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JUSTICE AND CONSTITUTIONAL DEVELOPMENT PORTFOLIO COMMITTEE

4 November 2003

PREVENTION OF CORRUPT ACTIVITIES BILL; SUPERIOR COURTS BILL: DELIBERATIONS

Chairperson: Adv J De Lange (ANC)

Documents handed out:

[Prevention of Corrupt Activities Bill \(Working Document No. 8\)](#)

Proposed Clause 11 - Offences respect of corrupt activities relating to procuring and withdrawal of tenders (Appendix 1)

Prevention of Corrupt Activities Options (Appendix 2)

SUMMARY

The Committee discussed Working Document 8 of the Bill and the amendments provided by legislative drafter, Advocate Neil Gerhard. They covered various clauses in Chapters 2 to 11. There was considerable discussion surrounding the creation of separate offences, in particular for bribery, and for the supplying of inside information in tendering processes.

In the afternoon deliberations on Chapter 3, the Chair said it was a cardinal legal principle that a court could not punish an accused person twice for an offence that arose from similar facts. He tasked Adv. Gerhard to research that they would not be offending this principle before admitting section 21A. The Chair referred to the "endorsement by the Registrar at section 24A" and wondered what would become of partners and managers in the future. Adv. Gerhard explained that the Cabinet has taken a policy decision to phase out National Tender Boards and hence reference would only be made to Provincial Tender Boards. He further explained that the purpose of the endorsement was to prevent a person or enterprise so convicted from engaging in similar activities.

MINUTES

CHAPTER 2: OFFENCES IN RESPECT OF CORRUPT ACTIVITIES

Clause 3: General Offence of Corruption

Clause 3(b)(i)(aa)

The Chairperson suggested inserting the words, "dishonest, unauthorised" after "illegal", in (aa).

A policing provision was created by the insertion of (bb), a provision not found in international legislation. He further advised, therefore, the consequential deletion of (cc).

He informed the Committee that [(ii)] had been deleted, as its implications were very wide and vague, and were captured elsewhere.

In (ii), an amendment was added to include the abuse of a position of authority.

The inclusion of subclause (iii) ensured that, even if an act was not illegal or unauthorised, it could still amount to an "unjustified result".

Subclause (iv) was a 'catch-all' provision that included unauthorised or improper inducement. The Chairperson instructed the drafter to add the words, "or not to do", after "to do". He said the word "or" should be included between subclauses (iii) and (iv).

Subclause (viii) was deleted. The drafter had unsuccessfully attempted to capture the crime of bribery in this subclause. The Chairperson's suggested that he draft a new offence for both the public and private sector, similar to bribery, without referring to the common law.

Ms Chohan-Khota asked if a separate offence was going to be created for bribery.

The Chairperson responded that a separate offence would be created along the lines of bribery, and would cover both the public and private sectors.

Some discussion followed on the occurrence of bribery, as opposed to corruption. The Chairperson explained that bribery was confined only to an employment relationship, whereas corruption could take place in all relationships. Crimes of dishonesty should really be based on an unauthorised consideration being received. Capturing adequate definitions of the terms in the Bill was proving difficult, and it would be decided if the common law crime of bribery would be reinstated in the Bill.

Ms Chohan-Khota's thought that the crime of bribery was captured in the general provision, and that it included the private sector. If the crime was found not to be included, then "unauthorised consideration" could be included after "gratification".

Discussion of Option 1 and Option 2 for Clause 2(4) followed. It was decided that because "not to act" included an omission, "act" would include, "(i) not to act"; (ii) "acting or not acting"; or (iii) having acted or "not having acted". Additionally, (b) and (c) would be omitted, and (d) would become (b).

The Chairperson directed the drafter to add the offence of "extended bribery" to Part 3: Clause 11, with respect to special crimes. Option 2 was dropped in favour of Option 1.

Clause 4: Offences in respect of corrupt activities relating to public officers

In Clause 4(1)(a), the term "from any other person" was added. Options 2 and 3 were dropped in favour of Option 1. In Subclause 2(a), the term "or not voting" was deleted, and in Subclause 2(b), the term "or not performing" was also deleted. The "or" after (e) was deleted, to be placed after (g). The Chairperson suggested that point (vii) after Subclause (1)(b) should read, "is guilty of an offence of corrupt activities relating to public offices".

It was decided that Subclause (2) should read, "In subsection (1), "to act" includes the generality of the definition of Clause 2(4)". The Chairperson stated that would indicate the need to read both definitions.

Adv. Masutha asked, in terms of the suggestion that the crime of corruption was referred to in other laws, if that would refer to corruption as per this Act. He asked if it would be the intention of the Act to create a general crime of corruption that would be a crime wherever reference was made elsewhere to the offence.

The Chairperson explained that the latest attached schedule used various references to give effect to the definition.

Adv. Masutha asked if the attempt to act, was covered in the Bill.

The Chairperson responded that Clause 19 dealt with that issue.

Clause 5: Offences in respect of corrupt activities relating to agents

In Clause 5 (a)(i), the terms "from any other person", and "for the benefit of any other person" were added. Options 2 and 3 were dropped.

Clause 6: Offences in respect of corrupt activities relating to members of legislative authority

"From any other person" was added to Clause 6(1)(a). Subsection (2) would now read, "For purposes of subsection (1), 'to act' includes the generality of the definition of Clause 2(4)".

Subclause (ii)(a) would now form part of (b), problematically meaning that absenting oneself from a Committee meeting was linked only to voting. It was concluded that subclause (3) (a) and (b) would be deleted, and the previous Subclause 2(a) and (b) would be retained. In addition, "or" was inserted between subclause (2)(c) and (d).

It was felt that a corrupt activities offence by members of legislative authorities (Clause 6), should not be named. As with other Acts of Parliament mentioning dishonesty, the Bill could speak of offences involving corruption, or corrupt activities. The provision revolved around the giving of a bribe, with the

purpose to retain a contract. In order to retain the contract, the offender attempted to influence an election by getting people to vote in a particular manner. The Chairperson felt that the provision lacked clarity on the relationship between the parties involved in the crime, and their roles in it. This crime related to three parties. The Chairperson could also not determine if the provision was intended to prohibit people from funding candidates' election campaigns. The Committee finally decided to flag the clause.

Clause 7: Offences in respect of corrupt activities relating to members of judicial authority

The Chairperson considered deleting Subclause (2) from Clause 7. However, it was then decided to retain the provision, but to remove "unfair" from Subclause (2)(a). Subclause (c) would be amended to read, "upholding the rule of law and the independence of the judiciary". The Committee would make a decision on whether to delete the entire subclause at a later stage.

Clause 8: Offences in respect of corrupt activities relating to members of prosecuting authority

Option 2 was deleted from Clause 8.

Clause 9: Offences relating to witnesses and evidential material during certain proceedings

It was agreed that it would be wrong to give evidence in any particular way. The words "from any other person", were inserted in Clause 9(1). Clause 9(1)(e) was also a new insertion requested by the Committee. The Committee decided that this clause should go under "Specific Offences". It was decided to split Clause 9(2) into points (a) and (b). Point (b) was flagged to question whether a separate offence should be created, in terms of "intimidates" at a future stage. Such an offence would appear under "Part 4: Other Offences".

In terms of Clause 9(1)(a) on a person testifying "in a particular way or fashion", Adv. Masutha wanted to clarify that a person who testified truthfully, but received an award for that testimony, would have committed an offence. Currently however, witness fees were being paid to people who were required by subpoena to appear. Those witness fees may not be the equivalent of a person's daily income to cover the expenses incurred because of taking time off work to testify. He asked if work establishments who made financial provision for staff members to testify in court, and for whom court fees would be insufficient to compensate for the loss suffered because of the court appearance, would be impacted by this provision.

The Chairperson responded that paying people to testify was tantamount to a subversion of justice, irrespective of whether the evidence given was truthful. People should not give evidence on the basis of the payment of a gratification. Compensation by employers to workers who had to appear in court were not targeted by the provision, because the compensation was not in exchange for evidence given in a particular way. Rather, it aimed to enable people to be away from work in order to perform a civic duty.

Clause 10: Offences in respect of corrupt activities relating to foreign public officials

All the usual changes were made to Clause 10. The generality provision would be inserted into Subclause 2. The word "or" was inserted after Clause 10(1)(a).

Clause 11: Offences in respect of corrupt activities relating to procuring and withdrawal of tenders

Part 3 of Clause 11 referred to (a) the awarding of a tender; (b) the withdrawal of a tender; and (c) the giving of inside information, to enable the tenderer to make a better offer than other contenders.

The drafter explained that tenders not only related to a contract, but were also for the provision of any services, or supplying of articles, substances, or materials, or for performing any other act. The provision revolved around an attempt to corrupt the tender process.

Ms Camerer wondered whether the issue was already covered in existing legislation where there was no particular reward. She was sure that legislation existed which covered officials who dealt with tenders, with the intention of ensuring confidentiality. When inappropriate handling of the tender process was linked to a reward however, that action constituted corruption.

Notwithstanding existing legislation, the drafter felt that (c) should have a provision like "or as reward".

The Chairperson felt that inappropriate handling of the tender process should be a separate offence, because it involved both the acceptance and the giving of a bribe. Point (c) said, "notwithstanding the acceptance of â€". This meant that irrespective of whether a bribe was accepted, if insider information was given to enable a person to have an unfair advantage, that in itself was a crime.

The Committee felt that the word "improperly" was probably unnecessary, and noted it for possible deletion.

Part 3: Offences in respect of corrupt activities relating to specific matters

Clause 12

After the lunchbreak, the Chair asked Adv. Neil Gerhard to redraft 12 (2)(a)(i) (aa) and (bb) in order to make reference to auctioneers, and to add (cc) to deal with any other person. He noted that the term "refrain from bidding" in (b)(i) (aa) and 2(a)(i) was not clear. He asked Adv. Gerhard to tighten it to clarify that the refrain in this case was for the benefit of that "other person".

Clause 13

The Chair said that the use of "inducement" in subsection 13(b)(i) would be problematic because the term has been clearly defined within certain parameters.

Adv. Gerhard said that he had placed the term "improperly" in square brackets to suggest possible corrections.

Ms Camerer (DP) agreed and said that the current section would be problematic, particularly when government contracts were at stake.

The Chair said that similar problems could arise in the private sector. It was difficult to prove that such an inducement actually took place. While it was easy to create offences, mounting the required probative force to sustain a conviction was another matter.

Imam Solomon (ANC) sought an explanation as to why the terms "unlawful and wrongful" had been avoided throughout the Bill.

The Chair explained that the Bill spelled out actual unlawful and wrongful acts and that therefore it would be superfluous to repeat these descriptions.

Adv. Gerhard suggested the use of "improperly" in 13(b)(i) before "inducement" for clarity.

The Chair said he would prefer not to use "improperly", but for the lack of any other workable solution, he would settle for the suggested wording.

The Chair asked Adv. Gerhard to remove 13(b)(3)(c) and place it in a new category of related crimes. He suggested the creation of a section for miscellaneous offences relating to corrupt activities or unacceptable behaviour.

Adv. Gerhard proposed that the new miscellaneous section should read "in the event of a tender processâ€"

The Chair instead proposed that the section open with "in the case of a contract agreement or tender processâ€" He noted that should be some connecting nexus between subsection 3 (b) and (a).

Clause 14

The Chair objected to the use of "induce" in (b)(i), noting that the term only applied where it captured many other activities.

Adv. Gerhard said that he would be happy to take it out as this would not harm the clause.

Clause 15

The Chair suggested that the clause be crafted in the same manner as Clause 14. The best way would be is to pin the clause to anything that affected integrity. The interpretation as to what constituted "integrity" would be left to the courts.

Clause 16

Adv. Gerhard said that clause 16 had been removed.

The Chair suggested that clause 16 should be placed under the new miscellaneous section under Part 5.

Part 4: Other offences

The Chair asked Adv. Gerhard to move offences relating to "intentional interference with", "hindering" or "obstructing of investigation" from clause 18 to the miscellaneous section.

Part 5: Authorisation to institute proceedings in respect of certain offences

The Chair asked Adv. Gerhard to move Part 5 to the section dealing with investigations, noting that it was not properly suited for an area that deal with offences.

Chapter 3: Presumptions and Defences

Clause 21a

The Chair said it was a cardinal legal principle that a court could not punish an accused person twice for an offence that arose from similar facts. He tasked Adv. Gerhard to research whether they would be offending this principle before admitting Clause 21a.

The Chair asked Adv. Gerhard to check and determine which of the terms between "lawful reason" and "lawful cause" suited 21(iii). Technically, the amendment would work but it would not be easy for laypersons to comprehend the underlying presumption. The Committee should go with the previous amendment instead.

Adv. Gerhard explained that Part 1 dealt with general offences while Part 2 referred specifically to offences committed by public officers.

The Chair suggested that for the sake of clarity, the clause should state that it referred to offences in Part 1 and 2. Part 3 should be left out.

Adv. Gerhard agreed that Part 3 was not needed since it was specific in its provision.

The Chair expressed dissatisfaction with the use of "arising from" in 21(2), noting that there was no link between the terminology and the "acceptance".

Adv. Gerhard explained that the activity arose from the alleged offence that supplied the gratification.

The Chair asked Adv. Gerhard to add something to show that the alleged gratification followed from a certain activity in order to supply a proper link between the activity and the offence.

CHAPTER 4: PENALTIES AND RELATED MATTERS

Clause 24

The Chair referred to the "endorsement by the Registrar" in Clause 24a and wondered what would become of partners and managers in the future.

Adv. Gerhard explained that the purpose of the endorsement was to prevent a person or enterprise so convicted from engaging in similar activities.

The Chair asked Adv. Gerhard to explain the policy position with regard to tender boards.

Adv. Gerhard explained that the Cabinet had decided to phase out National Tender Boards and hence

reference would only be made to Provincial Tender Boards.

The Chair suggested that under 3(a)(i)(aa)(aaa), the level of performance should be added for clarity and tasked Adv. Gerhard to apply the appropriate wording. For 3(b), he suggested "dismissed" should be replaced with "finalised".

The Chair observed that the National Treasury had already been empowered under section 3(a) and therefore there was no need for subsection 3(5). Adv. Gerhard agreed and added that the numbering sequence here was incorrect and could affect following clauses. The Chair requested him to check this. Adv. Gerhard added that subsection 6(8) on page 33 fell away in view of previous amendments.

The Chair reminded members that tomorrow they would vote on the Judicial Matters, Conventions and Resolutions and the SADC Tribunal. The meeting was adjourned.

Appendix 1 PROPOSED CLAUSE 11

Offences respect of corrupt activities relating to procuring and withdrawal of tenders

11(1) Any person who, directly or indirectly, accepts or agrees or offers to accept any gratification from another person. whether for the benefit of himself or herself or for he benefit of another person. as-

- (a) an inducement to, personally or by influencing any other person so to act. {improperly}
- (i) award a tender in relation to a contract for performing any work, providing any service. supplying any article. material or substance or performing any other act to a particular person:
- (ii) upon an invitation to tender for such contract, make a tender for that contract which has as it aim to cause the tenderer to accept a particular tender: or
- (iii) withdraw a tender made by him or her for such contract:

(b) a reward for acting or having acted as contemplated in paragraph (a)(i), (ii) or is guilty of an offence.

(2) Any person who, directly or indirectly

(a) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or the benefit of another person, as-

- (i) an inducement to. personally or by influencing any other person so to act, {improperly} award a tender in relation to a contract for performing any work. providing any service, supplying any article, material or substance or performing any other act, to a particular person; or
- (ii) a reward for acting or having acted as contemplated in subparagraph (i).

(b) with the intent to obtain a tender in relation to a contract for performing any work, providing any service, supplying any article, material or substance or performing any other act, gives or agrees or offers to give any gratification to any person who has made a tender in relation to that contract. whether for the benefit of that tenderer or any other person. as an inducement to{improperly} withdraw or as a reward for withdrawing or having withdrawn his or her tender:

(c) notwithstanding the acceptance of or offer to accept any gratification. gives any other person inside information in respect of a tender so as to enable such other person to tender. or not to tender, in a particular way in order to obtain an unfair advantage in the tender process, is guilty of an offence.

Appendix 2 Prevention of Corrupt Activities Options

OPTION 2: CLAUSE 2(4)

(4) A reference in this Act to-(a) act includes-

- (i) not to act;

- (ii) acting or not acting; or

- (iii) having acted or not having acted;

(1)) acting includes not acting;

- (c) having acted includes not having acted; or

- (d) to act in a specific manner, includes not to act or not acting or not having acted in such a manner.

OPTION 1: CLAUSE 2(4)

(4) A reference in this Act to-(a) act includes-

- (i) to omit to act;
- (ii) acting or omitting to act; or
- (iii) having acted or omitted to act; -) acting includes omitting to act;
- (c) having acted includes omitted to act; or
- (d) to act in a specific manner, includes to omit to act or omitting to act or omitted to act in such a manner.

Clause 3

3. Any person, including a person in the private sector, 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
- Q) 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, act, personally or by influencing another person so to act-in a manner that
 - (aa) amounts to the illegal, incomplete, contrived or biased;
 - (bb) amounts to the misuse or selling of information or material acquired in the course of the; or
 - (cc) adversely affects, or could adversely affect the honest, exercise, carrying out or performance of any person? 5 powers, duties or functions;

[(ii) that is unacceptable according to the normal standards of moral, social or professional behavior;]

(ii) in a manner 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;
- in order to

(iii) in a manner designed to achieve an unjustified result.'

(vii) in a manner that amounts to any other **unauthorized** or improper inducement to do anything;

(viii) under circumstances where the person who_)

(aa) accepts or agrees or offers to accept the gratification as contemplated in paragraph (a), is not authorized to so accept or agree or offer to accept any such gratification from any other person: or

(bb) gives or agrees or offers to give the gratification to any person as contemplated in paragraph (b) knows or ought reasonably to have known that such other person is not authorized to so accept or agree or offer to accept any such gratification, is guilty of the offence of corruption / an offence.

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