions. However, the ANC’s 2007 National Policy Conference resolved to request their National Executive Committee to develop a clear framework to guide the flow of skills between the public and private sectors. This is intended to include a cooling off period and compensation for opportunities lost as a result of such restrictions.

The inclusion in the draft Single Public Service Bill of provisions related to post-employment restrictions for certain members of the civil service involved in procurement processes reflects a growing appreciation of the existence of a problem in this regard.

**References:**
YES: A YES score is earned if there are regulations restricting the ability of heads of state/government and ministers to take positions in the private sector after leaving government that would present a conflict of interest, including positions that directly seek to influence their former government colleagues. Figurehead officials (symbolic figures without day-to-day authority) may be exempt.

NO: A NO score is earned if no such restrictions exist.

29f. In practice, the regulations restricting post-government private sector employment for heads of state and government and ministers are effective.

| 100 | 75 | 50 | 25 | 0 |

Comments:
No restrictions currently exist, but at least there is now recognition in the ruling party's Resolutions that the problem exists and needs to be addressed.

Similarly, the inclusion in the draft Single Public Service Bill of provisions related to post-employment restrictions for certain members of the civil service involved in procurement processes reflects a growing appreciation of the existence of a problem in this regard.

Many media reports reflect public concern about the absence of post-employment restrictions governing senior members of the executive branch of government. A notable example is Valli Moosa, erstwhile Minister of Environment Affairs and Tourism, who became Chairman of the Board of Eskom, and is alleged to have approved contracts favoring tenderers connected to the government.

References:


Eskom's big connections Mail & Guardian June 13, 2008. Available at: http://www.mg.co.za


100: The regulations restricting post-government private sector employment for heads of state/government and ministers are uniformly enforced. There are no cases or few cases of those officials taking jobs in the private sector after leaving government where they directly lobby or seek to influence their former government colleagues without an adequate cooling off period.

75:

50: The regulations are generally enforced though some exceptions exist. In certain sectors, heads of state/government or ministers are known to regularly take jobs in the private sector that entail directly lobbying or seeking to influence their former government colleagues. Cooling off periods are short and sometimes ignored.

25:
The regulations are rarely or never enforced. Heads of state/government or ministers routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced.

29g. In practice, the regulations governing gifts and hospitality offered to members of the executive branch are effective.

Comments:
The Executive Ethics Code of 2000, as published in terms of section 2 of the Executive Ethics Act, 82 of 1998, prescribes the rules governing the acceptance of gifts, hospitality and travel privileges for members of the executive. It requires all executive members to request permission from the President for the gifts to be retained and thereafter to disclose such gifts, as prescribed under section 6 of the Executive Ethics Code of 2000.

In practice, the provisions of the Code are sometimes interpreted generously. Thus, in terms of the regulations governing gifts and hospitality offered to executive members, the Public Protector investigated the alleged non-disclosure of a gift of accommodation by the government of the United Arab Emirates during an unofficial trip by Deputy President Phumzile Mlambo-Ngcuka. The Public Protector found that the accommodation did not constitute a gift in terms of the Code. It did not therefore need to be disclosed.

By contrast, in a more recent report, the Public Protector found that the Minister of Public Service and Administration had failed to comply with the Code's provisions to disclose a gift valued at R2 500 and to obtain permission from the President to retain it.

References:


100: The regulations governing gifts and hospitality to members of the executive branch are regularly enforced. Members of the executive branch never or rarely accept gifts or hospitality above what is allowed.

75:

50: The regulations governing gifts and hospitality to members of the executive branch are generally applied though exceptions exist. Some ministers in certain sectors are known to accept greater amounts of gifts and hospitality from outside interest groups or private sector actors than is allowed.

25:

0: The regulations governing gifts and hospitality to members of the executive branch are routinely ignored and unenforced. Ministers and other members of the executive branch routinely accept significant amounts of gifts and hospitality from outside interest groups and actors seeking to influence their decisions.

29h. In practice, executive branch asset disclosures (defined here as ministers and above) are audited.
In principle, disclosures can be and are audited from time to time, for example by the Auditor-General. The Public Protector can, in principle, conduct own initiative investigations into the level of compliance. In practice, however, such auditing does not take place on a regular basis.

The Western Cape Premier’s office does not conduct a detailed audit of the contents of disclosures, but does routinely verify directorships disclosed. Attempts to establish whether the Presidency conducts any form of audit of disclosures received did not receive any response.

References:


Public Protector Act, No. 23 of 1994). Available at: http://www.publicprotector.org

Telephonic interview with the Registrar in the Western Cape Premier’s office, Khasim Ahmed, Sept.1, 2008, Cape Town.

100: Executive branch asset disclosures are regularly audited using generally accepted auditing practices.

75:

50: Executive branch asset disclosures are audited, but audits are limited in some way, such as using inadequate auditing standards, or the presence of exceptions to disclosed assets.

25:

0: Executive branch asset disclosures are not audited, or the audits performed have no value. Audits may be performed by entities known to be partisan or biased in their practices.

30. Can citizens access the asset disclosure records of the heads of state and government?

67

30a. In law, citizens can access the asset disclosure records of the heads of state and government.

Comments:
In terms of section 7.1 of the Executive Members Ethics Code of 2000, each cabinet secretary (i.e. in the national and provincial cabinets), is required to keep a register of all financial interests disclosed by members. The register must have a confidential and a public part. Section 7.5 states that any person has access to the public part of a register during office hours.
Section 2(2)(d) of the Act prescribes that access to the public part of the Register of Interests must at least be under the same conditions as is required by members of the National Assembly.

References:

YES: A YES score is earned if the heads of state and government file an asset disclosure form that is, in law, accessible to the public (individuals, civil society groups or journalists).

NO: A NO score is earned if there is no asset disclosure for either the head of state or government. A NO score is earned if the form is filed, but not available to the public.

30b. In practice, citizens can access the asset disclosure records of the heads of state and government within a reasonable time period.

100  |  75  |  50  |  25  |  0

 Comments:
Section 7.1 of the Executive Ethics Code states that the register held by the secretary to cabinet (Director-General in the Presidency and the Provincial Premiers offices) must have a confidential and a public part. Section 7.5 of the Code states that any person has access to the public part of a register during the office hours of the secretary concerned.

For members of the public to access the asset disclosure records of the head of state and government, one has to write a formal letter requesting that he/she be allowed to access those records, and send it to the Presidency. However, it is unclear how long that process will take before that person can access those records, if at all he/she will eventually be allowed to access the records.

The Presidency's website does not disclose that the Director-General in the Presidency bears this responsibility. Nor does it provide any information regarding the Act or Code, apart from a link to the Constitution, including section 96, which provides for legislation to prescribe a code of ethics.

The website of the Western Cape Provincial government's website does not contain details of or any information about the Register. Only contact details for the office appear. The Premier's office requires only a written request for access to the public part of the Register. After any necessary consultation with its legal department, and depending on the circumstances at the time, personal perusal of the Register can take place within a week or two. If a request is reasonable in scope and extent, extracts will be posted to a requester as soon as possible. As members of the executive are also members of the Provincial legislature requester may also be advised to contact the legislature directly, where access to their Register may be quicker.

According to PIMS' 2003 research, there was a lack of clarity in the Presidency about whether the records could be accessed or not. The research also showed that while it was established that the public section of the records could be accessed, it was not clear what procedure needed to be followed. It is not known whether the public part of the records of heads of state and government has been accessed by citizens. The secretary in the office of the Presidency stated that an application in the form of a letter would have to be made to access the asset disclosure records of the president; the office said each department would deal with the application of each cabinet minister. The official was unable to provide any statistics regarding the number of cases where citizens had accessed the asset disclosure records of the president.

More recent attempts to establish whether these processes in the Presidency are now characterized by any greater degree of clarity and user-friendliness did not receive any response.

References:
Presidency's website
http://www.thepresidency.gov.za;
100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some additional delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

30c. In practice, citizens can access the asset disclosure records of the heads of state and government at a reasonable cost.

Comments:
The Western Cape Premier’s office doesn't levy any charge for a reasonable number of copies of extracts from the Register. However, there may be costs associated with traveling to the office to view the Register, if the requester opts not to submit a written request for extracts to be posted.

According to PIMS’ 2003 research, the researchers had to travel to the office of the Presidency in Pretoria to view the public part of the record, which is a trip most ordinary citizens cannot afford. The Executive Members’ Ethics Act does not require that copies be provided to those who request the documents. Furthermore, the documents are not available on the Presidency’s web site.

More recent attempts to establish whether these processes in the Presidency are now characterized by any greater degree of clarity and user-friendliness did not receive any response.

References:

Presidency’s web site
http://www.thepresidency.gov.za

http://www.idasa.org.za

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or CSOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or CSOs trying to access this information.

26. Can citizens sue the government for infringement of their civil rights?

YES | NO

Comments:
In terms of the Institution of Legal Proceedings Against Certain Organs of State Act (Act 40 of 2002), legal proceedings can be instituted for the recovery of a debt. According to the Act, debt includes any delictual, contractual or any other liability or cause of action for which an organ of state is liable to pay damages.

Citizens can also pursue their actions in terms of the law of delict. The criteria for negligence would have to be proven. This can be seen clearly in the case of Carmichele, where an accused in a rape case was released on bail and, while awaiting trial, assaulted a citizen. In developing the law, the court observed that section 7(2) of the Constitution imposed a duty on the state to respect, protect, promote and fulfill the fundamental human rights. These included the right to dignity, life, freedom and security of all persons. The responsibility for these constitutional duties imposed on the state rested inter alia on the police and the prosecution services. The court found that in the determination of any particular case, officials of the state owed the public in general, and women in particular, a duty in private law to exercise reasonable care in the prevention of violent crime. The proper application of the test required courts to attach primary significance to the constitutional imperatives imposed by section 7(2). In addition, the absence of a public law remedy compelled the recognition of a private law claim against the state for damages in delict.

References:
Carmichele v Minister of Safety and Security and Another 2002 (10) BCLR 1100. Available at: http://www.saflii.org/za/cases/ZASCA/2003/117.html


YES: A YES score is earned if all citizens (citizen is defined broadly, to include all ethnicities, or anyone born in the country) can receive compensation or redress through the courts for civil rights violations committed by the government, such as failure to follow due process of law when detaining suspected criminals.
31. Official government functions are kept separate and distinct from the functions of the ruling political party.

50

31. In practice, official government functions are kept separate and distinct from the functions of the ruling political party.

Comments:
There is a view that at times the ruling African National Congress party has used its political dominance to subordinate and even interfere with state or independent institutions. The division in ANC leadership over the country's intelligence services is an example, as is the so-called Oilgate scandal over party funding.

The first relates to the ANC succession battle prior to the Polokwane National Conference in 2007, where allegations surfaced that intelligence operatives under the command of former Director-General of the National Intelligence Agency (NIA) Billy Masetlha, allied to ANC President Jacob Zuma, conducted illegal surveillance over Saki Macozoma, a businessman and staunch ally of President Thabo Mbeki.

In the Oilgate matter, in 2005 the Mail & Guardian newspaper reported that the state-owned oil company, PetroSA, irregularly paid R15 million (US$1.5 million) to Imvume Management, a company closely tied to the ANC at a time when the party was desperate for funds to contest elections in 2004. The Mail & Guardian claimed to be in possession of bank statements and other forensic evidence proving that Imvume had transferred the major portion of this payment to the ANC within days of receipt, leaving its debt to a sub-contractor unpaid.

The legislation recently introduced to disband the Scorpions anti-corruption unit has been seen by many as representing a blurring of the distinction between party and state. The fact that the Speaker of Parliament, Baleka Mbete, is also the Chairperson of the African National Congress is another example often cited, as is the weakness of Parliamentary oversight of executive action. However, Parliament's performance during 2008 has shown signs of greater willingness to utilize its extensive powers in this regard, albeit unevenly.

References:


Clear rules are followed distinguishing state functions from party activities. Government funds are never used for party activities. The civil service is completely distinct from party bureaucracy.

The ruling party is, in principal, separate from the state, but exceptions to this standard sometimes occur. Examples may be the use of civil servants to organize political rallies, use of government vehicles on campaign trips, or use of government funds for party purposes.

The government bureaucracy is an extension of the ruling party. There are few boundaries between government and party activities. Government funds, equipment and personnel are regularly used to support party activities.

III-2. Legislative Accountability

32. Can members of the legislature be held accountable for their actions?

100

32a. In law, the judiciary can review laws passed by the legislature.

YES | NO

Comments:
Section 8 of the Constitution provides that the Bill of Rights, of which Sections 34 and 38 form part, applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. Section 34 provides that everyone has access to the courts, and Section 38 provides that anyone listed may approach the courts in order to enforce the rights in the Constitution, and for appropriate relief.

References:

YES: A YES score is earned if there is a formal process by which the judiciary or constitutional courts can pass judgments on the legality or constitutionality of laws passed by the legislature.

NO: A NO score is earned if no such mechanism exists. A NO score is earned if judicial review is vaguely established in law or regulation without formal procedures. A NO score is earned if general exceptions exist exempting certain legislative actions from being reviewed (a national security exemption, for example).

32b. In practice, when necessary, the judiciary reviews laws passed by the legislature.
Comments:
The Constitutional Court handed down judgment in an application brought by members of the Merafong community, challenging the validity of parts of the Constitution Twelfth Amendment Act of 2005, as well as of the Cross-boundary Municipalities Laws and Repeal Related Matters Act 23 of 2005.

Similarly, the Constitutional Court has held, in the Matatiele and Doctors for Life decisions, that the KwaZulu-Natal Provincial legislature and Parliament, respectively, had failed to comply with its obligations to facilitate public participation in the legislative process.

The SCA considered the implications of the Special Investigating Units and Special Tribunals Act, No. 74 of 1996 for the separate juristic entities established in terms of the Act, and found that liability for the wrongful acts of the one does not devolve upon the other.

A study by the Legal Resources Center shows how the courts have undertaken reviews of legislation.

References:


Matatiele Municipality and Others v President of the Republic of South Africa and Others CCT 73/05 Aug. 18, 2006. Available at: http://www.constitutionalcourt.org.za

Doctors for Life v Speaker of the National Assembly and Others CCT 12/05 2006 (12) BCLR 1399 (CC). Available at: http://www.constitutionalcourt.org.za


100: When constitutional or legal questions or possible violations are raised, the judiciary is aggressive in reviewing laws passed and can void illegal or unconstitutional actions. The judiciary is fair and nonpartisan in its application of this power.

75:

50: The judiciary will review laws passed, but is limited in its effectiveness. The judiciary may be slow to act, unwilling to take on politically sensitive issues, or occasionally unable to enforce its judgments.

25:

0: The judiciary does not effectively review laws passed. The judiciary may make judgments but not enforce them, or may fail to pass judgments on executive abuses. The judiciary may be partisan in its application of power.

32c. In law, are members of the national legislature subject to criminal proceedings?

YES | NO
Comments:
Section 9 of the Constitution provides that all are equal before the law. Section 165 of the Constitution provides for the independence and authority of the courts.

In addition, section 24 of the Powers and Privileges Act has the clear implication that members of Parliament are susceptible to criminal prosecution, except in respect of the rights arising from speech protected in terms of this Act.

The Travelgate prosecution of the last Member of Parliament for alleged abuse of travel vouchers is due to come to trial in early 2009. A significant number of MPs from most of the parties represented in Parliament have concluded plea bargains with the National Prosecuting Authority admitting guilt in exchange for a sentence not exceeding 12 months. This option allowed them, in terms of section 47 of the Constitution, to retain their seats in Parliament, although they were publicly sanctioned by the Speaker.

In S v Yengeni 2006 (1) SACR 405 (T), the Chief Whip of the African National Congress in Parliament, was convicted of fraud in connection with the government’s arms procurement contract, on the grounds that he failed to admit to Parliament that he had received a significant discount on the purchase price of a motor vehicle.

References:


YES: A YES score is earned if all members of the legislature can, in law, be investigated and prosecuted for criminal allegations.

NO: A NO score is earned if any member of the legislature cannot, in law, be investigated and prosecuted for criminal proceedings. A NO score is also earned if the legislative branch itself controls whether investigative or prosecutorial immunity can be lifted on members of the legislature.

33. Are there regulations governing conflicts of interest by members of the national legislature?

33a. In law, members of the national legislature are required to file an asset disclosure form.

YES | NO

Comments:
Section 6 of the Code of Conduct requires annual disclosure of certain assets and interests to an official appointed by the Speaker of the National Assembly and the Chairperson of the National Council in terms of section 3. Sections 12 and 13 require that a member must declare any personal or private financial or business interests to parliamentary committees and forums when making representations. The Code is a schedule to the joint rules of Parliament.

References:
YES: A YES score is earned if all members of the legislature are required by law to file an asset disclosure form while in office, illustrating sources of income, stock holdings, and other assets. This form does not need to be publicly available to score a YES.

NO: A NO score is earned if any member of the legislature is not required to disclose assets.

33b. In law, there are restrictions for national legislators entering the private sector after leaving the government.

YES | NO

Comments:
No legislation governs such matters. Neither does the Code of Conduct deal with it.

However, the Public Administration Management Bill introduced in 2008, but subsequently withdrawn, contains provisions proposing the regulation of post-employment opportunities, but only in respect of public servants involved in procurement functions.

This follows adoption by the African National Congress at its 52nd National Congress of a resolution in the following, rather broader, terms:

1. The NEC needs to urgently develop a clear framework to guide the flow of skills between the public and private sector. This framework must specify:
   a. a period during which public representatives and senior officials in the public service should be prohibited from accepting appointment to a board of directors, any form of employment or any other substantial benefit from a national or international private sector organization to which a contract, tender or partnership arrangement has been awarded, or in the process of negotiation by the public organization to which the official was attached.
   b. compensation for public representatives and senior officials who are prohibited from the above.
2. Public representatives and senior officials must desist from using their former public office, including supplying any information or other strategic advantage, for the benefit of any private sector organization;
3. Mechanisms currently in existence must be strengthened to curb the possibilities of the abuse of public office for personal gain.

References:
Code of Conduct with regard to Financial Interests for Assembly and Permanent Council Members. Available at:
http://www.parliament.gov.za
http://www.pmg.org.za/parlinfo/joinrules

Public Administration Management Bill [B47-2008]. Available at:
http://www.pmg.org.za
http://www.info.gov.za

African National Congress, 2007. 52nd National Conference Resolutions. Available at:
http://www.anc.org.za

YES: A YES score is earned if there are regulations restricting national legislators’ ability to take positions in the private sector after leaving government that would present a conflict of interest, including positions that directly seek to influence their former government colleagues.

NO: A NO score is earned if no such restrictions exist.

33c. In law, there are regulations governing gifts and hospitality offered to members of the national legislature.
Comments:
Section 7(f) read with section 8(i)-(iii) of the Code of Conduct require members to disclose gifts (other than from family members) and to provide a description and the value and source of the gift, if it is in excess of R1,500 (US$150) according to the version of the Code on Parliament's web site. (The version of the Code available on the web site of the Parliamentary Monitoring Group (http://www.pmg.org.za) appears to be out of date with its figure of R350 – US$35.) Disclosure must also take place where the cumulative value of gifts in a calendar year is in excess of R1,500. A member must also disclose any hospitality which was intended as a gift in kind.

A limiting feature of the Code is that it is preventative, lacking prescribed punitive measures, which are left to the discretion of the Speaker and the political party to which the offending member belongs.

References:
Code of Conduct with regard to Financial Interests for Assembly and Permanent Council (i.e. National Council of Provinces) Members. Available at:
http://www.parliament.gov.za
http://www.pmg.org.za/parlinfo/jointrules

YES: A YES score is earned if there are formal guidelines regulating gifts and hospitality for members of the legislature.

NO: A NO score is earned if there are no guidelines or regulations with respect to gifts or hospitality offered to members of the legislature. A NO score is earned if the guidelines are general and do not specify what is and is not appropriate.

33d. In law, there are requirements for the independent auditing of the asset disclosure forms of members of the national legislature.

YES | NO

Comments:
At present there is no provision within the Public Audit Act governing the auditing of the asset disclosure forms of members of the national legislature. However, in terms of section 188(4) of the Constitution, read with the Public Audit Act, it is arguable that the Auditor-General can, within his discretion, audit the asset disclosure forms by members of the legislature. Similarly, in terms of section 7 of the Public Protector Act, the Public Protector can conduct own initiative investigations, which includes the possibility of monitoring compliance with the provisions of the parliamentary code of ethics.

In terms of Rule 3 of the Code of Conduct in terms of the Rules of Parliament, the Registrar must open and keep the Register, and record members’ interests. The Registrar does not ordinarily inquire into the details of a member’s disclosure unless instructed to do so by the Joint Committee on Ethics and Members’ Interests.

References:
The Constitution of the Republic of South Africa (Act 108 of 1996). Available at:
http://www.info.gov.za

Public Audit Act (Act 25 of 2004). Available at:
http://www.agsa.co.za

Public Protector Act, No. 23 of 1994. Available at:
http://www.publicprotector.org

Code of Conduct with regard to Financial Interests for Assembly and Permanent Council Members. Available at:
http://www.parliament.gov.za
Interview with Registrar of Members’ Interests, Ms. Fazela Mahommed, Aug. 28 and Sept. 2, 2008, Cape Town.

YES: A YES score is earned if there is a legal or regulatory requirement for independent auditing of legislative branch asset disclosures. The auditing is performed by an impartial third-party.

NO: A NO score is earned if there are no legal or regulatory requirements for the independent auditing of legislative branch asset disclosures or if such requirements exist but allow for self-auditing.

33e. In practice, the regulations restricting post-government private sector employment for national legislators are effective.

100 | 75 | 50 | 25 | 0

Comments:
No legislation governs such matters. Neither does the Code of Conduct deal with it.

References:
Code of Conduct with regard to Financial Interests for Assembly and Permanent Council Members. Available at:
http://www.parliament.gov.za
http://www.pmg.org.za/parlinfo/jointrules

Global Integrity Country Report South Africa, 2006, Available at:
https://last.globalintegrity.org/reports/2006/index.cfm

100: The regulations restricting post-government private sector employment for national legislators are uniformly enforced. There are no cases or few cases of legislators taking jobs in the private sector after leaving government where they directly lobby or seek to influence their former government colleagues without an adequate cooling off period.

75:

50: The regulations are generally enforced though some exceptions exist. In certain sectors, legislators are known to regularly take jobs in the private sector that entail directly lobbying or seeking to influence their former government colleagues. Cooling off periods are short and sometimes ignored.

25:

0: The regulations are rarely or never enforced. Legislators routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced.

33f. In practice, the regulations governing gifts and hospitality offered to national legislators are effective.

100 | 75 | 50 | 25 | 0

Comments:
There have been no reports within the past 12 months of irregularities relating to gifts and hospitality offered to national...
legislators. However, a recent media report states that at least 12 members claimed they had nothing to disclose in the 2008 declaration. This seems improbable, given that the Code of Conduct with regard to Financial Interests for Assembly and Permanent Council Members contains provisions requiring the disclosure of interests in land and property including, but not limited to, ownership, as well as any interest in a pension. In view of the relatively substantial remuneration packages for Members of Parliament, the supposed absence of even such interests would, at least, suggest the need for inquiry and explanation.

According to a media report, in 2007, only two members failed to lodge declarations, but this was on account of serious illness.

There are several weaknesses in the rules applicable the members of the national legislature. Firstly, unlike the rule applicable to members of the executive, there is currently no rule requiring members of the national legislature to seek permission to retain a gift or gifts cumulatively exceeding the current threshold value of R1,500 (US$150). They are required merely to make subsequent disclosure. The absence of such a requirement means that there is, secondly, no obligation on legislature members to avoid the possibility of a conflict of interest.

In terms of Rule 124(2) of Part 11, Joint Committee on Ethics and Members’ Interests of the Rules of Parliament, the Committee is required to report annually to both Houses of Parliament on the implementation and effectiveness of the Code.

However, Rule 125 requires that meetings of the Joint Committee must be held in closed session when the Committee considers a matter affecting a specific Assembly or Council member and the Committee regards that matter to be confidential. Moreover, Rule 127(1) provides that members and staff of the Joint Committee must take an oath of confidentiality.

These discretionary provisions limiting transparency constitute a third area of weakness in the rules.

While, therefore, the fact that some members are alleged to have failed to declare any interests, the view is taken that the true test of the Rules is not necessarily that members failed to declare any interests but, rather, whether that failure is tested for accuracy, and whether remedial action or sanctions follow if appropriate.

A significant difficulty arises at this point as, in practice, proceedings of the Committee are closed. Accurate assessment of the rigor of the Committee’s inquiries and the fairness of sanctions is thereby compromised as it is entirely reliant on any information released by the Committee. Historically, information regarding infractions and disciplinary actions has been quite limited.

These factors may have contributed to a perception by members that the disclosure of registrable interests is not an obligation to be taken particularly seriously.

References:

Code of Conduct with regard to Financial Interests for Assembly and Permanent Council Members. Available at: http://www.parliament.gov.za

Interview with the Registrar of Members’ Interests, Ms. Fazela Mahommed, Aug. 28 and Sept. 2, 2008, Cape Town.


100: The regulations governing gifts and hospitality to national legislators are regularly enforced. Legislators never or rarely accept gifts or hospitality above what is allowed.

75:

50: The regulations governing gifts and hospitality to national legislators are generally applied though exceptions exist. Some legislators in certain sectors are known to accept greater amounts of gifts and hospitality from outside interest groups or private sector actors than is allowed.

25:
The regulations governing gifts and hospitality to national legislators are routinely ignored and unenforced. Legislators routinely accept significant amounts of gifts and hospitality from outside interest groups and actors seeking to influence their decisions.

In practice, national legislative branch asset disclosures are audited.

Comments:
The Register of Members' Interests is not routinely audited by the Registrar of Members' Interests or anyone else. Inquiries into the contents of declarations take place on a reactive basis only, following receipt of a complaint or allegation of irregularity.

The Register of Members' Interests was adopted by the Parliamentary Joint Committee on Ethics and Members Interests on Sept. 20, 2007. The minutes of the meeting indicate that the Register would be available on the Parliamentary web site shortly, but was still not on the web site as of Aug. 28, 2008.

The 2008 disclosure reports were due to be filed with the Registrar on June 20, 2008, but as of Aug. 28, 2008, the Joint Committee on Ethics and Members Interests had not met to consider them.

References:

Interview with the Registrar of Members' Interests, Ms. Fazela Mahommed, Aug. 28 and Sept. 2, 2008.

100: Legislative branch asset disclosures are regularly audited using generally accepted auditing practices.

75:

50: Legislative branch asset disclosures are audited, but audits are limited in some way, such as using inadequate auditing standards, or the presence of exceptions to disclosed assets.

25:

0: Legislative branch asset disclosures are not audited, or the audits performed have no value. Audits may be performed by entities known to be partisan or biased in their practices.

34. Can citizens access the asset disclosure records of members of the national legislature?

YES | NO

34a. In law, citizens can access the asset disclosure records of members of the national legislature.
In terms of section 11(1) and (2) of the Code of Conduct for Assembly and Permanent Council Members, any person has access to the public part of the register on a working day during office hours. The registrar must publish the public part of the register during April of each year in a manner determined by the Joint Committee on Ethics and Members Interests. Section 10 of the code makes provision for a confidential part of the register, to which only a committee member, the registrar and staff assigned to the committee have access.

References:

YES: A YES score is earned if members of the national legislature file an asset disclosure form that is, in law, accessible to the public (individuals, civil society groups or journalists).

NO: A NO score is earned if there is no asset disclosure for members of the national legislature. A NO score is earned if the form is filed, but not available to the public.

34b. In practice, citizens can access legislative asset disclosure records within a reasonable time period.

Comments:
The public part of the Register of Members Interests is not accessible on Parliament’s web site. However, the telephone number and postal address of the Registrar of Members’ Interests are available on the website.

In an interview with the Registrar, she indicated that Parliament’s IT department is responsible for posting the public part of the Register onto Parliament’s web site. A request for an extract from the Register will be attended to immediately by the Registrar.

The Parliament issues a general media release when the Register becomes available.

References:

Interview with the Registrar of Members’ Interests, Ms. Fazela Mahommed, Aug. 28, 2008.


100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:
Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

In practice, citizens can access legislative asset disclosure records at a reasonable cost.

Comments:
Unlike in previous years, these records are not currently accessible electronically on the Parliament’s web site. The majority of citizens do not have access to the Internet. Apart from the costs of a telephone call or a letter, there are no additional costs involved in obtaining an extract from the Register, which will be provided free of charge in the format requested, for example, by email, fax or post.

References:
Interview with the Registrar of Members’ Interests, Ms. Fazela Mahommed, Aug. 28, 2008.

Parliament’s web site:

Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

Records impose a financial burden on citizens, journalists or CSOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or CSOs trying to access this information.

35. Can citizens access legislative processes and documents?

YES | NO

35a. In law, citizens can access records of legislative processes and documents.

Comments:
The right of access to information is enshrined as a fundamental right in the South African Constitution. Section 32 (1) of the Bill of Rights states that:

(a) everyone has the right of access to any information held by the state and
(b) any information that is held by another person and that is required for the exercise or protection of any rights.
The Promotion of Access to Information Act (Act 2 of 2000) gives effect to the constitutional right of access. The Act provides for the right of access to any information held by the state and any information that is held by another person and that is required for the exercise of protection of any rights. Section 11(1) states that a requester must be given access to a record of a public body if:

(a) The requester complies with all the procedural requirements in the Act relating to a request for access to that record; and
(b) Access to that record is not refused in terms of any ground for refusal contemplated in chapter 4 of this part.

Section 18 (1)-(3) of the Promotion of Access to Information Act (Act 2 of 2000) sets out the procedure which the requester must follow. Nevertheless, there are certain exceptions to the above which are contained in section 41 of the Act. According to this section, the record of a public body can be refused if, among other considerations, it reasonably could cause prejudice to the security and defense of the Republic. However, most legislative processes and documents do not fall within these exclusions, and access is mostly a matter of routine.

References:


YES: A YES score is earned if there is a general legal right to access records of legislative proceedings including voting records. A YES score can still be given if there are formal rules for specific exemptions to the right to disclosure (special secret sessions related to national security).

NO: A NO score is earned if there is no general right to access documents recording legislative proceedings. A NO score is earned if there exemptions to the general right that are not clearly defined by formal rules.

35b. In practice, citizens can access records of legislative processes and documents within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:
Records of legislative processes and documents are easily accessible, within a relatively short period of time. The independent Parliamentary Monitoring Group (PMG) captures informal minutes of all open parliamentary committee meetings, which are posted online along with audio recordings and all relevant public documents. Audio recordings are made available immediately, while meeting reports and relevant documents are available within three working days of the committee proceedings.

Transcripts of Parliamentary proceedings are also captured in the Hansard system, and can be accessed for free from the Parliament's web site, although the web site is not always up to date.

In cases where information is required that is not available through PMG or the Parliamentary web site, individuals can request information through the Promotion of Access to Information Act (Act 2 of 2000).

The PAIA states that public bodies currently have 30 days to respond to requests for information (reduced from 60 days before March 2003 and 90 days before March 2002). The Clerk of the Papers in Parliament is delegated in terms of the Act to provide information and assist the public with accessing parliamentary records.

Requests for access to records that are automatically available to the public can be made by phone, fax, e-mail or letter. Other records have to be requested in terms of the PAIA and the requester is required and expected to comply with all the procedural requirements of the Act. Such records include decisions related to procurement, employment contracts, etc.

In practice, it appears that parliamentary staff are generally more accustomed to responding to requests for information than staff of other public bodies, and many requests are dealt with efficiently.
100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

35c. In practice, citizens can access records of legislative processes and documents at a reasonable cost.

Records of legislative processes and documents are easily accessible, and at a relatively low cost. The independent Parliamentary Monitoring Group (PMG) captures informal minutes of all open parliamentary committee meetings, which are posted online along with audio recordings and all relevant public documents. Audio recordings are made available immediately, while meeting reports and relevant documents are available within three working days of the committee proceedings. While some information is freely accessible, other content requires a subscription for access. However, subscription fee exemptions exist for: non-governmental and community-based organizations; public educational institutions; government departments; legislatures; municipalities; trade unions; and journalists.

Transcripts of Parliamentary proceedings are also captured in the Hansard system, and can be accessed for free from the Parliament’s web site.

In cases where information is required that is not available through PMG or the Parliamentary website, individuals can request information through the Promotion of Access to Information Act (Act 2 of 2000).

The costs of accessing information are prescribed by the Regulations to the Promotion of Access to Information Act (PAIA)(Act 2 of 2000), and are applicable to all public bodies. These costs are reasonable, and are not prohibitive. A fee of R35 (US$3.50) is
payable by all requesters, with the exception of individuals requesting personal information about themselves.

The Regulations also prescribe the following costs in respect of information from public bodies: photocopies, R0.60 (US$0.06) per A4-page; printing, R0.40 (US$0.04) per A4-page; copy onto a stiffy disc, R5 (US$0.5); copy onto a compact disc, R40 (US$4); transcription of visual images, R22 (US$2.2) per A4-page; copy of visual images, R60 (US$6); transcription of an audio record, R12 (US$1.2) per A4-page; copy of an audio record, R17 (US$1.7).

In addition, an access fee of R15 (US$1.5) is applicable for each hour or part of an hour, excluding the first hour, reasonably required for search and preparation of a record for disclosure. A deposit must be paid where search and preparation will exceed six hours, and one-third of the fee is payable as a deposit by the requester.

Further, the actual postage is payable when a copy of a record must be posted to a requester.

In practice, it appears that parliamentary staff are generally more accustomed to responding to requests for information than staff of other public bodies. Further, Parliament does not enforce the requirement of a request fee (R35 = US$3.5), though the requester may be asked to pay the access fee when access is granted, depending on the hours required to search and prepare the record for disclosure. Fees related to reproducing information do, however, apply.

It is important to note that, according to the Open Democracy Advice Center (ODAC), an exemption has also been introduced, whereby individuals who are unemployed or earn below a determined annual income no longer have to pay any fees associated with accessing information from either a public or private body.

However, while the costs specified are reasonably low, a requester may incur other costs, for example, in terms accessing the internet, or communication and travel to access information. Also, if a requester was denied information and initiated legal proceedings, costs would likely increase substantially, to levels beyond the financial means of most citizens.

The Open Democracy Advice Center (ODAC) observes that generally, cases involving access to information are heard at the High Court level. The associated costs, which would include fees for both an advocate and attorney, are estimated to range from R300,000 (US$30,000) to R2 million (US$200,000).

There have been growing calls for the Rules Board to finalize rules for the use of the PAIA, and to develop an adjudication system for speedy resolution of contested decisions to withhold release of records. The rules as developed by the Rules Board have been tabled in Parliament for consideration by the Justice Committee, but are unlikely to be passed during the current (2008) session.

The adjudication authority has been endorsed by the findings of a Parliamentary Ad Hoc Committee investigation into the functioning of the state institutions supporting democracy, but the Committee's report has not yet been discussed by Parliament, and it is unlikely that it will be discussed this session.

References:

Interview with Mukelani Dimba, Deputy Chief Executive Officer, Open Democracy Advice Centre (ODAC), Oct. 16, 2008.


100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or CSOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or CSOs trying to access this information.

**82**

III-3. Judicial Accountability

36. Are judges appointed fairly?

100

36a. In law, there is a transparent procedure for selecting national-level judges.

Comments:

Procedures governing the appointment, tenure and dismissal of judges and magistrates are regulated by the Constitution of the Republic of South Africa and by relevant Acts of Parliament. These procedures are relatively comprehensive, and while the executive (in the person of the President) has constitutional mandate in the appointment of the most senior judicial officers of the Constitutional Court and Supreme Court of Appeals, judicial independence is upheld through the functions of the independent Judicial Service Commission (JSC), which consider applications and make recommendations to the President.

Procedures for the appointment of judges are captured in Section 174(7) of the Constitution, where it is specified that any candidate for judicial office must be appropriately qualified, fit and proper, and a citizen of South Africa. The Constitution further specifies that the need for the judiciary to reflect broadly the racial and gender composition of the country should be taken into account in the appointment of new judicial officers. All judicial officers must be appointed in terms of an Act of Parliament, and must take an oath or affirm their commitment to upholding and protecting the Constitution before assuming office.

The JSC is established in Section 178(1) of the Constitution, and is assigned primary responsibility for the appointment of all judges. This represents a significant break from the pre-1994 system, under which judicial appointments were made directly by the national executive. The powers and functions of the JSC are stipulated in both the Constitution and the Judicial Service Commission Act. The responsibilities of the Commission include consultation with the executive on the selection of the Chief Justice and Deputy Chief Justice: judicial officers who also serve as the President and Deputy President of the Constitutional Court.

Section 174(4) further requires the JSC to prepare a list of judges to be nominated for appointments to the Constitutional Court, also made by the Executive, for advising the Executive on the selection of all other judges (Section 174 (6)), and for participating
Section 174(3) of the Constitution establishes specific procedures for the confirmation of all judicial officers in South Africa. Prior to appointing the Chief Justice and Deputy Chief Justice, and the President and Deputy President of the Supreme Court of Appeal, the President of the Republic as head of the national Executive is obliged to consult with both the JSC, and leaders of political parties represented in the National Assembly. All other judges in the Constitutional Court are also appointed by the President of the Republic, following consultations with the President of the Constitutional Court and leaders of political parties represented in the National Assembly.

In preparation for the appointment of new judges to the Constitutional Court, the JSC is obligated in terms of Section 174(4)(a) of the Constitution to provide the President of the Republic with a list of nominee candidates with at least three names more than the number of appointments to be made. Section 174(4)(b) stipulates that the President may make appointments to the Constitutional Court from this list of nominees. This Section also obliges the President, in turn, to advise the JSC if any nominees are unacceptable and provide reasons for this, and to indicate whether appointments remain. In such cases, Section 174(4)(c) requires the JSC to provide the President with a list of further nominees, from which the President may make an appointment.

According to Section 174(6) of the Constitution, the President of the Republic is also required to appoint all other judges in other courts in South Africa, on the specific advice of the JSC. Section 174(7) further specifies that other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice. The JSC assumes a central role in the nomination, interviewing and selection of judges, and the interview process takes place publicly, lending transparency to the appointment process. The JSC is also permitted discretion in condoning, or in departing from these procedures whenever appropriate to do so.

References:
Comments:
Section 174 of the Constitution specifies that any person can be appointed as judicial officer if they are fit and proper, and requires that persons appointed to the Constitutional Court are also South African citizens. The Constitution also requires that the racial and gender composition of the country must be taken into account in judicial appointments.

Broadly speaking, the Judicial Service Commission is viewed as conforming to democratic principles in the appointments process, with decisions generally consensus based rather than simple majority which is required by the rules of procedure. The public is also permitted to comment on candidates selected for interviews, and the JSC has obliged itself to distribute the list of interviewees to the ‘institutions’, civil society organization and professional and governmental bodies concerned with legal developments.

However, elements of the appointment process that have been criticized, including the ability of Commissioners to put forward their own candidates for judicial officers after nominations are closed, as well as the absence of obligation for the JSC to make public its reasons for recommending or declining candidates.

Further, the Democratic Governance and Rights Unit (DGRU) at the University of Cape Town maintains that the JSC has been reluctant to consider candidates who have not had experience as acting judges, although the Commission itself has no control over acting appointments, which are made by the executive in consultation with the head of the court concerned, in terms of Section 175 of the Constitution. The DGRU further suggests that as the method of appointing acting judges has thus not changed since the advent of the JSC, and is no more transparent than it was in the past, which may present a hurdle for potential candidates other than the practicing advocates who are more likely to catch the eye of a Judge President.

References:


100: National-level judges selected have relevant professional qualifications such as formal legal training, experience as a lower court judge or a career as a litigator.

75:

50: Most national-level judges selected meet these qualifications, with some exceptions.

25:

0: National-level judges are often unqualified due to lack of training or experience.

36c. In law, there is a confirmation process for national-level judges (i.e. conducted by the legislature or an independent body).

YES | NO
Section 174(3) of the Constitution establishes specific procedures for the confirmation of all judicial officers in South Africa. The President of the Republic appoints the Chief Justice and Deputy Chief Justice, and the President and Deputy President of the Supreme Court of Appeal. However, prior to these appointments, the President as head of the national Executive is obligated to consult with both the independent Judicial Service Commission (JSC), and leaders of political parties represented in the National Assembly. All other judges in the Constitutional Court are also appointed by the President of the Republic, following consultations with the President of the Constitutional Court and leaders of political parties represented in the National Assembly.

In preparation for the appointment of new judges to the Constitutional Court, the JSC is obligated in terms of Section 174(4)(a) of the Constitution to provide the President of the Republic with a list of nominee candidates with three names more than the number of appointments to be made. Section 174(4)(b) stipulates that the President may make appointments to the Constitutional Court from this list of nominees. This Section also obliges the President, in turn, to advise the JSC if any nominees are unacceptable and provide reasons for this, and to indicate whether appointments remain outstanding. In such cases, Section 174(4)(c) requires the JSC to provide the President with a list of further nominees, from which the President may make an appointment.

According to Section 174(6) of the Constitution, the President of the Republic is also required to appoint all other judges in other courts in South Africa, on the specific advice of the JSC. Section 174(7) further specifies that other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favor or prejudice. The JSC assumes a central role in the nomination, interviewing and selection of judging, and the interview process takes place publicly, lending transparency to the appointment process. The JSC is also permitted discretion in condoning, or in departing from these procedures whenever appropriate to do so.

However, AfriMAP and the Open Society Foundation also note that there is no formal confirmation procedure of judges in the legislature, and that the only scope for civil society input would be in terms of nominating candidates when invited to do so by the JSC.

References:


YES: A YES score is earned if there is a formal process establishing a review of national-level judicial nominees by an agency independent from the body appointing the judges.

NO: A NO score is earned if there is no formal review. A NO score is earned if the review is conducted by a body directed by the body appointing the judges (such as review by the head of police if judges are appointed by the executive).

37. Can members of the judiciary be held accountable for their actions?

83

37a. In law, members of the national-level judiciary are obliged to give reasons for their decisions.

YES | NO
Judgments consist of both a court order and the reasons for the order. Generally, reasons precede a court order. At times, orders can be made without reasons, but in these cases reasons are usually given shortly thereafter, failing which reasons can be requested in terms of rule 49(1)(c) of the High Court Rules.

References:


YES: A YES score is earned if there is a formal and mandatory process for judges to explain their decisions.

NO: A NO score is earned if justices are not required to explain decisions. A NO score is earned if there is a general exemption from explaining some decisions (such as national security).

37b. In practice, members of the national-level judiciary give reasons for their decisions.

Comments: Furnishing of reasons is standard practice. However, not all cases are reported in either law reports or electronic legal databases.

References:


100: Judges are formally required to explain their judgments in detail, establishing a body of precedent. All judges comply with these requirements.

75:

50: Judges are compelled to give substantial reasons for their decisions, but some exceptions exist. These may include special courts, such as military courts or tribunals.

25:

0: Judges commonly issue decisions without formal explanations.

37c. In law, there is a disciplinary agency (or equivalent mechanism) for the national-level judicial system.
The Judicial Service Commission (JSC) was established by Section 178(1) of the Constitution, and its powers and functions are stipulated in both the Constitution and the Judicial Service Commission Act (Act 9 of 1994). These include consulting with the Executive on the appointment of judges, as well as participating in the removal of judges. In addition, complaints made against judicial officers are lodged with the JSC for investigation.

However, according to the University of Cape Town’s Democratic Governance and Rights Unit, there is currently no national legislation explicitly setting out procedures for the receipt and handling of complaints about judges. At present, complaints are often referred by the JSC to Judge Presidents of the High Court divisions concerned. The JSC presently has no jurisdiction to deal with complaints about conduct where such a step was not warranted. It is important to note that to date, in spite of some complaints received recently by the JSC, no judge in South Africa has ever been impeached.

The Judicial Services Commission Amendment Bill (B50A-2007), however, proposes bestowing oversight over judicial conduct and ethics on the JSC, and includes detailed procedures for a complaints mechanism, and for disciplinary actions in response to non-impeachable and impeachable offenses committed by judicial officers. The Bill has been adopted by the National Assembly and the National Council of Provinces, and is awaiting signature from the President.

References:


YES: A YES score is earned if there is a disciplinary agency (or equivalent mechanism) for the judicial system. A disciplinary agency is defined here as an agency or mechanism specifically mandated to investigate breaches of procedure, abuses of power or other failures of the judiciary.

NO: A NO score is earned if no agency or mechanism is specifically mandated to act as a disciplinary mechanism for the national-level judiciary.

37d. In law, the judicial disciplinary agency (or equivalent mechanism) is protected from political interference.
Comments:
The independence of the judiciary is firmly entrenched in the Constitution, as well as in case law. The Constitution vests all judicial authority in the courts, and guarantees that the courts are independent and subject only to the Constitution and the law, and prohibits any person or organ of state from interfering in their functions.

AfriMAP and the Open Society Foundation observe that because of the ANC’s dominant position in the National Assembly and the National Council of Provinces, a majority of the JSC could conceivably be constituted from persons over whose appointment the ANC has direct control, which could be perceived as amounting to undue political influence over the judicial appointments process. However, both organizations also observe that there are few countries in the world where judicial appointments are not politically controlled, and the ANC’s de facto control over judicial appointments is not, on its own, a reason to question the independence of the judiciary in South Africa.

Section 178(1) of the Constitution establishes the Judicial Service Commission (JSC). The powers and functions of the JSC are currently stipulated in both the Constitution and the Judicial Service Commission Act (Act 9 of 1994). In terms of section 2 of the Act, a member shall hold office for a period not exceeding five years, provided that the President shall remove a member of the JSC if that member’s designator requests him/her in writing to do so. The term is not defined in the Act, but appears to mean the Minister of Justice, either of the houses of Parliament, or professional associations that may designate representatives in terms of section 178(1) of the Constitution.

References:
African Peer Review Mechanism (APRM), 2007. South Africa Country Report. Available at: 


Constitution of the Republic of South Africa (Act 108 of 1996). Available at: 

Judicial Service Commission Act (Act 9 of 1994). Available at: 

Judicial Services Commission Amendment Bill (B50A-2007) 


YES: A YES score is earned if there are formal rules establishing that the judicial disciplinary agency (or equivalent mechanism) is protected from political interference by the executive and legislative branches.

NO: A NO score is earned if there are no formal rules establishing the independence of the judicial disciplinary agency (or equivalent mechanism). A NO score is given if the judicial disciplinary agency or equivalent mechanism function is carried out by an inherently subordinate organization, such as an executive ministry or legislative committee.

37e. In practice, when necessary, the judicial disciplinary agency (or equivalent mechanism) initiates investigations.
The Judicial Service Commission (JSC) was established through Section 178(1) of the Constitution, and its powers and functions are stipulated in both the Constitution and the Judicial Service Commission Act (Act 9 of 1994). These powers include investigating complaints made against judicial officers that are lodged with the JSC.

However, according to the University of Cape Town’s Democratic Governance and Rights Unit, as yet there is no specific national legislation setting out procedures for the receipt and handling of complaints about judges. At present, complaints are often referred to Judge Presidents of the divisions concerned. The JSC presently has a key role to play in the impeachment of a judge, but no jurisdiction to deal with complaints about conduct where such a step was not warranted. It is important to note that to date, in spite of some complaints received by the JSC, no judge in South Africa has ever been impeached.

In May 2008, it was alleged that Judge Hlophe had lobbied at least two Constitutional Court judges to rule in favor of African National Congress President Jacob Zuma and French arms company Thint in four matter heard by that court. The judges of the Constitutional Court lodged a complaint with the JSC, which has accepted the complaint for investigation.

In another recent case, KwaZulu-Natal Acting Judge and Advocate Mzochitwayo Ngcamu faced disbarment last year after the JSC discovered that he had been found guilty of professional misconduct in the past by the provincial law society, and had failed to disclose this in an interview for a Labor Court judge position. The outcome of the inquiry is unclear.

In addition, Judicial Services Commission Amendment Bill (B50A-2007) proposes bestowing oversight over judicial conduct and ethics on the JSC, and includes detailed procedures for a complaints mechanism, and for disciplinary actions in response to non-impeachable and impeachable offenses committed by judicial officers. The Bill has been adopted by the National Assembly and the National Council of Provinces, and is awaiting signing from the President.

References:


The judicial disciplinary agency (or equivalent mechanism) aggressively starts investigations — or participates fully with cooperating agencies’ investigations — into judicial misconduct. The judicial disciplinary agency (or equivalent mechanism) is fair in its application of this power.

The judicial disciplinary agency (or equivalent mechanism) will start or cooperate in investigations, but often relies on external pressure to set priorities, or has limited effectiveness when investigating. The judicial disciplinary agency (or equivalent mechanism), though limited in effectiveness, is still fair in its application of power.

The judicial disciplinary agency (or equivalent mechanism) rarely investigates on its own or cooperates in other agencies’ investigations, or the judicial disciplinary agency (or equivalent mechanism) is partisan in its application of this power.

In practice, when necessary, the judicial disciplinary agency (or equivalent mechanism) imposes penalties on offenders.

The independence of the judiciary in South Africa is guaranteed under Section 165 of the Constitution. Administration and application of legislation related to the judiciary and judicial functions are the responsibility of the national Department of Justice and Constitutional Development (DoJCD).

The Judicial Service Commission (JSC) was established through Section 187 (1) of the Constitution, and its powers and functions are stipulated in both the Constitution and the Judicial Service Commission Act (Act 9 of 1994). These include consulting with the Executive on the appointment of judges, as well as participating in the removal of judges. In addition, complaints made against judicial officers can be lodged with the JSC.

The Constitution gives the JSC a key role in the impeachment of a judge but the JSC currently has no jurisdiction to deal with complaints about conduct where such a step was not warranted. According to the University of Cape Town’s Democratic Governance and Rights Unit, as yet there is no specific national legislation setting out procedures for the receipt and handling of complaints about judges. However, such legislation has been drafted by Parliament and will be enacted shortly.

The Judicial Services Commission Amendment Bill (B50A-2007) proposes bestowing oversight over judicial conduct and ethics on the JSC, and includes detailed procedures for a complaints mechanism, and for disciplinary actions in response to non-impeachable offences committed by judicial officers. The Bill has been adopted by the National Assembly and the National Council of Provinces, and is awaiting signature from the President.

In addition, in 2006 the JSC adopted rules to govern the handling of impeachable complaints. In the absence of a legal framework to deal with complaints against judicial officers, non-impeachable complaints (complaints that do not justify removal from office) are often referred to Judge Presidents of the divisions concerned.

A number of complaints against judicial officers have been recorded by the JSC (17 in 2006, 23 in 2007), but to date no judge has been impeached. Complaints have generally not proceeded past the subcommittee stage of the disciplinary process because the JSC, in these cases, resolved that the pertinent conduct, if established, did not justify the judge’s removal. In other words, in these cases, there were insufficient grounds to justify the invocation of the impeachment procedure.
There was one exception in 2006, when the JSC charged Judge Ismail Hussain of the Transvaal High Court with gross misconduct, on allegations that he misused funds in his safe-keeping linked to an arbitration award. However, Hussain resigned shortly before the formal hearing of the JSC, and therefore there was no need to invoke the impeachment process.

It is also important to note that judicial officers are also themselves subject to the courts. For example, Judge Nikola Motata is currently on trial on charges of driving under the influence of alcohol and defeating the ends of justice.

In practice, the JSC is generally viewed as conforming to democratic principles, and upholding judicial ethics. In spite of the complaints made against some judicial officers, there is general consensus that the favorable working conditions prescribed by Section 176 of the constitution which guarantees tenure and prohibits the reduction of salaries, allowance or benefits for judges strengthens integrity and discourages corruption or the purchase of favorable judgments by litigants.

However, the JSC’s recent handling of complaints against Cape Judge President John Hlophe has been met with criticism for the failure to impose an adequate or appropriate sanction.

After considering a complaint against Hlophe over payments received from the Oasis Group, the JSC granted the same company permission to sue Judge Siraj Desai for defamation: another member of the bench in the same division. Hlophe was also accused of a conflict of interest when his son reportedly received a bursary from top legal firm Smith, Tabata, Buchanan & Boyes, which regularly briefs counsel in matters before the Cape High Court. The JSC controversially decided it had insufficient evidence to warrant an investigation into the complaints.

In May 2008, it was alleged that Judge Hlophe had lobbied at least two Constitutional Court judges to rule in favor of African National Congress President Jacob Zuma and French arms company Thint in four matters heard by that court. The judges of the Constitutional Court lodged a complaint with the JSC, which has accepted the complaint for investigation.

References:
African Peer Review Mechanism (APRM), 2007. South Africa Country Report. Available at:

Constitution of the Republic of South Africa (Act 108 of 1996). Available at:

http://www.thoughtleader.co.za/pierredevos/2007/10/24/hlophe-to-blame-for-damage-to-judiciary/

Judicial Service Commission Act (Act 9 of 1994). Available at:

Judicial Services Commission Amendment Bill (B50A-2007).


SAPA, 2008. Judgment reserved on Judge Motata video, Mail & Guardian, June 3, 2008. Available at:
http://www.mg.co.za/article/2008-06-03-judgement-reserved-on-judge-motata-video


50: The judicial disciplinary agency (or equivalent mechanism) enforces rules, but is limited in its effectiveness. The judicial disciplinary agency (or equivalent mechanism) may be slow to act, unwilling to take on politically powerful offenders, resistant to cooperating with other agencies, or occasionally unable to enforce its judgments.

25:

0: The judicial disciplinary agency (or equivalent mechanism) does not effectively penalize offenders. The judicial disciplinary agency (or equivalent mechanism) may make judgments but not enforce them, does not cooperate with other agencies in enforcing penalties, or may fail to make reasonable judgments against offenders. The judicial disciplinary agency (or equivalent mechanism) may be partisan in its application of power.

38. Are there regulations governing conflicts of interest for the national-level judiciary?

38a. In law, members of the national-level judiciary are required to file an asset disclosure form.

YES | NO

Comments:
Currently, there are no legal requirements concerning financial disclosure by the judiciary. However, the provisions of the Supreme Court Act and the Judges’ Remuneration Act require both serving and retired judges to seek permission before undertaking remunerative activities other than their judicial duties.

This is likely to change through the legislating of the Judicial Services Commission Amendment Bill, which has already been adopted by the National Assembly and National Council of Provinces, and is awaiting signing from the President.

Currently, judicial financial accountability is only partially accommodated by the voluntary Guidelines for Judges, which prohibits members of the judiciary from holding any office of profit or earning anything apart from salaries and allowances paid by the state, except with the permission of the Minister, which permission need not be reduced to writing. Judges are not required to disclose their financial positions or assets, but they are encouraged (in terms of Rule 9) to recuse themselves should any conflict of interest arise between their private interests and public duties.

Section 13 of the Amendment Bill introduces the requirement that judges and their immediate family members, including spouses and others living in the same household as the judge, must declare their interests and assets. This Section also envisages the drafting of regulations on the content and manner of disclosure. According to the Bill, accompanying regulations should address the compilation, maintenance, content and management of the Register of Judicial Officers’ Interests. It should also: prescribe a format of the register; state what is regarded as registrable interests; provide for a confidential and public part of the register; stipulate the procedure for the public to access the public part of the Register, a procedure for maintaining confidentiality of the register; and, the procedure for lodging a complaint where there is a failure to lodge a registrable interest, where false or misleading information is registered, or where there is a breach of confidentiality. Thus, failure to comply would constitute valid grounds for complaint, and could attract a sanction.

References:


YES: A YES score is earned if all members of the national-level judiciary are required by law to file an asset disclosure form while in office, illustrating sources of income, stock holdings, and other assets. This form does not need to be publicly available to score a YES.

NO: A NO score is earned if any member of the national-level judiciary is not required to publicly disclose assets.

YES  |  NO

38b. In law, there are regulations governing gifts and hospitality offered to members of the national-level judiciary.

Comments:
Currently, there are no legal requirements concerning financial disclosure of, or declaration of gifts by, the judiciary. However, this is likely to change through the legislating of the Judicial Services Commission Amendment Bill, which has already been adopted by the National Assembly and National Council of Provinces, and is awaiting signature from the President.

Currently, judicial accountability in this regard is only rather modestly accommodated by the voluntary Guidelines for Judges, which merely enjoins judges (in Rule 23) not to directly or indirectly accept any gift, advantage or privilege that can reasonably be perceived as being intended to influence the judge in the performance of judicial duties or to serve as a reward therefor.

The notes explain that this rule is not intended to prevent corruption, for that need hardly be mentioned here. The purpose is, rather, stated to be to avoid any semblance of impropriety.

Judges are, moreover, encouraged (in terms of Rule 9) to recuse themselves should any conflict of interest arise between their private interests and public duties.

Section 13 of the Amendment Bill introduces the requirement that judges and their immediate family members, including spouses and others living in the same household as the judge, must declare their interests and assets. This Section also envisages the drafting of regulations on the content and manner of disclosure. According to the Bill, accompanying regulations should address the compilation, maintenance, content and management of the Register of Judicial Officers’ Interests. It should also: prescribe a format of the register; state what is regarded as registrable interests; provide for a confidential and public part of the register; stipulate the procedure for the public to access the public part of the Register, a procedure for maintaining confidentiality of the register; and, the procedure for lodging a complaint where there is a failure to lodge a registrable interest, where false or misleading information is registered, or where there is a breach of confidentiality. Thus, failure to comply would constitute valid grounds for complaint, and could attract a sanction.

References:

Judicial Services Commission Amendment Bill (B50A-2007)


YES: A YES score is earned if there are formal guidelines regulating gifts and hospitality for members of the national-level judiciary.

NO: A NO score is earned if there are no guidelines or regulations with respect to gifts or hospitality offered to members of the national-level judiciary. A NO score is earned if the guidelines are general and do not specify what is and is not appropriate.
38c. In law, there are requirements for the independent auditing of the asset disclosure forms of members of the national-level judiciary.

YES | NO

Comments:
There is currently no legislative requirement of this nature.

Section 13 of the Amendment Bill introduces the requirement that judges and their immediate family members, including spouses and others living in the same household as the judge, must declare their interests and assets. This Section also envisages the drafting of regulations on the content and manner of disclosure. According to the Bill, accompanying regulations should address the compilation, maintenance, content and management of the Register of Judicial Officers' Interests. It should also: prescribe a format of the register; state what is regarded as registrable interests; provide for a confidential and public part of the register; stipulate the procedure for the public to access the public part of the Register, a procedure for maintaining confidentiality of the register; and, the procedure for lodging a complaint where there is a failure to lodge a registrable interest, where false or misleading information is registered, or where there is a breach of confidentiality. Thus, failure to comply would constitute valid grounds for complaint, and could attract a sanction.

However, unless the regulations introduce a requirement that these disclosures should be audited, there will be no requirement in the Amendment Bill concerning auditing.

References:

Judicial Services Commission Amendment Bill (B50A-2007)


YES: A YES score is earned if there is a legal or regulatory requirement for independent auditing of national-level judiciary asset disclosures. The auditing is performed by an impartial third-party.

NO: A NO score is earned if there are no legal or regulatory requirements for the independent auditing of national-level judiciary asset disclosures or if such requirements exist but allow for self-auditing.

38d. In law, there are restrictions for national-level judges entering the private sector after leaving the government.

YES | NO

Comments:
In terms of the JSC Amendment Bill, retired judges will be able to engage in paid work when they are no longer on the bench, but on condition that written permission is received from the Minister of Justice in consultation with the Chief Justice. The Minister, acting in concurrence with the Chief Justice, will be required to issue guidelines on the criteria to be applied when such consent is given.

Currently, in terms of the Supreme Court Act and the Judges' Remuneration and Conditions of Employment Act, the Minister of Justice and Constitutional Development is required to give permission for both serving and retired judges to perform other work. The reasons for requiring even retired judges to seek and obtain such permission is that the Judges' Remuneration Act provides
that all judges continue to receive remuneration after retirement and are, in return, required to remain available to perform work when requested to do so by the Chief Justice, the President of the Supreme Court of Appeal or the judge president of a division of the High Court. A high value is, thus, placed on judges’ continued independence and impartiality.

Since 1994, most permission granted by the Minister has been for active and retired judges to

(a) act as arbitrators;
(b) act as chairpersons of commissions of inquiry;
(c) provide legal advice or assistance to charitable or non-profit organizations;
(d) act as executors of deceased estates or trustees;
(e) lecture and teach at post-graduate institutions;
(f) accept modest honoraria; and
(g) serve as members of company boards.

References:

YES: A YES score is earned if there are regulations restricting national-level judges’ ability to take positions in the private sector after leaving government that would present a conflict of interest, including positions that directly seek to influence their former government colleagues.

NO: A NO score is earned if no such restrictions exist.

38e. In practice, the regulations restricting post-government private sector employment for national-level judges are effective.

100 75 50 25 0

Comments:
Currently, in terms of the Supreme Court Act and the Judges’ Remuneration and Conditions of Employment Act, the Minister of Justice and Constitutional Development is required to give permission for both serving and retired judges to perform other work. The reasons for requiring even retired judges to seek and obtain such permission is that the Judges’ Remuneration Act provides that all judges continue to receive remuneration after retirement and are, in return, required to remain available to perform work when requested to do so by the Chief Justice, the President of the Supreme Court of Appeal or the judge president of a division of the High Court. A high value is, thus, placed on judges’ continued independence and impartiality.

Since 1994, most permission granted by the Minister has been for active and retired judges to
(h) act as arbitrators;
(i) act as chairpersons of commissions of inquiry;
(j) provide legal advice or assistance to charitable or non-profit organizations;
(k) act as executors of deceased estates or trustees;
(l) lecture and teach at post-graduate institutions;
(m) accept modest honoraria; and
(n) serve as members of company boards.

The extent of outside remunerative activities by even serving judges disclosed in correspondence with the Ministry of Justice has disturbed commentators. The potential for conflicts of interests is significant as, while both serving and retired judges must seek permission from the Minister for outside remunerative activities, they are entirely reliant on their own discretion and personal conscience when deciding when a sufficient conflict exists that requires their recusal from presiding in a particular matter.

In terms of the JSC Amendment Bill, however, retired judges will be able to engage in paid work when they are no longer on the bench, but on condition that written permission is received from the Minister of Justice in consultation with the Chief Justice. The Minister, acting in concurrence with the Chief Justice, will be required to issue guidelines detailing the criteria to be applied when such consent is given.

References:


100: The regulations restricting post-government private sector employment for national-level judges are uniformly enforced. There are no cases or few cases of judges taking jobs in the private sector after leaving government where they directly lobby or seek to influence their former government colleagues without an adequate cooling off period.

75:

50: The regulations are generally enforced though some exceptions exist. In certain cases, judges are known to regularly take jobs in the private sector that entail directly lobbying or seeking to influence their former government colleagues. Cooling off periods are short and sometimes ignored.

25:

0: The regulations are rarely or never enforced. Judges routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced.

38f. In practice, the regulations governing gifts and hospitality offered to members of the national-level judiciary are effective.
Comments:
As there are no regulations (only a voluntary code aimed at guiding the judiciary, and the provisions of the code are not monitored), it is impossible to measure its efficacy in practice. General observation of media coverage of instances of irregularities or non-compliance with the code, however, reveals very few that have come to public attention.

References:

Judicial Services Commission Amendment Bill (B50A-2007)


100: The regulations governing gifts and hospitality to members of the national-level judiciary are regularly enforced. Judges never or rarely accept gifts or hospitality above what is allowed.

75:

50: The regulations governing gifts and hospitality to members of the national-level judiciary are generally applied though exceptions exist. Some judges are known to accept greater amounts of gifts and hospitality from outside interest groups or private sector actors than is allowed.

25:

0: The regulations governing gifts and hospitality to members of the national-level judiciary are routinely ignored and unenforced. Judges routinely accept significant amounts of gifts and hospitality from outside interest groups and actors seeking to influence their decisions.

38g. In practice, national-level judiciary asset disclosures are audited.

Comments:
No auditing is undertaken in practice, as there are no regulations requiring disclosure and asset disclosure does not take place.

References:

Judicial Services Commission Amendment Bill (B50A-2007)

39. Can citizens access the asset disclosure records of members of the national-level judiciary?

0

39a. In law, citizens can access the asset disclosure records of members of the national-level judiciary.

References:


YES: A YES score is earned if members of the national-level judiciary file an asset disclosure form that is, in law, accessible to the public (individuals, civil society groups or journalists).

NO: A NO score is earned if there is no asset disclosure for members of the national-level judiciary. A NO score is earned if the form is filed, but not available to the public.

39b. In practice, citizens can access judicial asset disclosure records within a reasonable time period.

| 100 | 75 | 50 | 25 | 0 |

Comments:
There are no asset disclosures in law or in practice.

References:

Judicial Services Commission Amendment Bill (B50A-2007)


100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

39c. In practice, citizens can access judicial asset disclosure records at a reasonable cost.

| 100 | 75 | 50 | 25 | 0 |

Comments:
There are no asset disclosures in law or in practice.
III-4. Budget Processes

40. Can the legislature provide input to the national budget?

42

40a. In law, the legislature can amend the budget.

YES | NO

Comments:
The Constitution of the Republic of South Africa requires that an Act of Parliament provide for a procedure to amend so-called money bills before Parliament. As of August 2008, such legislation had not been passed, although public hearings were held in the same month by the Portfolio Committee on Finance on the Draft Money Bills Amendment Procedure and Related Matters Bill. Indications appear to be that such legislation will be passed before the beginning of the 2009/10 fiscal year, that is, before April 2009. It is not entirely clear how comprehensive the final legislation will be or what stance it will adopt on key questions, such as the degree of constraint imposed on legislative amendment authority.
YES: A YES score is earned if the legislature has the power to add or remove items to the national government budget.

NO: A NO score is earned if the legislature can only approve but not change details of the budget. A NO score is earned if the legislature has no input into the budget process.

40b. In practice, significant public expenditures require legislative approval.

100  |  75  |  50  |  25  |  0

Comments:
The Constitution of South Africa and the Public Finance Management Act (PFMA) explicitly requires legislative approval of public expenditures. There are some concerns about the extent to which the operations of the public sector, rather than government more narrowly, may have fiscal implications which circumvent the role of the legislature. Thus, various state-owned enterprises have required bailouts from the fiscus in excess of transfers initially approved by the legislature, though they have nonetheless been approved as a matter of necessity.

References:


100: All significant government expenditures (defined as any project costing more than 1% of the total national budget), must be approved by the legislature. This includes defense and secret programs, which may be debated in closed hearings.

75:

50: Most significant government expenditures (as defined) are approved by the legislature, but some exceptions to this rule exist. This may include defense programs, an executive's personal budget, or other expenses.

25:

0: The legislature does not have the power to approve or disapprove large portions of the government budget, or the legislature does not exercise this power in a meaningful way.
40c. In practice, the legislature has sufficient capacity to monitor the budget process and provide input or changes.

Comments:
While a Parliamentary Research Office exists, there is no dedicated Budget Office to provide support to the legislature, and only a small proportion of Research Office staff have specific expertise in public finance. However, a Draft Money Bills Amendment Procedure and Related Matters Bill has been debated in Parliament, which envisages the establishment of such an office. Though not an issue of capacity per se, the fact that no amendment legislation exists has also tended to reduce the incentive of the legislature to develop the required capacity.

References:


100: Legislators benefit from a sufficient and qualified staff as well as adequate financial and physical resources. Lack of capacity is never a reason why legislators cannot carry out their duties effectively.

75:

50: Legislators have some staff and financial resources but are limited by a shortfall of resources to adequately perform all of their budgetary oversight functions. Legislators are occasionally overwhelmed by the volume of work to be performed.

25:

0: Legislators have little to no staff and virtually no financial resources with which to perform their budgetary oversight role. Lack of resources is a regular and systemic problem that cripples the performance of the legislature.

41. Can citizens access the national budgetary process?

67

41a. In practice, the national budgetary process is conducted in a transparent manner in the debating stage (i.e. before final approval).
Comments:
The initial phases of the budget drafting process occur within the government and are coordinated by the Minister of Finance and the National Treasury. This initial phase is not particularly transparent. However, the government releases a Medium-Term Budget Policy Statement (MTBPS) midway through the fiscal year, which sets out key assumptions and broad intended shifts in fiscal policy and sectoral prioritization for the coming three years. Public hearings on the MTBPS are held within the legislature. In addition to the MTBPS, the general existence of a Medium-Term Expenditure Framework (MTEF) enables citizens to influence budget policy, as they have an overview of the government’s medium-term planning, and can engage with this. The public existence of various other forms of budget documentation, such as monthly spending reports, departmental strategic plans and annual reports, also ensures a fiscal environment conducive to participation.

References:


100: Budget debates are public and records of these proceedings are easily accessible. Authors of individual budget items can easily be identified. Nearly all budget negotiations are conducted in these official proceedings.

75:

50: There is a formal, transparent process for budget debate, but major budget modifications may be negotiated in separate, closed sessions. Some items, such as non-secret defense projects, may be negotiated in closed sessions. Authors of individual line items may be difficult to identify.

25:

0: Budget negotiations are effectively closed to the public. There may be a formal, transparent process, but most real discussion and debate happens in other, closed settings.

41b. In practice, citizens provide input at budget hearings.

Comments:
Non-governmental organizations (NGOs), business alliances, and trade unions regularly provide such input. There are, however, two significant concerns in this regard. Firstly, one prominent civil society grouping, the People’s Budget Coalition, has declined to participate in such hearings, arguing that they are largely meaningless in the absence of a legislated procedure for budget amendment. As this grouping includes the government’s alliance partner, the Congress of South African Trade Unions (COSATU), as well as a significant grouping of faith-based organizations and other NGOs, it remains of concern.

Secondly, it appears as though the same, well-funded and established civic organizations tend to provide inputs. A concern is that many NGOs and other civil society organizations have not to date taken the opportunity, due to their own lack of capacity, and possibly, a perception that their submissions are unlikely to have an impact.
References:


100: Citizens, usually acting through CSOs, can provide information or commentary to the budget debate through a formal process. This information is essential to the process of evaluating budget priorities.

75:

50: Citizens or CSOs can provide input, but this information is often not relevant to budget decisions.

25:

0: Citizens or CSOs have no formal access to provide input to the budget debate.

Comments:
The South African national budget consists of a number of documents which together provide a comprehensive and reasonably accessible sense of budget allocations and relative priorities. The Division of Revenue Act clearly indicates the division of revenue between the three levels of government in South Africa, as well as its divisions horizontally, that is between various local government and various provinces.

The annual Estimates of National Expenditure provides allocation information for all national departments by program and sub-program and has made significant progress in linking these allocations to so-called measurable objectives. The budgets of the nine provinces are also detailed. At the local level, the quality of budgeting is somewhat more uneven, owing primarily to a lack of capacity in many of the smaller local authorities. It is, currently, easier for citizens to obtain good financial information on national departments than on their own local governments, which has some negative implications for the quality of participation and accountability at the local level.

References:


100: Citizens, journalists and CSOs can access itemized lists of budget allocations. This information is easily available and up to date.

75:

50: Citizens, journalists and CSOs can access itemized lists of budget allocations but this information may be difficult to access, incomplete or out of date.

25:
0: Citizens cannot access an itemized list of budget allocations, due to secrecy, prohibitive barriers or government inefficiency.

43. Is the legislative committee overseeing the expenditure of public funds effective?

58

43a. In practice, department heads regularly submit reports to this committee.

100  75  50  25  0

Comments:
Large improvements have been made in this regard, in part facilitated by the Public Finance Management Act (PFMA) and the Municipal Finance Management Act (MFMA). Some reports are still submitted late, however.

References:


100: Heads of ministry- or cabinet-level agencies submit regular, formal reports of expenses to a budget oversight committee.

75:

50: Agency heads submit reports to a budget oversight committee, but these reports are flawed in some way. The reports may be inconsistently delivered, or lacking important details.

25:

0: There is no budget oversight committee or equivalent, or heads of agencies do not submit meaningful reports to the agency.

43b. In practice, the committee acts in a non-partisan manner with members of opposition parties serving on the committee in an equitable fashion.

100  75  50  25  0
Comments:
The controversial government Arms Deal demonstrated that, under circumstances where there is political tension, the chairpersonship of the Standing Committee on Public Accounts (SCOPA) could potentially be manipulated to serve the interests of the ruling party. In this instance, once allegations of corruption in government tendering and procurement processes around the purchase of armaments from European manufacturers began to surface, the Chairperson of the Committee – who had recommended the establishment of a Commission of Enquiry into the matter- was replaced with a chairperson less likely to be supportive of such measures.

In the case of the Finance and Joint Budget Committees, there appears to be a healthy dynamic within the committees between the various parties. Debates within these committees are generally open and robust and the inputs provided by opposition parties are reflected in committee reports as well as in the oversight-related engagement of the committee with government departments. Thus, for example, when interrogating the annual reports of departments the Finance Committee oversees, experience has demonstrated that the committee is willing to ask relevant Directors-General the often-difficult questions prepared by members of both the majority and opposition parties.

References:

Interview with Len Verwey, Senior Researcher, Public Finance, Idasa, August 2008 Cape Town.

Interview (telephonic) with Perran Hahndiek, Secretary: Joint Budget Committee, Parliament of South Africa, August 2008, Cape Town.

100: The committee is comprised of legislators from both the ruling party (or parties) and opposition parties in a roughly equitable distribution. All members of the committee — including opposition party members — are able to fully participate in the activities of the committee and influence the committee’s work to roughly the same extent as any other member of the committee.

75:

50: The committee is comprised of legislators from both the ruling party (or parties) and opposition parties although the ruling party has a disproportionate share of committee seats. The chairperson of the committee may be overly influential and curb other members’ ability to shape the committee’s activities.

25:

0: The committee is dominated by legislators of the ruling party and/or the committee chairperson. Opposition legislators serving on the committee have in practice no way to influence the work of the committee.

43c. In practice, when necessary, this committee initiates independent investigations into financial irregularities.

Comments:
In the case of the Standing Committee on Public Accounts (SCOPA), clear mechanisms and the attendant administrative capacity do not appear to exist for ensuring that instances of financial irregularity do in fact lead to prosecution or return of funds.

In the case of the oversight of performance, committees have struggled to evaluate departmental performance both because of the large amounts of information required and because of time limits.

References:
100: When irregularities are discovered, the committee is aggressive in investigating the government.

75:

50: The committee starts investigations, but is limited in its effectiveness. The committee may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

25:

0: The committee does not effectively investigate financial irregularities. The committee may start investigations but not complete them, or may fail to detect offenders. The committee may be partisan in its application of power.

42. Is there a separate legislative committee which provides oversight of public funds?

100

42. In law, is there a separate legislative committee which provides oversight of public funds?

YES | NO

Comments:
The Constitution, in Chapter 4, sections 55 (2), 56, and 57 (2) (a), provides for oversight and accountability mechanisms in respect of public expenditure.

In terms of its Rules, the national legislature has three committees which exercise different kinds of oversight of public funds, namely the Standing Committee on Public Accounts (SCOPA), the Portfolio Committee on Finance, and the Joint Budget Committee. SCOPA is responsible for procedural oversight, whilst the other two committees are respectively responsible for overseeing the macro-dimensions of budgeting and the medium-term budgeting process.

References:
Constitution of the Republic of South Africa (Act 108 of 1996). Available at:
http://www.info.gov.za

Parliament of South Africa. Rules of the National Assembly. Available at:
http://www.parliament.gov.za

YES: A YES score is earned if there is a dedicated legislative committee (or equivalent group located in the legislature) that oversees the expenditure of public funds.

NO: A NO score is earned if no such body exists within the legislature. A NO score is earned if there is a body executing this function but it is not part of the legislature (such as a separate supreme audit institution).
IV-1. Civil Service Regulations

44. Are there national regulations for the civil service encompassing, at least, the managerial and professional staff?

75

44a. In law, there are regulations requiring an impartial, independent and fairly managed civil service.

YES | NO

Comments:
Chapter 10 of the Constitution sets out a number of principles governing public administration, including in section 195(1) that public services must be provided impartially, fairly, equitably and without bias. Further, section 195(1)(i) stipulates that public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness and the need to redress the imbalances of the past. These principles are elaborated on in the Public Service Act and Regulations, which establishes a framework of norms and standards relating to recruitment, training, promotion, management and evaluation of civil servants. The recruitment and management of the senior management service are determined separately in the Regulations, as well as in the "Handbook for Senior Managers," issued in terms of the regulations.

References:

YES: A YES score is earned if there are specific formal rules establishing that the civil service carry out its duties independent of political interference.

NO: A NO score is earned if there are no formal rules establishing an independent civil service.

44b. In law, there are regulations to prevent nepotism, cronyism, and patronage within the civil service.
Guided by the Constitution and Public Service Act, the public service Regulations aim to prevent nepotism, cronyism and patronage by setting out specific procedures for the appointment of officials. Any deviation from the procedures needs to be justified.

More particularly, section 196(4)(d) of the Constitution provides that the independent and impartial Public Service Commission must give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles of ability, objectivity, fairness and the need to redress the imbalances of the past.

References:


YES: A YES score is earned if there are specific formal rules prohibiting nepotism, cronyism, and patronage in the civil service. These should include competitive recruitment and promotion procedures as well as safeguards against arbitrary disciplinary actions and dismissal.

NO: A NO score is earned if no such regulations exist.

Section 196 in Chapter 10 of the Constitution establishes an independent Public Service Commission that must be impartial. Its powers and functions include the ability, either of its own accord or on receipt of a complaint, to investigate, monitor and evaluate the organization and administration, and the personnel practices, of the [entire] public service.

These powers and functions are confirmed in section 8 to 10 of the Public Service Commission Act.

Section 196(4)(f)(ii) of the Constitution specifically allows the commission to investigate grievances of employees in the public service concerning official acts or omissions, and recommend appropriate remedies. In the 2007/8 financial year, the Commission finalized 98 employee grievances.

References:


YES: A YES score is earned if there is a mechanism to which civil servants and applicants for the civil service can take grievances regarding civil service management actions. The mechanism should be independent of their supervisors but can still be located within the government agency or entity (such as a special commission or board). Civil servants are able to appeal the mechanism's decisions to the judiciary.

NO: A NO score is earned if no such mechanism exists.

44d. In law, civil servants convicted of corruption are prohibited from future government employment.

YES | NO

Comments:
Though proposed as part of the Public Sector Anti-Corruption Strategy 2002, a comprehensive system of regulation, including blacklisting has not yet been implemented. However, Clause B.3.1 of the Public Service Regulations provides that an executing authority may not re-appoint a former employee under certain conditions. Further, sections 28-33 of the Prevention and Combating of Corrupt Activities Act envisage the creation and maintenance of a register (or blacklist) of people, including public servants, convicted of offenses involving procurement and tender irregularities. The Act does not, however, prohibit the re-employment in the public service of any person convicted of an offense in terms of the Act.

Although the DPSA intends creating a corruption database (Corruption Management Information System), its purposes do not overtly include the identification and prevention of re-employment of public servants convicted of corruption (MACC at p58).

References:


YES: A YES score is earned if there are specific rules prohibiting continued government employment following a corruption conviction.

NO: A NO score is earned if no such rules exist or if the ban is not a lifetime ban.

45. Is the law governing the administration and civil service effective?

64

45a. In practice, civil servants are protected from political interference.
The ruling African National Congress party has a committee that implements a policy of deploying cadres to various senior and influential positions in the public and private sectors. The impact of the policy is difficult to measure although, at least ostensibly, deployments are only to political positions, such as Premiers and Mayors and their MECs and Mayoral Committees.

The PSC Reports are the best known measurement of public service professionalism, albeit that they are an indirect measurement of political interference.

The most recent PSC report on public service compliance with the Constitutional imperative that public services must be provided impartially, fairly, equitably and without bias. (s. 195(1)(d)), suggests an overall 50 percent compliance rate (see p 37ff). This measures a government department's ability to prove that it has complied with four standards of objective and apolitical service delivery, viz. (1&2) All decisions are taken in accordance with prescribed legislation/policies and in terms of delegated authority; (3) All decisions are justified and fair considering the evidence submitted; and (4) The procedures required in terms of the Promotion of Administrative Justice Act, No. 3 of 2000, to communicate administrative decisions, are followed.

The 2008 SOPS Report concluded (p50) that a majority of government departments do not comply with standards of administrative fairness.

It is especially senior officials of government departments or agencies who are widely considered to be vulnerable to political interference. In the past year, there have been reports of politically motivated suspension or firing of civil servants, for example, Vusi Pikoli, National Director of Public Prosecutions, and of constant political interference in some agencies such as the South African Police Service (SAPS).

References:


100: Civil servants operate independently of the political process, without incentive or pressure to render favorable treatment or policy decisions on politically sensitive issues. Civil servants rarely comment on political debates. Individual judgments are rarely praised or criticized by political figures. Civil servants can bring a case to the courts challenging politically-motivated firings.

75:

50: Civil servants are typically independent, yet are sometimes influenced in their judgments by negative or positive political or personal incentives. This may include favorable or unfavorable treatment by superiors, public criticism or praise by the government, or other forms of influence. Civil servants may bring a case to the judicial system challenging politically-motivated firings but the case may encounter delays or bureaucratic hurdles.

25:

0: Civil servants are commonly influenced by political or personal matters. This may include conflicting family relationships, professional partnerships, or other personal loyalties. Negative incentives may include threats, harassment or other abuses of power. Civil servants are unable to find a remedy in the courts for unjustified or politically-motivated firings.
45b. In practice, civil servants are appointed and evaluated according to professional criteria.

Comments:
Although some sources conclude that South African public officials’ appointments are affected by their competencies, qualifications and experience related to the requirements of a specific post, public agencies sometimes lack clear professional criteria to recruit and to evaluate public servants. For instance, the Public Service Commission’s 2007 Monitoring and Evaluation report indicates that only 63 percent of departments have an effective recruitment policy that complies with good practice standards and that spells out detailed recruitment procedures. The PSC’s 2008 Payment of Performance Incentives Report states that there was decline to a 24 percent compliance rate for filing with the PSC of heads of departments’ performance agreements, without which proper performance assessments are not possible.

In addition, reported cases of political interference in some public agencies, for example, the suspension of the Head of the National Prosecution Authority, suggest that professionalism is not the sole determining factor of performance in the public sector, particularly in regard to senior employees.

References:


100: Appointments to the civil service and their professional evaluations are made based on professional qualifications. Individuals appointed are free of conflicts of interest arising from personal loyalties, family connections or other biases. Individuals appointed usually do not have clear political party affiliations.

75:

50: Appointments and professional assessments are usually based on professional qualifications. Individuals appointed may have clear party loyalties, however.

25:

0: Appointments and professional assessments are often based on political considerations. Individuals appointed often have conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

45c. In practice, civil service management actions (e.g. hiring, firing, promotions) are not based on nepotism, cronyism, or patronage.
Comments:
Although difficult to assess, the reported weaknesses in human resource management, particularly in terms of the employment, evaluation of senior employees and dismissal of officials, probably does allow for a significant degree of nepotism, cronyism and patronage. A 2006 PSC survey into compliance with the Civil Service Code of Conduct disclosed that, in terms of conflicts of interest, favoring friends or family was perceived as the biggest problem.

References:


100: Nepotism (favorable treatment of family members), cronyism (favorable treatment of friends and colleagues), and patronage (favorable treatment of those who reward their superiors) are actively discouraged at all levels of the civil service. Hirings, firings, and promotions are based on merit and performance.

75:

50: Nepotism, cronyism, and patronage are discouraged, but exceptions exist. Political leaders or senior officials sometimes appoint family member or friends to favorable positions in the civil service, or lend other favorable treatment.

25:

0: Nepotism, cronyism, and patronage are commonly accepted principles in hiring, firing and promotions of civil servants.

45d. In practice, civil servants have clear job descriptions.

Comments:
The Public Service Regulations stipulate that civil servants must have clear job descriptions. This is particularly significant in the case of senior managers because their remuneration and performance bonuses are linked to their employment contracts. In practice, however, compliance with these regulations is mixed, as there is only a 24 percent compliance rate with the obligation for heads of department to file performance agreements with the PSC.

In respect of less senior employees, however, employment takes place on the basis of detailed advertisements that include job descriptions. Thereafter, once employment is confirmed after successful completion of the probationary period, all employees are required to sign performance agreements, in terms of which they are evaluated on a quarterly basis.
Civil servants almost always have formal job descriptions establishing levels of seniority, assigned functions, and compensation. Job descriptions are a reliable representation of positions in terms of a person’s authority, responsibility and base pay.

Civil servants often have formal job descriptions, but exceptions exist. Some civil servants may not be part of the formal assignment of duties and compensations. Some job descriptions may not map clearly to pay or responsibilities in some cases.

Civil servants do not have formal roles or job descriptions. If they do, such job descriptions have little or nothing to do with the position’s responsibilities, authority, or pay.

In practice, civil servant bonuses constitute only a small fraction of total pay.

In April 2006, the Department of Public Service and Administration raised the legal amount of bonuses payable for senior management officials in the public service. Senior civil servants qualifying for the outstanding performance level, which is the highest possible performance rank, could receive 10 to 14 percent of total remuneration package. However, the implementation of these percentages might be in question, as there have been allegations that senior officials in certain departments have received significant bonuses.

In addition, the PSC’s report of March 2008 reveals that some heads of departments, for instance, were awarded performance incentives without proper evaluations. It also highlights, in its 2008 State of the Public Service report, that departments generally lack the capacity to manage performance management. Heads of departments possess the power to develop reward systems for staff below the senior level. According to a Director of the PSC, in practice, awards consonant with very good or excellent performance, of between 10 and 18 percent of pensionable salary, are sometimes paid to staff below senior management level for performance that is merely above satisfactory.

Parliament’s Standing Committee on Public Accounts (SCOPA) recently demanded that the Department of Sport and Recreation repay over R1million (US$100,000) in bonuses paid to senior staff despite necessary permission being refused by the Public Service and Administration Minister.

References:


Telephonic interview with Roderick Davids, Public Service Commission’s Manager of professional ethics, research and promotion, September 2008.

References:


Reform or pay back bonuses, Financial Mail, 28 March 2008. Available at: http://www.fm.co.za

### 100: Civil servant bonuses constitute no more than 10% of total pay and do not represent a major element of take-home pay.

### 75:

### 50: Civil servant bonuses are generally a small percentage of total take-home pay for most civil servants though exceptions exist where some civil servants' bonuses represent a significant part of total pay.

### 25:

### 0: Most civil servants receive bonuses that represent a significant amount of total take-home pay. In some cases bonuses represent the majority of total pay to civil servants.

45f. In practice, the government publishes the number of authorized civil service positions along with the number of positions actually filled.

| 100 | 75 | 50 | 25 | 0 |

Comments:
Organizational details and staffing, including the number of authorized posts and the number of posts filled, must be and are included in the annual reports of departments as tabled in the various legislatures on an annual basis. They are verified in the course of the PSC's annual Monitoring and Evaluation reports.

References:
Departments' annual reports to Parliament, available at: http://www.jsp.org.za


Telephonic interview with Roderick Davids, Public Service Commission's Manager of professional ethics, research and promotion, September 2008.

### 100: The government publishes such a list on a regular basis.

### 75:

### 50: The government publishes such a list but it is often delayed or incomplete. There may be multiple years in between each successive publication.

### 25:
The government rarely or never publishes such a list, or when it does it is wholly incomplete.

45g. In practice, the independent redress mechanism for the civil service is effective.

Comments:
Section 196 in Chapter 10 of the Constitution establishes an independent Public Service Commission that must be impartial. Its powers and functions include the ability, either of its own accord or on receipt of a complaint, to investigate, monitor and evaluate the organization and administration, and the personnel practices, of the [entire] public service.

Section 196(4)(f)(ii) of the Constitution specifically allows the commission to investigate grievances of employees in the public service concerning official acts or omissions, and recommend appropriate remedies. In the 2007/8 financial year, the Commission finalized 98 employee grievances of 597 received, although 402 (67 percent) of complaints had to be referred back to departments due to non-compliance with the Grievance Rules. These Rules, agreed between public sector trades unions and employers in the Public Sector Co-ordinating Bargaining Council, require departments to first attempt to resolve grievances before the employee is entitled to approach the PSC. According to the PSC, in 10 cases the aggrieved employees withdrew their grievances before they could be finalized. A total of 177 (30 percent) cases were pending due to incomplete information provided by departments.

The Ad hoc Committee's Report finds (at p92) that the PSC’s performance in this regard is generally satisfactory, but that the scope of its mandate is not matched by an appropriately equivalent budget and human resource capacity.

References:

100: The independent redress mechanism for the civil service can control the timing and pace of its investigations without any input from the bodies that manage civil servants on a day-to-day basis.

75:

50: The independent civil service redress mechanism can generally decide what to investigate and when but is sometimes subject to pressure from the executive or the bodies that manage civil servants on a day-to-day basis on politically sensitive issues.

25:

0: The civil service redress mechanism must rely on approval from the executive or the bodies that manage civil servants on a day-to-day basis before initiating investigations. Politically sensitive investigations are almost impossible to move forward on.

45h. In practice, in the past year, the government has paid civil servants on time.
Comments:
In general, regular and prompt payment of salaries is not an issue of concern. There have been no reports during the past year of late payment of civil servants' salaries.

References:

Interview with Roderick Davids, Public Service Commission's Manager of professional ethics, research and promotion, September 2008.

**100:** In the past year, no civil servants have been paid late.

**75:**

**50:** In the past year, some civil servants have been paid late.

**25:**

**0:** In the past year, civil servants have frequently been denied due pay.

45i. In practice, civil servants convicted of corruption are prohibited from future government employment.

Comments:
Although the Public Service's Anti-Corruption Strategy proposed the prohibition of the re-employment civil servants convicted of corruption, this has never been formalized and implemented. According to the Public Service Commission, the most common types of sanctions imposed on those convicted of financial misconduct were written warnings and/or discharge from the public service.

In terms of paragraph B.3.1(b) of Part VII of the Public Service Regulations, an employee may not be reappointed where the circumstances of the initial termination of employment militate against such re-employment. This is a relatively vague and weak legal framework and is unlikely to provide clear guidance in practice.

In terms of the Prevention and Combating of Corrupt Activities Act, however, the courts are obliged to notify the National Treasury of any convictions of any persons, public servants included, in terms of the Act, but no such instance has yet occurred.

References:


Telephonic interview with Roderick Davids, Public Service Commission's Manager of professional ethics, research and promotion, September 2008.

| 100: A system of formal blacklists and cooling off periods is in place for civil servants convicted of corruption. All civil servants are subject to this system. |
| 75: |
| 50: A system of formal blacklists and cooling off periods is in place, but the system has flaws. Some civil servants may not be affected by the system, or the prohibitions are sometimes not effective. Some bans are only temporary. |
| 25: |
| 0: There is no such system, or the system is consistently ineffective in prohibiting future employment of convicted civil servants. |

46. Are there regulations addressing conflicts of interest for civil servants?

67

| 46a. In law, senior members of the civil service are required to file an asset disclosure form. |
| YES | NO |

Comments:
In terms of Section C of Chapter 3, all members of the Senior Management Service (i.e. director, level 13) and above, must file registrable interest disclosure forms with their executing authority (i.e. head of department) within 30 days of the end of the previous financial year, or within 30 days of assumption of duty. Within a further 30 days, the executing authority must file them with the Public Service Commission.

References:
Chapter 3 of the Public Service Regulations (2001), in terms of the Public Service Act (1994). Available at: http://www.dpsa.gov.za

| YES: A YES score is earned if senior members of the civil service are required by law to file an asset disclosure form while in office, illustrating sources of income, stock holdings, and other assets. This form does not need to be publicly available to score a YES. |
| NO: A NO score is earned if any senior member of the civil service is not required to disclose assets. |

46b. In law, there are requirements for civil servants to recuse themselves from policy decisions where their personal interests may be affected.

| YES | NO |
Comments:
Clause C.4. 6 requires recusal from any action of decision-making process that may result in improper personal gain, and disclosure of the reasons for such recusal.

References:
Chapter 3 of the Public Service Regulations (2001), in terms of the Public Service Act (1994). Available at: http://www.dpsa.gov.za

YES: A YES score is earned if there are requirements for civil servants to recuse themselves from policy decisions where their personal interests, including personal financial interests as well as those of their family and friends, are affected.

NO: A NO score exists if no such requirements exist in regulation or law.

46c. In law, there are restrictions for civil servants entering the private sector after leaving the government.

Comments:

References:


YES: A YES score is earned if there are regulations restricting civil servants' ability to take positions in the private sector after leaving government that would present a conflict of interest, including positions that directly seek to influence their former government colleagues.

NO: A NO score is earned if no such restrictions exist.

46d. In law, there are regulations governing gifts and hospitality offered to civil servants.

Comments:
Clause C.5.3 of the Code of Conduct rather confusingly provides that an employee shall not, without prior written approval of the Head of Department obtain or accept any gifts, benefits or item of monetary value (a description and the value and source of gift with a value in excess or R350 – US$35) from any person for himself or herself during the performance of duties as these may be construed as bribes. The threshold amount has probably increased, but details could not be found on relevant web sites.

Gifts and hospitality other than from a family member must be disclosed in terms of Section D(a) to (g) of Chapter 3 of the Public Service Regulations.
References:

Chapter 3 of the Public Service Regulations (2001), in terms of the Public Service Act (1994). Available at: http://www.dpsa.gov.za

YES: A YES score is earned if there are formal guidelines regarding gifts and hospitality given to civil servants.

NO: A NO score is earned if there are no such guidelines or regulations.

46e. In law, there are requirements for the independent auditing of the asset disclosure forms of senior members of the civil service.

YES | NO

Comments:
In terms of the Public Service Regulations, the Public Service Commission conducts annual audits of the number and percentage, as well as the contents, of disclosure forms submitted to it.

References:
Section G of Chapter 3 of the Public Service Regulations (2001), in terms of the Public Service Act (1994). Available at http://www.dpsa.gov.za


YES: A YES score is earned if there is a legal or regulatory requirement for independent auditing of civil service asset disclosures. The auditing is performed by an impartial third-party.

NO: A NO score is earned if there are no legal or regulatory requirements for the independent auditing of civil service asset disclosures or if such requirements exist but allow for self-auditing.

46f. In practice, the regulations restricting post-government private sector employment for civil servants are effective.

100 | 75 | 50 | 25 | 0

Comments:
100: The regulations restricting post-government private sector employment for civil servants are uniformly enforced. There are no cases or few cases of civil servants taking jobs in the private sector after leaving government where they directly lobby or seek to influence their former government colleagues without an adequate cooling off period.

75:

50: The regulations are generally enforced though some exceptions exist. In certain sectors, civil servants are known to regularly take jobs in the private sector that entail directly lobbying or seeking to influence their former government colleagues. Cooling off periods are short and sometimes ignored.

25:

0: The regulations are rarely or never enforced. Civil servants routinely take jobs in the private sector following government employment that involve direct lobbying or influencing of former government colleagues. Cooling off periods are non-existent or never enforced.

46g. In practice, the regulations governing gifts and hospitality offered to civil servants are effective.

Comments:
During the 2006/7 financial year, the latest for which figures are available, 85 percent of disclosure forms were filed. As the purpose of such filing is the prevention of conflicts of interest, including those arising from gifts and hospitality, it may be inferred from this figure that the regulations in this regard are not completely effective.

In general, ensuring compliance with disclosure regulations, including those relating to gifts and hospitality, has constantly been a challenge in the public service. During the 2006/7 financial year, the latest for which figures are available, 85 percent of disclosure forms were filed. As the purpose of such filing is the prevention of conflicts of interest, it may be inferred from this figure that the regulations in this regard are not completely effective.

References:


The regulations governing gifts and hospitality to civil servants are regularly enforced. Civil servants never or rarely accept gifts or hospitality above what is allowed.

The regulations governing gifts and hospitality to civil servants are generally applied though exceptions exist. Some civil servants in certain sectors are known to accept greater amounts of gifts and hospitality from outside interest groups or private sector actors than is allowed.

The regulations governing gifts and hospitality to the civil service are routinely ignored and unenforced. Civil servants routinely accept significant amounts of gifts and hospitality from outside interest groups and actors seeking to influence their decisions.

In practice, the requirements for civil service recusal from policy decisions affecting personal interests are effective.

The levels of non-compliance with disclosure regulations would tend to suggest a decreasing level of non-compliance with recusal requirements. Nevertheless, the PSC identified up to 89 percent of senior management in some departments with potential conflicts of interest.

According to the PSC’s 2008 SOPS Report (p21), citing the Auditor-General’s 2006 report, conflicts of interest arising from designated employees being directors in companies that in turn do business with government, are fairly rampant. For example, a recent study by the PSC found that, as a result of a legislative gap in the management of public servants who are elected as full-time or part-time municipal councilors, conflicts of interest may arise from dual employment. For instance, the Democratic Alliance recently highlighted that electing Charles Makola as the governing African National Congress’ (ANC) Mpumulanga deputy chairperson demonstrates a conflict of interest with his position as Nkangala district municipal manager.

References:


The requirements that civil servants recuse themselves from policy decisions where their personal interests are affected are routinely followed by most or all civil servants.
The requirements that civil servants recuse themselves from policy decisions where their personal interests are affected are followed by most civil servants though exceptions exist. In certain sectors, civil servants are known to routinely participate in policy decisions where their personal interests are affected.

Most civil servants routinely ignore recusal requirements and continue to participate in policy decisions where their personal interests are affected.

In practice, civil service asset disclosures are audited.

Comments:
The PSC scrutinizes the disclosure of public servants’ financial interests. Should it become suspicious of illegal actions, it refers the situation to the relevant departments for further action.

The 2008 SOPS Report (p20) notes that 85 percent of senior managers disclosed their financial interests for the 2006/7 financial year. This represents an improvement from 73 percent in the 2005/6 financial year, and 62 percent in 2004/5.

However, the PSC’s Report on the Management of Conflicts of Interest (p20) indicates a number of practical capacity problems preventing a proper, thorough audit of disclosure forms received.

References:


Telephonic interview with Roderick Davids, Public Service Commission’s Manager of professional ethics, research and promotion, Sept. 4, 2008.

Civil service asset disclosures are regularly audited using generally accepted auditing practices.

Civil service asset disclosures are audited, but audits are limited in some way, such as using inadequate auditing standards, or the presence of exceptions to disclosed assets.

Civil service asset disclosures are not audited, or the audits performed have no value. Audits may be performed by entities known to be partisan or biased in their practices.

Can citizens access the asset disclosure records of senior civil servants?

In law, citizens can access the asset disclosure records of senior civil servants.
YES | NO

Comments:
The disclosure records of senior civil servants are confidential, with only certain officers, as designated in the Public Service Regulations, able to access them. This, together with the limited internal monitoring by the PSC, represents a weakness in the Regulations.

References:

YES: A YES score is earned if laws or regulations guarantee that citizens can access the asset records of senior civil servants.

NO: A NO score is earned if senior civil servants do not file an asset disclosure. A NO score is earned if senior civil servants file an asset disclosure, but it is not available to the public.

47b. In practice, citizens can access the asset disclosure records of senior civil servants within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:
The disclosure records of senior civil servants are confidential, with only certain officers, as designated in the Public Service Regulations, able to access them. This, together with the limited internal monitoring by the PSC, represents a weakness in the Regulations.

References:


100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.
47c. In practice, citizens can access the asset disclosure records of senior civil servants at a reasonable cost.

**Comments:**
The disclosure records of senior civil servants are confidential, with only certain officers, as designated in the Public Service Regulations, able to access them. This, together with the limited internal monitoring by the PSC, represents a weakness in the Regulations.

**References:**

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or CSOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or CSOs trying to access this information.

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**IV-2. Whistle-blowing Measures**

48. Are employees protected from recrimination or other negative consequences when reporting corruption (i.e. whistle-blowing)?

75

48a. In law, civil servants who report cases of corruption, graft, abuse of power, or abuse of resources are protected from recrimination or other negative consequences.
The Protected Disclosures Act (26 of 2000) protects all employees in the public and private sectors from occupational detriment when disclosing information relating to suspected or alleged criminal or other irregular conduct in the workplace. The Act also protects disclosures of civil servants related to a failure to comply with a legal obligation, a miscarriage of justice, endangering the health or safety of an individual, damaging the environment, or unfair discrimination.

The Act details how instances of criminal or irregular conduct should be reported, preferably within the organization and only outside of the organization under certain circumstances. If the reported wrongdoing concerns one of the instances described above and is reported correct, the Act protects the whistle-blower from occupational detriment, including victimization or dismissal.

The Act also specifies remedies in cases where an employee is subjected to occupational detriment, including approaching a court with jurisdiction, such as the Labor Court. The remedy for unfair treatment may include re-instatement, removal of the discrimination, or two years’ salary as compensation.

The Act further specifies that employees making protected disclosures, who reasonably believe that they may be adversely affected, must, at their request, be transferred to another post or position in the same or another division.

However, there are some weaknesses in the Act. The confidentiality of the whistle-blower is not protected, nor does the Act deal with defamation charges brought against a whistle-blower. The maximum compensation amount of 24 months' salary is also low, particularly when costs including protracted legal proceedings and negative perceptions by potential employers and the community are taken into account.

References:

Open Democracy Advice Centre (ODAC), http://www.opendemocracy.org.za


YES: A YES score is earned if there are specific laws against recrimination against public sector whistleblowers. This may include prohibitions on termination, transfer, harassment or other consequences.

NO: A NO score is earned if there are no legal protections for public-sector whistleblowers.

48b. In practice, civil servants who report cases of corruption, graft, abuse of power, or abuse of resources are protected from recrimination or other negative consequences.

A 2007 survey conducted by the Open Democracy Advice Center (ODAC) that one in four South African respondents had blown the whistle, while three in four had not. Less than one-third of respondents had heard of the Protected Disclosures Act. Almost one-half of respondents felt the law does not effectively protect whistle-blowers, while less than one-third felt that the law does provide adequate protection.
Over the course of the last year, several cases of individuals employed in the public sector who suffered negative consequences as a result of whistle-blowing gained a high profile in media coverage. Rather than on corruption, these particular cases focused on poor conditions at medical treatment facilities. Two such cases related to medical staff at the Pollsmoor Prison, who disclosed a health care crisis to the Inspecting Judge of Prisons and Parliament.

Following this disclosure, nurse and hospital manager Adries Slinger was charged with keeping expired medicines in the hospital unit at Pollsmoor and failing to dispose of them, and was dismissed after a disciplinary hearing. However, his dismissal was found to be unfair by an arbitrator for the Public Health and Welfare Sectoral Bargaining Council, and he was awarded six months remuneration. The arbitrator found that the Department of Correctional Services failed to prove that the same rules and standards were applied to other hospital managers, although it was also noted that Slinger had been negligent in failing to ensure that all expired medication had been removed.

Dr Paul Theron was suspended by the Department of Correctional Services following this disclosure, but this was overturned by the Labor Court. Theron subsequently reached a settlement with the Departments of Health and Correctional Services, but stated that he would no longer work at Pollsmoor Prison, in spite of an order allowing him to do so. He stated, I can t work at Pollsmoor without the full cooperation of the Department of Correctional Services. I accept that in the present circumstances, that cooperation will not be forthcoming. Theron also faced a defamation claim brought against him by Correctional Services Minister Ngconde Balfour.

In late 2007, Dr Nokuzola Ntshona also faced disciplinary charges after making public statements on a spate of preventable infant deaths at the Frere Hospital Maternity Ward. After writing two letters raising concerns about the maternity ward, including one addressed to the Director-General in the Presidency, Ntshona was dismissed. In response, the Freedom of Expression Institute (FXI) commented: the FXI remains highly disturbed by the state of free speech in the public sector&The ‘acceptable’ ways of voicing one’s concerns seem consistently ignored, and the moment that public servants begin to be truly heard, they are victimized or criminalized."

It has also been reported that a whistle blower who exposed corruption at the Land Bank in 2007, where senior officials allegedly approved loans worth billions of rand for developments outside of the Bank’s mandate, has been removed from the Witness Protection Program on the grounds that he and his family were no longer needed as witnesses. Media reports suggest that the family has filed papers against the Justice Department, and have lodged a complaint with the South African Human Rights Commission.

Also in 2007, Mike Tshishonga, former Deputy-Director General in the Department of Justice, was awarded 12 months’ salary as well as legal costs by the Labor Courts. Tshishonga was suspended after he publicly disclosed corruption and nepotism within the liquidation industry, and blew the whistle when then-Justice Minister Penuel Maduna insisting on appointing his friend in lucrative cases.

In 2008, advocate Jeanetha Brink won a case against the Gauteng Shared Services Center. In 2006, Brink exposed fraud related to the provincial anti-corruption hot line, which included tip-offs not being investigated and the derailment of probes against senior Gauteng government officials. Several months after reporting, she was stripped of her duties and pushed to resign from the Gauteng Audit Services. This year, her resignation was declared forced and she was awarded one year’s salary.

More recently, personnel who naval authorities believe disclosed classified information on the submarine SAS Manthatisa S101 to the Sunday Times are reportedly facing a court martial. The submarine was purchased under the controversial Arms Deal, and has been plagued by serious defects.

In an attempt to encourage the reporting of corrupt activities, the Public Service Commission operates a National Anti-Corruption Hotline (NACH) that allows for anonymous disclosures. In a 2007 report, the Public Service Commission (PSC) found that between Sep. 1, 2004 and Nov. 30, 2006, a total of 4,182 cases of alleged corruption were reported. After an evaluation, it was found that only 2,296 related to corruption. Most cases (60 percent) were reported anonymously, while 30 percent of callers were willing to disclose their personal details. About 9 percent of disclosures were made via e-mail, and 2 percent in person. Most cases referred (320) related to unethical behavior by public servants, including abuse of power and non-compliance with official working hours. Others included procurement irregularities (234), abuse of government vehicles (233), mismanagement of school funds (121) and corruption related to government RDP housing (115).

References:


ODAC. Pollsmoor nurse vindicated: awarded six months salary by bargaining council, Press Statement. Available at: http://www.opendemocracy.org.za
Public sector whistleblowers can report abuses of power without fear of negative consequences. This may be due to robust mechanisms to protect the identity of whistleblowers or may be due to a culture that encourages disclosure and accountability.

Public sector whistleblowers are sometimes able to come forward without negative consequences, but in other cases, whistleblowers are punished for disclosing, either through official or unofficial means.

Public sector whistleblowers often face substantial negative consequences, such as losing a job, relocating to a less prominent position, or some form of harassment.

In law, private sector employees who report cases of corruption, graft, abuse of power, or abuse of resources are protected from recrimination or other negative consequences.

The Protected Disclosures Act (26 of 2000) protects all employees in both the public and private sector from occupational detriment when disclosing information relating to suspected or alleged criminal or other irregular conduct in the workplace. The Act also protects disclosures related to a failure to comply with a legal obligation, a miscarriage of justice, endangering the health or safety of an individual, damaging of the environment, or unfair discrimination.

The Act details how instances of criminal or irregular conduct should be reported, preferably within the organization and only outside of the organization under certain circumstances. If the reported wrongdoing concerns one of the instances described...
above and is reported correct, the Act protects the whistle-blower from occupational detriment, including victimization or
dismissal.

The Act also specifies remedies in cases where an employee is subjected to occupational detriment, including approaching a
court with jurisdiction, such as the Labor Court. The remedy for unfair treatment may include re-instatement, removal of the
discrimination, or two years' salary as compensation.

The Act further specifies that employees making protected disclosures, who reasonably believe that they may be adversely
affected, must, at their request, be transferred to another post or position in the same or another division.

However, there are some weaknesses in the Act. The confidentiality of the whistle-blower is not protected, nor does the Act deal
with defamation charges brought against a whistle-blower. The maximum compensation amount of 24 months' salary is also low,
particularly when costs including protracted legal proceedings and negative perceptions by potential employers and the
community are taken into account.

References:

Open Democracy Advice Centre (ODAC),
http://www.opendemocracy.org.za

Protected Disclosures Act (Act 26 of 2000). Available at:

YES: A YES score is earned if there are specific laws against recrimination against private sector whistleblowers. This may
include prohibitions on termination, transfer, harassment or other consequences.

NO: A NO score is earned if there are no legal protections for private-sector whistleblowers.

48d. In practice, private sector employees who report cases of corruption, graft, abuse of power, or abuse of resources are
protected from recrimination or other negative consequences.

Comments:
In law, private sector employees who report cases of corruption, graft, abuse of power or abuse of resources are protected under
the Protected Disclosures Act (Act 26 of 2000). Some private companies have outsourced reporting hot lines to independent
companies, to ensure that employees who disclose wrongdoing do not suffer negative consequences. However, when companies
themselves are behind wrongdoing, for example through tax irregularities or the flouting of rules and regulations, whistle-blowers
may be victimized or dismissed.

Also, there have been some recent cases of private sector whistle-blowers who have suffered negative consequences as a result
of disclosure. For example, independent bread distributor Imraahn Mukaddam reported to the Competition Commission over
price-fixing by Premier Foods, Pioneer Foods and Tiger brands, when bakeries raised bread prices in the Western Cape by
identical amounts and cut the distributors' commission. Following this disclosure, he was subject to defamation and underwent
numerous financial difficulties. However, the response of the Competition Commission has been to assert that the Commission
functions to protect competition and not individuals*.

In addition, a recent study conducted by organized business on Corruption in the South African Private Sector highlighted the
need for greater attention and support to whistle-blowers.

References:
Business Unity South Africa (BUSA),
http://www.busa.org.za


100: Private sector whistleblowers can report abuses of power without fear of negative consequences. This may be due to robust mechanisms to protect the identity of whistleblowers or may be due to a culture that encourages disclosure and accountability.

75:

50: Private sector whistleblowers are sometimes able to come forward without negative consequences, but in other cases, whistleblowers are punished for disclosing, either through official or unofficial means.

25:

0: Private sector whistleblowers often face substantial negative consequences, such as losing a job, relocating to a less prominent position, or some form of harassment.

50. In practice, is the internal mechanism (i.e. phone hotline, e-mail address, local office) through which civil servants can report corruption effective?

56

50a. In practice, the internal reporting mechanism for public sector corruption has a professional, full-time staff.

Comments:
As the government’s main mechanism for allowing disclosures and detection corruption in the public service, the National Anti-Corruption Hotline has professional, full-time staff. Callers can report in any of the eleven official languages, and Hotline operators are provided with a checklist to assist in communication with callers. The PSC also established a dedicated standby unit for the management of case referral.

However, the Public Service Commission (PSC) has acknowledged the interrogation skills of operators as a problem area that hinders the effective functioning of the Hotline, and this has been confirmed in feedback from both national and provincial government departments.

Other government departments with internal reporting mechanisms in place, including the Independent Complaints Directorate, the South African Revenue Service, and the Department of Home Affairs, also employ full-time, professional staff in the operation of these mechanisms. However, a number of sources suggest that other national and provincial departments lack adequate institutional capacity to establish and maintain the reporting and investigating of cases of corruption.
100: The agency/entity has staff sufficient to fulfill its basic mandate.

75:

50: The agency/entity has limited staff, a fact that hinders its ability to fulfill its basic mandate.

25:

0: The agency/entity has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

50b. In practice, the internal reporting mechanism for public sector corruption receives regular funding.

Comments:
The National Anti-Corruption Hotline operated by the Public Service Commission (PSC) receives consistent funding, as reflected in the 2008 Estimates of National Expenditure released by National Treasury. However, the PSC also contends that funding has been concentrated primarily on the operation of the call center, to the detriment of the dedicated unit established to manage case referrals and other initiatives.

Other permanent anti-corruption units within various departments also receive regular funding, including those located in the Independent Complaints Directorate and the South African Revenue Service. Nonetheless, limited resources, especially in the provincial departments, are often cited as the reason behind poor feedback and investigation performance rates.
The Call Center for the National Anti-Corruption Hotline (NACH) must submit cases to the Public Service Commission (PSC) within 24 hours for approval and referral to departments. Although government departments are then required to provide feedback to the PSC on the status of cases originating from the NACH within 40 days of referral, PSC reports suggest that performance has been disappointing overall in this regard.

For instance, in 2006-2007, the PSC received feedback on only 30 percent of cases referred to provincial departments. Between September of 2004 and November of 2006, only 142 cases out of 2,296 referred to departments were closed, following the conclusion of an investigation. Reportedly, in some provinces such as KwaZulu-Natal, investigations have only begun six months after the original referral from the PSC. In spite of these reports, sources highlight that most of the serious allegations reported to the NACH have been dealt with in an appropriate period of time.

Reports suggest that other internal reporting mechanisms have also yielded positive results. For example, the 2006/07 Annual Report of the South African Revenue Service (SARS) underscored successful responses to fraud and corruption through numerous internal investigations, in which offenders were prosecuted and the relevant employees were dismissed, criminally charged, or both. The Independent Complaints Directorate also reported success in the handling of corruption allegations during 2006 and 2007.

**Comments:**
The Call Center for the National Anti-Corruption Hotline (NACH) must submit cases to the Public Service Commission (PSC) within 24 hours for approval and referral to departments. Although government departments are then required to provide feedback to the PSC on the status of cases originating from the NACH within 40 days of referral, PSC reports suggest that performance has been disappointing overall in this regard.

For instance, in 2006-2007, the PSC received feedback on only 30 percent of cases referred to provincial departments. Between September of 2004 and November of 2006, only 142 cases out of 2,296 referred to departments were closed, following the conclusion of an investigation. Reportedly, in some provinces such as KwaZulu-Natal, investigations have only begun six months after the original referral from the PSC. In spite of these reports, sources highlight that most of the serious allegations reported to the NACH have been dealt with in an appropriate period of time.

Reports suggest that other internal reporting mechanisms have also yielded positive results. For example, the 2006/07 Annual Report of the South African Revenue Service (SARS) underscored successful responses to fraud and corruption through numerous internal investigations, in which offenders were prosecuted and the relevant employees were dismissed, criminally charged, or both. The Independent Complaints Directorate also reported success in the handling of corruption allegations during 2006 and 2007.

**References:**


100: The agency/entity acts on complaints quickly. While some backlog is expected and inevitable, complaints are acknowledged promptly and investigations into serious abuses move steadily towards resolution. Citizens with simple issues can expect a resolution within a month.

75:

50: The agency/entity acts on complaints quickly, with some exceptions. Some complaints may not be acknowledged, and simple issues may take more than two months to resolve.

25:

0: The agency/entity cannot resolve complaints quickly. Complaints may be unacknowledged for more than a month, and simple issues may take more than three months to resolve. Serious abuses are not investigated with any urgency.

50d. In practice, when necessary, the internal reporting mechanism for public sector corruption initiates investigations.

Comments:
The Public Service Commission (PSC) does not have the power, nor the institutional capacity, to initiate investigations, and instead refers allegations reported through the National Anti-Corruption Hotline (NACH) to relevant departments. However, it has been suggested that increasing the PSC's investigative capacity would enable the Commission to handle a number of sensitive investigations that are not being followed through by departments.

Instead, a number of actions have been taken, which are reflected in the budget of the PSC. Each public service department is required to meet a minimum requirement of investigative capacity. However, it is also apparent that this is lacking in a number of departments. For example, only two provincial departments in the Free State had investigative procedures in place in 2007. Investigative capacity is stronger in other national and provincial departments, indicating varying degrees of compliance, capacity and implementation.

References:


The Department of Public Service and Administration (DPSA) has issued Minimum Anti-Corruption Capacity for Departments and Organizational Components in the Public Service guidelines, which require all government departments to establish internal information systems to record allegations, and ensure capacity to investigate them.

The Public Service Commission also has operated a National Anti-Corruption Hotline for Public Service since September of 2004 – a national, toll-free, non-stop hotline, along with a fax, email and mail reporting system. Reports to the hotline are re-directed to the relevant departments. Currently, some other government departments have also established reporting lines, such as the Ethical Helpline of the Independent Complaints Directorate (ICD) and the Anti-Fraud and Corruption Hotline of the South African Revenue Services (SARS). Moreover, anti-corruption hotlines have been established in some provinces, such as the Eastern Cape.

However, the PSC’s National Anti-Corruption Hotline will eventually replace other existing hotlines in government departments and provincial administrations.

Civil servants, as well as members of the public, are also able to report suspicious activities, or lodge complaints online or via email, through the Office of the Public Protector and SARS. Each province also has an office where individuals can make walk-in disclosures. Finally, in cases where there are implications of organized crime, a report can be made to the Scorpions crime-fighting unit in person or on the phone.

References:
Department of Public Service and Administration, 2003. Guideline for Minimum Anti-Corruption Capacity for Departments and
YES: A YES score is earned if there is a mechanism, or multiple mechanisms for multiple national government agencies, through which civil servants can report cases of graft, misuse of public funds, or corruption.

NO: A NO score is earned if no such mechanism (or equivalent series of mechanisms) exists.

IV-3. Procurement

51. Is the public procurement process effective?

YES | NO

51a. In law, there are regulations addressing conflicts of interest for public procurement officials.
Comments:
National Treasury regulations for Supply Chain Management, in terms of the Public Finance Management Act (1999) stipulate a system of disclosure applicable to all procurement officials. Procurement officials are also subject to the Public Service Regulations.

References:
Public Finance Management Act (Act 1 of 1999). Available at:

Regulations: A Framework for Supply Chain Management 2003. Available at

Public Service Regulations (2001) in terms of the Public Service Act (1994). Available at:

Telephonic interview with Marcia Sheraton, economist, Provincial Treasury Western Cape Provincial Administration, Sept. 3, 2008, Cape Town

YES: A YES score is earned if there are specific formal regulations defining and regulating conflicts of interest between official public duty and private interests for public procurement officials. A YES score is earned if such regulations cover all civil servants, including procurement officials.

NO: A NO score is earned if no such rules exist.

51b. In law, there is mandatory professional training for public procurement officials.

YES | NO

Comments:
The Supply Chain Management Framework Regulations stipulate that all officials involved in public procurement must be appropriately trained, including in the application of the preferential procurement policy.

References:
Public Finance Management Act (Act 1 of 1999). Available at:

Regulations: A Framework for Supply Chain Management 2003. Available at

Public Service Regulations (2001) in terms of the Public Service Act (1994). Available at:

Telephonic interview with Marcia Sheraton, economist, Provincial Treasury Western Cape Provincial Administration, Sept. 3, 2008, Cape Town

YES: A YES score is earned if public procurement officials receive regular mandatory training to ensure professional standards in supervising the tendering process. A YES score is earned if such training is mandated for portions of the broader civil service, to include procurement officials.

NO: A NO score is earned if there is no regular required training of public procurement officials or if training is sporadic, inconsistent, unrelated to procurement processes, or voluntary.
In practice, the conflicts of interest regulations for public procurement officials are enforced.

Comments:
Various regulations governing conflicts of interest have been developed for the public sector, and for procurement specifically. However, the risk of corruption in procurement processes remains high, and questions remain as to how effectively regulations have been implemented and enforced.

The Regulations to the Public Service Act (Act 103 of 1994) require public sector employees generally to declare any potential conflict of interest. These are monitored by the Public Service Commission.

Chapter 1 of the 2008 draft regulations also provides that if a possible conflict of interest arises in the performance of any act by any functionary in terms of these regulations, that functionary shall perform the act after considering a recommendation of an independent panel consisting of at least two persons, appointed by the relevant executive authority, and if the functionary is the relevant executive authority, the Minister shall appoint the panel.

The Public Service Act (Act 103 of 1994), read with the Code of Conduct for Public Servants (2001), provides that employees must serve the public in an unbiased and impartial manner in order to create confidence in the Public Service. A public servant may not engage in any transaction or action that is in conflict with or infringes on the execution of his or her official duties. They must refrain from any official action and recuse themselves from any decision-making process which may result in improper personal gain, and this should be properly declared by the employee. The Code also requires that a public servant does not abuse his or her position in the Public Service to promote or prejudice the interest of any political party or interest group.

Moreover, Section 50 (3) of the Public Finance Management Act (Act 1 of 1999) provides for a mechanism requiring that a member of an accounting authority must disclose to the accounting authority any direct or indirect personal or private business interest that that member or any spouse, partner or close family member may have in any matter before the accounting authority, and withdraw from the proceedings of the accounting authority when that matter is considered. The accounting authority may grant an exemption if the interest is trivial or irrelevant.

The PSC has also introduced a Financial Disclosure Framework, which provides guidelines on managing conflicts of interest and the submission of financial disclosure forms. In terms of the Framework, all members of the Senior Management Service (SMS) are required to disclose their financial interests.

More directly related to procurement process, in 2003 Cabinet adopted a Policy to Guide Uniformity in Procurement Reform Processes in Government, which preceded the implementation of a number of procurement reform initiatives, and the issuing of the Regulations for the Framework for Supply Chain Management, as per section 76(4)(c) of the Public Finance Management Act (PFMA)(Act 1 of 1999).

The Supply Chain Management Framework required all accounting officers/authorities to establish and implement a supply chain management function that promotes sound financial management and uniformity in all spheres of government. Subsequent Practice Notes issued by National Treasury introduced standardized bidding documents, directives for the appointment of consultants and a code of conduct applicable to all Supply Chain Management practitioners. The Framework is applicable to all national and provincial departments, constitutional institutions and public entities listed in schedules 3A and 3C of the PFMA.

The Regulations to the State Tender Board Act (Act 86 of 1968) were also amended: whereas previously the Regulations required that procurement of all goods and services must be done only through the State Tender Board, the amended Regulations now allow for accounting officers of national departments to procure goods and services either through the State Tender Board or alternatively in terms of the Public Finance Management Act, No. 1 of 1999 (as amended by Act 29 of 1999) (PFMA).

In some cases, sector-specific guidelines have also been developed: for example, in February of 2008, the Construction Industry Development Board amended the Standards for Uniformity in Construction Procurement Procedures to specifically address conflicts of interest in procurement, among other issues.

The Standards explicitly define conflicts of interest as any situation in which: someone in a position of trust has competing professional or personal interests which make it difficult to fulfill his or her duties impartially; an individual or organization is in a position to exploit a professional or official capacity in some way for their personal or corporate benefit; incompatibility or contradictory interests exist between an employee and the organization which employs that employee.
The Standards also detail circumstances in respect of persons involved in the procurement process, which include direct, indirect or family interests in the tender or outcome of the procurement process and any personal bias, inclination, obligation, allegiance or loyalty which would in any way affect any decisions taken.

The Standards compel employers, tenderers, agents and employees involved in tender process to avoid conflicts of interest, and declare conflicts where they exist. The Standards further require that employees, agents and advisors of the employer shall declare any conflict of interest to whoever is responsible for overseeing the procurement process at the start of any deliberations relating to the procurement process or as soon as they become aware of such conflict, and abstain from any decisions where such conflict exists or recuse themselves from the procurement process, as appropriate.

However, the effectiveness of implementation and enforcement of these regulations remains questionable.

In 2005, a Transparency International report valued public sector procurement at approximated R180-billion (US$18 billion) annually, and observed that as the nexus between the public and private sectors, it is also one of the areas most vulnerable to corruption.

In a 2007 report, the PSC noted that across government administration, potential conflicts of interest are most likely to appear in financial management, and more specifically, in procurement, auditing and accounting. The Report indicates that since the introduction of the Financial Disclosure Framework, the submission of the financial disclosure forms by various members of the SMS has not been satisfactory, and that every year many senior managers fail to disclose their financial interests. The PSC has found that potential conflicts of interest are most likely to occur at top management level, and through cases identified by the Auditor-General based on declarations by SMS memberships with directorships in companies and close corporations, it was found that a total of 835 SMS members (53 percent of cases assessed) are involved in private companies that could pose a potential conflict of interest.

A Business Against Crime survey conducted with 760 South Africa-based companies in 2006 found that 26 percent of respondents were aware of unethical procurement practices in the awarding of quotes and tenders in their industry, and 11 percent indicated that bribery featured in these practices. Business Against Crime also reported that strict contracting and procurement processes along with strong internal audit functions and IT controls were the most effective mechanisms used to prevent corruption.

However, aside from cases such as the highly-publicized government Arms Deal, in general cases of conflicts of interest are illicit and well-concealed. In the last year, there have been relatively few media reports on conflicts of interest in procurement processes, although several cases have emerged. For example, in April it was reported that Sisa Consulting was under investigation by the Directorate of Special Operations (DSO) after the company was awarded tenders from the KwaZulu-Natal Health Department valued at millions of rands. Solomon Sibeko, holder of a 40 percent share in Sisa, is the husband of Busy Nyembezi, former head of the Department.

In June, the Head of the State Information Technology Agency (SITA) admitted in Parliament that tender procedures were flouted on multi-billion contracts awarded to four companies to modernize the home affairs identification systems.

References:


Interview (telephonic) with John Van Rheede, Deputy Director: Economic Empowerment Unit, Department of Economic Development and Tourism, Western Cape Provincial Administration, Sept. 4, 2008, Cape Town.

Interview (telephonic) with Jan Breytenbach, Chief Director: Norms and Standards, National Treasury, Oct. 17, 2008.


State Tender Board Act (Act 86 of 1968).


100: Regulations regarding conflicts of interest for procurement officials are aggressively enforced.

75:

50: Conflict-of-interest regulations exist, but are flawed. Some violations may not be enforced, or some officials may be exempt from regulations.

25:

0: Conflict-of-interest regulations do not exist, or are consistently ineffective.

51d. In law, there is a mechanism that monitors the assets, incomes and spending habits of public procurement officials.
Comments:
There is no legislation that deals comprehensively with all of these areas, and no single mechanism is in place. However, there are legislative measures that, together, endeavor to address many aspects of the activities of public procurement officials.

The regulations for the tender process are used as a tool to foster transparency and prevent corruption in procurement. However, the frequency with which public officials are embroiled in tender controversies unfortunately raises many questions about the adequacy of the tender as a reliable antidote to corruption.

In addition, the public service regulations requiring annual asset disclosures by all senior officials are monitored by the Public Service Commission.

The Public Service Act, 1994, read with the Code of Conduct for Public Servants, 2001, provide that employees must serve the public in an unbiased and impartial manner in order to create confidence in the Public Service. A public servant may not engage in any transaction or action that is in conflict with or infringes on the execution of his or her official duties. They must refrain from any official action and recuse themselves from any decision-making process which may result in improper personal gain, and this should be properly declared by the employee. The Code also requires that a public servant does not abuse his or her position in the Public Service to promote or prejudice the interest of any political party or interest group.

Moreover, the PFMA provides in Section 50(3) for a mechanism requiring that a member of an accounting authority must disclose to the accounting authority any direct or indirect personal or private business interest that that member or any spouse, partner or close family member may have in any matter before the accounting authority, and withdraw from the proceedings of the accounting authority when that matter is considered. The accounting authority may grant an exemption if the interest is trivial or irrelevant.

A Treasury Circular prescribes a procedure for members of the Committee to declare their interests annually. At each meeting of the Committee, each Committee member and each official providing administrative support to the Committee must also sign a declaration that they will not purposefully favor or prejudice anybody.

The Code also requires in strict and unequivocal terms that an attendance register must be signed by members at each meeting; that this register must include a declaration of interests, including all gifts and invitations accepted to social events received from suppliers or potential suppliers, irrespective of the value; and that the register form part of the official minutes.

The Code also requires that no discussions may take place until each member (including the chairperson or vice-chairperson) declares every reasonably possibly relevant interest concerning any matter serving before the Committee and until affected members have recused themselves.

The guidelines are explicitly stated to be supplementary to the Code of Conduct for the Public Service as contained in Chapter 2 of the Public Service Regulations, 2001, as well as to the Code of Conduct for Supply Chain Management Practitioners, issued on Dec. 5, 2003, as practice note number SCM 4 of 2003.

Additionally, in terms of section 23(3)(b) of the Prevention and Combating of Corrupt Activities Act, a judge may authorize an investigation of an allegation of corruption if satisfied, among others things, that there are reasonable grounds to believe that a person maintains a standard of living above that which is commensurate with his or her present or past known sources of income or assets, or is in control or possession of pecuniary resources or property disproportionate to his or her present or past known sources of income or assets; and that person maintains such a standard of living through the commission of corrupt activities or the proceeds of unlawful activities or that such pecuniary resources or properties are instrumentalities of corrupt activities or the proceeds of unlawful activities.

Section 34(1) imposes a responsibility on any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed an offense in terms of the Act to report such knowledge or suspicion to a police official. Failure to do so is an offense.

References:
Section G of Chapter 3 of the Public Service Regulations (2001), in terms of the Public Service Act (1994). Available at http://www.dpsa.gov.za


YES: A YES score is earned if there is a formal mandate to some agency to monitor the assets, incomes and spending habits of public procurement officials, such as an inspector general, or ombudsman.

NO: A NO score is earned if no such mandate exists.

51e. In law, major procurements require competitive bidding.

YES | NO

Comments:
Section 217 of the Constitution of the Republic of South Africa requires an organ of state to contract for goods or services in accordance with a system which is fair, equitable, transparent, competitive and cost effective.

Section 76(4)(c) of the Public Finance Management Act of 1999 obliges accounting officers and authorities of a department, trading entity or constitutional institution to ensure an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.

References:


YES: A YES score is earned if all major procurements (defined as those greater than 0.5% of GDP) require competitive bidding.

NO: A NO score is earned if competitive bidding is not required by law or regulation for major procurement (greater than 0.5% OF GDP).

51f. In law, strict formal requirements limit the extent of sole sourcing.
Comments:
Section 217 of Constitution requires competitive bidding. This is confirmed and elaborated in the Public Finance Management Act. Treasury regulations do, however, allow competitive bidding to be bypassed in circumstances where such bidding is impractical, but they specify that the responsible authority must document the reasons for the deviation. Minor procurements below a threshold amount, determined annually by proclamation in the Government Gazette (currently R5,000 – US$500), need not follow a competitive bidding process.

References:
Constitution of the Republic of South Africa (Act 108 of 1996). Available at:
http://www.info.gov.za

Public Finance Management Act (Act1 of 1999). Available at:

Regulations: A Framework for Supply Chain Management 2003. Available at

YES: A YES score is earned if sole sourcing is limited to specific, tightly defined conditions, such as when a supplier is the only source of a skill or technology.

NO: A NO score is earned if there are no prohibitions on sole sourcing. A NO score is earned if the prohibitions on sole sourcing are general and unspecific.

51g. In law, unsuccessful bidders can instigate an official review of procurement decisions.

Comments:
Clause 9 of Treasury's Supply Chain Management Framework Regulations state that the various authorities responsible for procurement must investigate any allegations against an official or other role player of corruption, improper conduct or failure to comply with the supply chain management system. The regulations stipulate that the national treasury and each provincial treasury must establish a mechanism to receive and consider complaints regarding alleged non-compliance with prescribed norms and standards; and to make recommendations for remedial actions to be taken if non-compliance with norms and standards is established, including recommendations of criminal steps.

References:
Constitution of the Republic of South Africa (Act 108 of 1996). Available at:
http://www.info.gov.za

Public Finance Management Act (Act1 of 1999). Available at:

Regulations: A Framework for Supply Chain Management 2003. Available at

YES: A YES score is earned if there is a formal appeal process for unsuccessful bidders.

NO: A NO score is earned if no such process exists.
51h. In law, unsuccessful bidders can challenge procurement decisions in a court of law.

**YES** | **NO**

**Comments:**
Section 8 of the Constitution provides that the Bill of Rights, of which Sections 34 and 38 form part, applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. Section 34 provides that everyone has access to the courts, and Section 38 provides that anyone listed may approach the courts in order to enforce the rights in the Constitution, and for appropriate relief.

Unsuccessful bidders can, in terms of the Public Finance Management Act, challenge the bidding process in court. In terms of standard legal principles and the law, litigation can be undertaken if dissatisfaction persists after pursuing the complaints mechanisms of the various treasuries (National and Provincial), which can, after investigating a particular matter, also recommend criminal steps.

**References:**


**YES:** A YES score is earned if unsuccessful bidders can use the courts to appeal a procurement decision.

**NO:** A NO score is earned if no such process exists.

51i. In law, companies guilty of major violations of procurement regulations (i.e. bribery) are prohibited from participating in future procurement bids.

**YES** | **NO**

**Comments:**
Clause 9 of Treasury's regulations stipulate that officials responsible for procurement must reject a proposal for the award of a contract if the recommended bidder has committed a corrupt or fraudulent act in competing for particular bid. The regulations require that procurement officials must check the national treasury's database prior to awarding any contract to ensure that no recommended bidder, nor any of its directors, are listed as companies or persons prohibited from doing business with the public sector.

The database is the Register established in terms of Chapter 6 of the Prevention and Combating of Corrupt Activities Act.

**References:**


**YES:** A YES score is earned if there are formal procurement blacklists, designed to prevent convicted companies from doing business with the government.

**NO:** A NO score is earned if no such process exists.

51. In practice, companies guilty of major violations of procurement regulations (i.e. bribery) are prohibited from participating in future procurement bids.

| 100 | 75 | 50 | 25 | 0 |

**Comments:**
The method of preventing blacklisted companies from participating in future government tenders has been established but, to date, no companies have been listed, as there have been no convictions.

**References:**


**52. Can citizens access the public procurement process?**

| 100 |

52a. In law, citizens can access public procurement regulations.
### Comments:
The Constitution in Section 217 dictates that procurement processes must be in accordance with a fair, equitable, transparent and competitive system. Section 38(1)(a)(iii) of the PFMA operationalizes this requirement. This legislative framework requires, among other things, that procurement regulations and processes are made accessible to the public. The Promotion of Access to Information Act also ensures citizens the right to access records of public bodies.

### References:
http://etd.uwc.ac.za/usrfiles/modules/etd/docs/etd_init_2352_1174547916.pdf

The Constitution of the Republic of South Africa (Act 108 of 1996). Available at:

Public Finance Management Act (Act1 of 1999). Available at:

Promotion of Access to Information Act (Act 2 of 2000). Available at:

<table>
<thead>
<tr>
<th>YES</th>
<th>NO</th>
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<tbody>
<tr>
<td>A YES score is earned if procurement rules are, by law, open to the public. These regulations are defined here as the rules governing the competitive procurement process.</td>
<td>A NO score is earned if procurement rules are officially secret for any reason or if there are no procurement rules.</td>
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52b. In law, the government is required to publicly announce the results of procurement decisions.

### Comments:
Section 76(4)(c) of the Public Finance Management Act of 1999 obliges accounting officers and authorities of a department, trading entity or constitutional institution to ensure an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective. This provision necessitates the publication of results of procurement decisions. In addition, Section 6(3)(d) of A Framework for Supply Chain Management issued by the National Treasury, requires that awards be published in the Government Tender Bulletin and other media by means of which the bids were advertised.

### References:
Public Finance Management Act (Act1 of 1999). Available at:


<table>
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<tr>
<th>YES</th>
<th>NO</th>
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<tbody>
<tr>
<td>A YES score is earned if the government is required to publicly post or announce the results of the public procurement process. This can be done through major media outlets or on a publicly-accessible government register or log.</td>
<td>A NO score is earned if there is no requirement for the government to publicly announce the results of the public procurement process.</td>
</tr>
</tbody>
</table>
52c. In practice, citizens can access public procurement regulations within a reasonable time period.

Comments:
All procurement regulations are easily accessible on the website of the National Treasury. In addition, new regulations and amendments are posted on the website immediately.

References:

Telephonic interview with Aletta Mbuyani, Supply Chain Specialist, the National Treasury, Sept. 5, 2008.


100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information. These records are defined here as the rules governing the competitive procurement process.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

52d. In practice, citizens can access public procurement regulations at a reasonable cost.

Comments:
All procurement regulations are easily accessible on the website of the National Treasury, free of charge, or from the Government Printer on payment of a minimal charge.

References:


Telephonic interview with Aletta Mbuyani, Supply Chain Specialist, the National Treasury, Sept. 5, 2008.
100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line. These records are defined here as the rules governing the competitive procurement process.

75:

50: Records impose a financial burden on citizens, journalists or CSOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or CSOs trying to access this information.

52e. In practice, major public procurements are effectively advertised.

Comments:
Public procurements are advertised through the weekly state and provincial tender bulletins and through the print media, particularly newspapers. According to Sabinet, there are over 100 sources in South Africa where tenders are announced and advertised. Government Tender Bulletin is available online for free and in print for a small amount of charge. Other professional tender databases, such as Tenderscan and Sabinet Online Tender Database, also charge to provide full and up-to-date information on all tenders.

References:
Tenders section on Western Cape Provincial government web site, available at:

Global Integrity, 2006. Country Report: South Africa. Available at:
https://last.globalintegrity.org/reports/2006/index.cfm

Telephonic interview with Aletta Mbuyani, Supply Chain Specialist, the National Treasury, Sept. 5, 2008.

Web site of the National Treasury
http://www.treasury.gov.za/

Government web site

100: There is a formal process of advertising public procurements. This may include a government website, newspaper advertising, or other official announcements. All major procurements are advertised in this way. Sufficient time is allowed for bidders to respond to advertisements.

75:

50: There is a formal process of advertisement but it is flawed. Some major procurements may not be advertised, or the advertising process may not be effective. The time between advertisements and bidding may be too short to allow full participation.
There is no formal process of advertising major public procurements or the process is superficial and ineffective.

In practice, citizens can access the results of major public procurement bids.

Comments:
In general, tenders are opened in public on the closing date and the names of the bidders are read out. In addition, as required by Supply Chain Management Regulations, the National Treasury publishes the results of most large public procurement bids, including the names of the successful bidders, price and the scores they earned in regards to the established criteria. Losing bidders can also request the relevant authority to explain why their bid was unsuccessful. Responses are usually forthcoming.

References:


Telephonic interview with Aletta Mbuyani, Supply Chain Specialist, the National Treasury, Sept. 5, 2008.

Web site of the National Treasury http://www.treasury.gov.za/


100: Records of public procurement results are publicly available through a formal process.

75:

50: Records of public procurements are available, but there are exceptions to this practice. Some information may not be available, or some citizens may not be able to access information.

25:

0: This information is not available to the public through an official process.

IV-4. Privatization

53. Is the privatization process effective?
53a. In law, all businesses are eligible to compete for privatized state assets.

**YES | NO**

Comments:
All businesses can compete for privatized state-owned enterprises/assets, in the same way as in any activity related to the management of public assets. However, guidelines for Broad-Based Black Economic Empowerment as gazetted in 2007 set certain criteria to be met by businesses bidding for state enterprises/assets. The rationale for these criteria is to broaden the ownership base so as to benefit communities and individuals from previously disadvantaged background.

References:


Tendering in South Africa, Tender Scan, available at: [http://www.tenderscan.co.za/Procurement/SouthAfrica.aspx](http://www.tenderscan.co.za/Procurement/SouthAfrica.aspx)


**YES:** A YES score is earned if all businesses are equally eligible to compete for privatized assets. A YES score is still earned if the government did not privatize any state-owned assets during the study period.

**NO:** A NO score is earned if any group of businesses (other than those blacklisted due to corruption charges) is excluded by law.

53b. In law, there are regulations addressing conflicts of interest for government officials involved in privatization.

**YES | NO**

Comments:
There is no legislation dealing specifically with privatizations. However, various legislative measures, taken together, apply to the conduct of all public officials.

The Public Service Regulations generally require public sector employees to declare any potential conflict of interest. These are monitored by the Public Service Commission. However, access to assets disclosure records of senior officials is restricted.

Chapter 1 of the 2008 draft regulations also provides that if a possible conflict of interest arises in the performance of any act by any functionary in terms of these regulations, that functionary shall perform the act after considering a recommendation of an independent panel consisting of at least two persons, appointed by the relevant executive authority, and if the functionary is the relevant executive authority, the Minister shall appoint the panel.

The Public Service Act, 1994, read with the Code of Conduct for Public Servants, 2001, provide that employees must serve the public in an unbiased and impartial manner in order to create confidence in the Public Service. A public servant may not engage in any transaction or action that is in conflict with or infringes on the execution of his or her official duties. They must refrain from any official action and recuse themselves from any decision-making process which may result in improper personal gain, and this
should be properly declared by the employee. The Code also requires that a public servant does not abuse his or her position in the Public Service to promote or prejudice the interest of any political party or interest group.

Moreover, the PFMA provides in Section 50(3) for a mechanism requiring that a member of an accounting authority must disclose to the accounting authority any direct or indirect personal or private business interest that that member or any spouse, partner or close family member may have in any matter before the accounting authority, and withdraw from the proceedings of the accounting authority when that matter is considered. The accounting authority may grant an exemption if the interest is trivial or irrelevant.

A Treasury Circular prescribes a procedure for members of tender committees to declare their interests annually. At each meeting of the Committee, each Committee member and each official providing administrative support to the Committee must also sign a declaration that they will not purposefully favor or prejudice anybody.

The Code also requires in strict and unequivocal terms that an attendance register must be signed by members at each meeting; that this register must include a declaration of interests, including all gifts and invitations accepted to social events received from suppliers or potential suppliers, irrespective of the value, and that the register form part of the official minutes.

The Code also requires that no discussions may take place until each member (including the chairperson or vice-chairperson) declares every reasonably possibly relevant interest concerning any matter serving before the committee and until affected members have recused themselves.

The guidelines are explicitly stated to be supplementary to the Code of Conduct for the Public Service as contained in Chapter 2 of the Public Service Regulations, 2001, as well as to the Code of Conduct for Supply Chain Management Practitioners, issued on 5 December 2003 as practice note number SCM 4 of 2003.

Additionally, in terms of section 23(3)(b) of the Prevention and Combating of Corrupt Activities Act, a judge may authorize an investigation of an allegation of corruption if satisfied, among others things, that there are reasonable grounds to believe that a person maintains a standard of living above that which is commensurate with his or her present or past known sources of income or assets, or is in control or possession of pecuniary resources or property disproportionate to his or her present or past known sources of income or assets; and that person maintains such a standard of living through the commission of corrupt activities or the proceeds of unlawful activities or that such pecuniary resources or properties are instrumentalities of corrupt activities or the proceeds of unlawful activities.

Section 34(1) imposes a responsibility on any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed an offense in terms of the Act to report such knowledge or suspicion to a police official. Failure to do so is an offense.

References:


Section G of Chapter 3 of the Public Service Regulations (2001), in terms of the Public Service Act (1994). Available at http://www.dpsa.gov.za


YES: A YES score is earned if there are specific formal regulations defining and regulating conflicts of interest between official public duty and private interests for privatization officials. A YES score is earned if such regulations cover all civil servants, including privatization officials.

NO: A NO score is earned if there are no such formal regulations.

53c. In practice, conflicts of interest regulations for government officials involved in privatization are enforced.

Comments:
There is no specific legislation dealing with conflict of interests in the privatization process. Further, whilst some privatization occurred in the late 1990s, there have been no recent instances of privatization that would allow for an assessment of enforcement of legislation or regulations. However, various legislative measures, taken together, apply to the conduct of all public officials.

The Regulations to the Public Service Act (Act 103 of 1994) require public sector employees generally to declare any potential conflict of interest. These are monitored by the Public Service Commission.

Chapter 1 of the 2008 draft regulations also provides that if a possible conflict of interest arises in the performance of any act by any functionary in terms of these regulations, that functionary shall perform the act after considering a recommendation of an independent panel consisting of at least two persons, appointed by the relevant executive authority, and if the functionary is the relevant executive authority, the Minister shall appoint the panel.

The Public Service Act (Act 103 of 1994), read with the Code of Conduct for Public Servants (2001), provides that employees must serve the public in an unbiased and impartial manner in order to create confidence in the Public Service. A public servant may not engage in any transaction or action that is in conflict with or infringes on the execution of his or her official duties. They must refrain from any official action and recuse themselves from any decision-making process which may result in improper personal gain, and this should be properly declared by the employee. The Code also requires that a public servant does not abuse his or her position in the Public Service to promote or prejudice the interest of any political party or interest group.

Moreover, Section 50 (3) of the Public Finance Management Act (Act 1 of 1999) provides for a mechanism requiring that a member of an accounting authority must disclose to the accounting authority any direct or indirect personal or private business interest that that member or any spouse, partner or close family member may have in any matter before the accounting authority, and withdraw from the proceedings of the accounting authority when that matter is considered. The accounting authority may grant an exemption if the interest is trivial or irrelevant.

The PSC has also introduced a Financial Disclosure Framework, which provides guidelines on managing conflicts of interest and the submission of financial disclosure forms. In terms of the Framework, all members of the Senior Management Service (SMS) are required to disclose their financial interests.

A National Treasury Circular prescribes a procedure for members of tender committees to declare their interests annually. At each meeting of the Committee, each Committee member and each official providing administrative support to the Committee must also sign a declaration that they will not purposefully favor or prejudice anybody.

The Code of Conduct for Bid Adjudication Committees promulgated in the Circular also requires in strict and unequivocal terms that an attendance register must be signed by members at each meeting; that this register must include a declaration of interests, including all gifts and invitations accepted to social events received from suppliers or potential suppliers, irrespective of the value; and that the register form part of the official minutes.

The Code also requires that no discussions may take place until each member (including the chairperson or vice-chairperson) declares every reasonably possibly relevant interest concerning any matter serving before the committee and until affected members have recused themselves.

The Guidelines contained in the Code are explicitly stated to be supplementary to the Code of Conduct for the Public Service as contained in Chapter 2 of the Public Service Regulations, 2001, as well as to the Code of Conduct for Supply Chain Management Practitioners, issued on Dec. 5, 2003, as practice note number SCM 4 of 2003.
Additionally, in terms of section 23(3)(b) of the Prevention and Combating of Corrupt Activities Act (Act 12 of 2004), a judge may authorize an investigation of an allegation of corruption if satisfied, among others things, that there are reasonable grounds to believe that a person maintains a standard of living above that which is commensurate with his or her present or past known sources of income or assets, or is in control or possession of pecuniary resources or property disproportionate to his or her present or past known sources of income or assets; and that person maintains such a standard of living through the commission of corrupt activities or the proceeds of unlawful activities or that such pecuniary resources or properties are instrumentalities of corrupt activities or the proceeds of unlawful activities.

Section 34(1) imposes a responsibility on any person who holds a position of authority and who knows or ought reasonably to have known or suspected that any other person has committed an offense in terms of the Act to report such knowledge or suspicion to a police official. Failure to do so is an offense.

References:


Interview with Gary Pienaar, Senior Researcher: Public Ethics, Institute for Democracy in South Africa, Sept. 2, 2008, Cape Town


Public Service Commission. Available at: http://www.psc.gov.za


Section G of Chapter 3 of the Public Service Regulations (2001), in terms of the Public Service Act (1994). Available at http://www.dpsa.gov.za


100: Regulations regarding conflicts of interest for privatization officials are aggressively enforced.

75:

50: Conflict-of-interest regulations exist, but are flawed. Some violations may not be enforced, or some officials may be exempt from the regulations.
25:
0: Conflict of interest regulations do not exist, or are consistently ineffective.

54. Can citizens access the terms and conditions of privatization bids?

90

54a. In law, citizens can access privatization regulations.

YES | NO

Comments:
There is no specific legislation regulating privatizations, but the Promotion of Access to Information Act allows citizens the right to access information, including information related to privatization.

References:


YES: A YES score is earned if privatization rules (defined here as the rules governing the competitive privatization process) are, by law, open to the public. Even if privatization is infrequent or rare, the most recent privatization should be used as the basis for scoring this indicator.

NO: A NO score is earned if privatization rules are officially secret for any reason or if there are no privatization rules.

54b. In practice, privatizations are effectively advertised.

100 | 75 | 50 | 25 | 0

Comments:
When state-owned enterprises or assets are going to be privatized, requests for expressions of interest, a preliminary step before actual privatization, are advertised in both the print and electronic media.

References:
Interview with Nigel Gwynne Evans, Director: Trade and Industry, Western Cape Department of Economic Development and Tourism, Aug. 21, 2008, Cape Town
100: There is a formal process of advertising privatizations. This may include a government website, newspaper advertising, or other official announcements. All major procurements are advertised in this way. Sufficient time is allowed for bidders to respond to advertisements.

75:

50: There is a formal process of advertisement but it is flawed. Some privatizations may not be advertised, or the advertising process may not be effective. The time between advertisements and bidding may be too short to allow full participation.

25:

0: There is no formal process of advertising privatizations or the process is superficial and ineffective.

54c. In law, the government is required to publicly announce the results of privatization decisions.

YES | NO

Comments:
The Constitution and the Promotion of Access to Information Act set general transparency standards for all state activity. While no legislation exists specifically addressing access to information on privatization, section 1(d) of the Constitution declares that openness is one of the founding values, while section 195(1)(g) provides that, among the values and principles governing public administration are transparency, which must be fostered by providing the public with timely, accessible and accurate information. Moreover, section 51 of the Public Finance Management Act sets standards of transparency regarding the management of all public assets.

References:


YES: A YES score is earned if the government is required to publicly post or announce the results of the privatization process. This can be done through major media outlets or on a publicly-accessible government register or log.

NO: A NO score is earned if there is no requirement for the government to publicly announce the results of the privatization process.

54d. In practice, citizens can access privatization regulations within a reasonable time period.
Comments:
There have been no recent instances of privatization in South Africa, although some did take place in the late 1990s.

However, regulations governing privatization are available to download at no cost from the website of the Department of Trade and Industry (DTI).

In cases where information is not available, individuals can request information through the Promotion of Access to Information Act (Act 2 of 2000).

Section 10 of the PAIA mandated the South African Human Rights Commission (SAHRC) to produce a comprehensive Guide to the PAIA, published in all official languages, distributed to government departments, and available to the public.

Section 3 of the SAHRC Guide details procedures for requesting access to information, and includes the relevant forms required for requests to public and private bodies. The Guide explains procedural requirements for requesters, costs involved, appeals mechanisms, and grounds for refusal of requests. Individuals who are unable to read or write can also make oral requests from the information officer of a public body.

Section 14 of the PAIA also requires public bodies to develop specific manuals on how to access information. The DTI has developed a specific manual on accessing information for any DTI institutions, which can be downloaded for free online.

Individuals may submit a request for information by fax, e-mail or hand delivery.

The PAIA states that public bodies currently have 30 days to respond to requests for information (reduced from 60 days before March 2003 and 90 days before March 2002).

References:
Department of Trade and Industry. Available at: http://www.dti.gov.za


Interview with Nigel Gwynne Evans, Director, Trade and Industry: Western Cape Department of Economic Development and Tourism, Aug. 21, 2008, Cape Town.


100: Records (defined here as the rules governing the competitive privatization process) are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:
Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

In practice, citizens can access privatization regulations at a reasonable cost.

However, regulations governing privatization are available to download at no cost from the website of the Department of Trade and Industry (DTI).

In cases where information is not available online, individuals can request information through the Promotion of Access to Information Act (Act 2 of 2000). The costs of accessing information are prescribed by the Regulations to the PAIA, and are also listed in The Guide on how to use the Promotion of Access to Information Act – Act 2 of 2000 developed by the South African Human Rights Commission (SAHRC).

The Regulations to the PAIA specify that this Guide must be made available in each official language to: the head of the national department responsible for Government Communications and Information Services (GCIS); to every place of legal deposit, as defined by the Legal Deposit Act (Act 54 of 1997), and every tertiary institution established under law; and, upon request, to the head of a private body.

The Regulations also require that the Guide be made available in each official language to the information officers of public bodies, and the Director-General of Communications. The Guide must be published in each official language in the government Gazette, made available in each official language for public inspection during at the SAHRC during office hours, and made available on the SAHRC web site.

The costs of accessing information from a public body are reasonable, and are not prohibitive. A fee of R35.00 (US$3.5) is payable by all requesters, with the exception of individuals requesting personal information about themselves.

The Regulations also prescribe the following costs in respect of information from public bodies: photocopies, R0.60 (US$0.06) per A4-page; printing, R0.40 (US$0.04) per A4-page; copy onto a stiffy disc, R5.00 (US$0.5); copy onto a compact disc, R40 (US$4); transcription of visual images, R22 (US$2.2) per A4-page; copy of visual images, R60 (US$6); transcription of an audio record, R12 (US$1.2) per A4-page; copy of an audio record, R17 (US$1.7).

In addition, an access fee of R15 (US$1.5) is applicable for each hour or part of an hour, excluding the first hour, reasonably required for search and preparation of a record for disclosure. A deposit must be paid where search and preparation will exceed six hours, and one-third of the fee is payable as a deposit by the requester.

Further, the actual postage is payable when a copy of a record must be posted to a requester.

It is important to note that, according to the Open Democracy Advice Center (ODAC), an exemption has also been introduced, whereby individuals who are unemployed or earn below a determined annual income no longer have to pay any fees associated with accessing information from either a public or private body.

However, while the costs specified are reasonably low, a requester may incur other costs, for example, in terms of communication and travel to access information from either a public or private body. Also, if a requester was denied information and initiated legal proceedings, costs would likely increase substantially.

References:
Department of Trade and Industry. Available at: http://www.dti.gov.za

Interview with Mukelani Dimba, Deputy Chief Executive Officer, Open Democracy Advice Centre (ODAC), Oct. 16, 2008.

Interview with Nigel Gwynne Evans, Director, Trade and Industry: Western Cape Department of Economic Development and Tourism,
Aug. 21, 2008, Cape Town.


100: Records (defined here as the rules governing the competitive privatization process) are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or CSOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or CSOs trying to access this information.

Category V. Oversight and Regulation

V-1. National Ombudsman

56. Is the national ombudsman effective?

82

56a. In law, the ombudsman is protected from political interference.
Comments:
Chapter 9 of the Constitution establishes a number of state institutions supporting constitutional democracy, including the Public Protector. All Chapter 9 institutions must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice, according to Section 181(2). Section 181(4) states that no person or organ of state, which includes Parliament (Section 239), may interfere with the functioning of the office of the Public Protector.

Section 181(3) requires other organs of state, through legislative and other measures to protect these institutions to ensure their independence, including in the processes of appointment and removal from office.

Section 193 specifies that the President of the Republic must appoint the Public Protector, on recommendation of the National Assembly. The National Assembly, in turn, must recommend candidates who are nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly. Nominations must be approved by the Assembly by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. The appointment of the Deputy Public Protector is also determined in Parliament, but requires only a majority in the National Assembly.

Similarly, in terms of section 194(1), the Public Protector may be removed from office only on

(a) the ground of misconduct, incapacity or incompetence;
(b) a finding to that effect by a committee of the National Assembly; and
(c) the adoption by the Assembly of a resolution calling for that person’s removal from office.

The Public Protector Act (Act 23 of 1994) also specifies that the Public Protector may be appointed among past or present Members of Parliament with demonstrated experience in the administration of justice.

Both the Public Protector and Deputy Public Protector serve for a seven-year, non-renewable term.

References:

YES: A YES score is earned only if the agency (or set of agencies) has some formal organizational independence from the government. A YES score is earned even if the entity is legally separate but in practice staffed by partisans.

NO: A NO score is earned if the agency is a subordinate part of any government ministry or agency, such as the Department of Interior or the Justice Department.

56b. In practice, the ombudsman is protected from political interference.

Comments:
In law, a strong framework exists to guarantee the Public Protector freedom from political interference, as captured in Chapter 9 of the Constitution and the Public Protector Act (Act 23 of 1994).

Chapter 9 specifies that all state institutions supporting constitutional democracy, including the Public Protector, must be impartial and must exercise their powers and perform their functions without fear, favor or prejudice. Section 181(4) states that no person or organ of state, which includes Parliament (Section 239), may interfere with the functioning of the office of the Public Protector.

Section 181(3) also requires other organs of state, through legislative and other measures to protect these institutions to ensure their independence, including in the processes of appointment and removal from office. The Constitution also includes specific
provisions around the nomination, appointment, tenure, and potential dismissal of the Public Protector, as well as the Deputy Public Protector.

Section 193 specifies that the President of the Republic must appoint the Public Protector, on recommendation of the National Assembly. The National Assembly, in turn, must recommend candidates who are nominated by a committee of the Assembly proportionally composed of members of all parties represented in the Assembly. Nominations must be approved by the Assembly by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. The appointment of the Deputy Public Protector is also determined in Parliament, but requires only a majority in the National Assembly.

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(a) the ground of misconduct, incapacity or incompetence;
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(c) the adoption by the Assembly of a resolution calling for that person’s removal from office.

The Public Protector Act (Act 23 of 1994) also specifies that the Public Protector may be appointed among past or present Members of Parliament with demonstrated experience.

Both the Public Protector and Deputy Public Protector serve for a seven-year, non-renewable term.

However, a 2007 Parliamentary Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions also found that the qualifications required of the Public Protector are extensive and broad and do not compare with those for other Chapter 9 institutions, beyond which the criteria have, in any event not really been applied. The Committee noted that in practice, appointment turns largely on having legal qualifications, or experience in the administration of justice.

The current Public Protector, Lawrence Mushwana, was appointed from among the ruling African National Congress (ANC) parliamentary caucus. This fact, along with the appearance of undue leniency towards the ANC, has led to some perceptions of political bias or favoritism.

Critics often cite Mushwana’s investigation into then-Deputy President Phumzile Mlambo-Ngcuka’s trip to the United Arab Emirates, and to what has become known as the Oilgate affair, as evidence of political influence over the Public Protector.

In 2004, the media reported that PetroSA, a major public entity involved in trading crude oil had advanced R15 million (US$1.5 million) in 2003 to privately-owned black economic empowerment company, Imvume Management. Imvume was contracted to provide oil condensate for its operations, but instead of paying its supplier, reportedly diverted R11 million (US$1.1 million) to the ANC. Subsequently, PetroSA repeated the payment to Imvume’s supplier, resulting in a further loss of public funds.

The Public Protector was then requested to investigate accusations of collusion between PetroSA and Imvume. However, controversially Mushwana found that there was no misconduct or maladministration by PetroSA or any other public official, and that the R15 million lost its designation as public money when it was paid by PetroSA, and was thus beyond his jurisdiction. Critics suggested that this unduly and artificially narrow interpretation of his mandate was motivated by a desire not to offend important political interests.

However, more recently the Public Protector has made a number of significant negative reports, for example, related to then-Minister of Public Service and Administration Geraldine Fraser-Moleketi’s failure to disclose a gift, and possible contempt of court on the part of former Health Minister Manto Tshabalala-Msimang. These cases suggest that, while the possibility of political interference exists, it is not necessarily the case in practice.

The extent to which any of these rulings may be the result of direct or active interference, or perceptions of pressure, expectations or inclination, is unclear.

References:


This agency (or set of agencies) operates independently of the political process, without incentive or pressure to render favorable judgments in politically sensitive cases. Investigations can operate without hindrance from the government, including access to politically sensitive information.

This agency (or set of agencies) is typically independent, yet is sometimes influenced in its work by negative or positive political incentives. This may include public criticism or praise by the government. The ombudsman may not be provided with some information needed to carry out its investigations.

This agency (or set of agencies) is commonly influenced by political or personal incentives. This may include conflicting family relationships, professional partnerships, or other personal loyalties. Negative incentives may include threats, harassment or other abuses of power. The ombudsman cannot compel the government to reveal sensitive information.

In practice, the head of the ombudsman agency/entity is protected from removal without relevant justification.

Sections 183 and 194 of the Constitution stipulates that the Public Protector is appointed for a fixed, non-renewable term of seven years, and that the Public Protector may be removed from office only on the grounds of misconduct, incapacity or incompetence. This has not occurred to date.

The director of the ombudsman (or directors of multiple agencies) serves a defined term and cannot be removed without a significant justification through a formal process, such as impeachment for abuse of power.

The director of the ombudsman (or directors of multiple agencies) serves a defined term, but can in some cases be removed through a combination of official or unofficial pressure.

Comments:
Sections 183 and 194 of the Constitution stipulates that the Public Protector is appointed for a fixed, non-renewable term of seven years, and that the Public Protector may be removed from office only on the grounds of misconduct, incapacity or incompetence. This has not occurred to date.

References:
Constitution of the Republic of South Africa (Act 108 of 1996). Available at:
http://www.info.gov.za


http://www.pmg.org.za
0: The director of the ombudsman (or directors of multiple agencies) can be removed at the will of political leadership.

56d. In practice, the ombudsman agency (or agencies) has a professional, full-time staff.

100  75  50  25  0

Comments:
The Public Protector has a full-time staff of about 205 of 238 available posts, with a reduction in vacancy rate from 32 percent to 13.9 percent. The Office has shown improved performance by reducing the number of its backlogged cases.

However, the Ad hoc Committee’s Report expresses concern at the lengthy vacancies in senior posts, specifically those of chief financial officer and chief executive officer, saying that these seriously impinged on the operations of the Office.

References:


100: The ombudsman agency (or agencies) has staff sufficient to fulfill its basic mandate.

75:

50: The ombudsman agency (or agencies) has limited staff that hinders its ability to fulfill its basic mandate.

25:

0: The ombudsman agency (or agencies) has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

56e. In practice, agency appointments support the independence of the ombudsman agency (or agencies).

100  75  50  25  0

Comments:
Chapter 9 of the Constitution establishes a number of state institutions supporting constitutional democracy, including the Public Protector. All Chapter 9 institutions must be impartial and must exercise their powers and perform their functions without fear, favor or prejudice, according to Section 181(2). Section 181(4) states that no person or organ of state, which includes Parliament (Section 239), may interfere with the functioning of the office of the Public Protector.

Section 181(3) requires other organs of state, through legislative and other measures, which includes the appointment and removal process, to protect these institutions to ensure [their] independence.
Consequently, section 193 provides that Public Protector must be appointed by the President on the recommendation nominated by a supporting vote by the National Assembly of at least 60 percent of its members. The appointment of the Deputy Public Protector is also determined in Parliament, but requires only a majority in the National Assembly.

Similarly, in terms of section 194(1), the Public Protector may be removed from office only on

(a) the ground of misconduct, incapacity or incompetence;
(b) a finding to that effect by a committee of the National Assembly; and
(c) the adoption by the Assembly of a resolution calling for that person’s removal from office.

Subsection 194(2) provides that such resolution must be passed with a supporting vote of at least two thirds of the members of the Assembly.

However, in terms of section 1A(3)(e) of the Public Protector Act, the Public Protector can be appointed from among past or present members of Parliament, based on experience.

Both the Public Protector and Deputy Public Protector serve for a seven-year, non-renewable term.

Generally, appointments have supported the independence of the Office. While some allegations of political favoritism have been lodged against current Public Protector Lawrence Mushwana, the negative findings of investigations into senior politicians, including former the former Minister of Public Service and Administration Geraldine Fraser-Moleketi and former Health Minister Manto Tshabalala-Msimang, are also cited as evidence of the independence and impartiality of the office.

Within the Office of the Public Protector, relatively few vacant posts exist and critical senior positions, such as that of the Chief Financial Officer (CFO) and Chief Executive Officer (CEO), have been filled.

Generally, appointments of investigators are based on relevant qualifications and competence. Political affiliations or sympathies play no evident role in appointments. In some cases, investigators have been appointed and promoted despite backgrounds that include affiliation with parties other than the ruling party. Nor have political considerations played an overt role in formal case discussions among senior managers.

Recently, however, the quality and quantity of applicants for advertised investigators posts has declined significantly. It is unclear whether this is a result of market scarcity and remuneration differentials, or any perceptions regarding politicization of the institution, or a combination of these factors.

In addition, a 2007 Parliamentary Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions also found that the qualifications required of the Public Protector are extensive and broad and do not compare with those for other Chapter 9 institutions, beyond which the criteria have, in any event not really been applied. The Committee noted that in practice, appointment turns largely on having legal qualifications, or experience in the administration of justice.

References:
http://www.mg.co.za/article/2005-08-08-dismal-depressing-disingenuous

Constitution of the Republic of South Africa Act (Act 108 of 1996). Available at:


Public Protector, 2007. Annual Report of the Public Protector 2006/07. Available at:
http://www.publicprotector.org

Appointments to the agency (or agencies) are made based on professional qualifications. Individuals appointed are free of conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed usually do not have clear political party affiliations.

Appointments are usually based on professional qualifications. Individuals appointed may have clear party loyalties.

Appointments are often based on political considerations. Individuals appointed often have conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

In practice, the ombudsman agency (or agencies) receives regular funding.

In practice, the ombudsman agency (or agencies) makes publicly available reports.

The Public Protector’s office receives an annual budget, allocated through the Department of Justice and approved by a vote in Parliament. The budget was R59,238 million (US$5.9 million) for the 2005/06 financial year, R68,304m (US$6.8 million) in 2006/7, R78,722m (US$7.8 million) in 2007/8, and R86,475 million (US$8.6 million) for 2008/09.

References:


Comments:
Reports are routinely furnished to complainants and to the organ of state complained against. While the Public Protector may declare all or part of a report confidential, this is extremely rare and reports are usually freely available on request from the office. Most significant reports are published on the Public Protector’s web site.

References:
Public Protector, 2008. Investigation Reports. Available at:
http://www.publicprotector.org


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<td><strong>100:</strong> The agency (or agencies) makes regular, publicly available, substantial reports either to the legislature or directly to the public outlining the full scope of its work.</td>
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<td><strong>50:</strong> The agency (or agencies) makes publicly available reports to the legislature and/or directly to the public that are sometimes delayed or incomplete.</td>
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<td><strong>0:</strong> The agency (or agencies) makes no reports of its activities, or makes reports that are consistently out of date, unavailable to the public, or insubstantial.</td>
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56h. In practice, when necessary, the national ombudsman (or equivalent agency or agencies) initiates investigations.

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<td><strong>100:</strong> The agency aggressively starts investigations — or participates fully with cooperating agencies’ investigations — into judicial misconduct. The agency is fair in its application of this power.</td>
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Comments:
Due primarily to a caseload backlog and some uncertainty regarding the interpretation and application of the Office’s mandate, relatively few own initiative investigations have been initiated, viz. 41 during the period 2002/3 to 2006/7. Very few of these involved contentious issues. Parliament’s investigation expressed concern at the underutilization of this important power.

References:
Public Protector, 2007. Annual Report of the Public Protector 2006/7. Available at:
http://www.publicprotector.org

http://www.pmg.org.za

The agency will start or cooperate in investigations, but often relies on external pressure to set priorities, or has limited effectiveness when investigating. The agency, though limited in effectiveness, is still fair in its application of power.

0: The agency rarely investigates on its own or cooperates in other agencies' investigations, or the agency is partisan in its application of this power.

56i. In practice, when necessary, the national ombudsman (or equivalent agency or agencies) imposes penalties on offenders.

Comments:
In terms of its constitutive and empowering legislation, the Public Protector may not impose penalties on offenders, but can, in terms of the Constitution, take appropriate remedial action. This usually takes the form of facilitated resolution of complaints, and informal or formal recommendations. Most recommendations are complied with by the organs of state concerned. Comparable institutions in several other developing countries are empowered to enforce compliance with their findings.

References:


100: When rules violations are discovered, the agency is aggressive in penalizing offenders or in cooperating with other agencies who penalize offenders.

56j. In practice, the government acts on the findings of the ombudsman agency (or agencies).

50: The agency enforces rules, but is limited in its effectiveness. The agency may be slow to act, unwilling to take on politically powerful offenders, resistant to cooperating with other agencies, or occasionally unable to enforce its judgments.

25:

0: The agency does not effectively penalize offenders. The agency may make judgments but not enforce them, does not cooperate with other agencies in enforcing penalties, or may fail to make reasonable judgments against offenders. The agency may be partisan in its application of power.
Comments:
Most recommendations are complied with by the organs of state concerned. On the other hand, critics argue that this compliance rate is a function of the Public Protector’s failure to make negative findings in hard or contentious cases.

References:


100: Ombudsman’s reports are taken seriously, with negative findings drawing prompt corrective action.

75:

50: In most cases, ombudsman’s reports are acted on, though some exceptions may occur for politically sensitive issues, or particularly resistant agencies.

25:

0: Ombudsman’s reports are often ignored, or given superficial attention. Ombudsman’s reports do not lead to policy changes.

56k. In practice, the ombudsman agency (or agencies) acts on citizen complaints within a reasonable time period.

Comments:
The Public Protector’s office is making progress in its efforts to reduce the turnaround time within which it finalizes investigation of complaints. During the 2006/7 financial year, 72 percent of complaints were resolved within six months, 15 percent took seven to 12 months, 8 percent took 13-24 months, and 5 percent took more than two years to finalize.

References:


100: The agency (or agencies) acts on complaints quickly. While some backlog is expected and inevitable, complaints are acknowledged promptly and investigations into serious abuses move steadily towards resolution. Citizens with simple issues can expect a resolution within a month.

75:

50: The agency (or agencies) acts on complaints quickly, with some exceptions. Some complaints may not be acknowledged, and simple issues may take more than two months to resolve.
0: The agency (or agencies) cannot resolve complaints quickly. Complaints may be unacknowledged for more than a month, and simple issues may take more than three months to resolve. Serious abuses are not investigated with any urgency.

57. Can citizens access the reports of the ombudsman?

83

57a. In law, citizens can access reports of the ombudsman(s).

YES | NO

Comments:
The Constitution, read with the Public Protector Act, require reports to be open to the public unless circumstances dictate complete or partial confidentiality.

References:

YES: A YES score is earned if all ombudsman reports are publicly available.

NO: A NO score is earned if any ombudsman reports are not publicly available. This may include reports made exclusively to the legislature or the executive, which those bodies may choose not to distribute the reports.

57b. In practice, citizens can access the reports of the ombudsman(s) within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:
Complainants receive a copy of the investigation report as a matter of routine and promptly after completion of the investigation. Most high-profile or significant reports are posted on the web site periodically.

However, requests by third party members of the public for hard copies of reports are not always responded to promptly, as the Office does not yet have a proper information classification and management system, and associated procedures.

References:
Public Protector’s reports. Available at: http://www.publicprotector.org

57c. In practice, citizens can access the reports of the ombudsman(s) at a reasonable cost.

| 100 | 75 | 50 | 25 | 0 |

Comments:
Complainants receive a copy of the investigation report as a matter of routine after completion of the investigation. Most high-profile or significant reports are posted on the web site periodically and can be accessed without charge.

Requests by third party members of the public for hard copies of a small or reasonable number or reports are acceded to without charge.

References:
Public Protector’s reports. Available at: http://www.publicprotector.org


55. Is there a national ombudsman, public protector or equivalent agency (or collection of agencies) covering the entire public sector?

| 100 |

100: Reports are free to all citizens, or available for the cost of photocopying. Reports can be obtained at little cost, such as by mail, or on-line.

75:

50: Reports impose a financial burden on citizens, journalists or CSOs. Retrieving reports may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving reports imposes a major financial burden on citizens. Reports costs are prohibitive to most citizens, journalists, or CSOs trying to access this information.
55. In law, is there a national ombudsman, public protector or equivalent agency (or collection of agencies) covering the entire public sector?

YES | NO

Comments:
Chapter Nine of the Constitution provides for the Office of the Public Protector. In terms of section 182, the office has the power to investigate any conduct in state affairs or in the public administration in any sphere of government that is alleged or suspected to be improper or to result in impropriety or prejudice. The office may then report on that conduct and to take appropriate remedial action. The mandate and powers of the public protector are expanded on in the Public Protector Act.

References:

YES: A YES score is earned if there is a specific agency or set of agencies whose primary mandate is to investigate the actions of government on the behalf of common citizens. This agency or set of agencies should be specifically charged with seeking out and documenting abuses of power.

NO: A NO score is earned if no such agency or set of agencies exists, or that function is a secondary concern of a larger body, such as the legislature.

V-2. Supreme Audit Institution

59. Is the supreme audit institution effective?

75

59a. In law, the supreme audit institution is protected from political interference.

YES | NO

Comments:
The independence of the Auditor-General is guaranteed in Section 188 of the Constitution, and in the Public Audit Act. Alongside other Chapter Nine institutions, the Constitution guarantees that the Auditor-General must be independent, impartial, and must exercise powers and perform functions without fear, favor or prejudice, or with protection or interference from any individual or organ of state. The Public Audit Act also provides for the establishment of a parliamentary Standing Committee on the Auditor General, which provides additional safeguards of independence and impartiality, and protection against interference.
YES: A YES score is earned only if the agency has some formal organizational independence from the government. A YES score is earned even if the entity is legally separate but in practice staffed by partisans.

NO: A NO score is earned if the agency is a subordinate part of any government ministry or agency, such as the Department of Interior or the Justice Department.

59b. In practice, the head of the audit agency is protected from removal without relevant justification.

100  |  75  |  50  |  25  |  0

Comments:
According to Section 189 of the Constitution, the Auditor-General serves a fixed, non-renewable term of between five and 10 years.

In terms of section 194 of the Constitution, special majorities are required for both the appointment, and removal from office of the Auditor-General. Dismissal would require a resolution adopted with a supporting vote of at least a two-thirds majority in the National Assembly, on specific grounds of misconduct, incapacity or incompetence. Such a removal has not occurred. The seven-year term of Auditor-General Shauket Fakie expired on Nov. 30, 2006, and Terence Nombembe was appointed to fill the position from Dec. 1, 2006.

References:


The director of the agency serves a defined term and cannot be removed without a significant justification through a formal process, such as impeachment for abuse of power.

The director of the agency serves a defined term, but can in some cases be removed through a combination of official or unofficial pressure.

The director of the agency can be removed at the will of political leadership.

In practice, the audit agency has a professional, full-time staff.

Comments:
The Office of the Auditor-General (OAG) currently employs about 1,900 staff, of which 1,500 are revenue-generating and 400 provide support. The OAG also makes use of the services of external audit firms.

A Minimum Qualifications Framework for staff has been introduced, which is based on either a Chartered Accountant qualification or equivalent. The OAG has been working to ensure that all staff possess a minimum qualification, and reported in 2008 that 100 staff had qualified over the past year. The 2006/07 Annual Report that 129 staff members passed final professional qualifying examinations, consisting of: 37 chartered accountants; 88 registered government auditors; and 4 certified information systems auditors.

However, issues of high vacancy rates and staff turnover have been significant challenges for the OAG in recent years. The 2006/07 Annual Report noted that while some progress had been made in 2005/06, staff turnover again rose to 16.1 percent (excluding trainee accountants), exceeding the 12 percent target. Turnover was particularly high amongst managers and assistant managers, and the OAG struggles to attract audit professionals in a highly competitive labor market.

More recently, at a meeting of the parliamentary parliamentary Standing Committee on the Auditor-General in April of 2008, it was reported that progress in filling vacancies has primarily been at the lower levels within the organization. The OAG continues to struggle in filling managerial and supervisory positions in particular, creating a risk that trainees and junior staff are not adequately supervised. At the time of the meeting, 592 vacancies still existed within the OAG, at a rate of about 14 percent.

Staff shortages have led to increasing dependence on outsourcing to commercial audit firms, and the employment of limited duration contractors (LDC’s) often earning higher packages than permanent employees. Further, overhead recovery through audit work done by staff is being lost due to the need to outsource, and this has contributed to a budget deficit, meaning cuts to essential costs in some instances.

It was recently reported that the OAG will be recruiting 20 auditors from India to compensate for staff shortages.

References:


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<tr>
<th>Score</th>
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<tr>
<td>100</td>
<td>The agency has staff sufficient to fulfill its basic mandate.</td>
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<td>The agency has limited staff that hinders it ability to fulfill its basic mandate.</td>
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<td>The agency has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.</td>
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59d. In practice, audit agency appointments support the independence of the agency.

100 | 75 | 50 | 25 | 0

**Comments:**

The Public Audit Act of 2004 assigns the process of initiating the appointment of an Auditor-General to the Speaker of the National Assembly, consistent with Section 193 of the Constitution. A National Assembly committee then nominates a candidate for appointment, and makes recommendations on conditions of employment. The Auditor-General is then appointed by the President on the recommendation of at least 60 percent of National Assembly members. Section 194 of the Constitution specifies that the Auditor-General serves a fixed, non-renewable term of between five and ten years.

The Report of the Parliamentary Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions underscored the importance of public perception, noting that the Auditor-General must not only be independent but must be seen to be independent.

The seven-year term of Auditor-General Shauket Fakie expired on Nov. 30, 2006, and Terence Nombembe was appointed to fill the position from Dec. 1, 2006. Nombembe was previously the Deputy Auditor-General, and is the first African to hold the Auditor-General position.

However, it is important to note that following the controversial multi-billion rand Arms Deal, Fakie was criticized for allegedly attempting to keep information from the public and Parliament. The Pretoria High Court found that he had failed to comply with a court order to provide CCII Systems, a sub-contracting bidder, with documents pertaining to the government’s arms procurement process. However, this ruling was overturned by the Supreme Court of Appeals, which also set aside a suspended sentence of imprisonment the High Court had imposed on Fakie.

**References:**


Comments:
Over the past year, the Office of the Auditor-General (OAG) has reported a deteriorating funding position, resulting from limitations placed on tariff increases, as well as bad debts accumulating from audit clients. At an April meeting with the parliamentary Standing Committee on the Auditor-General, a draft report on the Evaluation of alternative funding options for the Auditor-General was tabled. This followed on a request to National Treasury for immediate relief through an unconditional grant, in the amount of R154.8 million (US$15.4 million).

Currently, the (OAG) is set up to be self-funding, through the recovering of fees from audit clients, which are used to defray expenses. However, the OAG has suggested that fundamental deficiencies exist in this funding model, and that these have been compounded by a rapid growth in the cost of auditing due to new standards, a rise in bad debts, and critical staff vacancies. Accordingly, the OAG reviewed a number of options for alternative funding, including proposals that: the budget of the OAG could be included in Parliament's budget vote; that audit fees could be recovered from relevant provincial treasuries, or departments of local government; or, that indirect costs could be funded via a parliamentary allocation and direct costs from audit clients. However, the OAG has ultimately proposed that the current method of feel recovery from auditees should be maintained, but with market-related annual tariff increases.

References:
Sabelo, 2000. Local authorities owe AG's office millions, IOL, Sept. 6, 2000. Available at:  


100: The agency has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

0: Funding source is unreliable. Funding may be removed arbitrarily or as retaliation for agency actions.

59f. In practice, the audit agency makes regular public reports.

100  75  50  25  0

Comments:
Section 188, Part 3 of the Constitution requires that the Auditor-General must submit audit reports to any legislature that has a direct interest in the audit, and to any other authority prescribed by national legislation. All reports must be made public.

Audit reports are publicly available online through the web site of the Auditor-General, http://www.agsa.co.za.

However, the ability of the Auditor-General to make regular public reports has been constrained to some extent by late submissions of financial records from various government departments. The Auditor-General's 2006/07 Annual Report, for example, notes that many audit clients do not meet the reporting requirements set out in the Public Finance Management Act (PFMA) (Act 1 of 1999) and the Municipal Finance Management Act (MFMA) (Act 56 of 2003). The Report also states that receiving financial statements after the prescribed deadline not only impacts on the ability of the AG to perform its function in this regard, but could impact on the ability of the auditees to perform within the accountability framework.

In 2006/07, the Auditor-General was able to finalize audit reports of 90 percent of PFMA organizations, including national and provincial departments and listed public entities, and 95 percent of other PFMA organizations, including Circular 1 entities, constitutional institution, other entities, statutory bodies, trading entities and unlisted entities, within prescribed deadlines. However, only 42 percent of MFMA audit reports were finalized according to prescribed deadlines, referring to municipalities, consolidated municipal financial statements, and municipal entities.

A 2005 Transparency International report also noted that the previous Chair of the Parliamentary Standing Committee on Public Accounts (SCOPA), Gavin Woods, had criticized the reports of the Auditor-General, describing them as partly superficial. However, the report also notes that this may be in fact a reflection of the information provided by departments, rather than the competency of the Auditor-General.

References:
http://www.agsa.co.za


100: The agency makes regular, publicly available, substantial reports to the legislature and/or to the public directly outlining the full scope of its work.

75:

50: The agency makes publicly available reports to the legislature and/or to the public directly that are sometimes delayed or incomplete.

25:

0: The agency makes no reports of its activities, or makes reports that are consistently out of date, unavailable to the public, or insubstantial.

59g. In practice, the government acts on the findings of the audit agency.

100 | 75 | 50 | 25 | 0

Comments:
Though the various legislatures are required to oversee the management of state finances, no specific mechanisms exist to track the progress of government departments in responding to audit reports.

In 2007, the Parliamentary Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions observed that while the Auditor-General regularly submits reports addressing recommendations to Parliament, the lack of implementation of the recommendations contained in these reports by affected departments is cause for concern. The Committee also proposed that the Auditor-General should make special reports to Parliament in cases where departments receive qualified audits over a number of years, and that such special reports should result in debates in Parliament. A 2005 Transparency International reported also raised issues of inaction from the civil service in response to the recommendations of the Auditor General.

Reports released by the Auditor-General also indicate that a number of departments have received consistently poor audit results in recent years. Between 2001/02 and 2006/07, national departments with ongoing, poor audit results include: Correctional Services (6 qualified audits); Defense (5 qualified audits); Health (5 qualified audits); Home Affairs (4 qualified audits and 2 disclaimers); Justice and Constitutional Development (4 qualified audits); Labor (4 qualified audits); Water Affairs and Forestry (3 qualified audits and 2 adverse audits).

References:
### Comments:
The Public Audit Act (Act 25 of 2004) allows for the Auditor-General to initiate its own investigations. The Auditor-General has also initiated its own investigations in practice. For example, in 2008 the Auditor-General releases reports following special investigations into the Management and Provision of Official Accommodation to Staff at the Department of Defense (DOD), and into Alleged Irregularities in Respect of Payments to Adult Basic Education and Training Centers.

### References:
- Auditor-General of South Africa, [http://www.agsa.co.za](http://www.agsa.co.za)

### Audit Agency Reports

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**100:** Audit agency reports are taken seriously, with negative findings drawing prompt corrective action.

**75:**

**50:** In most cases, audit agency reports are acted on, though some exceptions may occur for politically sensitive issues, or particularly resistant agencies.

**25:**

**0:** Audit reports are often ignored, or given superficial attention. Audit reports do not lead to policy changes.

59h. In practice, the audit agency is able to initiate its own investigations.
50: The supreme audit institution can generally decide what to investigate, and when, but is subject to pressure from the executive or legislature on politically sensitive issues.

25:

0: The supreme audit institution must rely on approval from the executive or legislature before initiating investigations. Politically sensitive investigations are almost impossible to move forward on.

60. Can citizens access reports of the supreme audit institution?

100

60a. In law, citizens can access reports of the audit agency.

YES | NO

Comments:
Section 188(3) of the Constitution requires that the Auditor-General must submit audit reports to any legislature that has a direct interest in the audit, and to any other authority prescribed by national legislation. All reports must be made public.

Section 21 of the Public Audit Act reinforces this obligation, which requires reports to be submitted to legislatures, where they are accessible to the public.

Audit reports are publicly available without charge online through the website of the Auditor-General, http://www.agsa.co.za. Individual government departments must also publish audit results in their Annual Reports, which are available to download from departmental web sites, and from the government web site (http://www.gov.za).

References:


Public Audit Act (Act 25 of 2004). Available at: http://www.agsa.co.za


YES: A YES score is earned if all supreme auditor reports are available to the general public.

NO: A NO score is earned if any auditor reports are not publicly available. This may include reports made exclusively to the legislature or the executive, which those bodies may choose not to distribute.

60b. In practice, citizens can access audit reports within a reasonable time period.
Section 188(3) of the Constitution requires that the Auditor-General must submit audit reports to any legislature that has a direct interest in the audit, and to any other authority prescribed by national legislation. All reports must be made public.

Section 21 of the Public Audit Act reinforces this obligation, which requires reports to be submitted to legislatures, where they are accessible to the public.

Audit reports are publicly available for free online through the web site of the Auditor-General, http://www.agsa.co.za. Individual government departments must also publish audit results in their Annual Reports, which are available to download from departmental web sites, and from the government web site (http://www.gov.za). Delays, however, may occur when government departments themselves are late in finalizing or submitting Annual Reports.

References:


Public Audit Act (Act 25 of 2004). Available at: http://www.agsa.co.za


100: Reports are available on-line, or records can be obtained within two days. Reports are uniformly available; there are no delays for politically sensitive information.

75:

50: Reports take around two weeks to obtain. Some delays may be experienced.

25:

0: Reports take more than a month to acquire. In some cases, most reports may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

60c. In practice, citizens can access the audit reports at a reasonable cost.
Section 21 of the Public Audit Act reinforces this obligation, which requires reports to be submitted to legislatures, where they are accessible to the public.

Audit reports are publicly available for free online through the web site of the Auditor-General, http://www.agsa.co.za. Individual government departments must also publish audit results in their Annual Reports, which are available to download from departmental web sites, and from the government web site (http://www.gov.za).

References:
Auditor-General of South Africa, http://www.agsa.co.za

100: Reports are free to all citizens, or available for the cost of photocopying. Reports can be obtained at little cost, such as by mail, or on-line.

75:

50: Reports impose a financial burden on citizens, journalists or CSOs. Retrieving reports may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving reports imposes a major financial burden on citizens. Report costs are prohibitive to most citizens, journalists, or CSOs trying to access this information.

58. Is there a national supreme audit institution, auditor general or equivalent agency covering the entire public sector?

100

58. In law, is there a national supreme audit institution, auditor general or equivalent agency covering the entire public sector?

YES | NO

Comments:
The Auditor-General is an independent institution established through Section 188, Chapter 9 of the 1996 Constitution. The Public Audit Act of 2004 establishes the Auditor-General as the supreme audit institution for the public sector, and compels the Auditor-General to audit and report on the accounts and financial management of all spheres of government and other publicly-funded bodies, including national departments, provincial entities, municipal governments and state-owned enterprises. The Auditor-General currently services about 760 audit clients.

The Auditor-General is appointed by the National Assembly and must submit audit reports (including matters of accountability) to the relevant national or provincial legislatures.
The Public Audit Act also established a Parliamentary Standing Committee on the Auditor General, which provides assistance, protection and oversight, and ensures independence, impartiality and effectiveness. The Act provides an auditing framework for all public sector entities, and specifies that audit reports must reach Parliament within a reasonable time, while also providing for the means to do so.

Through the Public Audit Act, the Auditor-General has the power to perform search and seizure procedures, if there is reasonable suspicion that information needed is being withheld.

References:
Auditor-General of South Africa, [http://www.agsa.co.za](http://www.agsa.co.za)


**YES:** A YES score is earned if there is a specific agency whose primary mandate is to audit and track the movement of money through the government. This agency should be specifically charged to investigate and document the misuse of funds. A system of agencies located in each department is equivalent.

**NO:** A NO score is earned if no such agency exists, or that function is a secondary concern of a larger body, such as the executive.

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**92**

**V-3. Taxes and Customs**

**62. Is the tax collection agency effective?**

100

62a. In practice, the tax collection agency has a professional, full-time staff.

100  |  75  |  50  |  25  |  0

**Comments:**
The South African Revenue Service (SARS) has a dedicated professional staff deployed across regional offices and the head office. At the end of March 2007, SARS had a staff of 14,709 of which 14,013 were permanent and 696 temporary employees.

SARS has also established partnerships with institutions such as the University of South Africa (UNISA), Stellenbosch University, the Gordon Institute of Business Science, and Franklin Covey SA to ensure customized training for SARS managers. In 2006/07, 111 staff in managerial/leadership and specialist positions graduated successfully from management development programs.
SARS has also embarked on an ambitious modernization program, through which individuals can file their tax returns through the e-filing system. The e-filing system is aimed at enhancing both the administrative and compliance efficiencies. This has in part led to the growth of tax revenue collected from R417.3 billion (US$41.7 billion) in 2005/06 to R495.5 billion (US$49.5 billion) in the 2006/07 financial year.

In his budget speech to Parliament in 2008, the Minister of Finance also lauded the extraordinary work of the South African Revenue Service and the ongoing administrative capacity building.

References:


100: The agency has staff sufficient to fulfill its basic mandate.

75: The agency has limited staff that hinders its ability to fulfill its basic mandate.

50: The agency has limited staff that hinders its ability to fulfill its basic mandate.

25: The agency has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

62b. In practice, the tax agency receives regular funding.

100 | 75 | 50 | 25 | 0

Comments:
Parliament appropriates money annually to the South African Revenue Service (SARS) for its services. SARS may also render service to a government department or institutions and charge an agreed rate. In the 2006/07 financial year, SARS received R5.2 billion (US$522 million) in revenue to fund its operations, of which R4.9 billion (US$499 million) was in the form of a grant from the National Treasury.

References:


100: The agency has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.
The agency has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

Funding source is unreliable. Funding may be removed arbitrarily or as retaliation for agency actions.

65. Is the customs and excise agency effective?

100

65a. In practice, the customs and excise agency has a professional, full-time staff.

Comments:
The South African Revenue Service (SARS) has a dedicated professional staff deployed across regional offices and the head office. At the end of March 2007, SARS had a staff of 14,709 of which 14,013 were permanent and 696 temporary employees.

SARS has also established partnerships with institutions such as the University of South Africa (UNISA), Stellenbosch University, the Gordon Institute of Business Science, and Franklin Covey SA to ensure customized training for SARS managers. In 2006/07, 111 staff in managerial/leadership and specialist positions graduated successfully from management development programs.

SARS has also embarked on an ambitious modernization program, through which individuals can file their tax returns through the e-filing system. The e-filing system is aimed at enhancing both the administrative and compliance efficiencies. This has in part led to the growth of tax revenue collected from R417.3 billion (US$41.7 billion) in 2005/06 to R495.5 billion (US$49.5 billion) in the 2006/07 financial year.

In his budget speech to Parliament in 2008, the Minister of Finance also lauded the extraordinary work of the South African Revenue Service and the ongoing administrative capacity building.

References:


100: The agency has staff sufficient to fulfill its basic mandate.

75:

50: The agency has limited staff that hinders its ability to fulfill its basic mandate.

25:
The agency has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

65b. In practice, the customs and excise agency receives regular funding.

100 | 75 | 50 | 25 | 0

Comments:
Parliament appropriates money annually to the South African Revenue Service (SARS) for its services. SARS may also render service to a government department or institutions and charge an agreed rate. In the 2006/07 financial year, SARS received R5.2 billion (US$522 million) in revenue to fund its operations, of which R4.9 billion (US$499 million) was in the form of a grant from the National Treasury.

References:


100: The agency has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

0: Funding source is unreliable. Funding may be removed arbitrarily or as retaliation for agency actions.

61. Is there a national tax collection agency?

100

61. In law, is there a national tax collection agency?

YES | NO

Comments:
The South African Revenue Services (SARS) collects national tax revenue. SARS was established by legislation to collect revenue and ensure compliance with tax law. According to the South African Revenue Service Act (Act 34 of 1997), the service is an administratively autonomous organ of the state.
63. Are tax laws enforced uniformly and without discrimination?

100

63. In practice, are tax laws enforced uniformly and without discrimination?

Comments:
South African Revenue Service (SARS) releases public documents to help businesses, individuals and tax consultants gain certainty about the way legislation will be applied. SARS aims to enforce tax laws consistently for all citizens. SARS undertakes various activities to reduce tax avoidance and evasion, as well as illegal or fraudulent activities (for example, the SARS Fraud and Anti-Corruption Hotline encourages compliance through information, education, and enforcement, if necessary).

The SARS Taxpayer Service Charter binds SARS to service delivery standards and to regularly carry out independent, publicly reported taxpayer satisfaction surveys. In 2004 such surveys showed customer satisfaction ratings averaging between 79 and 95 percent. SARS also launched several initiatives in the recent years to decrease assessment errors. These include staff training, quality awareness, improved experience levels and improved templates.

If taxpayers believe they have been treated unfairly, they can contact the SARS Service Monitoring Office, established in 2004, which operates independently of SARS branch offices. It facilitates the resolution of service issues that have not been resolved through the normal channels by SARS branch offices. The alternative dispute resolution appears an increasingly popular option among taxpayers for resolving tax disputes in view of its speed and relatively low costs, compared with litigation. SARS was commended in 2004/05 for performance improvements and progress with the transformation.

SARS also has a user-friendly web site where businesses, individuals and tax consultants can access public related to the application of legislation. SARS also operates dedicated call centres for local and international businesses seeking more information. SARS also operates a 24-hour fraud and anti-corruption hotline. In December of 2007, SARS reported the arrest of two individuals who are believed to be part of a broader commercial fraud syndicate.

References:


100: Tax laws (which may be economically unfair as written) are enforced consistently for all citizens. No general group of citizens is more or less likely to evade tax law than another.

75:

50: Tax laws are generally enforced consistently, but some exceptions exist. For example, some groups may occasionally evade tax law. Some arbitrary and discriminatory tax rules exist.

25:

0: Tax law is unequally applied. Some groups of citizens are consistently more or less likely to evade tax law than others. Tax regulations are, as a rule, written to be discriminatory and/or arbitrary.

64. Is there a national customs and excise agency?

100

64. In law, is there a national customs and excise agency?

YES | NO

Comments:
The South African Revenue Service (SARS) is mandated to collect excises and inspect customs.

References:


YES: A YES score is earned if there is an agency formally mandated to collect excises and inspect customs.

NO: A NO score is earned if that function is spread over several agencies, or does not exist.

66. Are customs and excise laws enforced uniformly and without discrimination?

100

66. In practice, are customs and excise laws enforced uniformly and without discrimination?

100 | 75 | 50 | 25 | 0
Comments:
SARS has defined a new strategic direction for customs due to the challenges posed by the integration of the South Africa into the global economy. Customs is being repositioned to play a more proactive role in facilitation of legal trade. The new strategic direction is aimed at facilitating trade and travelers, establishing electronic data interchange which seeks to provide traders with quicker and simpler ways to conduct business, locating industrial development zones aimed at promoting foreign direct investment and the establishment of a specialized anti-smuggling unit. Total anti-smuggling seizures for the year under review came to more than 4,700, which represented a 9 percent increase from 2005/06. There has also been a substantial increase in numbers of narcotic seizures. Cannabis seizures have increased by 111 with majority of the seizures taking place at OR Tambo international airport.

References:


100: Customs and excise laws (which may be economically unfair as written) are enforced consistently for all citizens. No general group of citizens is more or less likely to evade customs than another.

75:

50: Customs and excise laws are generally enforced consistently, but some exceptions exist. For example, some groups may occasionally evade customs requirements.

25:

0: Customs and excise laws are unequally applied. Some groups of citizens are consistently more or less likely to evade customs and excise laws than others.

V-4. State-Owned Enterprises

68. Is the agency, series of agencies, or equivalent mechanism overseeing state-owned companies effective?

60

68a. In law, the agency, series of agencies, or equivalent mechanism overseeing state-owned companies is protected from political interference.

YES | NO

Comments:
This is in accordance with Sections 50 and 51 of the Public Finance Management Act (PFMA), which require, for example, that
their accounting authorities exercise the duty of utmost care to ensure reasonable protection of the assets of the public entity, and to act with fidelity, honesty, integrity and in the best interests of the public entity in managing [its] financial affairs.

References:

YES: A YES score is earned only if the agency, series of agencies, or equivalent mechanism has some formal operational independence from the government. A YES score is earned even if the entity is legally separate but in practice staffed by partisans.

NO: A NO score is earned if the agency, series of agencies, or equivalent mechanism is a subordinate part of any government ministry or agency.

68b. In practice, the agency, series of agencies, or equivalent mechanism overseeing state-owned companies has a professional, full-time staff.

100 | 75 | 50 | 25 | 0

Comments:
In 2008, the staff of the National Electricity Regulator of South Africa consisted of four full-time and five part-time regulators. A wide range of full-time and part-time staff support the regulators. Recent debates on electricity pricing and reports on the performance of the energy state-owned enterprise, Eskom, suggest a regulator that is capacitated to actively shape these debates and energy policy in South Africa.

References:
Annual Report of the National Electricity Regulator of South Africa, 2006. Available at: http://www.nersa.co.za


100: The agency, series of agencies, or equivalent mechanism has staff sufficient to fulfill its basic mandate.

75:

50: The agency, series of agencies, or equivalent mechanism has limited staff that hinders its ability to fulfill its basic mandate.

25:

0: The agency, series of agencies, or equivalent mechanism has no staff, or a limited staff that is clearly unqualified to fulfill its mandate.

68c. In practice, the agency, series of agencies, or equivalent mechanism overseeing state-owned companies receives regular funding.
The Department of Public Enterprises (DPE), which oversees state-owned enterprises (SOEs), is funded directly from the fiscus. In the 2007/08 fiscal year, the overall allocation to the DPE was R4.6 billion (US$466 million). A large portion of this, however, was allocated for the development of nuclear energy capability.

The two programs in the department tasked with oversight of SOEs, namely the Manufacturing Enterprises program and the Transport Enterprises program, were allocated R1.17 billion (US$117 million) and R754 million (US$75.4 million) respectively. Large portions of these allocations, however, are for restructuring and turnaround of failing SOEs, and allocations are set to decline substantially in the Manufacturing Enterprises program in 2008/09, and in the Transport Enterprises program in 2009/10.

References:


100: The agency, series of agencies, or equivalent mechanism has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency, series of agencies, or equivalent mechanism has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

0: Funding source is unreliable. Funding may be removed arbitrarily or as retaliation for agency functions.

68d. In practice, when necessary, the agency, series of agencies, or equivalent mechanism overseeing state-owned companies independently initiates investigations.

Comments:
Although the National Treasury has initiated a number of informal investigations into cash-flow and related problems experienced by some state-owned enterprises (SOEs), the current SOE governance environment cannot be described as one where a range of independent investigations are regularly initiated. Concerns therefore exist concerning the extent to which non-performing SOEs are accountable to the public for the extent of their demands on the fiscus.

References:
When irregularities are discovered, the agency, series of agencies, or equivalent mechanism is aggressive in investigating and/or in cooperating with other investigative bodies.

The agency, series of agencies, or equivalent mechanism starts investigations, but is limited in its effectiveness or in its cooperation with other investigative agencies. The agency, series of agencies, or equivalent mechanism may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

The agency, series of agencies, or equivalent mechanism does not effectively investigate financial irregularities or cooperate with other investigative agencies. The agency, series of agencies, or equivalent mechanism may start investigations but not complete them, or may fail to detect offenders. The agency may be partisan in its application of power.

In practice, when necessary, the agency, series of agencies, or equivalent mechanism overseeing state-owned companies imposes penalties on offenders.

Comments:
This has not occurred to date. The National Energy Regulator of South Africa (NERSA) has, however, taken an active role in price-setting in the sectors it oversees: a role which has at times caused disagreement and robust debate with Eskom, the state-owned energy enterprise.

References:

When rules violations are discovered, the agency, series of agencies, or equivalent mechanism is aggressive in penalizing offenders and/or in cooperating with other agencies that impose penalties.

The agency, series of agencies, or equivalent mechanism enforces rules, but is limited in its effectiveness or reluctant to cooperate with other agencies. The agency, series of agencies, or equivalent mechanism may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

The agency, series of agencies, or equivalent mechanism does not effectively penalize offenders or refuses to cooperate with other agencies that enforce penalties. The agency, series of agencies, or equivalent mechanism may make judgments but not enforce them, or may fail to make reasonable judgments against offenders. The agency, series of agencies, or equivalent mechanism may be partisan in its application of power.

Can citizens access the financial records of state-owned companies?
69a. In law, citizens can access the financial records of state-owned companies.

<table>
<thead>
<tr>
<th>YES</th>
<th>NO</th>
</tr>
</thead>
</table>

**Comments:**
Citizens can access the financial records of state-owned enterprises in accordance with the provisions of the Public Finance Management Act (PFMA) and the Promotion of Access to Information Act.

**References:**

**YES:** A YES score is earned if the financial information of all state-owned companies is required by law to be public. State-owned companies are defined as companies owned in whole or in part by the government.

**NO:** A NO score is earned if any category of state-owned company is exempt from this rule, or no such rules exist.

69b. In practice, the financial records of state-owned companies are regularly updated.

| 100 | 75 | 50 | 25 | 0 |

**Comments:**
The annual reports of the state-owned enterprises (SOEs) falling under the management of the Department of Public Enterprise (DPE) are of good quality and, for the most part, contain adequate reporting on financial status. The DPE has also been punctual in reporting to Parliament on the state of these entities.

**References:**
- Telephonic interview with Perran Hahndiek, Secretary: Joint Budget Committee, Parliament of South Africa, August 2008, Cape Town

**100:** State-owned companies always publicly disclose financial data, which is generally accurate and up to date.

**75:**

**50:** State-owned companies disclose financial data, but it is flawed. Some companies may misstate financial data, file the information behind schedule, or not publicly disclose certain data.

**25:**
Financial data is not publicly available, or is consistently superficial or otherwise of no value.

In practice, the financial records of state-owned companies are audited according to international accounting standards.

Comments:
All financial records of state-owned companies are audited by established, reputable independent external auditors.

References:


Telephonic interview with Perran Hahndiek, Secretary: Joint Budget Committee, Parliament of South Africa, August 2008, Cape Town

Financial records of all state-owned companies are regularly audited by a trained third party auditor using accepted international standards.

50: Financial records of state-owned companies are regularly audited, but exceptions may exist. Some companies may use flawed or deceptive accounting procedures, or some companies may be exempted from this requirement.

25:

0: State-owned companies are not audited, or the audits have no functional value. The auditors may collude with the companies in providing misleading or false information to the public.

In practice, citizens can access the financial records of state-owned companies within a reasonable time period.

Comments:
In recent years, the Annual Reports and audited financial statements of the Department of Public Enterprise (DPE) have been submitted to Parliament in a timely manner.

More specifically, the DPE has complied with the requirements of Chapter 6, Section 55 of the Public Finance Management Act (Act 1 of 1999), which requires that public entities submit an Annual Report, financial statements and the accompanying external audit opinion to the executive authority as well as to Parliament.

This information is also available within a reasonable time electronically via the websites of the entities in question, as well as the web site of the DPE. They are typically available on the web sites of the entities in question, or are available by request, within four months after they have been submitted to Parliament.
References:

Interview (telephonic) with Perran Hahndiek, Secretary: Joint Budget Committee, Parliament of South Africa, August 2008, Cape Town.


100: Records are available on-line, or records can be obtained within two days. Records are uniformly available; there are no delays for politically sensitive information.

75:

50: Records take around two weeks to obtain. Some delays may be experienced.

25:

0: Records take more than a month to acquire. In some cases, most records may be available sooner, but there may be persistent delays in obtaining politically sensitive records.

69e. In practice, citizens can access the financial records of state-owned companies at a reasonable cost.

100 | 75 | 50 | 25 | 0

Comments:
The financial records are available to any interested citizen or organization. They are submitted and discussed in Parliament in open sessions, are generally available within reasonable time on the relevant web sites. SOEs also make copies of their annual reports available without charge.

References:

Telephonic interview with Perran Hahndiek, Secretary: Joint Budget Committee, Parliament of South Africa, August 2008, Cape Town

100: Records are free to all citizens, or available for the cost of photocopying. Records can be obtained at little cost, such as by mail, or on-line.

75:

50: Records impose a financial burden on citizens, journalists or CSOs. Retrieving records may require a visit to a specific office, such as a regional or national capital.

25:

0: Retrieving records imposes a major financial burden on citizens. Records costs are prohibitive to most citizens, journalists, or CSOs trying to access this information.
67. Is there an agency, series of agencies, or equivalent mechanism overseeing state-owned companies?

YES | NO

Comments:
The energy sector is regulated by the National Energy Regulator of South Africa (NERSA). Other state-owned companies, however, such as Transnet, South African Airways, and Denel, are not regulated but report to the Department of Public Enterprises (DPE) which, in turn, reports to the Portfolio Committee on Finance.

Thus, in assessing the quality of oversight of state-owned enterprises (SOEs) in South Africa, it is necessary to comment on the performance of NERSA but also on that of the DPE as well as the oversight committee which is the ultimate location of accountability. The role of the National Treasury in this regard is also relevant.

Chapter 6 of the Public Finance Management Act (PFMA) sets out reporting and accountability requirements for the accounting officers of various state entities, including state-owned enterprises.

References:

Annual Report of the National Electricity Regulator of South Africa, 2006. Available at: http://www.nersa.co.za


YES: A YES score is earned if there is an agency, series of agencies, or equivalent mechanism tasked with overseeing the conduct and performance of state-owned companies on behalf of the public. A YES score can be earned if several government agencies or ministries oversee different state-owned enterprises. State-owned companies are defined as companies owned in whole or in part by the government.

NO: A NO score is earned if this function does not exist, or if some state-owned companies are free from government oversight.

85
V-5. Business Licensing and Regulation

70. Are business licenses available to all citizens?
70a. In law, anyone may apply for a business license.

**YES** | **NO**

**Comments:**
The Business Act (Act 71 of 1991) governs business licensing in South Africa. According to the Act, the role of granting a business license is devolved to the local government sphere. As a result of this devolution of business licensing there is no uniform interpretation and implementation of the Act.

**References:**
Business Act (Act 71 of 1991). Available at:

Global Integrity, 2006.  Country Report: South Africa. Available at:

70b. In law, a complaint mechanism exists if a business license request is denied.

**YES** | **NO**

**Comments:**
Section 3 of the Business Act (Act 71 of 1991) states that any person who feels himself aggrieved by a decision of a licensing authority may appeal against the decision in accordance with the provisions of a regulation contemplated in Section 6 (1)(a)(vi).

Section 6 of the Act empowers Administrators to make provincial regulations pertaining to appeals, including the referral of appeals to appeals committees, and the constitution, functions, and procedures, and the legal effect, of findings of such committees.

**References:**
Business Act (Act 71 of 1991). Available at:

**YES:** A YES score is earned if there is a formal process for appealing a rejected license.

**NO:** A NO score is earned if no such mechanism exists.
70c. In practice, citizens can obtain any necessary business license (i.e. for a small import business) within a reasonable time period.

Comments:
Provided all requirements as stipulated in the Business Act (Act 71 of 1991) are met, citizens can obtain a business license within a reasonable time period.

It takes approximately one to two months to register a business. The registration process involves the following six procedural steps:

- Reserving a company name with the registrar (3 days)
- Lodging formation documentation (5-7 days)
- Opening of a bank account (1 day)
- Registration with the office of the local receiver of revenue (12 days)
- Registration with the Department of Labor for unemployment insurance (4 days)
- Registration with the Commissioner according to the Compensation for Occupational Injuries and Diseases Act (10 days) - this last step is done concurrently with the registration with the receiver of revenue.

References:

Companies and Intellectual Property Registration Office. Available at: www.cipro.gov.za

Interview (telephonic) with Ivan Gabriel, Deputy Director, Research and Development, Western Cape Department of Economic Development and Tourism, Aug. 22, 2008, Cape Town.

100: Licenses are not required, or licenses can be obtained within roughly one week.

75: 

50: Licensing is required and takes around one month. Some groups may be delayed up to a three months

25: 

0: Licensing takes more than three months for most groups. Some groups may wait six months to one year to get necessary licenses.

70d. In practice, citizens can obtain any necessary business license (i.e. for a small import business) at a reasonable cost.

Comments:
Provided than an applicant meets all requirements stipulated in the Business Act (Act 71 of 1991), a business license can be obtained at a reasonable cost.
According to the Companies and Intellectual Property Registration Office (CIPRO), the costs involved in registering the formation of a private, public, or Section 21 company are as follows:

- Application for the reservation of a company name (R50-US$5)
- Application for certificate to commence business (R60-US$6)

Companies with share capital are required to pay a fee of R350 (US$35) for R1,000 (US$100) capital, plus R5 (US$0.5) per additional R1,000 authorized capital, for the purpose of a Memorandum of Association.

Companies without share capital are liable only for the R350 fee.

References:


Companies and Intellectual Property Registration Office. Available at: http://www.cipro.gov.za

Interview (telephonic) with Ivan Gabriel, Deputy Director, Research and Development, Western Cape Department of Economic Development and Tourism, Aug. 22, 2008, Cape Town.

**100:** Licenses are not required, or licenses are free. Licenses can be obtained at little cost to the organization, such as by mail, or on-line.

**75:**

**50:** Licenses are required, and impose a financial burden on the organization. Licenses may require a visit to a specific office, such as a regional or national capital.

**25:**

**0:** Licenses are required, and impose a major financial burden on the organization. Licensing costs are prohibitive to the organization.

**71. Are there transparent business regulatory requirements for basic health, environmental, and safety standards?**

**100**

**71a. In law, basic business regulatory requirements for meeting public health standards are transparent and publicly available.**

**YES** | **NO**

Comments:

The Basic Conditions of Employment Act (Act 11 of 2002) and the Occupational Health and Safety Act (Act 85 of 1993) require compliance with public health standards by holders and prospective holders of business licenses and regulations. These standards are available to the public.
YES: A YES score is earned if basic regulatory requirements for meeting public health standards are publicly accessible and transparent.

NO: A NO score is earned if such requirements are not made public or are otherwise not transparent.

71b. In law, basic business regulatory requirements for meeting public environmental standards are transparent and publicly available.

YES | NO

Comments:
The regulations to the Business Act require compliance with environmental standards by holders and prospective holders of business licenses. These regulations are publicly available.

References:
Business Act (Act 71 of 1991). Available at:

Business Act (Act 71 of 1991), Regulations. Available at:
http://www.capetown.gov.za/.../Regulations%20Relating%20to%20Businesses%20PN%20786%20of%201991.pdf

Global Integrity, 2006. Country Report: South Africa. Available at:
https://last.globalintegrity.org/reports/2006/index.cfm

YES: A YES score is earned if basic regulatory requirements for meeting public environmental standards are publicly accessible and transparent.

NO: A NO score is earned if such requirements are not made public or are otherwise not transparent.

71c. In law, basic business regulatory requirements for meeting public safety standards are transparent and publicly available.

YES | NO

Comments:
The regulations to the Business Act require compliance with public safety standards by holders and prospective holders of
72. Does government effectively enforce basic health, environmental, and safety standards on businesses?

YES: A YES score is earned if basic regulatory requirements for meeting public safety standards are publicly accessible and transparent.

NO: A NO score is earned if such requirements are not made public or are otherwise not transparent.

100  |  75  |  50  |  25  |  0

72a. In practice, business inspections by government officials to ensure public health standards are being met are carried out in a uniform and even-handed manner.

Comments:
Routine inspections are conducted by the inspectors from local councils who monitor health standards. However, there have been incidences reported recently where government inspectors received bribes from business owners. For instance, an incident was reported in which the government increased the pressure for compliance, but two inspectors were found to have accepted bribes from business owners.

References:


100: Business inspections by the government to ensure that public health standards are being met are designed and carried out in such a way as to ensure comprehensive compliance by all businesses with transparent regulatory requirements.

75:

50: Business inspections by the government to ensure public health standards are met are generally carried out in an even-handed way though exceptions exist. Bribes are occasionally paid to extract favorable treatment or expedited processing.
Business inspections to ensure that public health standards are met are routinely carried out by government officials in an ad hoc, arbitrary fashion designed to extract extra payments from businesses in exchange for favorable treatment.

72b. In practice, business inspections by government officials to ensure public environmental standards are being met are carried out in a uniform and even-handed manner.

Comments:
Routine inspections are conducted by the inspectors from local councils who monitor environmental standards. However, there have been incidences reported recently where government inspectors received bribes from business owners. For instance, an incident was reported in which the government increased the pressure for compliance, but two inspectors were found to have accepted bribes from business owners.

References:


100: Business inspections by the government to ensure that public environmental standards are being met are designed and carried out in such a way as to ensure comprehensive compliance by all businesses with transparent regulatory requirements.

75: Business inspections by the government to ensure public environmental standards are met are generally carried out in an even-handed way though exceptions exist. Bribes are occasionally paid to extract favorable treatment or expedited processing.

50: Business inspections by the government to ensure public environmental standards are met are generally carried out in an even-handed way though exceptions exist. Bribes are occasionally paid to extract favorable treatment or expedited processing.

25: Business inspections to ensure that public environmental standards are met are routinely carried out by government officials in an ad hoc, arbitrary fashion designed to extract extra payments from businesses in exchange for favorable treatment.

72c. In practice, business inspections by government officials to ensure public safety standards are being met are carried out in a uniform and even-handed manner.

Comments:
Routine inspections are conducted by the inspectors of the local councils who monitor safety standards. The Basic Conditions of Employment act also stipulates minimum safety standards. However, there have been incidences reported recently where government inspectors received bribes from business owners. For instance, an incident was reported in which the government increased the pressure for compliance, but two inspectors were found to have accepted bribes from business owners.
Category VI. Anti-Corruption and Rule of Law

VI-1. Anti-Corruption Law

73. Is there legislation criminalizing corruption?

100

73a. In law, attempted corruption is illegal.

Comments:
Section 21 of the Prevention and Combating of Corrupt Activities Act specifies that any person who –

(a) attempts;
(b) conspires with any other person; or
(c) aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person to commit an offense in terms of this Act,
is guilty of an offense.
YES: A YES score is earned if corruption laws include attempted acts.

NO: A NO score is earned if this is not illegal.

73b. In law, extortion is illegal.

YES | NO

Comments:
Extortion is made an offense in terms of section 21 (c) of the Prevention and Combating of Corrupt Activities Act, read with the definition of induce in section 1(x), which makes a statutory offense of the common law crime of extortion.

References:
Prevention and Combating of Corrupt Activities Act of 2004 (Act 12 of 2004). Available at:

YES: A YES score is earned if corruption laws include extortion. Extortion is defined as demanding favorable treatment (such as a bribe) to withhold a punishment.

NO: A NO score is earned if this is not illegal.

73c. In law, offering a bribe (i.e. active corruption) is illegal.

YES | NO

Comments:
Section 3 of the Prevention and Combating of Corrupt Activities Act makes offering a bribe illegal by providing that:

Any person who directly or indirectly –

(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of him/herself or for the benefit of another person; or
(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner –
(i) that amounts to the-
(aa) illegal, dishonest, unauthorized, incomplete, or biased; or
(bb) misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutions, statutory, contractual or any other legal obligation
(ii) that amounts to
(aa) the abuse of a position of authority;
(bb) a breach of trust; or
(cc) the violation of a legal duty or a set of rules;
(iii) designed to achieve an unjustified result; or  
(iv) that amount to any other unauthorized or improper inducement to do or not to do anything,  
is guilty of the offense of corruption.

References:  
Prevention and Combating of Corrupt Activities Act of 2004 (Act 12 of 2004). Available at  

YES: A YES score is earned if offering a bribe is illegal.  
NO: A NO score is earned if this is not illegal.

73d. In law, receiving a bribe (i.e. passive corruption) is illegal.

YES | NO

Comments:  
Section 3 of the Prevention and Combating of Corrupt Activities Act of makes receiving a bribe illegal by providing that:

Any person who directly or indirectly –

(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or  
(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner –

(i) that amounts to the –

(aa) illegal, dishonest, unauthorized, incomplete, or biased; or  
(bb) misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutions, statutory, contractual or any other legal obligation;  
(ii) that amounts to  
(aa) the abuse of a position of authority;  
(bb) a breach of trust; or  
(cc) the violation of a legal duty or a set of rules;  
(iii) designed to achieve an unjustified result; or  
(iv) that amount to any other unauthorized or improper inducement to do or not to do anything, is guilty of the offense of corruption.

References:  
Prevention and Combating of Corrupt Activities Act of 2004 (Act 12 of 2004). Available at  

YES: A YES score is earned if receiving a bribe is illegal.  
NO: A NO score is earned if this is not illegal.

73e. In law, bribing a foreign official is illegal.
Comments:
Bribing a foreign official is illegal in terms of section 5 of the Prevention of Corrupt Activities Act:

(1) Any person who, directly or indirectly gives or agrees or offers to give any gratification to a foreign public official, whether for the benefit of that foreign public official or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner that amounts to the –
   (i) illegal, dishonest, unauthorized, incomplete, or biased; or
   (ii) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(b) that amounts to –
   (i) the abuse of a position of authority;
   (ii) a breach of trust; or
   (iii) the violation of a legal duty or a set of rules;

(c) designed to achieve unjustified result; or

(d) that amounts to any other unauthorized or improper inducement to do or not to do anything, is guilty of the offense of corrupt activities relating to foreign public officials.

(2) Without derogating from the generality of section 2(4). to act” in subsection (1
   (a) the using of such foreign public official's or such others person's position to influence any acts or decisions of the foreign state or public international organization concerned; or
   (b) obtaining or retaining a contract, business or an advantage in the conduct of business of that foreign state or public international organization.

References:

YES: A YES score is earned if bribing a foreign official is illegal.

NO: A NO score is earned if this is not illegal.

73f. In law, using public resources for private gain is illegal.

Comments:
Section 4 of the Prevention and Combating of Corrupt Activities Act criminalizes the misuse of public resources for private gain:

4.(1) Any –
   (a) public officer who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or
   (b) person who, directly or indirectly, gives or agrees or offers to give any gratification to a public officer, whether for the benefit of that public officer or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner –
   (i) that amounts to the –
      (aa) illegal, dishonest, unauthorized, incomplete, or biased; or
      (bb) misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
   (ii) that amount to the –
      (aa) the abuse of a position of authority;
      (bb) a breach of trust; or
      (cc) the violation of a legal duty or a set of rules;
   (iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorized or improper inducement to do or not do anything, is guilty of the offense of corrupt activities relating to public officers.

(2) Without derogating from the generality of section 2(4), to act in subsection (1), includes –
(a) voting at any meeting of a public body;
(b) performing or not adequately performing any official functions;
(c) expediting, delaying, hindering or preventing the performance of an official act;
(d) aiding, assisting or favoring any particular person in the transaction of any business with a public body;
(e) aiding or assisting in procuring or preventing the passing of any vote or the granting of any contract or advantage in favor of any person in relation to the transaction of any business with a public body;
(f) showing any favor or disfavor to any person in performing a function as a public officer;
(g) diverting, for purposes unrelated to those for which they were intended, any property belonging to the state which such officer received by virtue of his or her position for purposes of administration, custody or for any other reason, to another person; or
(h) exerting any improper influence over the decision making of any person performing functions in a public body.

References:

YES: A YES score is earned if using public resources for private gain is illegal.

NO: A NO score is earned if this is not illegal.

73g. In law, using confidential state information for private gain is illegal.

YES | NO

Comments:
Section 4(1)(bb) criminalizes the misuse of confidential state information for private gain:

4.(1) Any –
(a) public officer who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or
(b) person who, directly or indirectly, gives or agrees or offers to give any gratification to a public officer, whether for the benefit of that public officer or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner –
(i) that amounts to the –
(aa) illegal, dishonest, unauthorized, incomplete, or biased; or
(bb) misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
(ii) that amounts to the –
(aa) the abuse of a position of authority;
(bb) a breach of trust; or
(cc) the violation of a legal duty or a set of rules;
(iii) designed to achieve an unjustified result; or
(iv) that amounts to any other unauthorized or improper inducement to do or not do anything, is guilty of the offense of corrupt activities relating to public officers.

References:

YES: A YES score is earned if using confidential state information for private gain is illegal.

NO: A NO score is earned if this is not illegal.
73h. In law, money laundering is illegal.

**YES | NO**

**Comments:**
The Prevention of Organized Crime Act of 1998 makes money laundering an offense. One of the stated purposes of the Act is to introduce measures to combat organized crime, money laundering and criminal gang activities; [and] to provide for the prohibition of money laundering and for an obligation to report certain information. The Act also specifies that any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities shall be guilty of an offense.

The Preamble to the Prevention and Combating of Corrupt Activities Act of 2004 (Act 12 of 2004) also makes reference to the link between corrupt activities and other forms of crime, in particular organized crime and economic crime, including money-laundering.

**References:**


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73i. In law, conspiracy to commit a crime (i.e. organized crime) is illegal.

**YES | NO**

**Comments:**
Schedule 1 of The Prevention of Organized Crime Act indicates that any conspiracy, incitement or attempt to commit any offense in terms of the Act is punishable under law.

In addition, the Prevention and Combating of Corrupt Activities Act provides that:

Any person who –

(a) attempts;
(b) conspires with any other person; or
(c) aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person to commit an offense in terms of this Act,

is guilty of an offense.

**References:**
VI-2. Anti-Corruption Agency

75. Is the anti-corruption agency effective?

72

75a. In law, the anti-corruption agency (or agencies) is protected from political interference.

YES | NO

Comments:
South Africa does not have one single body specifically mandated to fight corruption. However, a number of bodies exist with a range of powers to fight corruption. The South African Constitution provides in Chapter 9 for the establishment of the Public Protector, which protects the public against conduct or action causing improper prejudice arising from the affairs of government and the conduct of public functions. Chapter 9 of the Constitution also establishes the Auditor General, which ensures financial accountability of public entities. The independence of all Chapter 9 institutions is protected in terms of section 181 of the Constitution, which also prohibits interference with or obstruction of their activities.

Chapter 10 of the Constitution also establishes the Public Service Commission, which is mandated to promote a high standard of professional ethics in the Public Service. Regarding the PSC, the Constitution specifies in section 196 that the Commission is independent and must be impartial, and must exercise its powers and perform its functions without fear, favor or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. [8] No person or organ of state may interfere with the functioning of the Commission.

The National Prosecuting Authority (NPA) is established in terms of section 179 in Chapter 8 of the Constitution. Chapter 8 also establishes the courts. The head of the NPA, the National Director of Public Prosecutions, is appointed by the President, in accordance with the Constitution. Nevertheless, section 179(4) of the Constitution requires that national legislation must ensure that the prosecuting authority exercises its functions without fear, favor or prejudice, while the National Prosecuting Authority Act provides that each member of the NPA should serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favor or prejudice and subject only to the Constitution and the law.

The Prevention and Combating of Corrupt Activities Act (2004) requires that corruption exceeding a threshold value should be reported to the Police Service by persons who are in a position of authority. The Directorate of Special Operations (DSO), known as the Scorpions, housed in the National Prosecuting Authority and enjoying similar protection of its independence, also deals with investigations into high-profile corruption cases, including the current corruption cases against African National Congress president, Jacob Zuma, and National Police Commissioner, Jackie Selebi.

The Special Investigating Units and Special Tribunals Act of 1996 created the Special Investigations Unit as a body to investigate serious issues related to state institutions and their employees.

In accordance with the Public Service Anti-Corruption Strategy, a cross-sectoral National Anti-Corruption Co-ordinating Committee was established to co-ordinate government anti-corruption policies. In addition, several Specialized Commercial Crime Courts preside over corruption cases.
According to the Constitution and the South Africa Police Services (SAPS) Act (Act 68 of 1995), the SAPS is under direct command of the national police commissioner, who is appointed by the president. The national commissioner appoints the provincial commissioners. The SAPS Act of 1995 also provides that no member of the SAPS shall in any manner further or prejudice party-political interests.

The South African Police Service (SAPS), the Public Service Commission (PSC) and the NPA are considered to be the main anti-corruption agencies in the country, in spite of the December 2007 resolution by the ruling African National Congress party to disband the DSO. Subsequently, draft legislation to disband the DSO has been introduced in Parliament, generating deep concern and fierce opposition from many sectors of society.

References:


Public Service Commission. Available at: http://www.psc.gov.za


Special Investigation Unit. Available at: http://www.siu.org.za/index.asp?include=about/SIUbackground.html


YES: A YES score is earned only if the agency (or agencies) has some formal organizational or operational independence from the government. A YES score is earned even if the agency/agencies is legally separate but in practice staffed by partisans.

NO: A NO score is earned if the agency (or agencies) is a subordinate part of any government ministry or agency, such as the Department of Interior or the Justice Department, in such a way that limits its operational independence.

75b. In practice, the anti-corruption agency (or agencies) is protected from political interference.
him is the result of the Scorpions former NPA boss Bulelani Ngcuka, who Selebi alleges has a vendetta against him. Selebi has also reportedly accused Leonard McCarthy, head of the Scorpions elite crime investigation unit, of being controlled by former National Assembly Speaker, Frene Ginwala, he stated:

The Prevention and Combating of Corrupt Activities Act (2004) requires that corruption exceeding a threshold value should be reported to the Police Service by persons who are in a position of authority. The Directorate of Special Operations (DSO), known as the Scorpions, housed in the National Prosecuting Authority and enjoying similar protection of its independence, also deals with investigations into high-profile corruption cases, including the current corruption cases against African National Congress president, Jacob Zuma, and National Police Commissioner, Jackie Selebi.

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Amongst these organizations, the South African Police Service (SAPS), the Public Service Commission (PSC) and the NPA are considered to be the main anti-corruption in the country. Further, the NPA and its various units are considered to be the most politically independent agencies dealing with issues of corruption. The Scorpions have initiated a number of recent high-profile corruption investigations, including those into ANC President Jacob Zuma, and National Police Commissioner Jackie Selebi.

While analysts have cited these cases as evidence of the political independence of the NPA, recent incidents highlight the potential threat of political interference. For example, National Police Commissioner Jackie Selebi was suspended in January on charges of corruption and defeating the ends of justice. These charges reportedly relate to his relationship with convicted drug dealer and crime boss Glenn Agliotti, who it is alleged provided Selebi with favors, loans and money over a period of fifteen years. Through his relationship with Agliotti, Selebi has also been linked to murdered mining magnate Brett Kebble.

However, the media has also reported that the Presidency, the Justice and Constitutional Development Department, the National Intelligence Agency, and the SAPS worked together to prevent Selebi from being charged. In late 2007, after procuring search warrants and a warrant of arrest against Selebi, National Director of Public Prosecutions Vusi Pikoli was suspended from his position, in what he claims was an attempt to prevent charges being brought against Selebi. At a Commission of Inquiry headed by former National Assembly Speaker, Frene Ginwala, he stated: “You cannot dispute the attempted concealment of executive interference into this matter immediately prior to my suspension, which is not consistent with all the interaction I have had. The Ginwala Commission has yet to finalise its findings in Pikoli’s case.

Selebi has also reportedly accused Leonard McCarthy, head of the Scorpions elite crime investigation unit, of being controlled by former NPA boss Bulelani Ngcuka, who Selebi alleges has a vendetta against him. Selebi has also claimed that the case against him is the result of the Scorpions fighting for survival.
In addition, at the African National Congress (ANC) National Conference in Polokwane in 2007, a resolution was adopted to dissolve the Scorpions. This is based on an interpretation of the Constitution which prefers a single police service, but this interpretation has been rejected by the Constitutional Court. Subsequently, draft legislation, currently before Parliament, has proposed that members of the DSO should fall under the SAPS.

However, consensus is widespread concerning the DSO's effectiveness, and critics suggest that efforts to dissolve the DSO are in fact an attempt to prevent investigations into senior ANC officials, particularly in the corruption case against ANC President Jacob Zuma.

More generally, analysts have suggested that the SAPS is at the center of a power struggle within the ANC, that corruption within the police has risen, and that the police service is increasingly susceptible to political interference. The citizen-lead Secretariat for Safety and Security has reportedly become largely an extension of SAPS.

The Public Service Commission reports to the National Assembly alone and has been more or less free of political interference. Criticism of the Public Protector has claimed that he has failed to adopt a sufficiently independent stance towards his erstwhile colleagues in the African National Congress, leading him to favor them in several investigation findings.

References:


Public Service Commission. Available at: http://www.psc.gov.za


Special Investigation Unit. Available at: http://www.siu.org.za/index.asp?include=about/SIUbackground.html


100: This agency (or agencies) operates independently of the political process, without incentive or pressure to render favorable judgments in politically sensitive cases. Investigations can operate without hindrance from the government, including access to politically sensitive information.

75:

50: This agency (or agencies) is typically independent, yet is sometimes influenced in its work by negative or positive political incentives. This may include favorable or unfavorable public criticism by the government, political appointments, or other forms of influence. The agency (or agencies) may not be provided with some information needed to carry out its investigations.

25:

0: This agency (or agencies) is commonly influenced by political or personal incentives. These may include conflicting family relationships, professional partnerships, or other personal loyalties. Negative incentives may include threats, harassment or other abuses of power. The agency (or agencies) cannot compel the government to reveal sensitive information.
Comment:
South Africa does not have one single body specifically mandated to fight corruption. However, a number of bodies exist with a range of powers to fight corruption. The South African Constitution provides in Chapter 9 for the establishment of the Public Protector, which protects the public against conduct or action causing improper prejudice arising from the affairs of government and the conduct of public functions. Chapter 9 of the Constitution also establishes the Auditor General, which ensures financial accountability of public entities. The independence of all Chapter 9 institutions is protected in terms of section 181 of the Constitution, which also prohibits interference with or obstruction of their activities.

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The Prevention and Combating of Corrupt Activities Act (2004) requires that corruption exceeding a threshold value should be reported to the Police Service by persons who are in a position of authority. The Directorate of Special Operations (DSO), known as the Scorpions, housed in the National Prosecuting Authority and enjoying similar protection of its independence, also deals with investigations into high-profile corruption cases, including the current corruption cases against African National Congress president, Jacob Zuma, and National Police Commissioner, Jackie Selebi.

The Special Investigating Units and Special Tribunals Act of 1996 created the Special Investigations Unit as a body to investigate serious issues related to state institutions and their employees.

In accordance with the Public Service Anti-Corruption Strategy, a cross-sectoral National Anti-Corruption Co-ordinating Committee was established to co-ordinate government anti-corruption policies. In addition, several Specialised Commercial Crime Courts preside over corruption cases.

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Amongst these organizations, the South African Police Service (SAPS), the Public Service Commission (PSC) and the NPA are considered to be the main anti-corruption in the country. Further, the NPA and its various units are considered to be the most politically independent agencies dealing with issues of corruption. The Scorpions have initiated a number of recent high-profile corruption investigations, including those into ANC President Jacob Zuma, and National Police Commissioner Jackie Selebi.

While analysts have cited these cases as evidence of the political independence of the NPA, recent incidents highlight the potential threat of political interference. For example, National Police Commissioner Jackie Selebi was suspended in January on charges of corruption and defeating the ends of justice. These charges reportedly relate to his relationship with convicted drug dealer and crime boss Glenn Agliotti, who it is alleged provided Selebi with favors, loans and money over a period of fifteen years. Through his relationship with Agliotti, Selebi has also been linked to murdered mining magnate Brett Kebble.

However, the media has also reported that the Presidency, the Justice and Constitutional Development Department, the National Intelligence Agency, and the SAPS worked together to prevent Selebi from being charged. In late 2007, after procuring search warrants and a warrant of arrest against Selebi, National Director of Public Prosecutions Vusi Pikoli was suspended from his position, in what he claims was an attempt to prevent charges being brought against Selebi. At a Commission of Inquiry headed by former National Assembly Speaker, Frene Ginwala, he stated: You cannot dispute the attempted concealment of executive interference into this matter immediately prior to my suspension, which is not consistent with all the interaction I have had. The Ginwala Commission has yet to finalise its findings in Pikoli’s case.
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More generally, analysts have suggested that the SAPS is at the center of a power struggle within the ANC, that corruption within the police has risen, and that the police service is increasingly susceptible to political interference. The citizen-lead Secretariat for Safety and Security has reportedly become largely an extension of SAPS.

The Public Service Commission reports to the National Assembly alone and has been more or less free of political interference. Criticism of the Public Protector has claimed that he has failed to adopt a sufficiently independent stance towards his erstwhile colleagues in the African National Congress, leading him to favor them in several investigation findings. The head of neither of these institutions has faced removal.

References:


100: The director(s) cannot be removed without a significant justification through a formal process, such as impeachment for abuse of power.

75:

50: The director(s) can in some cases be removed through a combination of official or unofficial pressure.

25:

0: The director(s) can be removed at the will of political leadership.

75d. In practice, appointments to the anti-corruption agency (or agencies) are based on professional criteria.
Comments:
South Africa does not have one single body specifically mandated to fight corruption. However, a number of bodies exist with a range of powers to fight corruption. The South African Constitution provides in Chapter 9 for the establishment of the Public Protector, which protects the public against conduct or action causing improper prejudice arising from the affairs of government and the conduct of public functions. Chapter 9 of the Constitution also establishes the Auditor General, which ensures financial accountability of public entities. The independence of all Chapter 9 institutions is protected in terms of section 181 of the Constitution, which also prohibits interference with or obstruction of their activities.

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In addition, at the African National Congress (ANC) National Conference in Polokwane in 2007, a resolution was adopted to dissolve the Scorpions. This is based on an interpretation of the Constitution which prefers a single police service, but this interpretation has been rejected by the Constitutional Court. Subsequently, draft legislation, currently before Parliament, has proposed that members of the DSO should fall under the SAPS.

However, consensus is widespread concerning the DSO's effectiveness, and critics suggest that efforts to dissolve the DSO are in fact an attempt to prevent investigations into senior ANC officials, particularly in the corruption case against ANC President Jacob Zuma.

More generally, analysts have suggested that the SAPS is at the center of a power struggle within the ANC, that corruption within the police has risen, and that the police service is increasingly susceptible to political interference. The citizen-lead Secretariat for Safety and Security has reportedly become largely an extension of SAPS.

The Public Service Commission reports to the National Assembly alone and has been more or less free of political interference. Criticism of the Public Protector has claimed that he has failed to adopt a sufficiently independent stance towards his erstwhile colleagues in the African National Congress, leading him to favor them in several investigation findings. The head of neither of these institutions has faced removal.

In general, recruitment of public sector officials has been criticized, due to a lack of coherent and clear employment policies and mechanisms. For instance, the Public Service Commission's 2007 4th Consolidated Report on Public Service Monitoring and Evaluation indicates that only 63 percent of departments have an effective recruitment policy that complies with good practice standards and that spells out detailed recruitment procedures.

In addition, the President of the Republic appoints some heads of anti-corruption agencies, including the National Police Commissioner. These appointments are therefore political, although professional qualifications are nonetheless required. However, National Police Commissioner Jackie Selebi, appointed by President Mbeki, was suspended in January of this year, and is facing charges of corruption. His appointment was also criticized, due to his civilian background.

The appointment of the current Public Protector from among the ranks of the African National Congress in Parliament was also criticized at the time.

References:


Public Protector of South Africa http://www.publicprotector.org/about_us/vision_mission_obj.htm


Appointments to the agency (or agencies) are made based on professional qualifications. Individuals appointed are free of conflicts of interest arising from personal loyalties, family connections or other biases. Individuals appointed usually do not have clear political party affiliations.

Appointments are usually based on professional qualifications. Individuals appointed may have clear party loyalties, however.

Appointments are often based on political considerations. Individuals appointed often have conflicts of interest arising from personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

In practice, the anti-corruption agency (or agencies) has a professional, full-time staff.

Comments:
South Africa does not have one single body specifically mandated to fight corruption. However, a number of bodies exist with a range of powers to fight corruption. The South African Constitution provides in Chapter 9 for the establishment of the Public Protector, which protects the public against conduct or action causing improper prejudice arising from the affairs of government and the performance of public functions. Chapter 9 of the Constitution also establishes the Auditor General, which ensures financial accountability of public entities. The independence of all Chapter 9 institutions is protected in terms of section 181 of the Constitution, which also prohibits interference with or obstruction of their activities.

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Amongst these organizations, the South African Police Service (SAPS), the Public Service Commission (PSC) and the NPA and its various units are considered to be the main anti-corruption agencies in the country. Further, the NPA is considered to be the most politically independent body dealing with issues of corruption.

According to Deputy National Police Commissioner Mala Singh, the SAPS has recruited 55 000 additional police officers in the past 5 years. Furthermore, to improve investigative capacity, including that related to commercial crime, the SAPS has more than doubled the duration of its academic program at the two detective academies, from 6 to 14 weeks. Nevertheless, the case load related to commercial crime still appears to be relatively high, and some sources mention that a police investigator of the SAPS Commercial Crime Unit handles at least 30 cases at any given time. This situation raises questions as to whether staffing of the Commercial Crime Unit is sufficient.

The Public Service Commission’s most recent annual report states that it has 220 staff nationwide, the majority of whom are based in Pretoria (172).

The National Prosecuting Authority, including the Scorpions, has a professional full-time staff. However, NPA's recent Annual Report indicates that the most experienced and skilled professionals are leaving the agency in large numbers. Currently, Parliament is debating proposed legislation that would integrate the Scorpions into SAPS, and as a result reportedly 10 percent of DSO staff have left their positions.

Generally, appointments to the Public Protector’s office are according to professional criteria, although recent advertisements for investigators have produced very limited numbers of applications.

References:


Public Protector of South Africa http://www.publicprotector.org/about_us/vision_mission_obj.htm


Special Investigation Unit. Available at: http://www.siu.org.za/index.asp?include=about/SIUbackground.html


100: The agency (or agencies) has staff sufficient to fulfill its basic mandate.

75: 

50: The agency (or agencies) has limited staff, or staff without necessary qualifications to fulfill its basic mandate.

25: 

0: The agency (or agencies) has no staff, or a limited staff, that is clearly unqualified to fulfill its mandate.

75f. In practice, the anti-corruption agency (or agencies) receives regular funding.

| 100 | 75 | 50 | 25 | 0 |

Comments:
South Africa does not have one single body specifically mandated to fight corruption. However, a number of bodies exist with a range of powers to fight corruption. Chapter 9 of the South African Constitution provides for the establishment of the Public Protector, which protects the public against conduct or action causing improper prejudice arising from the affairs of government and the performance of public functions. Chapter 9 of the Constitution also establishes the Auditor-General, which ensures financial accountability of public entities. The independence of all Chapter 9 institutions is protected in terms of section 181 of the Constitution, which also prohibits interference with or obstruction of their activities.

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The Prevention and Combating of Corrupt Activities Act (Act 12 of 2004) requires that corruption exceeding a threshold value should be reported to the South African Police Services (SAPS) by persons who are in a position of authority. The Directorate of Special Operations (DSO), known as the Scorpions and housed in the National Prosecuting Authority, also deals with investigations into high-profile corruption cases, including the current cases against African National Congress President Jacob Zuma and suspended National Police Commissioner Jackie Selebi.

The Special Investigating Units and Special Tribunals Act (Act 74 of 1996) created the Special Investigations Unit as a body to investigate serious issues related to state institutions and their employees. In accordance with the Public Service Anti-Corruption Strategy, a cross-sectoral National Anti-Corruption Coordinating Committee was established to coordinate government anti-corruption policies. In addition, several Specialized Commercial Crime Courts preside over corruption cases.
Amongst these organizations, the SAPS, PSC and the NPA and its various units are considered to be the main anti-corruption agencies in the country.

The NPA is generally better-funded than other criminal justice agencies. The Scorpions appear to have been sufficiently funded in order to achieve effective results in combating corruption, although according to its own mandate, the Unit may only undertake investigations that it has the capacity and resources to carry out. Further, Parliament is currently debating proposed legislation that would integrate the Scorpions into SAPS.

Although the SAPS, the Public Protector and the PSC receive regular funding from the state for general operations, reports suggest that both agencies struggle to allocate limited funding across a wide range of operations, especially in the context of their obligation to investigate every complaint or allegation falling within their mandates: they do not enjoy the relative discretion available to some of the NPA specialized units, which can select cases.

The main anti-corruption unit in the SAPS is the Commercial Crimes Branch, which operates under the Detective Services program. For the 2007/08 financial year, Detective Services was allocated R5.8 billion (US$588 million). However, this figure represents the entire allocation for the Detective Services, and not specifically for anti-corruption work.

In 2007/08, the DSO was allocated about R373 million (US$37.3), while the PSC Integrity and Anti-Corruption program was allocated about R20 million (US$2 million).

References:


Interview with Gary Pienaar, Senior Researcher: Public Ethics, Institute for Democracy in South Africa (IDASA), and previously Western Cape Provincial manager in the Office of the Public Protector, Aug. 28, 2008, Cape Town


Public Service Commission. Available at: http://www.psc.gov.za


Special Investigation Unit. Available at: http://www.siu.org.za/index.asp?include=about/SIUbackground.html


100: The agency (or agencies) has a predictable source of funding that is fairly consistent from year to year. Political considerations are not a major factor in determining agency funding.

75:

50: The agency (or agencies) has a regular source of funding, but may be pressured by cuts, or threats of cuts to the agency budget. Political considerations have an effect on agency funding.

25:

0: The agency’s funding sources are unreliable. Funding may be removed arbitrarily or as retaliation for agency actions.

75g. In practice, the anti-corruption agency (or agencies) makes regular public reports.

100 | 75 | 50 | 25 | 0

Comments:
South Africa does not have one single body specifically mandated to fight corruption. However, a number of bodies exist with a range of powers to fight corruption. The South African Constitution provides in Chapter 9 for the establishment of the Public Protector, which protects the public against conduct or action causing improper prejudice arising from the affairs of government and the performance of public functions. Chapter 9 of the Constitution also establishes the Auditor General, which ensures financial accountability of public entities. The independence of all Chapter 9 institutions is protected in terms of section 181 of the Constitution, which also prohibits interference with or obstruction of their activities.

Chapter 10 of the Constitution also establishes the Public Service Commission, which is mandated to promote a high standard of professional ethics in the Public Service. Regarding the PSC, the Constitution specifies in section 196 that the Commission is independent and must be impartial, and must exercise its powers and perform its functions without fear, favor or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. [&] No person or organ of state may interfere with the functioning of the Commission.

The National Prosecuting Authority (NPA) is established in terms of section 179 in Chapter 8 of the Constitution. Chapter 8 also establishes the courts. The head of the NPA, the National Director of Public Prosecutions, is appointed by the President, in accordance with the Constitution. Nevertheless, section 179(4) of the Constitution requires that National legislation must ensure that the prosecuting authority exercises its functions without fear, favor or prejudice, while the National Prosecuting Authority Act provides that each member of the NPA should serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favor or prejudice and subject only to the Constitution and the law.
The Prevention and Combating of Corrupt Activities Act (2004) requires that corruption exceeding a threshold value should be reported to the Police Service by persons who are in a position of authority. The Directorate of Special Operations (DSO), known as the Scorpions, housed in the National Prosecuting Authority, also deals with investigations into high-profile corruption cases, including the current corruption cases against African National Congress president, Jacob Zuma, and National Police Commissioner, Jackie Selebi.

The Special Investigating Units and Special Tribunals Act of 1996 created the Special Investigations Unit as a body to investigate serious issues related to state institutions and their employees. In accordance with the Public Service Anti-Corruption Strategy, a cross-sectoral National Anti-Corruption Coordinating Committee was established to coordinate government anti-corruption policies. In addition, several Specialized Commercial Crime Courts preside over corruption cases.

Amongst these organizations, the South African Police Service (SAPS), the Public Service Commission (PSC) and the NPA are considered to be the main anti-corruption in the country.

The SAPS publishes Annual reports and crime statistics available to the public on its website. However, corruption does not appear to be a major part of its routine reporting activity. As a part of the NPA, the Scorpions are required to report to the Ministry of Justice and Constitutional Development and also to the Portfolio Committee of Justice and Constitutional Development in Parliament. These reports are accessible to the public. As required by the law, the Public Service Commission reports to Parliament at least once a year and also frequently publishes investigative and activities reports on its web site.

References:


Public Protector of South Africa. Investigation Reports. Available at: http://www.publicprotector.org

Public Service Commission. Available at: http://www.psc.gov.za


Special Investigation Unit. Available at: http://www.siu.org.za/index.asp?include=about/STUb Background.html
South Africa does not have one single body specifically mandated to fight corruption. However, a number of bodies exist with a range of powers to fight corruption. The South African Constitution provides for the establishment of the Public Protector (PP), which protects the public against improper actions in relation to the affairs of government and public functions. The Constitution also establishes the Public Service Commission (PSC), which is mandated to promote a high standard of professional ethics in the Public Service, as well as the Auditor General, which ensures financial accountability of public organizations, and the National Prosecuting Authority (NPA).

Because of complementary mandates, there is a good level of co-operation and cross-referral of cases between the various anti-corruption agencies. The PP’s work includes investigating allegations of corruption broadly defined to include any improper departure from accepted standards of public conduct. It deals mainly with issues of public administration and executive ethics. It co-operates with the PSC, which investigates ethics breaches (more narrowly defined) and misconduct in the civil service. The Special Investigations Unit (SIU) is mandated to investigate financial losses and recover such losses from individual civil servants by means of civil litigation. The PP is empowered only to make recommendations for corrective action, and these are often ignored in practice in sensitive cases. It has the most limited powers to ensure corrective action is actually taken.

The Prevention and Combating of Corrupt Activities Act (2004) requires that corruption exceeding a threshold value should be reported to the Police Service by persons who are in a position of authority. The Directorate of Special Operations (DSO), known as the Scorpions, housed in the NPA, also deals with investigations into high-profile corruption cases, including the current corruption case against ANC president Jacob Zuma.

The Special Investigating Units and Special Tribunals Act of 1996 created the Special Investigations Unit as a body to investigate serious issues related to state institutions and their employees. In accordance with the Public Service Anti-Corruption Strategy, a cross-sectoral National Anti-Corruption Coordinating Committee was established to coordinate government anti-corruption policies. In addition, several Specialized Commercial Crime Courts preside over corruption cases.

Amongst these organizations, the South African Police Service (SAPS), the Public Service Commission (PSC) and the NPA are considered to be the main anti-corruption in the country.

The NPA is tasked with conducting prosecutions on behalf of the state and possesses all necessary powers to do so. In general it is better funded than other criminal justice agencies. The Scorpions appear to have more or less sufficient amount of funding for effective combat against complex cases of corruption and organized crime. The NPA, including the Scorpions, has professional full time staff, however, NPA’s recent annual report highlights that some of the most experienced and skilled professionals are leaving the agency. Recent concerns surrounding the Scorpions’ possible disbandment has reportedly led 10 percent of the staff resigning.

The PSC is primarily a monitoring body with adequate powers, but its resources are stretched. The PSC’s most recent annual report to the citizens states that it has 220 staff nationwide, majority of whom are based in Pretoria (172).

SAPS has all the usual policing powers, but they are ineffectual primarily because of the very low skills levels among a high proportion of its staff. For example, it has far too few crime scene investigators, detectives and forensic analysts. The SAPS appears to be struggling to break this pattern. According to Deputy National Police Commissioner Mala Singh, the SAPS recruited 55 000 additional police officers in the past 5 years. Furthermore, to improve the detectives’ quality, including that of the commercial crime detectives, the SAPS has more than doubled the academic program at its two detective academies from six to 14 weeks. Nevertheless, the commercial crime related case-load still appears to be relatively high, as some sources mention that
a police investigator of the SAPS Commercial Crime Unit handles at least 30 cases at any given time. This situation raises questions as to whether staffing of the Commercial Crime Unit is sufficient.

Although the SAPS, the PP and the PSC receive regular funding from the state for their general operations, they struggle to allocate their funding across their broad mandates and operations. They do not enjoy the relative luxury of selecting cases or complaints for investigation: they are obliged to investigate all cases and complaints falling within their respective mandates. Moreover, although Parliament’s 2007 study of Chapter 9 institutions, some analysts have suggested that, as is the case in other developing countries, the PP’s office should have enforcement powers, as its recommendations can be ignored in the more sensitive cases.

References:
Camerer, Lala. 2001, Prerequisites for effective anti-corruption ombudsman’s offices and anti-corruption agencies, Paper for the 10th International Conference on Anti-Corruption, Available at http://www.10iacc.org/download/workshops/cs06.pdf.


Interview with Gary Pienaar, Senior Researcher: Public Ethics, Institute for Democracy in South Africa (IDASA), and previous Western Cape Provincial manager in the Office of the Public Protector, Sept. 3, 2008, Cape Town.


Public Protector of South Africa http://www.publicprotector.org/about_us/vision_mission_obj.htm

Public Service Commission. Available at: http://www.psc.gov.za


Special Investigation Unit. Available at: http://www.siu.org.za/index.asp?include=about/SIUbackground.html


**100:** The agency (or agencies) has powers to gather information, including politically sensitive information. The agency (or agencies) can question suspects, order arrests and bring suspects to trial (or rely on related agencies or law enforcement authorities to perform such functions).

**75:**

**50:** The agency (or agencies) has most of the powers needed to carry out its mandate with some exceptions.

**25:**

**0:** The agency (or agencies) lacks significant powers which limit its effectiveness.

75i. In practice, when necessary, the anti-corruption agency (or agencies) independently initiates investigations.

### Comments:

South Africa does not have one single body specifically mandated to fight corruption. However, a number of bodies exist with a range of powers to fight corruption. The South African Constitution provides for the establishment of the Public Protector (PP), which protects the public against improper actions in relation to the affairs of government and public functions. The Constitution also establishes the Public Service Commission (PSC), which is mandated to promote a high standard of professional ethics in the Public Service, as well as the Auditor General, which ensures financial accountability of public organizations, and the National Prosecuting Authority (NPA).

The PP’s work includes investigating allegations of corruption broadly defined to include any improper departure from accepted standards of public conduct. It deals mainly with issues of public administration and executive ethics. It co-operates with the PSC, which investigates ethics breaches (more narrowly defined) and misconduct in the civil service. The Special Investigations Unit (SIU) is mandated to investigate financial losses and recover such losses from individual civil servants by means of civil litigation. The PP is empowered only to make recommendations for corrective action, and these are often ignored in practice in sensitive cases. It has the most limited powers to ensure corrective action is actually taken.

The Prevention and Combating of Corrupt Activities Act (2004) requires that corruption exceeding a threshold value should be reported to the Police Service by persons who are in a position of authority. The Directorate of Special Operations (DSO), known as the Scorpions, housed in the National Prosecuting Authority, also deals with investigations into high-profile corruption cases, including the current corruption cases against African National Congress president, Jacob Zuma, and National Police Commissioner, Jackie Selebi.

The Special Investigating Units and Special Tribunals Act of 1996 created the Special Investigations Unit as a body to investigate serious issues related to state institutions and their employees. In accordance with the Public Service Anti-Corruption Strategy, a cross-sectoral National Anti-Corruption Coordinating Committee was established to coordinate government anti-corruption policies. In addition, several Specialized Commercial Crime Courts preside over corruption cases.

Amongst these organizations, the South African Police Service (SAPS), the Public Service Commission (PSC) and the NPA are considered to be the main anti-corruption in the country.

The PSC is required by the Constitution to either of its own accord or on receipt of any complaint, to investigate and evaluate the application of personnel and public administration practices, and report to the relevant executive authority and legislature. The PSC therefore initiates investigations when necessary. For instance, in August of 2007, the PSC released a report on investigations conducted into the management of public servants who were elected as municipal councilors.
Parliament’s Review of Chapter 9 institutions found that the PP had underutilized its important own initiative powers. The PP’s most recent annual report indicates barely a dozen own initiative investigations undertaken recently.

Amongst anti-corruption agencies, the Scorpions is the foremost agency with operational independence, which allows for the initiation of investigations into high-profile corruption cases, such as that of SAPS National Commission Jackie Selebi.

The SAPS investigates all criminal matters referred to it. It is common experience and knowledge that frequently, however, its members decline to undertake an investigation in the absence of a complaint.

References:


Interview with Gary Pienaar, Senior Researcher: Public Ethics, Institute for Democracy in South Africa (IDASA), and previous Western Cape Provincial manager in the Office of the Public Protector, Sept. 3, 2008, Cape Town.


Public Protector of South Africa. Annual Reports. Available at: http://www.publicprotector.org

Public Service Commission. Available at: http://www.psc.gov.za


Special Investigation Unit. Available at: http://www.siu.org.za/index.asp?include=about/SIUbbackground.html
When irregularities are discovered, the agency (or agencies) is aggressive in investigating the government or in cooperating with other investigative agencies.

The agency (or agencies) starts investigations, but is limited in its effectiveness or is reluctant to cooperate with other investigative agencies. The agency (or agencies) may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

The agency (or agencies) does not effectively investigate or does not cooperate with other investigative agencies. The agency (or agencies) may start investigations but not complete them, or may fail to detect offenders. The agency (or agencies) may be partisan in its application of power.

Can citizens access the anti-corruption agency?

In practice, the anti-corruption agency (or agencies) acts on complaints within a reasonable time period.

Comments:
South Africa does not have one single body specifically mandated to fight corruption. However, a number of bodies exist with a range of powers to fight corruption. The South African Constitution provides for the establishment of the Public Protector (PP), which protects the public against improper actions in relation to the affairs of government and public functions. The Constitution also establishes the Public Service Commission, which is mandated to promote a high standard of professional ethics in the Public Service, as well as the Auditor General, which ensures financial accountability of public organizations, and the National Prosecuting Authority (NPA).

The Prevention and Combating of Corrupt Activities Act (2004) requires that corruption exceeding a threshold value. The Directorate of Special Operations (DSO), known as the Scorpions, housed in the National Prosecuting Authority, also deals with investigations into high-profile corruption cases, including the current corruption case against ANC president Jacob Zuma.

The Special Investigating Units and Special Tribunals Act of 1996 created the Special Investigations Unit as a body to investigate serious issues related to state institutions and their employees. In accordance with the Public Service Anti-Corruption Strategy, a cross-sectoral National Anti-Corruption Coordinating Committee was established to coordinate government anti-corruption policies. In addition, several Specialized Commercial Crime Courts preside over corruption cases.

Amongst these organizations, the South African Police Service (SAPS), the Public Service Commission (PSC) and the NPA are considered to be the main anti-corruption agencies in the country.

Across government, finalization of corruption cases is reportedly often delayed, for a variety of reasons. For example, a report released by the PSC states that cases of professional misconduct, including corruption, within state departments are often not resolved within 35 days as required. The PSC also found that compliance rates with this requirement within some departments were at zero percent. This finding is also consistent with other reports suggesting that corruption cases are not resolved within a reasonable amount of time. While the PSC monitors how public service institutions handle cases of misconduct, the Commission has had difficulty in ensuring compliance. Between September of 2004 and November of 2006, only 142 cases out of 2,296 allegations received through the anti-corruption hotline and referred to departments were closed, following the conclusion of investigations by relevant Departments.

Investigations conducted by SAPS also often take some time to resolve, particularly given the high caseloads of the Commercial Crimes Unit. The Public Protector has made some progress in improving its investigation turnaround times.
The NPA, and the Scorpions in particular, is considered the most efficient anti-corruption agency, with a consistently high success rate. However, due to the nature of the crimes investigated, the process of finalizing cases is often protracted. Further, Parliament is currently debating legislation that would integrate the Scorpions into the SAPS.

References:
Constitution of the Republic of South Africa (Act 108 of 1996). Available at: 

Global Integrity, 2006. Country Report: South Africa. Available at: 
https://last.globalintegrity.org/reports/2006/index.cfm


Mail & Guardian, 2007. Fidentia bosses stole R5.5 million says charge sheet, Dec. 7, 2007 Available at: 
http://www.mg.co.za/article/2007-12-07-fidentia-bosses-stole-r55m-says-charge-sheet

National Anti-Corruption Forum. Available at: 

http://www.news24.com/News24/South_Africa/Politics/0,,2-7-12_2269377,00.html

Public Protector of South Africa 
http://www.publicprotector.org/about_us/vision_mission_obj.htm

Public Service Commission. Available at: 
http://www.psc.gov.za

Public Service Commission, 2007, Available at: 


Prevention and Combating of Corrupt Activities Act of 2004 (Act 12 of 2004). Available at 

http://www.unglobalcompact.org/docs/issues_doc/7.7/case_stories/CS_South_Africa.pdf

South African Police Service, 


Special Investigation Unit. Available at: 

UN Department of Economic and Social Affairs and UN Development Program, 2001. Public Service Ethics in Africa: Support for Policy and Program Development, 2001. Available at: 
http://www.unpan.org/EthicsWebSite/database/results/scrutiny-1.html

100: The agency (or agencies) acts on complaints quickly. While some backlog is expected and inevitable, complaints are acknowledged promptly and investigations into serious abuses move steadily towards resolution. Citizens with simple issues can expect a resolution within a month.
The agency (or agencies) acts on complaints quickly, with some exceptions. Some complaints may not be acknowledged, and simple issues may take more than two months to resolve.

The agency (or agencies) cannot resolve complaints quickly. Complaints may be unacknowledged for more than a month, and simple issues may take more than three months to resolve. Serious abuses are not investigated with any urgency.

In practice, citizens can complain to the anti-corruption agency (or agencies) without fear of recrimination.

Comments:
South Africa does not have one single body specifically mandated to fight corruption. However, a number of bodies exist with a range of powers to fight corruption. The South African Constitution provides for the establishment of the Public Protector (PP), which protects the public against improper actions in relation to the affairs of government and public functions. The Constitution also establishes the Public Service Commission, which is mandated to promote a high standard of professional ethics in the Public Service, as well as the Auditor General, which ensures financial accountability of public organizations, and the National Prosecuting Authority (NPA).

The Prevention and Combating of Corrupt Activities Act (2004) requires that corruption exceeding a threshold value should be reported to the Police Service by persons who are in a position of authority. The Directorate of Special Operations (DSO), known as the Scorpions, housed in the National Prosecuting Authority, also deals with investigations into high-profile corruption cases, including the current corruption case against ANC president Jacob Zuma.

The Special Investigating Units and Special Tribunals Act of 1996 created the Special Investigations Unit as a body to investigate serious issues related to state institutions and their employees. In accordance with the Public Service Anti-Corruption Strategy, a cross-sectoral National Anti-Corruption Coordinating Committee was established to coordinate government anti-corruption policies. In addition, several Specialized Commercial Crime Courts preside over corruption cases.

Amongst these organizations, the South African Police Service (SAPS), the Public Service Commission (PSC) and the NPA are considered to be the main anti-corruption in the country.

The Scorpions in particular are considered to be an agency to which citizens can report incidences of corruption without fear, given the strength of the NPA's Witness Protection Program. However, Parliament is currently debating legislation that could integrate the Scorpions into the SAPS.

The PSC has operated an anti-corruption hotline since 2004, which gives citizens the opportunity to blow whistle without disclosing their identity. A PSC report on the effectiveness of the hotline notes that 60 percent of callers preferred to remain anonymous when reporting a possible case of corruption. The Protected Disclosures Act of 2000 protects whistleblowers from recrimination in law. However, in practice there still are instances where whistle blowers are victimized. For instance, it has been reported that the Mpumalanga Provincial Working Committee of the ruling African National Congress attempted to remove a councilor who blew the whistle on Mbombela Municipal Manager Jacob Dladla and Mayor Justice Nsibande over alleged corruption valued at one billion rand, in February of 2008.

Another recent example is of a medical doctor based at Pollsmoor prison who was dismissed by the Department of Correctional Services after revealing the poor quality of medical care for inmates. Despite winning his court challenge and the court ordering reinstatement, the Department has shown great reluctance to comply.

References:


100: Whistleblowers can report abuses of power without fear of negative consequences. This may be due to robust mechanisms to protect the identity of whistleblowers, or may be due to a culture that encourages disclosure and accountability.

75:

50: Whistleblowers are sometimes able to come forward without negative consequences, but in other cases, whistleblowers are punished for disclosing, either through official or unofficial means.

25:

0: Whistleblowers often face substantial negative consequences, such as losing a job, relocating to a less prominent position, or some form of harassment.

74. Is there an agency (or group of agencies) with a legal mandate to address corruption?

100

74. In law, is there an agency (or group of agencies) with a legal mandate to address corruption?
Comments:
South Africa does not have one single body specifically mandated to fight corruption. However, a number of bodies exist with a range of powers to fight corruption. The South African Constitution provides for the establishment of the Public Protector, which protects the public against improper actions in relation to the affairs of government and public functions. The Constitution also establishes the Public Service Commission, which is mandated to promote a high standard of professional ethics in the Public Service, as well as the Auditor General, which ensures financial accountability of public entities, and the National Prosecuting Authority (NPA).

The Prevention and Combating of Corrupt Activities Act (2004) requires that corruption exceeding a threshold value should be reported to the Police Service by persons who are in a position of authority. The Directorate of Special Operations (DSO), known as the Scorpions, housed in the National Prosecuting Authority, also deals with investigations into high-profile corruption cases, including the current corruption cases against African National Congress president, Jacob Zuma, and National Police Commissioner, Jackie Selebi.

Also located within the NPA is the Asset Forfeiture Unit, which focuses on the recovery of assets obtained, directly or indirectly, as a result of criminal activities, or used in such activities.

The Special Investigating Units and Special Tribunals Act of 1996 created the Special Investigations Unit as a body to investigate serious financial maladministration and misappropriation of funds by state institutions and their employees, and recover those funds by civil litigation. In accordance with the Public Service Anti-Corruption Strategy, a cross-sectoral National Anti-Corruption Coordinating Committee was established to coordinate government anti-corruption policies. In addition, several Specialized Commercial Crime Courts currently rule in cases of corruption.

References:


Public Service Commission. Available at: http://www.psc.gov.za


VI-3. Rule of Law

77. Is there an appeals mechanism for challenging criminal judgments?

77a. In law, there is a general right of appeal.

YES | NO

Comments:
Section 35 (3) of the South African Constitution guarantees an accused person the right to a fair trial, which includes the right of appeal to, or review by, a higher court. The Criminal Procedure Act (Act 51 of 1977) governs the exercise of the right of appeal or review. Sections 309 to 314 of the Criminal Procedure Act determine the modalities of criminal appeals from the Magistrates’ Court. Section 309(1)(a) of the Criminal Procedure Act (51 of 1977) states that any person convicted of any offense by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted, appeal against such conviction and against any resultant sentence or order to the high court having jurisdiction.

References:


YES: A YES score is earned if there is a formal process of appeal for challenging criminal judgments.

NO: A NO score is earned if there is no such process.
77b. In practice, appeals are resolved within a reasonable time period.

Comments:
In general, appeals are only sometimes resolved within a reasonable time period, as resolution is dependent on the complexity of a case, the quality of legal representation and the often substantial case backlogs at the various courts. Despite various interventions to speed up the resolution of court cases, generally, court administration still suffers from capacity constraints, including backlogs of cases and undue delays in case processing. The Justice Department recently tabled in Parliament a document that deals with the review of the entire criminal justice system. The review is aimed at bringing about a new, more effective Integrated Criminal Justice system.

The 2006/07 Annual Report of the Department of Justice and Constitutional Development reported that the Supreme Court of Appeal aimed to finalize 80 percent of appeal cases per year, within six months of enrollment. Appeals finalized were: 52 percent of overall civil appeal cases; 85 percent of civil appeal petitions cases; 76 percent of overall criminal appeal cases; and 87 percent of overall criminal appeal petition cases. In the High Courts, 957 cases were finalized, and 815 were outstanding.

References:


100: Appeals are acted upon quickly. While some backlog is expected and inevitable, appeals are acknowledged promptly and cases move steadily towards resolution.

75:

50: Appeals are generally acted upon quickly but with some exceptions. Some appeals may not be acknowledged, and simple cases may take years to resolve.

25:

0: Most appeals are not resolved in a timely fashion. Appeals may go unacknowledged for months or years and simple cases may never be resolved.

77c. In practice, citizens can use the appeals mechanism at a reasonable cost.

Comments:
The Constitution guarantees access to courts of law for all individuals, regardless of their financial means. The right of appeal to,
or review by a higher court is an integral part of a right to a fair trial and where substantial injustice would otherwise result, the accused is entitled to legal representation at state expense for the purpose of an appeal. The Legal Aid Board was established to give effect to this right and its powers are contained in the Legal Aid Amendment Act (Act 20 of 1996). The Legal Aid Board assists citizens who cannot afford legal representation in their appeals on a pro bono (free legal services) basis. However, this depends on whether citizens meet the criteria of the means test of the Legal Aid Board. Where the services of a private counsel are used, the cost of an appeal will depend on the fees set by the Bar Council to which the legal representative belongs.

Rule 4(5) of the Constitutional Court Rules provide for the court registrar to waive fees if the individual can show satisfactorily that he or she is indigent. The individual must show that he or she does not possess property to the value of R20,000 (US$2,000) and will not be able, within a reasonable time, to provide the sum total required for the appeal.

In terms of Rule 15 of the Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa, the registrar is allowed to make a ruling on the indigence of the individual. The ruling is based on establishing that the individual does not own property valued at more than R10,000 (US$1,000) and would be unable to earn the prescribed money for the appeal or obtain legal aid within a reasonable period of time.

Rule 67 of the Uniform Rules of Court prescribes the fees for lodging an appeal in the high court. It also provides for an exemption in instances of indigence, where the party does not own property valued at more than R10,000 (US$1,000) and would be unable to earn the prescribed money for the appeal or obtain legal aid within a reasonable period of time.

Despite all these attempts to ensure affordability, there are still concerns about unequal access to the justice system, with the poor and the less-educated lacking adequate knowledge and resources to enjoy all their constitutionally guaranteed rights.

References:


Legal Aid Board. Do you qualify for help from the Legal Aid Board?. Available at: http://www.legal-aid.co.za/services/qualifications.htm

100: In most cases, the appeals mechanism is an affordable option to middle class citizens seeking to challenge criminal judgments. Attorneys fees are not a barrier to appeals.

75:

50: In some cases, the appeals mechanism is not an affordable option to middle class citizens seeking to challenge criminal judgments. Attorneys fees present somewhat of a barrier to pursuing appeal.

25:

0: The prohibitive cost of utilizing the appeals mechanism prevents middle class citizens from challenging criminal judgments. Attorneys fees greatly discourage the use of the appeals process.

78. Do judgments in the criminal system follow written law?

100

78. In practice, do judgments in the criminal system follow written law?
Comments:
The South African judiciary follows written law in the form of statutes or previous case law. There is also a system of traditional courts using traditional law and custom, although decisions given in these are appealable in the normal justice system and must conform to principles laid out in the Constitution. Judgments remain within the bounds of statutory law, case law and the Constitution.

References:

Interview with Professor Christina Murray, Department of Public Law, University of Cape Town, Aug. 25, 2008, Cape Town.

100: Judgments in the criminal system are made according to established legal code and conduct. There are no exceptional cases in which individuals are treated by a separate process. Political interference, bribery, cronyism or other flaws are rarely factors in judicial outcomes.

75: Judgments in the criminal system usually follow the protocols of written law. There are sometimes exceptions when political concerns, corruption or other flaws in the system decide outcomes.

50: Judgments in the criminal system are often decided by factors other than written law. Bribery and corruption in the criminal judicial process are common elements affecting decisions.

79. Are judicial decisions enforced by the state?

75

Comments:
Generally speaking, most judicial decisions are enforced by the state in practice. Respect for the rule of law by the Executive is often evidenced by compliance with unfavorable Constitutional Court rulings in a number of cases.

There have, however, been some problems with government implementing court orders, although this is generally understood to be related to the lack of capacity and inefficiency, rather that willful disregard or lack of concern for the authority of the courts.

The actual extent of non-compliance is difficult to determine, though a number of contentious cases have arisen, including the definitive Government of the Republic of South Africa and others v Grootboom and Others 2001, which raised issues related to the realization of constitutionally-guaranteed socio-economic rights.
Non-compliance with court orders has been a larger problem at the provincial level. In a recent case involving the Gauteng Health Department, both majority and dissenting judgments criticized government for not carrying out court orders and continued problems of inefficiency.

Several years ago, it was reported that the Eastern Cape provincial government had been the subject of more than 7,000 cases related to non-compliance with court orders for the payment of social grants.

A few years ago, a farmer near Benoni, east of Johannesburg, was obliged to go as far as the Constitutional Court in order to secure a ruling that the local authorities were obliged to remove illegal squatters from his farmland.

In a similar scenario, the Treatment Action Campaign (TAC), has conducted a lengthy campaign to compel government to supply anti-retroviral vaccines to women suffering from HIV/AIDS. Although TAC has been successful in the courts, government has shown a lack of enthusiasm to implement the order of court, and has complied slowly and in an incomplete manner.

References:


Interview with Professor Christina Murray, Department of Public Law, University of Cape Town, Aug. 25, 2008, Cape Town.


Nyathi vs. MEC for Health Gauteng, CCT 19/07

President of the RSA & Another v Modderklip Boerdery (Pty) (Ltd) (CCT 20/04) 2005 (5) SA 3 (CC). Available at: http://www.constitutionalcourt.org.za


100: Judicial decisions are enforced quickly regardless of what is being decided or who is appearing before the court. Failure to comply brings penalties enforced by the state.

75:

50: Judicial decisions are generally enforced by the state, with some exceptions. Certain areas of law may be ignored, or certain parties appearing before the courts may evade or delay enforcement.

25:

0: Judicial decisions are often ignored. The state lacks the will or capacity to consistently enforce these decisions.

80. Is the judiciary able to act independently?

75

80a. In law, the independence of the judiciary is guaranteed.
Section 165 of the Constitution states that the judicial authority of the republic is vested in courts that are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favor or prejudice. Section 165(3) prohibits interference with the functioning of the courts.

References:

YES: A YES score is earned if there are formal rules establishing that the judiciary is independent from political interference by the executive and legislative branches. Independence include financial issues (drafting, allocation, and managing the budget of the courts).

NO: A NO score is earned if there are no formal rules establishing an independent judiciary.

In practice, national-level judges are protected from political interference.

Comments:
Section 165 of the Constitution states that the courts are independent and subject only to the Constitution and the law, that no person or organ of state may interfere with the functioning of the courts, and that organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

The South African judiciary has been subject to political pressure at times, particularly in recent high-profile cases arising from the controversial Arms Deal, such as the current corruption case against ANC President Jacob Zuma. However, the courts have fiercely defended their independence and there is little evidence of political pressure interfering or resulting in undue influence on the outcomes of cases. The courts have shown their independence in several decisions.

One of the most well-known is the definitive Government of the Republic of South Africa and others v Grootboom and Others, which dealt with issues related to the realization of constitutionally-guaranteed socio-economic rights, in this case, housing.

Similarly, a few years ago, a farmer near Benoni, east of Johannesburg, was obliged to go as far as the Constitutional Court in order to secure a ruling that the local authorities were obliged to remove illegal squatters from his farmland. The Court did not shrink from speaking out strongly about the governance failures by the various authorities.

In a similar scenario, the Treatment Action Campaign (TAC), has conducted a lengthy campaign to compel government to supply anti-retroviral vaccines to women suffering from HIV/AIDS. The TAC has been successful in its efforts, with the courts requiring government to recognize scientific knowledge and to utilise its resources to supply proven medication.

References:
AFP, 2008. Zuma graft trial pitting ANC against S Africa's judiciary, Aug. 1, 2008. Available at: http://afp.google.com/article/ALeqM5gvbtvkTRMvKYTrGo3uVGPc00doXgQ


Interview with Professor Christina Murray, Department of Public Law, University of Cape Town, Aug. 25, 2008, Cape Town.


Nyathi vs. MEC for Health Gauteng, CCT 19/07

President of the RSA & Another v Modderklip Boerdery (Pty) (Ltd) (CCT 20/04) 2005 (5) SA 3 (CC). Available at: [http://www.constitutionalcourt.org.za](http://www.constitutionalcourt.org.za)

Zimbabwe will not come to Benoni, May 16, 2005, IOL. Available at: [http://www.iol.co.za](http://www.iol.co.za)


### National level judges

<table>
<thead>
<tr>
<th>Score</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>100</td>
<td>National level judges operate independently of the political process, without incentive or pressure to render favorable judgments in politically sensitive cases. Judges never comment on political debates. Individual judgments are rarely praised or criticized by political figures.</td>
</tr>
<tr>
<td>75</td>
<td>National level judges are typically independent, yet are sometimes influenced in their judgments by negative or positive political incentives. This may include favorable or unfavorable treatment by the government or public criticism. Some judges may be demoted or relocated in retaliation for unfavorable decisions.</td>
</tr>
<tr>
<td>50</td>
<td>National level judges are commonly influenced by politics and personal biases or incentives. This may include conflicting family relationships, professional partnerships, or other personal loyalties. Negative incentives may include demotion, pay cuts, relocation, threats or harassment.</td>
</tr>
<tr>
<td>25</td>
<td></td>
</tr>
</tbody>
</table>

80c. In law, there is a transparent and objective system for distributing cases to national-level judges.

**YES** | **NO**

**Comments:**

In terms of section 173 of the Constitution, the Constitutional Court, Supreme Court of Appeal and the high courts have the inherent power to protect and regulate their own processes. The distribution of cases to national-level judges is an internal process, normally performed by the judge president of a particular high court. The process of and criteria for allocation of cases falls within the discretionary authority of the heads of courts and is discernible only after the court roll is released.

**References:**


**YES:** A YES score is earned if there is an objective system that is transparent to the public that equitably or randomly assigns cases to individual judges. The executive branch does not control this process.
NO: A NO score is earned if the case assignment system is non-transparent or subjective where judges themselves have influence over which cases they adjudicate. A NO score is also earned if the executive branch controls this process.

80d. In law, national-level judges are protected from removal without relevant justification.

YES | NO

Comments:
Section 177 of the Constitution states that a judge may be removed from office only if: (a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and (b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two-thirds of its members. Subsection (2) requires that the President remove a judge from office upon adoption of such a resolution.

The JSC in 2006 issued rules governing complaints and inquiries in terms of section 177(1)(a) of the Constitution. In terms of these rules, a complex procedure is detailed for investigation of complaints.

After receipt of a complaint, the JSC passes it on to the judge against whom the complaint has been lodged. S/he is given 10 days to file a written response to the complaint. The accuser is then given the response and afforded five days to respond thereto.

The JSC then determines whether the relevant documentation discloses a prima facie case of gross misconduct that can lead to removal in terms of section 177(1) of the Constitution.

If the JSC decides that, perhaps because of conflicting evidence on the papers, or insufficient evidence, it cannot make a decision, it can appoint a sub-committee to perform the role of an evidence gathering or investigative body, and will hear evidence from the parties.

At this preliminary inquiry, the JSC may appoint counsel to act as a pro-forma prosecutor and to prepare a charge sheet, to lead evidence, to cross-examine witnesses, to present argument and do all things that may be necessary to assist the JSC fulfilling its task in terms of section 177(1) of the Constitution. The JSC has the discretion to open this preliminary inquiry to the public.

After this preliminary investigation and inquiry, the sub-committee reports to the JSC, which must then resolve whether or not to accept the recommendation of the subcommittee and proceed to a formal hearing of the issue.

In terms of the rules, the JSC can also choose to dispense with the appointment of this sub-committee and proceed straight to a formal hearing. If the JSC does decide to hold a formal hearing, the rules state that charges will be drawn up against the judge, witnesses may be called and both sides to the dispute may be legally represented. At the commencement of the hearing, the judge will be asked to plead to the charges.

Any member of the JSC is entitled to ask questions. Proceedings before the inquiry shall be recorded and a transcript prepared by the JSC. Again, the JSC has the discretion whether to open the formal hearings to the public.

After considering the evidence and argument, the JSC will make a written finding and provide reasons. If it finds that the judge committed gross misconduct, the matter will be referred to the Speaker of the National Assembly (NA) so that the NA can debate and vote on the judge’s removal.

References:


81. Are judges safe when adjudicating corruption cases?

81a. In practice, in the last year, no judges have been physically harmed because of adjudicating corruption cases.

**YES | NO**

Comments:
There have been no reports of judges being physically harmed in connection with their adjudication of corruption cases.

References:
Interview with Professor Christina Murray, Department of Public Law, University of Cape Town, Aug. 25, 2008, Cape Town

81b. In practice, in the last year, no judges have been killed because of adjudicating corruption cases.

**YES | NO**

Comments:
There have been no reports of judges being killed in connection with their adjudication of corruption cases.

References:
Interview with Professor Christina Murray, Department of Public Law, University of Cape Town, Aug. 25, 2008, Cape Town
on corruption issues, then the indicator is scored as a NO. Corruption is defined broadly to include any abuses of power, not just the passing of bribes.

82. Do citizens have equal access to the justice system?

75

82a. In practice, judicial decisions are not affected by racial or ethnic bias.

Comments:
There are guidelines and mechanisms in place to ensure that racial bias does not affect judicial decision-making. There have been no recent formal reports or complaints of racial or ethnic bias related to judicial decisions. The Judicial Service Commission Amendment Bill [B50 of 2008] is being debated, and seeks to establish and updated and legislated code of ethics governing judicial behavior.

At the same time, race is a pervasive issue in South Africa, and there have been occasional claims about racial bias in courts in the past, as well as claims of political bias, particularly in the current corruption case against ANC President Jacob Zuma.

There have also been a number of issues relating to racism within the legal fraternity and judges in the Cape High Court and the Northern Cape, both of which led to complaints being presented to the Judicial Service Commission. However, neither was related to bias affecting judicial decisions.

References:


100: Judicial decisions are not affected by racial or ethnic bias.

75:

50: Judicial decisions are generally not affected by racial or ethnic bias, with some exceptions. Some groups may be occasionally discriminated against, or some groups may occasionally receive favorable treatment.

25:

0: Judicial decisions are regularly distorted by racial or ethnic bias. Some groups consistently receive favorable or unfavorable treatment by the courts.

82b. In practice, women have full access to the judicial system.
Comments:
Section 34 of the Constitution guarantees all persons the right of access to courts. However, in spite of this constitutional framework, it has been suggested that some women do not have full access to the judicial system, particularly in rural communities and on the basis of geographic location. The Department of Justice and Constitutional Development has attempted to improve access by upgrading courts across the country, and constructing new courts in rural and township communities, but a 2004 report by the Department found that a major portion of society is deprived from accessing justice due to the geographical location of courts.

Moreover, it has been noted that poor women and men often do not have the resources to see through cases in court, particularly where this requires extensive travel and time off work, and given that limited support is available for public representation in civil matters.

References:


100: Women enjoy full and equal status in the eyes of the courts. There are no exceptions or practices in which women are treated differently by the judicial system. For this indicator, discrimination against women should reflect specific biases that confront women in the justice system as opposed to difficulties resulting from broader socio-economic disadvantages or discrimination against women.

75:

50: Women generally have use of the judicial system, with some exceptions. In some cases, women may be limited in their access to courts, or gender biases may affect court outcomes. For this indicator, discrimination against women should reflect specific biases that confront women in the justice system as opposed to difficulties resulting from broader socio-economic disadvantages or discrimination against women.

25:

0: Women generally have less access to the courts than men. Court decisions are commonly distorted by gender bias. Women may have to go through intermediaries to interact with the court, or are unable to present evidence. For this indicator, discrimination against women should reflect specific biases that confront women in the justice system as opposed to difficulties resulting from broader socio-economic disadvantages or discrimination against women.

82c. In law, the state provides legal counsel for defendants in criminal cases who cannot afford it.
Comments:
Section 35 of the Constitution guarantees the right to a fair trial, and that every detained person has the right to a legal practitioner. Section 35 (3) also stipulates that every accused person has the right to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result.

Legal representation is provided by the Legal Aid Board, an independent, statutory body established by the Legal Aid Act (Act 22 of 1969). Access to the services of the Legal Aid Board is based on a means test, which effectively reserves services for persons unable to afford the cost of representation.

References:


YES: A YES score is earned if the government is required by law to provide impoverished defendants with legal counsel to defend themselves against criminal charges.

NO: A NO score is earned if there is no legal requirement for the government to provide impoverished defendants with legal counsel to defend themselves against criminal charges.

82d. In practice, the state provides adequate legal counsel for defendants in criminal cases who cannot afford it.

Comments:
In practice, the state does provide legal counsel for defendants in criminal cases who are unable to afford representation, through the Legal Aid Board (LAB). According to the LAB's most recent annual report, in 2007/08 396,068 new matters were received, 399,738 matters were finalized, and 238,167 matters were pending at the end of the reporting period. Of the new cases received, 90 percent were criminal, and only 10 percent civil matters.

The South African Human Rights Commission (SAHRC) reported in 2005 that complaints had been lodged by individuals who had requested legal assistance from government and non-governmental service providers, and have been unsuccessful. The SAHRC has observed a dire lack of assistance in this area with many citizens' legal problems falling through the cracks because it is recognized that the Legal Aid Board cannot deal with all matters.

However, a new Legal Services Sector Charter was adopted in 2007, which commits the government to enhance the LAB's ability to provide legal services to indigent persons.

References:
State-provided legal aid is basic, but well-trained and effective in representing the rights of impoverished defendants.

State-provided legal aid is available, but flawed. Legal aid may be unavailable to some impoverished defendants. Legal aid/public defenders may be sometimes unable or unwilling to competently represent all defendants.

State-provided legal aid is unavailable to most impoverished defendants. State legal aid/public defenders may be consistently incompetent or unwilling to fairly represent all defendants.

In practice, citizens earning the median yearly income can afford to bring a legal suit.

South Africa has a very high level of income inequality, with median annual household income (R26,291- US$2,629) far below average annual household income (R74,589- US$7,458), and below the average annual income of black African households (R37,711- US$3,771).

According to the Legal Aid Board, legal aid services funded by government are available to unemployed persons, and persons who are employed but earn less than R2,000 (US$200) per month. Persons who earn more than R2,000 per month may also be considered for legal aid, depending on the grounds of the matter.

Therefore, in some cases, citizens earning the median income level would qualify for free legal assistance through the Legal Aid Board.

However, this would not be the case for citizens with an income comparable to the national average. In this case, citizens wishing to pursue a legal suit can approach private lawyers who are willing to work on contingency fees basis. This is in accordance with Section 2 of the Contingency Fees Act (Act 66 of 1997), which states that a legal practitioner may enter into an agreement with a client to render services if, in his or her opinion, there are reasonable prospects that his or her client may be successful in any proceedings. The legal practitioner is not entitled to fees for services rendered, unless the client is successful in proceedings as set out in the agreement.

Nonetheless, it has been suggested that professional legal services are generally unaffordable to average citizens. According to AfriMap and the Open Society Foundation, the rules of each respective court set out tariffs at which attorney’s fees are to be taxed, meaning the amount that can be recovered by a litigant awarded for costs. In some cases, the client may have to pay the difference, even in a successful matter. The following consultation fees apply for various courts: R67-R80 (US$6.7-8) per 15 minutes in the magistrate’s courts; R100 (US$10) per 15 minutes in the high courts; R70-R105 (US$7-10.5) per 30 minutes in the higher courts, including the Supreme Court of Appeal and the Constitutional Court. Law societies also publish recommended fees guidelines, and for example, the Cape Law Society has established a guideline of between R75 and R400 (US$7.5-US$40) per 15 minutes of consultation.

According to AfriMap and the Open Society Foundation, due to the split-bar system in South Africa, at times clients must pay for both the services of an advocate and an attorney, which may increase the costs of representation.
References:


Contingency Fees Act (Act 66 of 1997)


Legal Aid Board. http://www.legal-aid.co.za


100: In most cases, the legal system is an affordable option to middle class citizens seeking to redress a grievance. Attorneys fees do not represent a major cost to citizens.

75:

50: In some cases, the legal system is an affordable option to middle class citizens seeking to redress a grievance. In other cases, the cost is prohibitive. Attorneys fees are a significant consideration in whether to bring a case.

25:

0: The cost of engaging the legal system prevents middle class citizens from filing suits. Attorneys fees are high enough to discourage most citizens from bringing a case.

82f. In practice, a typical small retail business can afford to bring a legal suit.

82f: In practice, a typical small retail business can afford to bring a legal suit.

100 | 75 | 50 | 25 | 0

Comments:
According to Section 2 of the Contingency Fees Act (Act 66 of 1997), clients wishing to pursue a legal suit can approach private lawyers who are willing to work on a contingency fee basis. The Act does not impose parameters in terms of eligible categories of clients, and therefore there is no reason to believe that a typical small business unit cannot afford to bring a legal suit using this Act.

The Act states that a legal practitioner may enter into an agreement with a client to render services if, in his or her opinion, there are reasonable prospects that his or her client may be successful in any proceedings. The legal practitioner is not entitled to fees for services rendered, unless the client is successful in proceedings as set out in the agreement. A client can be a natural person or a juristic person.

The Legal Aid Board provides legal assistance to Section 21 companies (Not for Profit Companies) only and does not provide legal assistance to typical retail businesses.

In terms of the Small Claims Courts Act, no business entity may utilize the relatively cheap remedies available in the Small Claims Court in respect of claims with a value of less than R7,000 (US$700).
100: In most cases, the legal system is an affordable option to a small retail business seeking to redress a grievance. Attorneys fees do not represent a major cost to small businesses.

75:

50: In some cases, the legal system is an affordable option to a small retail business seeking to redress a grievance. In other cases, the cost is prohibitive. Attorneys fees are a significant consideration in whether to bring a case.

25:

0: The cost of engaging the legal system prevents small businesses from filing suits. Attorneys fees are high enough to discourage most small businesses from bringing a case.

82g. In practice, all citizens have access to a court of law, regardless of geographic location.

Comments:
Section 34 of the Constitution guarantees all persons the right of access to courts. In 1999, the Department of Justice and Constitutional Development (DoJCD) prioritized the establishment of courts in rural, as well as urban township areas. The establishment of periodic courts has also improved access.

However, in spite of the relative accessibility of magistrate’s courts, often high courts are still located in urban areas. Residents of rural areas often have to travel long distances to reach courts, and at significant cost. A DoJCD Commission in 2004 found that a major portion of society is deprived from accessing justice due to the geographical location of courts. The DoJCD has also recognized the acute need for more court facilities in rural and remote areas.

References:

VI-4. Law Enforcement

83. Is the law enforcement agency (i.e. the police) effective?

| 100 | 75 | 50 | 25 | 0 |

83a. In practice, appointments to the law enforcement agency (or agencies) are made according to professional criteria.

Comments:
The South African Police Services (SAPS) has developed a fairly sophisticated recruitment and promotions procedure. However, reports also point to some issues of unprofessional and discriminatory hiring and promotion practices, as well as nepotism and favoritism in appointments under the guise of compliance with employment equity criteria, which have compromised professionalism. On a more significant level, there have been accusations that the President Thabo Mbeki has provided significant political cover for the Police Commissioner, the head of the SAPS, who has been charged with corruption.

References:

### Appointments to the agency (or agencies) are made based on professional qualifications.

- **100:** Appointments to the agency (or agencies) are made based on professional qualifications. Individuals appointed are free of conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed usually do not have clear political party affiliations.

- **75:**

- **50:** Appointments are usually based on professional qualifications. Individuals appointed may have clear party loyalties, however.

- **25:**

- **0:** Appointments are often based on political considerations. Individuals appointed often have conflicts of interest due to personal loyalties, family connections or other biases. Individuals appointed often have clear party loyalties.

### In practice, the law enforcement agency (or agencies) has a budget sufficient to carry out its mandate.

83b. In practice, the law enforcement agency (or agencies) has a budget sufficient to carry out its mandate.

| 100 | 75 | 50 | 25 | 0 |

**Comments:**
The budget for the South African Police Services (SAPS) is secured through an annual appropriation by Parliament from a budget tabled by the Minister of Safety and Security. The budget is on par with countries around world and above that of some more developed countries. However, police station commanders complain of a lack of resources to maintain and improve stations. Major expansions in funding to the police force and judiciary were announced at the beginning of 2008, to increase the number of police officers, stations and forensic laboratories in an effort to cut crime rates. The SAPS also receives donations from other countries to improve their capacity.

### References:


### The agency (or agencies) has a budget sufficient to fulfill its basic mandate.

100. The agency (or agencies) has a budget sufficient to fulfill its basic mandate.

- **75:**

- **50:** The agency (or agencies) has limited budget, generally considered somewhat insufficient to fulfill its basic mandate.

- **25:**

- **0:** The agency (or agencies) has no budget or an obviously insufficient budget that hinders the agency's ability to fulfill its mandate.

### In practice, the law enforcement agency is protected from political interference.

83c. In practice, the law enforcement agency is protected from political interference.
Comments:
Over the course of the year, there have been a number of high-profile incidents highlighting the potential threat of political interference in law enforcement agencies.

Notably, one such case revolves around National Police Commissioner Jackie Selebi, who was suspended in January following an announcement from the National Prosecuting Authority (NPA) that he would be charged with corruption and defeating the ends of justice. These charges reportedly relate to his relationship with convicted drug dealer and crime boss Glenn Agliotti, who it is alleged provided Selebi with favors, loans and money over a period of fifteen years. Through his relationship with Agliotti, Selebi has also been linked to murdered mining magnate Brett Kebble.

Selebi has reportedly accused Leonard McCarthy, head of the Scorpions elite crime investigation unit, of being controlled by former NPA boss Bulelani Ngcuka, who Selebi alleges has a vendetta against him. Selebi has also claimed that the case against him is the result of the Scorpions fighting for survival.

The case against Selebi was complicated by the suspension of National Director of Public Prosecutions Vusi Pikoli. Pikoli has alleged that he was suspended in an effort to prevent charges being brought against Selebi. He has stated that he advised President Thabo Mbeki that he had secured warrants against Selebi, but that once these warrants had been served, he was suspended from his position. At a Commission of Inquiry headed by former National Assembly Speaker Frene Ginwala, he stated: You cannot dispute the attempted concealment of executive interference into this matter immediately prior to my suspension, which is not consistent with all the interaction I have had. The Ginwala Commission has yet to finalize its findings in Pikoli's case.

It has been reported that the Presidency, the Justice and Constitutional Development Department, the National Intelligence Agency, and the South African Police Services worked together to prevent Selebi from being charged.

In addition, at the African National Congress (ANC) National Conference in Polokwane in 2007, a resolution was adopted to dissolve the elite crime-fighting unit, the Directorate of Special Operations (DSO), known as the Scorpions. This is based on an interpretation of the Constitution which prefers a single police service, and the subsequent proposal is that members of the DSO should fall under the South African Police Service (SAPS). However, consensus is widespread on DSO's effectiveness, and critics suggest that efforts to dissolve the DSO are in fact an attempt to prevent investigations into senior ANC officials, particularly in the corruption case against ANC President Jacob Zuma.

References:


100: The agency (or agencies) operates independently of the political process and has operational independence from the government. All laws can be enforced regardless of the status of suspects or the sensitivity of the investigation.

75:

50: The agency (or agencies) is typically independent, yet is sometimes influenced in its investigations or enforcement actions by negative or positive political incentives. This may include favorable or unfavorable public criticism by the government or other forms of influence. The agency (or agencies) may not be provided with some information needed to carry out its investigations.

25:

0: The investigative and enforcement work of the agency (or agencies) is commonly influenced by political actors or the government. These may include conflicting family relationships, professional partnerships, or other personal loyalties. Negative incentives may include threats, harassment or other abuses of power by the government.

84. Can law enforcement officials be held accountable for their actions?

92

84a. In law, there is an independent mechanism for citizens to complain about police action.

YES | NO

Comments:
Section 53 (2) of the South African Police Services (SAPS) Act (68 of 1995) provides for the establishment of an Independent Complaints Directorate (ICD) within the Department of Safety and Security. The Directorate is permitted to: investigate misconduct or offenses, deaths in police custody or as a result of police action; and matters referred by the Minister or members of the Executive Council.

Section 64 of the South African Police Services Act, read with Regulation 9 and Annexure 5 of the Regulations for Municipal Police Services, also grants the ICD the same civilian oversight duties in respect of Municipal Police Services as with SAPS.

Further, the ICD also has specific mandate through the Domestic Violence Act (116 of 1998), which specifies that failure of any SAPS member to comply with obligations imposed by the Act constitutes misconduct. The ICD must be informed of failure to comply with these obligations, and unless directed otherwise by the ICD, SAPS must institute disciplinary proceedings accordingly.

SAPS also operates a dedicated hotline for reporting poor service from police officers.

References:
Domestic Violence Act (Act 116 of 1998)

Independent Complaints Directorate (ICD), 2007. Annual Report 2006/07. Available at:
http://www.icd.gov.za

South African Police Services (SAPS),
http://www.saps.gov.za
YES: A YES score is earned if there is a formal process or mechanism by which citizens can complain about police actions. A YES score is earned if a broader mechanism such as the national ombudsman, human rights commission, or anti-corruption agency has jurisdiction over the police.

NO: A NO score is earned if there is no such mechanism

84b. In practice, the independent law enforcement complaint reporting mechanism responds to citizen’s complaints within a reasonable time period.

100 | 75 | 50 | 25 | 0

Comments:
The Independent Complaints Directorate (ICD) aims to finalize 60 percent of cases related to deaths in police custody within 180 days of notification, and 50 percent of cases of police criminality and misconduct within 180 days of reporting.

In 2006/07, 5,412 new cases were reported, and 7,374 (including backlog cases) were finalized over the reporting period. The overall finalization rate was 136 percent, but was higher in cases related to deaths in police custody (231 percent) than in criminal (126 percent) or misconduct (120 percent) cases. This data suggests that the ICD is generally exceeding targets set for the finalization of cases within a reasonable time period, although a substantial case backlog still persists.

The ICD suggests that the constant flow of complaints against police criminality and misconduct emphasizes the trust and confidence of the public in the ICD’s ability to treat them with dignity and to promptly attend to their complaints.

However, research has found that many ICD case dockets are incomplete, that many case files are closed without an indication of the outcome of proceedings, and that the criteria used for the closing of substantiated cases is not always clear or consistent.

References:


100: The agency/entity responds to complaints quickly. While some backlog is expected and inevitable, complaints are acknowledged promptly and investigations into serious abuses move steadily towards resolution. Citizens with simple issues can expect a resolution within a month.

75:

50: The agency/entity responds to complaints quickly, with some exceptions. Some complaints may not be acknowledged, and simple issues may take more than two months to resolve.
0: The agency/entity cannot resolve complaints quickly. Complaints may be unacknowledged for more than a month, and simple issues may take three to six months to resolve. Serious abuses are not investigated with any urgency.

84c. In law, there is an agency/entity to investigate and prosecute corruption committed by law enforcement officials.

YES | NO

Comments:
The Independent Complaints Directorate is charged with investigating complaints of corruption, and in 2004 established an Anti-Corruption Command (ACC) specifically to investigate complaints against officers of the South African Police Service (SAPS) and municipal police services related to corruption. In 2006/07, the ICD received 2,927 cases of police misconduct, including corruption. 3,510 cases were finalized, signifying some progress in overcoming an outstanding backlog. However, researchers have also described the ACC as hopelessly understaffed and under-resourced.

The Directorate of Special Operations (DSO), known as the Scorpions, also has a mandate which potentially includes police corruption, but it has not been exclusively focused on this role. Further, deliberations have begun over the possible disbanding of the DSO, following a resolution adopted at the ANC’s National Conference in Polokwane in 2007. Legislation to this effect would result in the integration of the DSO into SAPS. The DSO lead investigations into corruption charges against National Police Commissioner Jackie Selebi, who was suspended from his position in January.

However, South African Police Service (SAPS) Anti-Corruption Unit was closed down during 2000 and 2001 and there is, therefore, no dedicated anti-corruption mechanism dealing with corruption by law enforcement officials.

References:


YES: A YES score is earned if there is an agency/entity specifically mandated to investigate corruption-related activity within law enforcement. This agency/entity may be internal to the police department (provided it has a degree of independence, such as an internal affairs unit) or part of a broader national mechanism such as the national ombudsman, human rights commission, or anti-corruption agency.

NO: A NO score is earned if no such agency/entity exists.

84d. In practice, when necessary, the agency/entity independently initiates investigations into allegations of corruption by law enforcement officials.

Comments:
The policy of the South African Police Services (SAPS) is that it is the duty of all SAPS officers to investigate corruption. The
2006/07 SAPS Annual Report indicates that over the reporting period, 167 police members were suspended for corruption (160 without salaries and seven with salaries) and 62 members were suspended for fraud (55 without salaries and seven with salaries).

However, researchers suggest that corruption complaints about the SAPS, made to the Independent Complaints Directorate (ICD), have increased dramatically after the internal SAPS Anti-Corruption Unit was shut down in 2002.

However, perhaps more effective than the SAPS per se, the Independent Complaints Directorate within the Department of Safety and Security is charged with investigating misconduct and offenses committed by police officers, as well as deaths in police custody or as a result of police action. In 2006/07, the ICD received 2,927 cases of police misconduct, including corruption: 3,510 cases were finalized, signifying some progress in overcoming an outstanding backlog. In practice, the ICD investigates police corruption on a regular basis, and investigations receive media coverage.

In addition, the Directorate of Special Operations (DSO), known as the Scorpions, has initiated corruption investigations into law enforcement officials as well as other high-profile figures and organized criminals. In January of 2008, National Police Commissioner Jackie Selebi was suspended, following warrants served against him on charges of corruption and defeating the ends of justice, based on investigations initiated by the DSO. However, the ability of the DSO to initiate and conduct investigations of this kind may be compromised if the Directorate is integrated into SAPS, as is currently being debated in Parliament.

References:


100: When irregularities are discovered, the agency/entity is aggressive in investigating government law enforcement officials or in cooperating with other investigative agencies.

75:

50: The agency/entity starts investigations, but is limited in its effectiveness or is reluctant to cooperate with other investigative agencies. The agency/entity may be slow to act, unwilling to take on politically powerful offenders, or occasionally unable to enforce its judgments.

25:

0: The agency/entity does not effectively investigate or does not cooperate with other investigative agencies. The agency may start investigations but not complete them, or may fail to detect offenders. The agency may be partisan in its application of power.

84e. In law, law enforcement officials are not immune from criminal proceedings.
YES | NO

Comments:
Law enforcement officials are not immune from criminal proceedings in law. In terms of Section 9 (1) of the constitution, all are equal before the law.

References:


YES: A YES score is earned if law enforcement officers are fully accountable for their actions under the law and can be investigated and prosecuted for their actions.

NO: A NO score is earned if law enforcement enjoys any special protection from criminal investigation or prosecution.

84f. In practice, law enforcement officials are not immune from criminal proceedings.

100 | 75 | 50 | 25 | 0

Comments:
In practice, law enforcement officials are not immune from criminal proceedings or prosecution. The Independent Complaints Directorate (ICD) within the Department of Safety and Security is charged with investigating misconduct and offenses committed by police officers, as well as deaths in police custody or as a result of police action. In 2006/07, the ICD received 2,927 cases of police misconduct, including corruption. 3,510 cases were finalized, signifying some progress in overcoming an outstanding backlog. In practice, the ICD investigates police corruption on a regular basis, and investigations receive media coverage.

In addition, there have been a number of recent high-profile cases of criminal proceedings against law enforcement officers. In January of 2008, National Police Commissioner Jackie Selebi was suspended from his position following an announcement from the National Prosecuting Authority (NPA) that he would be charged with corruption and defeating the ends of justice. These charges reportedly relate to his relationship with convicted drug dealer and crime boss Glenn Agliotti, who it is alleged provided Selebi with favors, loans and money over a period of fifteen years. Through his relationship with Agliotti, Selebi has also been linked to murdered mining magnate Brett Kebble.

Ekurhuleni metro police chief Robert McBride is currently on trial in the Pretoria Regional Court on charges of driving his official police vehicle under the influence of alcohol, defeating the ends of justice, and fraud.

References:


Law enforcement officers are subject to criminal investigation for official misconduct. No crimes are exempt from prosecution.

Law enforcement is generally subject to criminal investigation but exceptions may exist where criminal actions are overlooked by the police or prosecutors. Some crimes may be exempt from prosecution, such as actions taken in the line of duty.

Law enforcement enjoys a general protection from most criminal investigation. This may be due to a formal immunity or an informal understanding that the law enforcement community protects itself.