



PUBLIC PROTECTOR  
SOUTH AFRICA

Speaking notes for Adv K Malunga

Deputy Protector-Republic of South Africa

***The major risks facing South Africa going forward from the Public  
Protector's point of view***

***and***

***Consequences of risks that have materialised in respect of the  
impact on government, business and citizens***

Keynote address

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## 1. INTRODUCTION:

According to the Institute of Risk Management South Africa (IRMSA), it is only when we fully understand and proactively manage the country's risks will we be able to provide greater certainty and security for all three sectors that comprise South African society, namely government, business and civil society. We will be better informed, more decisive and will move with increased confidence to achieve our vision of creating a foundation for South Africa's competitive position, which is sustainable from an economic, environmental and social perspective. IRMSA warned that

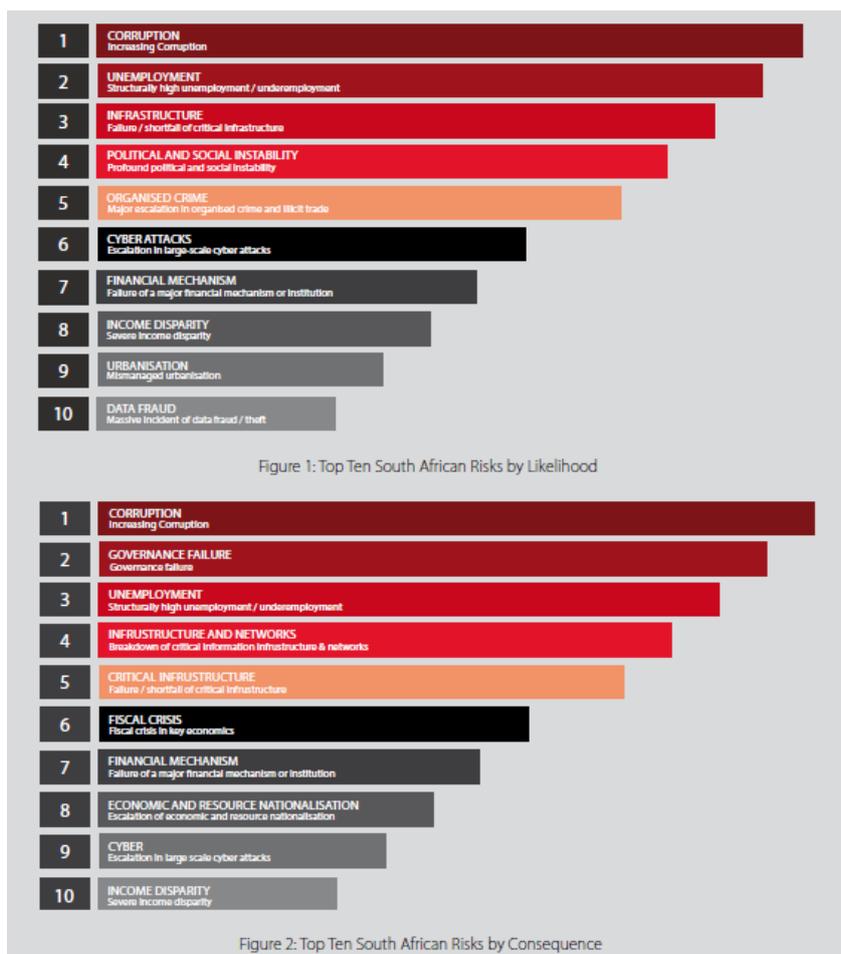
*“South Africa is in no position to deal with further unforeseen shocks in the near term considering that its resilience and ability to cope with new challenges is being increasingly compromised. A key characteristic of these events is their systemic nature, implying that they have the potential to affect the entire country, as opposed to compartmentalising their sphere of influence according to national, regional, provincial and municipal levels.”*

(IRMSA Risk Report 2015)

In its report *Global Risks 2015*, the World Economic Forum (WEF) warns that water crises, spread of infectious diseases, energy price shock, fiscal crises, failure of national governance and unemployment / underemployment are amongst the key global risks.

Corruption Watch SA, recently warned of an increasing level of corruption in the country with seven cases reported every day. According to newspaper reports most cases received by Corruption Watch were related to the abuse of power and some were in the areas of immigration, licensing and housing.

According to the 2015 IRMSA Risk Report, corruption was identified as the number one risk facing the country in terms of likelihood and consequences



Compared to the 2015 Global Report of the WEF) the picture looks slightly different on international level from the point of view of WEF respondents to the Global Risks Perception Survey 2014:

Top 10 risks in terms of Likelihood	Top 10 risks in terms of Impact
1 Interstate conflict	1 Water crises
2 Extreme weather events	2 Spread of infectious diseases
3 Failure of national governance	3 Weapons of mass destruction
4 State collapse or crisis	4 Interstate conflict
5 Unemployment or underemployment	5 Failure of climate-change adaptation
6 Natural catastrophes	6 Energy price shock
7 Failure of climate-change adaptation	7 Critical information infrastructure breakdown
8 Water crises	8 Fiscal crises
9 Data fraud or theft	9 Unemployment or underemployment
10 Cyber attacks	10 Biodiversity loss and ecosystem collapse

South African respondents are most concerned with economic risks as opposed to the environmental risks which are prioritised by WEF respondents. Geopolitical risks are very important to South African respondents from a rating perspective, but they do not appear on the WEF top ten list, whereas environmental risks do not feature at all on the South African top ten list by likelihood and consequence.

Failure of national **governance** features strongly this year, as the risk with the 2<sup>nd</sup> (second) highest impact from a South African perspective and 3<sup>rd</sup> (third) most likely risk across the global risks landscape. This risk area reflects on the inability to efficiently govern as a result of corruption, illicit trade, organized crime, the presence of impunity and generally weak rule of law.

The WEF stated in its report that

*“Over past years, the links between many forms of global crime and corruption ... have only grown stronger, and it is critical to acknowledge and address them through more effective policies that curb illegal financial flows, foster transparent governance and build capacity around anti-crime efforts at the national and local levels.”*

A lack of good governance, manifesting itself in maladministration, corruption and a lack of accountability and transparency, means that the majority of the people in South Africa are not only deprived of access to basic services but also side-lined from and lose confidence in the administrative and political activities and processes leading to the provision of such services.

South Africa has steadily been performing worse in Transparency International's Corruption Perceptions Index (CPI), which ranks countries/territories based on how corrupt a country's public sector is perceived to be. The country is ranked 72nd out of 177 countries surveyed, with a score of 42 out of 100 in the index.

These developments, and in particular risks associated with corruption and the failure of good governance has significant mandate implications for the Public Protector as an avenue for complaints and investigation of malfeasance and maladministration in the state and its bureaucracy, and even to protect fundamental

rights. Investigating, redressing and eradicating improper conduct or maladministration in state affairs is clearly about promoting good governance.

## **2. THE PUBLIC PROTECTOR'S PERSPECTIVES ON SOME OF THE RISKS FACING THE COUNTRY**

### **2.1 Governance failures**

According to the Mo Ibrahim Foundation's Index of African Governance for 2014, the most comprehensive collection of data on African governance South Africa's quality of governance on national level has ranked fourth in a list of 52 African countries. Arguably the greatest single failure of governance in South Africa is at local government level, as the lives of far too many citizens – especially those in small towns and rural areas – remain basically unchanged. Ironically by volume we as Public Protector South Africa receive the highest number of complaints against municipalities. The figures are startling-

As the key site of service delivery and development, the point of delivery where all spheres of government converge - local government is vital in providing the ordinary citizen with access to water and electricity supply, refuse removal, street cleaning, public transport, infrastructure investment, some health services, housing, parks, street trading and market stalls, and social amenities.

Governance failures are not only critical elements in the risk areas relating to maladministration and corruption, but are also recognised as contributing factors to the other risks identified on national and global Level. In respect of health risks, in particular the threat of pandemics like the Ebola outbreak, the WEF noted that *“coordinating responses and developing global governance mechanisms are critical to contain future outbreaks”*. Fighting risks associated with climate change requires the development of infrastructure in more sustainable, low-carbon ways which needs *“governance, technical, financial and institutional capacities that are often lacking in developing countries”*.

Locally the concept of good governance features strongly in the National Development Plan (NDP) in Chapter 14 dealing with the fight against corruption but

runs like a golden thread throughout the NDP as a requirement and enabler for most of the programmes and objectives stated in the Plan, including -

- a) Economic growth and development through adequate investment in energy infrastructure
- b) Public-transport investment
- c) Ensuring equitable transition to a low-carbon economy
- d) Rural governance
- e) Spatial patterns across all geographic scales that exacerbate social inequality and economic inefficiency
- f) Strengthen the health system
- g) Leadership and management
- h) Clarify the governance of state-owned enterprises (SOEs)
- i) Strengthen delegation, accountability and oversight: the oversight role of Parliament and Provincial Legislatures; and
- j) Mainstreaming citizen participation at local government level

In terms of our observations on the key governance gaps in the public sector the driving forces behind the risks relating to corruption and governance failures, include the following

- a) A lack of accountability closely linked to the question of leadership;
- b) Culprits enjoy impunity while the whistle-blowers suffer occupational and other detriment despite their protection under the Protected Disclosures Act;
- c) Many organs of state do not have strong systems and controls to support effective implementation particularly at local government level;
- d) In most instances, the weak systems and controls are due to capacity deficits in the form of skills, knowledge, institutional memory among and, to a limited extent, inadequate numbers of technical support people;
- e) The skills shortages include lack of understanding of the regulatory framework, with special reference to the Public Finance Management Act, the Municipal Finance Management Act and treasury regulations;

- f) One of the recurring concerns in maladministration investigations is the question of selective enforcement of prescripts resulting in laxity in enforcing accountability for compliance with laws, policies and prescripts.
- g) Lack of knowledge required to empower the people to demand the service standards in terms of quality and quantity they deserve and to hold those who exercise public power accountable
- h) Fragmented commitment to openness and transparency, which are two factors that constitute part of the key to ending maladministration and corruption.
- i) Failure to recognise one of the essential elements of the rule of law -the idea that nobody is above the law regardless of who they are.

## **2.2 Corruption**

Former World Bank President James Wolfensohn has repeatedly called corruption “the single greatest obstacle” to long-term development. More recently, corruption has emerged as a first-order concern in many post-conflict transitions as well.

We have a sound constitutional and legal framework with a complimentary arsenal of anti-corruption safeguards that we have established since the dawn of our 21-year-old democracy.

Our Constitution, which is the supreme law of the country, lays the foundation for those entrusted with public power. Constitutional imperatives include open democracy, public accountability, the supremacy of the Constitution and the rule of law. Supremacy of the Constitution means our courts, with the Constitutional Court at their pinnacle, have a final say on conduct required in compliance with the Constitution and people's rights

Legislation, includes the Prevention and Combating of Corrupt Activities Act, the Prevention of Organised Crime Act, the Protected Disclosures Act, the Witness Protection Act and the Financial Intelligence Centre Act and the Public Protector Act among others.

Watchdogs and oversight bodies include the Directorate for Priority Crime Investigation also known as the Hawks, the Independent Police Investigation Directorate, both falling under the SAPS, the Asset Forfeiture Unit under the National Prosecuting Authority, the Special Investigating Unit, Witness Protection Unit, the Presidential Hotline and the Anti-corruption Coordinating Committee under the Department of Public Service and Administration. We also have independent constitutional institutions with administrative oversight powers, which include the Public Protector, the Auditor-General and the Independent Electoral Commission and the Public Service Commission. Human Rights bodies such as the South African Human Rights Commission also play a role in fostering integrity by limiting discretion of decision-makers through enforcing human rights.

Despite a comprehensive anti-corruption arsenal, the 2013 Afrobarometer report, based on surveys of 51 000 people in 34 African countries, shows that South Africa is one of the countries where there is a notable increase in public perceptions that corruption is getting worse, particularly since 2008.

According to a recent study by the Institute for Security Studies<sup>1</sup> the manifestations of corruption may broadly be divided into two groups. Some involve corrupt transactions in which members of the public make payments to officials (bribery and extortion), while others involve government officials channelling public resources to themselves (misappropriation or abuse of state resources). The 2014 report issued by Corruption Watch reveals that abuse of power is the most prevalent type of corruption, constituting 41% of all the complaints received in 2014

According to a 2013 Transparency International (TI) survey, 47% of South African adults who had accessed one or more of eight different public services admitted to paying a bribe during the year prior to the survey, with the view to -

- a) To speed up the delivery of a service
- b) To receive a service or document to which they are entitled or to influence a decision even though they may already fulfil the administrative requirements.

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1 Bruce D, 2014: Counting the covert: Using data to understand corruption in South Africa, ISS Monograph Number 189

- c) To receive a service to which they are not entitled or illegitimately influence a decision in their favour;
- d) To avoid or reduce a legitimate sanction
- e) To avoid illegitimate sanction (pure extortion).

The National perceptions on Local Government fraud and corruption<sup>2</sup> reflect that Nepotism is the most common form of corruption (73.2%). Other forms of corruption include tender irregularities, maladministration and signing of cheques without appropriate controls, as well as the misuse of council property.

Some of the contributing factors that contribute to the high risks in this area include:

a) Permissive institutional norms

Permissive institutional norms that allow authorities to abuse their position. Public officers who refuse to take bribes are perceived as dogmatic and inflexible.

b) Apathetic/ intimidated Public

Political norm *vis-à-vis* institutional norm created apathetic public which feels powerless/disengaged to take action against corruption. The public no longer views corruption as offensive, instead much less punishable. Members of the public lost sight of their rights in obtaining goods and services.

People may believe that there is no point in reporting it or that it is not worth the trouble, for example if they believe that their information will not ensure that someone is prosecuted or disciplined. Victims or whistle-blowers play a huge role in exposing corrupt offences but need to have a motive for reporting it. This motive has to be strong enough to overcome the fear of adverse consequences or other factors that may discourage them from reporting it.

c) Insufficient capacity

Insufficient investigative capacity within public entities causes substantial delays, withdrawal and cancellation of investigations. Public entities take several months to finalize investigations - implicated officials resign without facing disciplinary sanctioning.

A report by the law firm Edward Nathan Sonnenbergs noted that, in the 2011–2012 financial year, public sector fraud cost taxpayers close to R1 billion, up from R130,6 million in 2006–2007. The report highlighted that a lack of accountability appeared to drive the problem. It found that although 88% of public officials tried for financial misconduct were found guilty, only 19% were fired. The rest remained in the public sector, where they were potentially able to continue with their criminality

d) Non reporting of financial misconduct

The most prevalent unlawful behaviour is financial misconduct. The legislative framework is prescriptive in terms of the action that must be taken against the public servant who wilfully or negligently makes or permits unauthorized, irregular or wasteful expenditure. The public service is obligated to report financial misconduct in terms of the PFMA, Treasury Regulations and PCCAA. The problem is that a significant number of public entities fail to take action or to report unlawful behaviour to law enforcement authorities.

Annual reports of the Public Service Commission on criminal proceedings instituted against public servants reveal that the majority of the public service does not comply with their mandatory reporting obligations and has consistently shunned instituting criminal charges in appropriate circumstances. We have a report in our hands on substantial misconduct in the North West Department of Education which is gathering dust.

e) Disproportionate sanctions

PSC Report on Financial Misconduct reflects that in many instances where incidents of financial misconduct were reported, there were no meaningful consequences. Most common sanction was a final written warning (43%).

Only 19% of officials found guilty were discharged. As a result the majority of perpetrators remain in their positions and often continue to commit financial misconduct.

According to a previous PSC report the losses from the finalized cases of financial misconduct totalled R346 million, and only 13% of this amount was recovered from officials (R44 million) whilst 87% remained lost to the public service (R302 million).

### **3. CONSEQUENCES OF RISKS THAT HAVE MATERIALISED IN RESPECT OF THE IMPACT ON GOVERNMENT, BUSINESS AND CITIZENS.**

When he addressed the UN General Assembly during the adoption of the UN Convention Against Corruption in New York, eleven years ago the former General Secretary of the United Nations, Mr Kofi Annan said the following:

*“Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life, and allows organised crime, terrorism and other threats to human security to flourish.”*

He went further to say:

*“This evil phenomenon is found in all countries big and small, rich and poor but it is in the developing world that its effects are most destructive. [It] hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid.”*

Corruption in public procurement is the primary cause of poverty in Africa, fostered by poor governance and weak legislation. According to World Bank and African Union surveys, public procurement corruption costs Africa \$148-billion a year and worldwide it is estimated to be \$390-400 billion per year.<sup>3</sup> Corruption has enormous negative consequences. It diverts public funds into unnecessary, unsuitable,

<sup>3</sup> Preventing Corruption in African Procurement, Professor Awadi Sadiki Mawenya, Number 9, August 2008)

uneconomic and actually, “undemocratic” projects with the primary objective to serve the interests of a few individuals at the expense of the country and its citizenry. In October 2011 Willie Hofmeyr, then head of the Special Investigating Unit (SIU) told South Africa’s Parliament that between R25-billion and R30-billion of government’s annual procurement budget alone was lost to corruption, incompetence and negligence. (source Corruption Watch).

According to a report by a non-profit research group in Washington, Global Financial Integrity, which monitors cross-border flows of illicit cash around the world South Africa has suffered a staggering outflow of about **R185 billion** in illegal money since 1994 due to corruption in the private and public sectors. The report named South Africa as having the fifth high-est illicit financial outflow in Africa - \$25 billion between 1994 and 2008 - after Nigeria, Egypt, Algeria and Morocco.

*The corruption of money and politics – is undermining democracy and robbing the poor of their most basic needs today. The conditions are severe: Half of South Africa’s 50 million people live in poverty, earning less than R500 per month. Between a quarter and half of citizens cannot find work. Nearly one in five is living with HIV, contributing to a national life expectancy of just 52 years. A mere ten percent of income is shared by the bottom half while close to 60 percent goes to the wealthiest ten percent<sup>4</sup>*

Corruption affects us all. It threatens sustainable economic development, ethical values and justice; it destabilises our society and endangers the rule of law. It undermines the institutions and values of our democracy. But because public policies and public resources are largely beneficial to poor people, it is they who suffer the harmful effects of corruption most grievously.

At the launch of the Anti-Intimidation and Ethical Practices Forum in Johannesburg In January 2015 the Institute of Internal Auditors South Africa stated that South Africa has lost an estimated **R700bn to corruption over the last 20 years**.

According to a recent article in NEWS24, this amount could have provided the following infrastructure and services

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<sup>4</sup> The Cost of Public Corruption in Democratic South Africa, MONEY and POLITICS PROJECT, 2011

- a) The cost of an RDP home at R 54 000.00, that money could have bought 12 500 000 Homes.
- b) A 760 bed hospital can be constructed for 1.5 Billion Rand. 450 of these hospitals could have been constructed. That is 252 000 hospital beds;
- c) A primary care clinic can be constructed for 4 Million Rand. That is 168 750 clinics stolen from the people. Each clinic could see 20 000 patients a year. We only have about 4 200 clinics in South Africa now.
- d) A school catering for 1 200 learners can be constructed for 40 Million Rand. This equates to 16 875 schools stolen from the people of South Africa.
- e) 2.4 Billion Rand can construct a wind farm large enough to provide electricity to 97 000 homes. 281 of these farms could be constructed for the money stolen. This is enough power for 27 257 000 homes. Load shedding would no longer be required and we would have enough power for a lot of future growth.

When you look at it though, it is not just the infrastructure that was stolen. The jobs that would have been created are stolen too. The money spent there would have come back into the economy stimulating growth. Some of that income would have been gained back to the state coffers in taxation. It could have gone even further funding more for the citizens of South Africa.

#### **4. THE ROLE OF THE PUBLIC PROTECTOR**

The Public Protector's mandate regarding the combating of corruption derives directly from the Constitution. Section 182 of the Constitution gives the Public Protector power to investigate any conduct in state affairs and the public administration at any level of government that is alleged or suspected to be improper; to report on that conduct and to take appropriate remedial action. This mandate stems from the overriding mandate of supporting and strengthening constitutional democracy that the Public Protector shares with other constitutional institutions, established under chapter 9 of the Constitution.

The Constitution states that the Public Protector has additional powers as prescribed by law. There are currently 16 national statutes that elaborate on the Public

Protector's Powers. It has recently come to our attention that there are also provincial statutes.

The anticorruption mandate also derives from the maladministration mandate under the Public Protector Act. Section 6(4)(a)(iii) of the Public Protector Act further specifically provides that the Public Protector shall be competent to investigate-

(iii) any improper or dishonest act or omission or offences referred to in Part 1 to 4 or sections 17, 20 or 21 (in so far as relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, with respect to Public money.

The Public Protector's anticorruption mandate is shared with other institutions. These include the Public Service Commission whose mandate is restricted to Public Servants, the Special Investigating Unit (SIU) whose mandate is restricted to a proclamation by the President; and the Asset Forfeiture Unit. The SIU, the police, including the Hawks and the National Prosecuting Authority, incorporating the Asset Forfeiture Unit, currently carry the primary workload in regard to fighting corruption as a crime in both the public and private sectors.

In addition to the Prevention and Combating of Corrupt Activities Act, the Prevention of Organised Crime Act and the Protected Disclosures Act, are part of the legal framework that supports efforts aimed at combating corruption. In some way the Promotion of Access to Information Act (PAIA) also contributes to anti-corruption efforts by promoting public accountability, primarily regarding reasons for decisions, through access to information.

A significant part of the national anticorruption framework is the National Anticorruption Forum whose interventions include a national Anticorruption Hotline and a regular National Anti-Corruption Summit.

## **5. STRATEGIES FOR TURNING THE TIDE AND STAND UP AGAINST CORRUPTION AND IMPUNITY**

What then do we do about it?:

- 5.1 Use international instruments, for example the United Nations Convention against Corruption, UNCAC, whose articles include protection for whistle-blowers.
- 5.2 Build strategic networks and coalitions mobilise support, using a broad approach (largely, preventive education, investigation, and public campaigns), by involving multiple partners (media, civil society, government institutions) through coalition building and networking with different spectrums of society to fight corruption

For example”: Colombia, the program Culture of Lawfulness (COL) 2 aims “to integrate the different sectors in a society to create a unified culture of lawfulness.” COL has taken up this task with three main strategies:

- (1) consolidating a group of public and private leaders and local authorities to become leaders in fostering a culture of lawfulness;
  - (2) promoting knowledge and the transformation of attitudes directed at recognizing the benefits of a culture of lawfulness,
  - (3) institutionalizing education about the rule of law in formal and synergistic programs across sectors to empower -
    - (a) public servants/law enforcement,
    - (b) mass media,
    - (c) school-based education, and
    - (d) centres of moral authority to promote the rule of law.
- 5.3 Use domestic national legal instruments and other existing legal frameworks, to build pressure for government to increase transparency and accountability.
  - 5.4 Create mechanisms to enable citizens to voice their concerns and initiate advocacy efforts against corruption.
  - 5.5 Design and implement creative activities aimed at developing a culture of vigilance and fostering active citizen participation in the campaign against corruption.

5.6 Utilise social media platforms to display and debate cases of corruption. Private initiatives such are proving to be very effective to encourage victims to report on corruption cases that they have personally experienced (In India the concept of a "zero-rupee note" was introduced to fight corruption by shaming the officials who ask for bribes).I also recommend using the state's own Twitter handles and Facebook pages to make known frustrations relating to governance

5.7 Mobilise citizens to improve or change the legal framework to alleviate institutional Impunity to corruption. Encourage public participation and advocacy initiatives to push for public access to government information, specifically on corruption cases

(In Bangladesh an Advice and Information Desk (AID) programme was established "to equip citizens to take action on cases of corruption that they have witnessed or been victims of including legal action, filing complaints with responsible anticorruption or other agencies, and "blowing the whistle" within institutions or bringing media attention to the issue

5.8 Establish a societal approach. "Corruption is a societal ill and requires the commitment of all members of society." (National Planning Commission). The private sector plays a role on the "supply side of corruption", paying bribes for government contracts, charging inflated rates for government contracts. There are incidences of corruption within the private sector itself such as price-fixing and collusion between businesses.

(Competition Commission - 15 Construction companies accused of collusion in the Construction Industry. Penalties of R1.46 billion)

5.9 The Focus Areas to for public and private sectors to address Fraud and Corruption should include steps to improve-:

- a) Training of management & staff
- b) Implement and enforce Risk Management and Fraud Policies
- c) Implement and enforce IT Policy (Internet Use)
- d) Promotion of ethical conduct and good business Practices- corporate code of conduct/ethics
- e) Whistleblower policy

- f) Review and/or improve internal controls
- g) Segregation of duties
- h) Improve security measures
- i) Organisational culture
- j) Senior management commitment

## 6. CONCLUSION

From the overview of the legislation it is evident that government has put in place a comprehensive and regulatory framework to combat corruption, but reports by the Auditor General and research by oversight bodies such as the PSC by has consistently shown a decided weakness in implementation of the framework.

The next phase of the anti-corruption effort should be focused on the successful institutionalization of principles of accountability, integrity and responsiveness in public service, anchored in stewardship service ethos.

An institution's environment is the foundation of risk management, providing the underpinning culture, discipline and structure that influence how strategy and objectives are established, how institutional activities are planned and executed and how risks are identified, assessed and acted upon.

To give effect to this, Accounting Officers and Heads of Institutions should ensure that the Institution<sup>5</sup>:

- a) *operates within its Constitutional mandate;*
- b) *adopts a value system founded on a public service ethos;*
- c) *possesses the inherent competencies required to execute its mandate;*
- d) *adopts management practices that embrace the concepts of delegation of authority, personal responsibility, accountability and performance management; and*

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<sup>5</sup> Adapted from South Africa: Public Sector Risk Management Framework

- e) *has an appropriate organisational structure supported by basic financial and management systems underpinned by risk management and internal controls.*

***We dare not allow the situation to arise whereby corruption is seen as an inevitable fact of life in South Africa. We believe that South Africa has not yet reached this point of no return. Whilst corruption poses a major governance challenge, there are concrete, practical steps that can be taken to halt and reverse the tide of corruption. We must seize the moment and turn the tide.<sup>6</sup>***

The biggest intervention for me is for us to stop talking about these things. Actions definitely speak louder than words. We have reached the cruising altitude in the journey to a mature, sound democracy. All we have to do is reinforce the fundamental values that got us here and never to repeat the awful past nor to emulate the mistakes of failed states. I wish you well as you deliberate today.

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<sup>6</sup> Corruption, Towards A Comprehensive Societal Response