

REPUBLIC OF SOUTH AFRICA

**PREVENTION AND COMBATING OF CORRUPT ACTIVITIES
AMENDMENT BILL**

(.....)

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Prevention and Combating of Corrupt Activities Act, 2004, so as to deal with passive corruption in respect of foreign public officials; to extend the offence of unacceptable conduct relating to ordinary witnesses to include whistle-blowers and members of the accounting profession; to increase the monetary sanctions provided for in the Act; and to provide for matters connected therewith.

PARLIAMENT of the Republic of South Africa enacts, as follows:—

Amendment of section 1 of Act 12 of 2004

1. Section 1 of the Prevention and Combating of Corrupt Activities Act, 2004 (hereinafter referred to as the principal Act), is hereby amended—

(a) by the insertion of the following definition after the definition of “dealing”:

“**facilitation payment**’ means a payment made to an official, a foreign public official or any third party that acts as incentive for the official to complete some action or process expeditiously, or to provide the party making the payment or another party an unfair or unlawful advantage.”;

(b) by the substitution for the definition of “foreign public official” of the following definition:

“foreign public official” means—

(a) any person holding a legislative, executive, administrative or judicial office of a foreign state whether appointed or elected;

(b) any person **[performing]** exercising public functions for a foreign state, including for a public agency or a public enterprise;

(c) any person employed by a board, commission, corporation or other body or authority that performs a function on behalf of the foreign state; [or]

[(c)] (d) an official or agent of a public international organisation; or

(e) any head or member of a diplomatic mission or consular post.”;

(c) by the substitution for the definition of “gambling game” of the following definition:

“gambling game’ means any gambling game as defined in section 1 of the National Gambling Act, **[1996 (Act No. 33 of 1996)]** 2004 (Act No. 7 of 2004);”;

(d) by the substitution in the definition of “gratification” for paragraph (j) of the following paragraph:

“(j) any valuable consideration or benefit of any kind, including any **facilitation payment**, discount, commission, rebate, bonus, deduction or percentage;”;

(e) by the substitution for the definition of “gambling game” of the following definition:

“listed company’ means a company, the equity share capital of which is listed on a stock exchange as defined in section 1 of the **[Stock Exchanges Control Act, 1985 (Act No. 1 of 1985)]** Financial Markets Act, 2012 (Act No. 19 of 2012);”;

(f) by the insertion of the following definition after the definition of “official”:

“official of a public international organisation’ means an international civil servant or any person who is authorised by such an organisation to act on behalf of that organisation, a special envoy or a member of the United Nations and its specialised agencies and other international organisations;”;

(g) by the substitution in the definition of “public body” for paragraph (a) of the following paragraph:

“(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government **or organ of state**; or”; and

(h) by the substitution in the definition of “public international organisation” for paragraph (c) of the following paragraph:

“(c) an organisation that is—

(i) an organ of, or office within, an organisation described in paragraph (a) or (b);

(ii) a commission, council or other body established by an organisation or organ referred to in subparagraph (i); [or]

- (iii) a committee or a subcommittee of a committee of an organisation referred to in paragraph (a) or (b) or of an organ, council or body referred to in subparagraph (i) or (ii); or
- (iv) an international organisation;”.

Amendment of section 2 of Act 12 of 2004

2. Section 2 of the principal Act is hereby amended by the substitution for subsection (4) of the following subsection:

“(4) (a) A reference in this Act to any act, includes an omission and “**acting**” shall be construed accordingly.

(b) A reference in this Act to “in order to act”, includes “for having acted”.”.

Amendment of section 5 of Act 12 of 2004

3. The following section is hereby substituted for section 5 of the principal Act:

“5. (1) Any—

(a) foreign public official who, directly or indirectly, accepts or agrees 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 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—]**

in order to act, personally or by influencing another person so to act, in a manner—

[(a)] (i) that amounts to the—

[(i)] (aa) illegal, dishonest, unauthorised, incomplete, or biased; or

[(ii)] (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;]**

exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

[(b)] (ii) that amounts to—

[(i)] (aa) the abuse of a position of authority;

- [(ii)] (bb)** a breach of trust; or
- [(iii)] (cc)** the violation of a legal duty or a set of rules;
- [(c)] (iii)** designed to achieve an unjustified result; or
- [(d)] (iv)** that amounts to any other unauthorised or improper inducement to do or not to do anything,

is guilty of the offence of corrupt activities relating to foreign public officials.

(2) Without derogating from the generality of section 2(4), “**to act**” in subsection (1) includes—

- (a) the using of such foreign public official’s or such others person’s position to influence any acts or decisions of **[the] a** foreign state or public international organisation **[concerned]**; or
- (b) obtaining or retaining a contract, business or an advantage in the conduct of business of **[that] a** foreign state or public international organisation.”.

Amendment of section 18 of Act 12 of 2004

4. Section 18 of the principal Act is hereby amended by substitution for section 18 of the following section:

“Offences of unacceptable conduct relating to witnesses, whistle-blowers and accounting profession”

18. (1) Any person who, directly or indirectly, intimidates or uses physical force, **[or improperly persuades]** or coerces or improperly persuades another person with the intent to—

- (a) influence, delay or prevent the testimony of that person or another person as a witness in a trial, hearing or other proceedings before any court, judicial officer, committee, commission or any officer authorised by law to hear evidence or take testimony; or
- (b) cause or induce any person to—
 - (i) testify in a particular way or fashion or in an untruthful manner in a trial, hearing or other proceedings before any court, judicial officer, committee, commission or officer authorised by law to hear evidence or take testimony;
 - (ii) withhold testimony or to withhold a record, document, police docket or other object at such trial, hearing or proceedings;
 - (iii) give or withhold information relating to any aspect at any such trial, hearing or proceedings;

- (iv) alter, destroy, mutilate, or conceal a record, document, police docket or other object with the intent to impair the availability of such record, document, police docket or other object for use at such trial, hearing or proceedings;
- (v) give or withhold information relating to or contained in a police docket;
- (vi) evade legal process summoning that person to appear as a witness or to produce any record, document, police docket or other object at such trial, hearing or proceedings; or
- (vii) be absent from such trial, hearing or other proceedings,
- (c) persuade any person not to report or deter any person from reporting an offence in terms of this Act; or
- (d) persuade or deter any public or private auditor or accountant or bookkeeper from reporting an offence in terms of this Act detected during the scope of his or her duties,

is guilty of the offence of unacceptable conduct relating to a witness.

(2) Any person who subjects a person who has reported an offence in terms of this Act or who is a witness in terms of this Act to any unfair, unlawful or discriminatory treatment as a result of their conduct referred to above, is guilty of an offence.”.

Amendment of section 26 of Act 12 of 2004

5. Section 26 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) Any person who is convicted of an offence referred to in—

(a) Part 1, 2, 3 or 4, or section 18 of Chapter 2, is liable—

- (i) in the case of a sentence to be imposed by a High Court, to a fine or to imprisonment up to a period for imprisonment for life;
- (ii) in the case of a sentence to be imposed by a regional court, to a fine not exceeding R50 million, or to imprisonment for a period not exceeding 18 years or to both a fine and such imprisonment; or
- (iii) in the case of a sentence to be imposed by a magistrate’s court, to a not exceeding R10 million, fine or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment;

(b) section 17(1), 19, 20, 23(7)(a) or (b) or 34(2), is liable—

- (i) in the case of a sentence to be imposed by a High Court or a regional court, to a fine not exceeding R30 million or to imprisonment for a period not exceeding 10 years or to both a fine and such imprisonment; or
 - (ii) in the case of a sentence to be imposed by a magistrate's court, to a fine not exceeding R10 million or to imprisonment for a period not exceeding three years or to both a fine and such imprisonment; or
 - (c) section 28(6)(b), or 34(6) or (7)(b) is liable to a fine **[of R250 000]** not exceeding R5 million or to imprisonment for a period not exceeding three years or to both a fine and such imprisonment."; and
- (b) by the substitution for subsection (3) of the following subsection:
- "(3) (a) In addition to any fine a court may impose in terms of subsection (1) or (2), the court may impose a fine equal to five times the value of the gratification involved in the offence.
 - (b) In sentencing a corporate body, the court must ensure that the fine imposed properly reflects the seriousness of the offence, the amount of the gratification paid, the benefit derived and the annual turnover of the corporate body, including that of any associated entities for the period preceding the offence."

Amendment of section 27 of Act 12 of 2004

6. The following section is hereby substituted for section 27 of the principal Act:
- "Authorisation by National Director[, Deputy National Director] or Director to institute proceedings in respect of certain offences**
- 27.** The institution of a prosecution for an offence referred to in section 17(1), 23(7)(b) or 34(2), must be authorised in writing by the National Director, **[a Deputy National Director of Public Prosecutions or]** the Director of Public Prosecutions concerned or any person authorized thereto by the National Director or Director concerned, and only after the person concerned has been afforded a reasonable opportunity by the investigating or prosecuting authority, as the case may be, to explain, whether personally or through a legal representative—
- (a) in the case of section 17(1), how he or she acquired the private interest concerned; or
 - [(b) in the case of section 23(7)(b), how he or she acquired the property or resources concerned; or]**

- (c) in the case of section 34(2), why he or she failed to report in terms of section 34(2).”.

Amendment of section 28 of Act 12 of 2004

7. Section 28 of the principal Act is hereby amended—
- (a) by the substitution for the words preceding subparagraph (i) in subsection (1)(a) of the following words:
- “(1) (a) A court convicting a person of an offence contemplated in [section 12 or 13] Part 1, 2, 3 or 4, or section 18 of Chapter 2, or section 20, 21, 28(6)(b) or 34(1)(b) of this Act or an offence contemplated in section 4, 5 or 6 of the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998), must institute an inquiry into the endorsement on the Register, and may, in addition to imposing any sentence contemplated in section 26, issue an order that—“; and
- (b) by the substitution of subparagraph (iii) of subsection (3)(a) of the following subparagraph:
- “(iii) during the period determined in subparagraph (ii), the National Treasury, the purchasing authority or any Government Department or any organ of state must—
- (aa) ignore any offer tendered by a person or enterprise referred to in subsection (1)(a), (b), (c) or (d); or
- (bb) disqualify any person or enterprise referred to subsection (1)(a), (b), (c) or (d), from making any offer or obtaining any agreement relating to the procurement of a specific supply or service.”.

Amendment of heading of Chapter 6 of Act 12 of 2004

8. The heading to Chapter 6 of the principal Act is hereby amended by the substitution of the following heading:

“DEBARMENT REGISTER [FOR TENDER DEFAULTERS]”

Amendment of section 29 of Act 12 of 2004

9. Section 29 of the principal Act is hereby amended by the substitution for the following section:

“29. Within six months after the commencement of this Chapter, the Minister of Finance must establish a register, to be known as the Debarment Register [for Tender Defaulters], within the Office of the National Treasury.”.

Amendment of section 34 of Act 12 of 2004

10. Section 34 of the principal Act is hereby amended—
- (a) by the substitution of paragraph (e) of subsection (4) for the following paragraph:
- “(e) **[the manager, secretary or]** a director of a company as defined in the Companies Act, **[1973 (Act No. 61 of 1973)]** 2008 (Act No. 71 of 2008), and includes a member of a close corporation as defined in the Close Corporations Act, 1984 (Act No. 69 of 1984);” and
- (b) by the insertion after subsection (4) of the following subsections:
- “(5) A court may find that any person who *bona fide* filed a report as contemplated in subsection (1) may not be held liable to any civil, criminal or disciplinary proceedings in respect of the content of such report.
- (6) All institutions referred to in subsection (4) must implement appropriate internal compliance programmes in order to ensure that the offences referred to in subsection (2) are in fact detected and reported.
- (7) (a) All State-owned enterprises, private entities and individuals who engage in foreign trade are required to keep full records of all such trade, including all payments made or received during the course of such trade.
- (b) Such records are to be retained for a period of 10 years from the date of the commencement of each transaction constituting foreign trade and any such person or entity who fails to maintain such records is guilty of an offence.”.

Amendment of section 35 of Act 12 of 2004

11. Section 35 of the principal Act is hereby amended—
- (a) by the substitution for subsection (1) of the following subsection:
- “(1) Even if the act alleged to constitute an offence under this Act occurred outside the Republic, **[a court of the Republic]** the South African authorities shall, regardless of whether or not the act constitutes an offence at **[the]** its place of **[its]** commission, have jurisdiction **[in respect of that offence if the person to be charged]** to investigate and prosecute, if appropriate, that offence, if the person implicated—

- (a) is a citizen of the Republic;
- (b) is ordinarily resident in the Republic;
- [(c) **was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic at the time the offence was committed;]**
- (d) is a company, incorporated or registered as such under any law, in the Republic; **[or]**
- (e) any body of persons, corporate or unincorporated, in the Republic;
- (f) is an entity referred to in paragraph (a), (b) or (d) and de facto exercises control over any corporation or body of persons located outside the Republic irrespective of the nationalities of such foreign corporation or body;
- (g) is a foreign public official or other foreign individual or entity who solicited or accepted a gratification in contravention of the Act; or
- (h) is any other person who is found to be present in the territory of the Republic or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic after the commission of the offence and who is not extradited by South Africa or if there is no application to extradite such person: Provided that such person may be arrested pending the issue of extradition being determined.”;
- (b) by the deletion of subsections (2), (3) and (4); and
- (c) by the insertion of the following subsection:
 - “(5) In respect of the situations referred to above, a warrant of arrest may be issued by and a prosecution instituted in any court where the—
 - (a) the suspect is ordinarily resident;
 - (b) the suspect’s principal place of business is located;
 - (c) the police docket or enquiry was registered;
 - (d) the complainant or other interested person ordinarily resides;
 - (e) the suspect was arrested; or
 - (f) elements of the crime were committed.”.

Insertion of section 35A in Act 12 of 2004

12. The following section is hereby inserted after section 35 of the principal Act:

Jurisdiction

35A. Any court in whose jurisdiction one or more elements of the crime have been committed may have jurisdiction to try such offence.”.

Amendment of Pre-amble of Act 12 of 2004

13. The Pre-amble of the principal Act is hereby amended—

(a) by the insertion after the tenth paragraph of the following paragraphs:

“AND WHEREAS the Government of the Republic of South Africa has committed itself in international for a, such as the United Nations, the African Union, the Southern African Development Community and the Organisation for Economic Cooperation and Development, to the prevention and combating of corruption and related corrupt activities;

AND WHEREAS the Republic of South Africa has already become party to the following regional and international instruments aiming at preventing and combating corruption and related corrupt activities:

(a) The Southern African Development Community Protocol against Corruption signed in Malawi on 14 August 2001. The Republic became a Party thereto, by ratification on 15 May 2003;

(b) the United Nations Convention against Corruption, which Convention was adopted on 31 October 2003 and entered into force on 14 December 2005. South Africa became Party thereto by ratification on 22 November 2004;

(c) the African Union Convention on Preventing and Combating Corruption signed in Maputo on 11 July 2003. The Republic became a party thereto, by ratification on 11 November 2005;

(d) the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments, which entered into force on 15 February 1999. South Africa became a party thereto, by ratification on 19 June 2007;”;

(b) by the deletion of the of the eleventh and twelfth paragraphs; and

(c) by the substitution of the last paragraph for the following paragraph:

“AND WHEREAS it is desirable to unbundle the crime of corruption in terms of which, in addition to the creation of a general, broad and all-encompassing offence of corruption, various specific corrupt activities are criminalized, to ensure that no person involved in any such activities is immune from prosecution.”.

Amendment of arrangement of sections of Act 12 of 2004

14. The arrangement of sections of the principal Act is hereby amended—
- (a) by the substitution of item 18 for the following item:

“18. Offences of unacceptable conduct relating to witnesses, whistle blowers and accounting profession”;
 - (b) by the substitution of item 27 for the following item:

“27. Authorisation by National Director[, **Deputy National Director**] or Director to institute proceedings in respect of certain offences”;
 - (c) by the substitution for the heading to Chapter 6 for the following heading:

“DEBARMENT REGISTER [FOR TENDER DEFAULTERS]”; and
 - (d) by the insertion after item 35 of the following item:

“35A. Jurisdiction”.

Short title

15. This Act is called the Prevention and Combating of Corrupt Activities Amendment Act, 20XX.

EXPLANATORY MEMORANDUM TO PREVENTION AND COMBATING OF CORRUPT ACTIVITIES AMENDMENT BILL

A. INTRODUCTION AND BACKGROUND

1. The Bill primarily emanates from recommendations made in the following international Reports:

- (i) The Country Review Report on South Africa's implementation of Articles 15 to 42 of Chapter III ("Criminalisation and Law Enforcement") and Articles 44 to 50 of Chapter IV ("International Cooperation") of the United Nations Convention against Corruption (hereinafter referred to as the "UNCAC Report").
- (ii) The Phase 3 Report of the OECD Working Group on Bribery on South Africa's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (hereinafter referred to as the "OECD Report"). The OECD Report was adopted by the OECD Working Group on Bribery on 13 March 2014.

2. Recommendations in UNCAC Report: The UNCAC was ratified on 22 November 2004 and signed by the President on 22 November 2004. South Africa deposited its instrument of ratification with the Secretary-General of the United Nations on 24 November 2004. The Conference of the States Parties to the UNCAC was established pursuant to Article 63 of the UNCAC to, inter alia, promote and review the implementation of the UNCAC. In accordance with Article 63(7), of the UNCAC, the Conference established the Mechanism for the Review of Implementation of the UNCAC. The Mechanism was established also pursuant to Article 4(1), of the UNCAC, which states that States parties shall carry out their obligations under the UNCAC in a manner consistent with the principles of sovereign equality and territorial integrity of States and of non-intervention in the domestic affairs of other States.

3. The Review Mechanism is an intergovernmental process, the overall goal of which is to assist State parties in implementing the UNCAC. South Africa's review was based on the completed responses provided by South Africa to a comprehensive self-assessment checklist and supplementary information provided by South Africa.

4. Thereafter, the evaluators of Mali and Senegal and the UNODC Secretariat conducted a country on-site visit in Pretoria, South Africa during the period 10 to 14

September 2012. During the on-site visit, the expert review team met with representatives of government and non-governmental organisations.

5. The expert review team found that overall, South Africa has the following successes and good practices in implementing Chapter III of the UNCAC:

- (i) A detailed mechanism to facilitate the investigation of suspected cases of illicit enrichment by public officials.
- (ii) A comprehensive conviction-based and non-conviction-based forfeiture mechanisms, including the potential invocation, at the discretion of the prosecutor and upon conviction of a particularly serious offence, of a 7-year presumption that the assets and property of the convicted person are subject to forfeiture unless their lawful origin can be established by the defendant.
- (iii) Elaborate protection for witnesses and whistle-blowers under the Witness Protection Act and the Protected Disclosures Act, 2000 (Act No. 26 of 2000), including broad scope of who qualifies as a witness and what counts as an “occupational detriment”.

6. The expert review team recommended that South Africa should consider the following legislative amendments:

- (i) Adopting legislation to make passive bribery of foreign public officials a criminal offense under section 5 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004) (“the PRECCA”).
- (ii) The development and adoption of legislative or other measures to criminalise the abuse of functions by public officials.
- (iii) Introducing a statutory prohibition for the obstruction of justice officials, consistent with Article 25(b) of UNCAC and the similar statutory prohibition with regard to law enforcement officials.
- (iv) The adoption of further procedures to disqualify, for a period of time, persons convicted of UNCAC offences from holding public office or holding office in a public enterprise, in line with Article 30(7) of the UNCAC.

7. Recommendations in OECD Report: The OECD Working Group on Bribery is responsible for monitoring the implementation and enforcement of the OECD Anti-Bribery Convention, the 2009 Recommendation on Further Combating Bribery of Foreign Bribery in International Business Transactions (2009 Recommendations) and related instruments.

8. A peer-review monitoring system is conducted in three phases:

- (i) Phase 1 which involves a comprehensive assessment of conformity of each country's anti-bribery laws with the OECD Convention. In other words the anti-corruption legislation is evaluated to see whether the legislation is in line with the requirements of the Convention.
- (ii) The Phase 2 monitoring process—
 - (a) examines structures in place to enforce the laws;
 - (b) assesses the countries' application and implementation of the Convention and 2009 Recommendation;
 - (c) recommends concrete actions for improvement;
 - (d) involves a one week on-site visit involving key actors from government, law enforcement agencies, business, trade unions and civil society; and
 - (e) assesses how effective a country's anti-foreign bribery laws are in practice.
- (iii) Phase 3: In 2010, the Working Group began a new, third cycle of peer review. In short, the purpose of the Phase 3 evaluation process is "to maintain an up-to-date assessment of the structures put in place to enforce the laws and rules implementing the Convention and 2009 Recommendation, and their application in practice.". The Phase 3 evaluation process concentrates on the following pillars:
 - (a) Progress made by States Parties on weaknesses identified in Phase 2.
 - (b) Issues raised by changes in domestic legislative or institutional frameworks since the Phase 2 evaluation.
 - (c) Enforcement efforts and results.
 - (d) Implementation of the new 2009 Recommendation for further Combating Foreign Bribery.
 - (e) Other Group-wide, cross-cutting issues, such as corporate liability and mutual legal assistance.

9. South Africa's Phase 1 Report was adopted and approved by the OECD Working Group on 20 June 2008. In paragraph 164 of the Phase 1 Report, the OECD Working Group summarises South Africa's legislative position as follows:

"Section 5 of the Prevention and Combating of Corrupt Activities Act 2004 (the PCCA) criminalises bribery of foreign public officials. The Working Group considers that overall South Africa's legislation conforms to the standards of the Convention, subject to the issues noted below. In addition, some aspects of the South African legislation would benefit from follow-up during the Phase 2 evaluation process."

10. The OECD Working Group approved and adopted South Africa's Phase 2 Report and in summary, in respect of South Africa's legislation, the Working Group remarked as follows:

“The legislative framework for combating bribery and related offences is of a generally high standard. Provisions under the PRECCA appear to cover all elements of the foreign bribery offence under the Anti-Bribery Convention.”.

11. However, the Working Group recommended, among others, that South Africa should take steps to ensure that “the penalties applied in practice are sufficiently effective, proportionate and dissuasive with regard to legal persons”. Furthermore, the Working Group was concerned regarding the wording of section 5(2) of the PRECCA. It was concerned that the wording might restrict the foreign bribery offence to acts performed only in the state of the foreign public official receiving the bribe. Therefore, the Working Group recommended that this be followed-up as case law develops.

12. The Bill envisages giving effect to the abovementioned recommendations in the UNCAC and OECD Reports.

B. SECTION BY SECTION EXPLANATION

13. Preamble: The preamble is updated so as to confirm that the Republic of South Africa has committed itself in international fora, such as the United Nations, the African Union, the Southern African Development Community and the Organisation for Economic Cooperation and Development to the prevention and combating of corruption and related corrupt activities. Furthermore, the preamble is amended to list all the international instruments ratified by South Africa dealing with South Africa’s obligations in respect of the criminalisation of corruption related offences and the implementation of other anti-corruption measures. Finally, it is proposed that the preamble be amended to ensure that no person involved in any corrupt activities is immune from prosecution.

14. Section 1: Definitions: In the first instance, it is proposed that the definition of a “foreign public official” be extended to include the executive as well as any head or member of a diplomatic mission or consular post. Paragraph (c) of the definition is amended to refer to all persons who perform functions on behalf of all spheres of government, for example a consultant or a temporary appointee standing in for an official.

15. A definition of “official of a public international organisation” is inserted to mean “an international civil servant or any person who is authorised by such an organisation to act on behalf of that organisation, a special envoy or a member of the United Nations and its specialised agencies and other international organisations”.

16. Paragraph (j) of the definition of “gratification” is amended to include a “facilitation payment”. This will make it clear that South Africa does not allow facilitation payments. Furthermore, a definition of “facilitation payment” is inserted to include any payment made to a public official, a foreign public official or any third party that acts as incentive for the official to complete some action or process expeditiously, or to provide the party making the payment or another party an unfair or unlawful advantage.

17. Section 2(4): Interpretation: At present section 2(4) provides as follows:

“(4) A reference in this Act to any act, includes an omission and ‘acting’ shall be construed accordingly.”.

18. Some commentators argue that at present the PRECCA does not criminalise corrupt activities in terms of which a gratification is given, offered, accepted or received for having committed corrupt activities in the past. In others words where a gratification is given, offered, accepted or received as a reward or any other similar advantage for having committed a corrupt act.

19. In terms of section 1 of the PRECCA “gratification” is among others, defined to include the following:

“(b) any donation, gift, loan, fee, reward, valuable security, property or interest in property of any description, whether movable or immovable, or any other similar advantage;”.

20. It may be argued that the above definition of “gratification” and in particular the word “reward” sufficiently covers such past actions. However, to avoid any uncertainty, it is proposed that section 2(4) be amended in terms of which the present subsection (4) becomes paragraph (a) and the following paragraph (b) be inserted:

“(b) A reference in this Act to “in order to act”, includes “for having acted”.

21. Section 5(1): Offences in respect of corrupt activities relating to foreign public officials: This amendment emanates from a recommendation in the UNCAC Report. Section 5 of the PRECCA is based on Article 1(1) of the OECD Anti-Bribery Convention. In short, this Article requires the criminalisation of active bribery of a foreign public official, in terms of which the intentional offering, promising or giving of a bribe to a foreign public official, is an offence. The OECD Anti-Bribery Convention does not regulate passive bribery by a foreign public official.

22. In line with the OECD Anti-Bribery Convention, section 5(1) of the PRECCA does not specifically deal with passive corruption in respect of foreign public officials. At the UNCAC Review process South Africa argued that section 3(a) of the PRECCA is applicable. This section provides that any person 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 in order to act, personally or by influencing another person so to act, in a manner described above. The expression “any person” includes a foreign public official.

23. However, the UNCAC evaluators argued that South Africa should have regard to Article 16(2) of the UNCAC. In terms of this provision each State Party “shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.”.

24. Accordingly, in paragraph 2.3 of the UNCAC Report it is recommended that, with a view to further strengthen existing anti-corruption measures South Africa should “Consider adopting legislation to make passive bribery of foreign public officials a criminal offence under section 5 of the PRECCA”.

25. To give effect to the above recommendation section 5 of the PRECCA is amended by the insertion of a new paragraph (a) in section 5(1). Paragraph (a) now specifically criminalises passive corruption committed by a foreign public official.

26. Section 5(2): This amendment emanates from a recommendation in the OECD Report. Section 5(2) of the PRECCA reads as follows:

“(2) Without derogating from the generality of section 2(4), 'to act' in subsection (1) includes—

- (a) the using of such foreign public official's or such other person's position to influence any acts or decisions of the foreign state or public international organisation concerned; or
- (b) obtaining or retaining a contract, business or an advantage in the conduct of business of that foreign state or public international organisation.”.

27. In paragraph 193 of South Africa’s Phase 2 OECD Report, the OECD Working Group held the view that the wording of section 5(2) might restrict the acts performed by the foreign public official to acts performed by “the foreign state or public international organisation

concerned”, or in respect of the business of “that foreign state or public international organisation”. The Working Group was concerned that situations envisaged under Commentary 19 of the OECD Anti-Bribery Convention would not be covered where, for instance, bribes might be paid to a foreign public official for him or her to influence the decision making process “in another state or in a multilateral development bank”. In South Africa’s Phase 3 Report (paragraphs 18 and 19 and the commentary), the OECD Working Group again raised this concern.

28. At the time South Africa held the view that subsection (2), by using the term “includes”, only provides additional specifications, and would not be read as restricting application of section 2(4) of the PRECCA. However, to avoid any uncertainty, it is recommended that section 5(2) be amended.

29. Section 18: Offences of unacceptable conduct relating to witnesses, whistle-blowers and the accounting profession: At present section 18 deals with offences of unacceptable conduct relating to ordinary witnesses. It is proposed that the application of this section be extended to include the protection of whistle-blowers and members of the accounting profession.

30. Therefore, it is recommended that the expression “or improperly persuades” should be inserted after the word “coerce”. Currently the former expression sits in amongst all forms of physical intimidation, whereas it is argued that it should also be interpreted as covering more subtle means, for example, cancelling the contract, firing or redeploying the person in order to prevent them exposing a crime. This would greatly assist in addressing the criticism of the OECD Working Group on Bribery of the lack of protection for auditors.

31. Furthermore, the addition of two further paragraphs is proposed in terms of which it is also an offence to persuade or deter any person not to report an offence in terms of the PRECCA or to persuade or deter any public or private auditor or accountant or bookkeeper from reporting an offence in terms of that Act detected during the scope of his or her duties.

32. Finally a new subsection (2) is added. In terms of this subsection it will be an offence for any person to subject any other person, who has reported an offence in terms of the PRECCA, or is a witness in terms of the PRECCA, to any unfair, unlawful or discriminatory treatment as a result of their conduct referred to above.

33. Section 26: Penalties: The proposed amendments to section 26(1) of the PRECCA emanate from the recommendations of the OECD Report.

34. In paragraphs 32 to 38 of the OECD Report, the evaluators had a long discussion regarding the sanctions that may be imposed in terms of section 26(1) of the PRECCA for both natural and legal persons. The following extracts are, among others, relevant:

- (i) “Consequently, the maximum fine which may be imposed on a legal person despite the recent increase (i.e. EUR 52 574) is not sufficiently effective, proportionate and dissuasive.”
- (ii) “The concern expressed in Phase 2 thus remains that, where Regional Courts have jurisdiction over legal persons, the level of maximum fines available are still too low to be deterrent, in particular for large companies.”
- (iii) “The lead examiners are significantly concerned that, where Regional Courts have jurisdiction over foreign bribery offences, the level of maximum fines applied in practice may still be too low and not sufficiently dissuasive, in particular with regard to legal persons. Therefore, they reiterate Phase 2 recommendation 10b, and urge South Africa to take steps to ensure that, regarding legal persons, the penalties applied in practice are sufficiently effective, proportionate and dissuasive.”

35. The opinion is held that the arguments of the OECD Working Group are sound and the recommendation is supported. It is accordingly proposed that the monetary sanctions should be increased drastically. The following examples of similar sanctions support such a drastic increase in the monetary penalties:

- (i) Section 1(xv) of the POCA defines “proceeds of unlawful activities” to mean “any property or part thereof or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in connection with or as a result of any unlawful activity carried on by any person, whether in the Republic or elsewhere”. This definition includes acts of foreign bribery and money laundering. The penalties prescribed by the POCA under section 8 are a “fine not exceeding R100 million or imprisonment for a period not exceeding 30 years”.
- (ii) Similarly, in terms of section 13 of the Prevention and Combating of Trafficking in Persons Act, 2013 (Act No. 7 of 2013), a person convicted of trafficking in persons is “liable to a fine not exceeding R100 million or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine or both.”
- (iii) In terms of section 102(1) of the National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004), a person convicted of an offence in terms of section

101 is “liable to a fine not exceeding R10 million, or to imprisonment for a period not exceeding ten years, or to both such a fine and such imprisonment.”.

- (iv) In terms of section 83(1) of the National Gambling Act, 2004 (Act No. 7 of 2004), a person convicted of an offence in terms of the Act is liable to a fine “not exceeding R10 million or to imprisonment of 10 years or both a fine or such imprisonment”.

36. Chapter 14 of the National Development Plan 2030 (NDP) specifically envisages, among others, to promote accountability and the fight against corruption. Government has put in place a programme of action based on the long term vision of the National Development Plan 2030 (NDP), which provides a strategic framework for Government. The opinion is held that the proposed increases in the monetary penalties will support Government’s strategy in emphasising its commitment to fight corruption and related corrupt activities.

37. Accordingly amendments to section 26(1)(b) and (c) of the PRECCA are proposed in terms of which, among others—

- (i) a regional court may in respect of the more serious corruption offences (including corruption relating to foreign public officials) impose a fine not exceeding R50 million, or to imprisonment for a period not exceeding 18 years, or to both a fine and such imprisonment; and
- (ii) a magistrate court may impose a fine not exceeding R10 million or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.

38. Furthermore, it is proposed that section 26(3) of the PRECCA should be amended to provide for an appropriate sentence to be imposed in respect of corporate bodies. Paragraph (b) is added to provide that in sentencing a corporate body, the court must ensure that the fine imposed properly reflects the seriousness of the offence, the amount of the gratification paid, the benefit derived and the annual turnover of the corporate body, including that of any associated entities for the period preceding the offence.

39. Section 27: Authorisation by Director to institute proceedings in respect of certain offences: Some stakeholders argue that section 27 of PRECCA is problematic in that it specifies that the authorisation can either be by the National Director, a Deputy National Director or Director. This is contrary to all other legislation which locates the power either on the NDPP or a DPP. In any case, in terms of the NPA Act, a Deputy National Director can perform all the powers of the NDPP as delegated by him or her.

40. The proposed amendment of section 27 aims to omit reference to the Deputy National Director.

41. Section 28: Endorsement of the Debarment Register: It is proposed that section 28 of the PRECCA be amended to apply to all convictions of the offences under PRECCA and not only to sections 12 and 13.

42. Furthermore, section 28(1)(a) confers a discretion on the Court. It is proposed that section should be amended so as to make it mandatory for the Court to hold an enquiry into the endorsement of the register and that the discretion lies simply with whether the order should in fact be made.

43. National Treasury is proposing that section 28 be amended to include the endorsement of the Register when an accused person has been found guilty of theft, fraud and any other offence of which dishonesty is an element. It is proposed that the offences referred to section 34(1) of the PRECCA be used, namely, the offence of theft, fraud, extortion, forgery or uttering a forged document.

44. Section 29: Establishment of the Debarment Register: In terms of section 29 of the PRECCA, the “Debarment Register” was established in the Office of National Treasury. There is no consistency regarding the name of the Register. In some provisions the Act refers to the “Register for Tender Defaulters” and other provisions to the “Debarment Register”.

45. National Treasury points out that stakeholders want to create a register restricting persons from taking up employment in the public sector who have been convicted of corruption. Therefore, it is recommended that it be called the “Debarment Register”. It is proposed that section 29 be amended accordingly.

46. Section 34: Duty to report corrupt transactions: It is proposed that a provision be inserted in section 34 of the PRECCA providing for immunity from civil liability for persons submitting reports in terms of section 34(1) in good faith. In the judgment of the Constitutional Court dealing with the DPCI, referred to above, the Chief Justice referred to corruption as a cancer requiring drastic action before it becomes terminal. It is proposed that the threshold of R100 000 in section 34(1)(b) should not apply to the PRECCA offences.

47. It is not clear whether state-owned enterprises (SOEs) or public entities (as they are often referred) would fall under the ambit of either section 34(4)(e) or (h). Therefore, it is proposed that section 34 should be amended so as to include the SOEs. If they fall under section 34(h), then only the CEO would be under a reporting responsibility, unlike private companies where managers, secretaries and directors are under a reporting obligation. It would appear that many senior people, other than the CEO, are ideally placed to report corruption and the SOEs should be under the same reporting obligations as private entities.

48. In view of the above, it is proposed that three new subsections be added in terms of which—

- (i) any person who bona fide files a report as contemplated in section 34(1) may not be held civilly or criminally liable in respect of the content of such report (subsection (5));
- (ii) the institutions referred to in section 34(4) are required to implement appropriate internal compliance programmes in order to ensure that the offences referred to in section 34(1) are in fact detected and reported (subsection (6));
- (iii) all State-owned enterprises, private entities and individuals who engage in foreign trade are required to keep full records of all such trade, including all payments made or received during the course of such trade;
- (iv) such records are to be retained for a period of 10 years from the date of the commencement of each transaction constituting foreign trade and any such person or entity who fails to maintain such records is guilty of a criminal offence (subsection (7)).

54. Section 35: Extraterritorial jurisdiction: In the light of the judgment of *The National Commissioner of the South African Police Service v Southern African Litigation Centre and another (Dugard and others as amici curiae)* [2014] JOL 32464 (CC), dealing with the Rome Statute, the use of the jurisdiction of a Court in the Republic is problematic in that the three Courts which adjudicated the matter, unanimously held that this was only a trial requirement and that for the purpose of an investigation, no conditions were necessary (namely, presence of the accused or active or passive nationality) for the initiation of an investigation. Therefore, even matters where there is no connection to South Africa should be investigated. It should be unambiguously stated that the conditions set out in section 35 are a prerequisite for the initiation of the investigation and any subsequent legal processes which may then follow.

49. It is proposed that section 35(1)(a), (b), (d) and (e) should be retained. However, section 35(1)(c) should be amended to refer to where the crime is committed as opposed to where the accused is arrested.

50. It is further proposed that a new section 35(1)(f) should be added to include any body or persons, corporate or unincorporated, located outside the Republic, but de facto controlled by any of the entities referred to in section 35(1)(a), (b), (d) and (e). It has been established that it is common practice for South Africans to set up companies abroad where nationals of that country are reflected as the directors and servants so as to circumvent South African extraterritorial law, de facto these companies are actually run by the South Africans. This is a serious problem in trying to enforce our mercenary laws.

51. It is further proposed that a new subsection should be inserted to confer jurisdiction to investigate and prosecute the foreign government official when located outside the Republic and all other foreign entities who participate in the commission of all the PRECCA offences, which are of extraterritorial effect.

52. The deletion of section 35(2)(a) is proposed. Section 35(2)(a) is too vague to be effectively implemented and is not a requirement of any of our international obligations. It is further recommended that section 35(2)(b) and (c) be collapsed into one new subsection of section 35(1)(a) and it should be specified that the person who had been arrested and appeared in court, pending the issue of extradition.

53. Section 35(3)(a) and (b) would not be applicable in many of the cases of extraterritorial jurisdiction referred to in section 35(1) where the suspects do not have residence or places of business in the Republic. Section 35(2)(b) relates to a person who is present as opposed to one who has residence. It is recommended that the provision should list multiple other grounds for conferring jurisdiction on specific courts to try the matters where the accused does not have a business or residence, jurisdiction could be based on one or more of the following:

- (i) The place where the person was found to be present or entered the Republic.
- (ii) The magisterial district where the crime was registered.
- (iii) The magisterial district where another party (for example the complainant or victim) is present or where key elements of the crime were committed.

54. Section 43(1)(b) of the CPA only makes provision for the issuing of a warrant of arrest in respect of an extraterritorial crime by the magistrate of the district in which the suspect is

present. Many of the suspects covered by section 35 of the PRECCA would not be present in a specific magisterial district. If section 43 of the CPA is amended, this would affect all the extraterritorial statutes and there may be good reason why certain statutes would want to limit jurisdiction to presence. It is therefore recommended that a new subsection be added in section 35 to the effect that where the warrant cannot be issued in terms of section 43, that it be issued by the magistrate of the district where the jurisdiction is conferred as indicated above.

55. The deletion of section 35(4) is recommended, since the conferring of jurisdiction, as being the place where the crime has been committed, is in conflict with the common law to the effect that conspiracy is a separate crime to the predicate offence and that the crime was committed at the place where there was an agreement to commit the predicate offence. The opinion is held that the issue of jurisdiction for conspiracy has been sufficiently defined in the Constitutional Court judgment of *S v Wouter Basson* and that no statutory enactment is necessary.