

# **Attending to the *audi alteram partem* rule: a perspective on the combatting of fraud and corruption in the public sector**

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**Albert van Zyl ©**

**Unit for Corruption and Integrity Studies**

**North-West University Business School**

# NWU Business School



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# 1. Introduction

# Introduction

## Our world post the Zondo Commission, Covid, ...:

- **SCC: Confirmed ‘state capture’ and ‘rampant corruption’** [i.e. very common and spreading in an uncontrolled way]
- **Rampant corruption:** “*pervasive culture of corrupt practices, mismanagement and malfeasance that had been inculcated within...*”
- **State capture:**
  - “... one of the most pervasive forms of corruption, where companies, institutions or powerful individuals use corruption such as the **buying of laws**, amendments, decrees or sentences, **as well as illegal contributions to political parties and candidates, to influence and shape a country’s policy, legal environment and economy** to their own interests” (Transparency International (2014))
  - “State Capture is a *political-economic project* whereby **public and private actors** collude in establishing **clandestine networks** that *cluster* around *state institutions* in order to *accumulate unchecked power, subverting the constitutional state and social contract* by operating outside of the realm of public accountability” (Godinho & Hermanus)

# Introduction

- **“Understood as** the disproportionate and unregulated influence of interest groups or decision-making processes, where special interest groups **manage to bend state laws**, policies and regulations **through** practices such as **illicit contributions** paid by private interests to political parties and for election campaigns, parliamentary **vote-buying**, buying of presidential decrees or court decisions, as well as through **illegitimate lobbying and revolving door appointments”**.
- State capture can also arise from the **more subtle close alignment of interests** between specific business and political elites through **family ties, friendship and the intertwined ownership of economic assets**.
- “The main risk of state capture is that decisions no longer take into consideration the public interest but instead favour a specific group.
  - **In a state of capture laws, policies and regulations are designed to benefit a specific interest group**, often to the detriment of smaller firms, or groups, or society in general”.
  - It is the process of making laws, policies and regulations that individuals or business entities seek to influence, not the implementation of existing laws”.

# Introduction

## The ugly face of corruption:

- The Transparency International Corruption Perceptions Index scores indicate that, like most countries in the world, South Africa has made **little or no progress** in the fight against corruption **over the last 10 years**.
- *“...in this complex world, corruption, or the overreach of public power for personal profit, has become a problem that affects most of the political, social and economic actions of a society. **[Corruption] slows economic growth and development, debilitate democratic institutions, and produces governmental uncertainty and instability, which can lead to crime and homicides.** Moreover, **poverty and corruption is likely to increase** because of the lack of opportunities and the decrease in social investments and economic growth. Economic growth is debilitated because investment decline due to the increase in transaction costs”.* (Poveda, Carvajal & Pulido)
- There is a **direct correlation** between the **prevalence of corruption** and a **lack of democracy and human rights infringements**
- *“Many **low performing countries** have several commonalties, **including few political rights, limited press freedoms and a weak rule of law.** In these countries, **laws often go unenforced and institutions are poorly resourced with little ability to handle corruption complaints.** In addition, **internal conflict and unstable governance structures contribute to high rates of corruption.**”*
- *“...by not fighting corruption; productivity, investment, capital and, therefore, economic growth and development decreases over time”.*

# Introduction

- **Homicide, Development, Inequality and Corruption**
- A 2019 Global Study on Homicide by the United Nations Office on Drugs and Crime (“UNODC”) shows that “**overall, there is a strong link between a country’s homicide rate and its level of development**”.
- Nevertheless, some of the highest homicide rates recorded worldwide cannot be explained by the level of development alone. South Africa appears to be one of these **interesting exceptions**, as it has a **comparatively high GNI per capita** (for instance compared to other Sub-Saharan countries) **and at the same time a high homicide rate**.
- However, it was found that there is a **clear and well-established link between homicide rates and income inequality**:
  - Countries with pronounced **income inequality** tend to have a **comparatively higher homicide rate**.

# Introduction

- *In the 2017 Fragile States Index, “South Africa ranked as the most-worsened country over the preceding decade that was not in a state of conflict, with a ten-year worsening trend that was matched only by the likes of war-torn Libya and Syria for the magnitude of its negative rate-of-change”*
- **Suspected gang conflict over tenders leaves 11 houses and four cars torched in NW township.** Very few complaints were lodged with the police. **Reportedly gangs were formed to hijack tenders.** Decided to impose companies owned by gang members to be awarded certain tenders. The gangsters forcibly entered the municipality and delivered a memorandum in which they **demanded to be given tenders.** (City Press, 3 March 2021)
- **The Nigerian experience:** “The problem is that politicians have been captured by the same mobs, gang leaders and warlords they raised to win elections – the monsters they nursed over the years”; “Our country is sliding into anarchy and the harder you try to run away from headlines of deaths, violence and destruction, the faster the news catches up with you”; “Crime thrives on indulgence”



# Introduction

- **Political killings: Findings and Recommendations from the 2018 Moerane Commission**
  - “The **recruitment of criminal elements by politicians to achieve political ends**, resulting in a complex matrix of criminal and political associations, **inevitably contributes to political murders**”
  - “**There was overwhelming evidence from the majority of witnesses that access to resources through the tender system is the main root cause of the murder of politicians.** There was ample evidence before this Commission that the [procurement provisions in the Constitution] were violated in all respects by manipulation and exploitation by politicians and public officials in collusion with business people.”
  - That the State immediately take measures to **depoliticise and professionalise the public service**. The State must also take measures to immediately **enforce the separation of powers**, duties, and functions between public representatives and public officials and **hold each accountable** professionally and criminally for their respective conduct.
  - “The investigation of corrupt activities and the attendant criminal acts by politicians, public officials and business people must be **vigorously investigated** and those against whom there is evidence of corruption must be **expeditiously prosecuted** and if found guilty must be **appropriately sentenced** to **rebuild the confidence of the public** in the public service and to avoid building a culture of impunity and a culture where perpetrators believe that they are politically protected from prosecution and punishment.”
  - “**The culture and network of patronage and impunity does not stop provincially but stretches nationally and the problem must therefore be prioritised provincially but eventually addressed nationally!**”



## **2. Lessons from State Capture & Rampant Corruption for Professions**

# Lessons from State Capture & Rampant Corruption for Professions

- Role of professionals (auditors, lawyers, advisory firms) as **enablers of corruption**
  - E.g. “The Commission believes that the answers she gave to certain questions during her evidence revealed **either that she has no clue about some of the basic obligations that she should know as a Chartered Accountant or she knew those obligations but dishonestly pretended that she did not know them** because it was convenient for her to do so. **In either case SAICA should be interested in investigating...**”
  - “In addition , both Ms Memela and Ms Mbanjwa are officers of the court. Ms Memela is an advocate and Ms Mbanjwa, an attorney. Despite this, they have participated in a fraudulent scheme to try to hide money that was paid as a kick-back to Ms Memela. **It is recommended that the Legal Practice Council should investigate whether the two should not be removed from the roll of attorneys, in the case Ms Mbanjwa, and, from the roll of advocates, in the case of Ms Memela...** Her conduct in this regard **should also receive the attention of the Legal Practice Council.**
  
- **Criticism** on professionals/professional bodies:
  - lack of oversight,
  - delays in implementing disciplinary measures,
  - proper fines

# Lessons from State Capture & Rampant Corruption for Professions

- **Robust checks and balances are essential constitutional mechanisms** and prerequisites for constitutionalism
- **Professional bodies fulfil a crucially important constitutional role**, by providing much needed **constitutional checks and balances** in their respective spheres in society
  - E.g., independent **lawyers**:
    - “...at its zenith was the most potent constitutional check on the aspiring sovereign”;
    - **Protect clients** from state, but also **remain measurably independent** from clients;
    - Remain loyal towards **the pursuit of justice**
- **Professional bodies offers protection to its members through its ‘corporate body’, thereby allowing them to speak up on fraud and corruption** without having to compromise or expose themselves individually
- **Autonomy NB: self governing and self regulating**; knows best what is required (access, training, standards, discipline)
- Unique character of **profession that operates across state borders**



### **3. Understanding the combatting of fraud and corruption**

# Understanding combatting of fraud and corruption

- Corruption can broadly be described as the “**abuse of power entrusted to a public or corporate sector official for private gain**” or “misuse of public office for private gain”
- Understand **the nature of corruption**:
  - Corruption: the ‘**happy crime**’.
  - Unlike other crimes (violent or commercial crime) often **no direct and/or immediate victim** (e.g. husband murdered by robbers in his house vs. corruption in respect of a tender)
  - Corruption is very often **not reported** to the authorities.
  - **Difficult to detect**
  - **Differences regarding the extent of corruption**
    - Every country/community has its own definition of where to draw the line
    - **Where do we draw the line** between illegal bribery and acceptable “gifts of good will”..
  - **Difficult to prove in a court of law** (especially against the mastermind or head of a syndicate)
  - **Traditionally focused only on the receiver**
- Corruption, like most crimes, **not only a police problem**
- Combatting of corruption – requires a **holistic approach**
- **Innovative measures required**: Hence, reporting duties; the creation of a culture conducive for whistle-blowing; protection of whistle blowers; money laundering offence; asset forfeiture; international collaboration OR self-reporting; deferred prosecution agreements; bounty-hunting; etc.

# Understanding the combatting of fraud and corruption

## The nature of economic crime

- “The **essence of fraud is a breach of trust**. Trust is the very foundation of commerce and of civil society. Economic crime thus jeopardises basic interpersonal relations, economic development, and in some cases, even the stability of governments” (Grabosky, P., 2001)
- Economic crime is often **complex and technical**
- It requires a **lot of time, dedication and specialized resources** to investigate
- “Crime is a **changing phenomenon**”. Specifically in terms of economic crime, it is true that what were inconceivable less than a decade ago, now pose significant risks to the economy and society.” (Grabosky, P., 2001)
- The environment of economic crime is characterised by **unprecedented mobility** of information, finance, goods and services, people, cultural artefacts, flora and fauna, even viruses-both those of the microbial variety as well as those which infect one's hard drive”.
- “The globalisation of finance, where electronically mediated exchanges occur in nanoseconds, is far removed from the days where deals were sealed with a handshake, and a man's word was his bond. The **proliferation of anonymous financial transactions** is accompanied by a commensurate proliferation of opportunities for betrayal of trust.” (Grabosky, P., 2001)

# Understanding the combatting of fraud and corruption

- These dynamics in economic crime are **increasingly becoming beyond the capacity of law enforcement agencies alone to control**, specifically in developing countries.
- The South African High Court's observation in **S v Botha** (1995 (2) SACR 598 (W)) confirms the aforementioned and made a very important observation in this regard:
  - In an application for his discharge, an accused contended that in terms of s 215 of the Interim Constitution, that the South African Police Service was entrusted with the task of investigating crimes and alleged crimes. **No other entity possessed this authority**. As the greater part of the investigation had been carried out by **an entity's internal investigation service**, it was contended that the accused's right to a fair trial in terms of the Interim Constitution had been breached.
  - The Court held firstly, that the requirement of a fair trial had as a result that evidence which had been irregularly obtained before the trial was inadmissible.
  - The Court was further required to determine whether the accused could have a fair trial because virtually all of the investigation had not been performed by the police. The right to a fair trial was interpreted as to include also that which happened in the pre-trial phases.
  - The Court held that the **intention of s 215** was not to prevent someone who was not a member of the police service from investigating a crime. **Modern society was so specialised that no police service could by itself investigate and prevent all crime**. Many private bodies did their own investigation in matters which affected them. Only then were the results handed to the police service.
  - The Court accordingly held that there had been no breach of the accused's right to a fair trial. The application for discharge was accordingly dismissed.




# Understanding the combatting of fraud and corruption

- **A starting point and basis for crime prevention**
  - 1829, Sir Robert Peel: **Focus was on prevention through unarmed police officers** on patrol whose success was literally dependent on their **ability to win public approval** rather through coercion via oppressive measures. Policing today, still relies on these principles. **Public support, through cooperative partnership with the police, is the foundation of policing.**
- **Prevention of economic crime** typically focusses on aspects like improved intelligence and data analytics, fraud prevention plans, monitoring and compliance systems, transparency, accountability, independence, reporting duties, the creation of an anti-corruption/fraud culture, political will, specialised units and training, etc.
- It is generally accepted that **effective fraud prevention measures reduce the quantity and magnitude of future fraud.** PwC's 2020 Global Economic Crime survey show that there is a clear link between fraud prevention investments made upfront and reduced cost when a fraud strikes.
  - Companies that have a dedicated fraud programme in place generally spent **42% less on response, and 17% less on remediation** costs than those companies with no programme in place.
  - Where bribery or corruption was experienced, companies with a dedicated bribery and corruption programme spent **58% less** on remediation than those without.

# Understanding the combatting of fraud and corruption

- The nature of effective policing ALSO depends heavily on the **societal and political environment in which the relevant actors function AS WELL as the functionaries, the people, and the management of those involved in the battle.**
- The combatting of economic crime, and specifically the preventative measures, should be managed within this **broader contextual environment.**
- Some elements of the context/environment wherein those involved in the prevention of economic crime in South Africa will be discussed



## **4. The nature, role and place of commercial forensic practice**

# The nature, role and place of commercial forensic practice

- **The nature of forensic investigations:**
  - **Unique** - cannot do detailed planning in advance like an audit
  - Manage **expectations** and **frustrations**
  - **Change** is a constant
  - **Where will the report end up?** Nature of investigations not always clear cut at the outset of an investigation, or the aim may change as new evidence come to the fore > Prepare to be able to adhere to the highest standard (i.e. be prepared that the matter may end up in a criminal court)
  - Litigious environment: **A lot to lose** > Important to protect yourself and your firm...
  - Improperly conducted and careless investigations **may have a very detrimental effect on everybody's** career associated by such investigation
  - **Sloppy techniques, careless gathering of facts and the bending of rules** are not acceptable and very risky
  - *“Today you cannot get away with unethical and improper investigations and if you try you will land yourself and your employer on the wrong end of a lawsuit.”*

# The nature, role and place of commercial forensic practice

- **Audit vs Internal Audit vs Forensic Investigation vs The Court**

INTERNAL AUDIT	EXTERNAL AUDIT	FORENSIC INVESTIGATION
<b>Definition:</b>	<b>Definition:</b>	<b>Definition:</b>
Internal auditing is an independent, objective assurance and consulting activity designed to add value and improve an organization's operations.	An external auditor is an independent professional who conducts external audits of companies. An external auditor expresses an opinion on the fair presentation of companies' financial statements.	Forensic accountants are involved in the prevention, detection and investigation of commercial crimes (such as fraud, corruption and money laundering).
<b>Professional body:</b> <u>IIA</u>	<b>Professional body:</b> <u>IRBA; SAICA</u>	<b>Professional body:</b> <u>ACFE; ICFP</u>

- **Knowledge of the law:**

- What is expected from you?
- What elements should be proved for a particular crime? What is the applicable burden of proof?
- **Know your own rights, those of your client AND respect those of others**

- **Aim of the investigation:**

- Is it acceptable to say that the aim is to get the client's money back?
- Or to get rid of a person?

*“The search for truth takes you where the evidence leads you, even if, at first, you don't want to go there.”*

Bart D. Ehrman

# The nature, role and place of commercial forensic practice

## Clarity on your role in legal proceedings is important

- "The increasing development of science and technology has the result that expert evidence, in its different fields and manifestations, will increasingly influence legal decision-making. The term '**expert evidence**' includes a range of opinion evidence. This evidence, in turn, **can vary greatly in probative value, weight and purpose**. The term is used to denote certain kinds of specialized, systematised knowledge not usually possessed by non-specialized magistrates and judges. Expert evidence therefore involves the meeting and mixing of two distinct professional worlds, those of law and science." (Meintjies-Van der Walt)
- Majola v Times Media: "***now, therefore, the defendant is guilty of the crime of theft***"
- R v Sole: "**appears**" and "**apparently**" in forensic report
- Lavelle Vere NO and others v MEC for Department Economic Development, Environment, Conservation and Tourism North-West Province (UM 112/2020 and UM 145/2020) on the importance of the audi alteram partem rule and its application in forensic investigations
- Msiza v Motau N.O. and Another (78587/2018) [2020] ZAGPPHC 366; 2020 (6) SA 604 (GP) (11 August 2020)
- **Objective and independent collation and communication of admissible evidence**
- A **proper understanding** of the issues at hand in the legal proceedings, will enable the forensic practitioner to decide **what** should be investigated, **how** it should be done and **what** to report on.

# The nature, role and place of commercial forensic practice

- History has shown that presiding officers **easily lose confidence in the merits of reports** when they find that the report is not properly researched, objective and well-motivated (Van der Hoven, 2006:169)
- “One thing is for certain, **you can expect to be rigorously examined** [in court] over your work. Thus, your ethics and professionalism will come into play in a big way. A professional should do the best job possible for the client, but **the way to do that is by being independent, objective, maintaining confidentiality, avoiding conflicts of interest**, and not accepting any contingency fees based on the outcome of the case. An open, honest assessment of the facts and circumstances is the best approach to high-quality client service” (Kranacher, 2011:497).

*“A good forensic investigator is somebody who has an inquisitive spirit. He/she also has to have integrity. You cannot approach a case with prejudices, you have to stay objective. Put the facts in a report, not your opinion. Any reader with some degree of intelligence would be able see the person is guilty. Work with facts and allow it to speak for itself.”*

*(Adv. Jan Swanepoel, 2015).*



## **5. Developing standards for the ICFP**



# Developing standards for the ICFP

## The Institute of Commercial Forensic Practitioners as a relevant example:

- Established 2010
- Developing of tailormade South African specific standards for the commercial forensic practitioner practicing in South Africa
- **Vision**
  - To be a respected self-regulator of the commercial forensic profession in South Africa and to be internationally aligned.
- **Mission**
  - The mission of the Institute for Commercial Forensic Practitioners (ICFP) is to Cohere, Co-ordinate and Self-regulate the Commercial Forensic profession in South Africa.
- **The primary purpose of the Institute is more fully described as being to:**
  - **cohere** the emerging industry in South Africa,
  - co-ordinate key initiatives to **develop the industry**,
  - serve the interests of the Commercial Forensic Practitioners and society, by upholding **internationally acceptable professional standards and integrity, and the pre-eminence of South African Commercial Forensic Practitioners nationally and internationally**,
  - **delivering competent entry-level members** with relevant skills

# Developing standards for the ICFP

- **Broad principles that underlies the ICFP as a self regulatory body:**
  - **Exists at the request of a profession**, industry and market,
  - **Independent**,
  - **Accredits** individuals, qualifications and institutions by means of a transparent, credible, objective and consistent process,
  - Has **active support** from the industry, key client markets and government,
  - Has relevant and recognised **expertise**,
  - **Serious consequences** for non-compliance.

# Developing standards for the ICFP

## Key objectives of the Institute

- **In order to fulfil its mission, the Institute will:**
  - Regulating the commercial forensic profession in South Africa by **providing a regulatory framework and a code of conduct for forensic practitioners;**
  - **Delivering competent entry-level members** with relevant skills to the forensic industry;
  - Providing services to assist members to **maintain and enhance their professional competence** thereby enabling them to create value for their clients and employers;
  - Fulfilling a **leadership role** regarding relevant business-related issues and providing public commentary on matters impacting the forensic industry;
  - **Developing a brand** for the forensic profession and its members that is **trusted and recognised** by all stakeholders.

# Developing standards for the ICFP

- **2019** the Board established a Standards Committee; established sub-committees, consulted wide with members, academia, relevant role players
- **Considerations in the development of standards for the ICFP:**
  - Needed to **protect public interest** by ensuring **consistency** to a minimum standard of practice
  - **Not intended to codify practical rules** and to **address all matters** associated to engagements. Rather provide **conceptual guidance**.
  - Assist with **application of professional judgment**. **Principle based**.
  - Due to unique nature of forensic engagements, the application of professional accounting and investigative skills must be customized to the **specific circumstances of each engagement**.
- **Sub-committees were guided by the following relating to the proposed standards:**
  - Commercial Forensic Practitioners should be **inspired by the proposed standards and not interpret it as being prescriptive**.
  - The proposed standards should be a **guideline** for Commercial Forensic Practitioners.
  - It was decided to initially focus on the development of **general performance and conduct standards** and that these standards would form the **foundation of the development of further, more specialised, detailed or specific standards**, where needed, at a later stage

# Developing standards for the ICFP

- 14 July 2022, AGM adopted:
  - Attribute standards
  - Information gathering standards
  - Reporting standards
- Outstanding: client and engagement acceptance standards

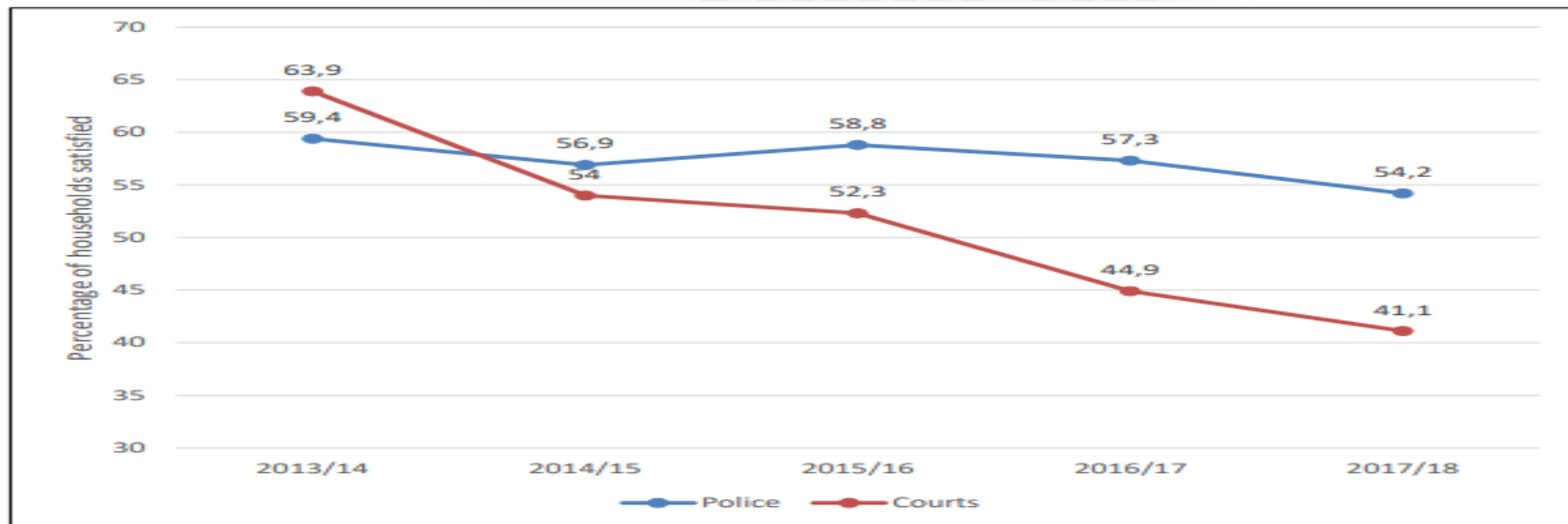


## **6. Perception and the issue of trust**

# Perceptions and the issue of trust

## Victims of Crime Survey (“VOCS”)

- VOCS data shows **notable declines in victims’ reporting of crime** to police in recent years.
  - For example, in **2013/14, 90%** of victims reported their **stolen vehicles** to police but by **2019/20 only 79%** did so.
  - Similar declines are found in **hijacking (100% to 78%)** and **assault (67% to 41%)**.
  - **Why is this happening? What does it tell us?**
- Table below - a % distribution of households' **satisfaction with police services** in their area and the way in which courts generally deal with perpetrators of crime, for the period 2013/14 – 2017/18 (not repeated in 2019 or 2020):



# Perceptions and the issue of trust

## Trust in the Police

- (Source: South Africans have low trust in their police. Here's why (Roberts, B. & Gordon, S. The Conversation. <https://theconversation.com/south-africans-have-low-trust-in-their-police-heres-why-17882>). Analysed trends in police confidence since the late 1990s (data from the [South African Social Attitudes Survey series](#), of the [HSRC](#))
- “The **legitimacy of legal authorities is recognised globally as crucial for the state’s ability to function in a justifiable and effective manner.** This applies, in particular, to the police.”

The pattern of public confidence in the police over the 1998 to 2021 period:

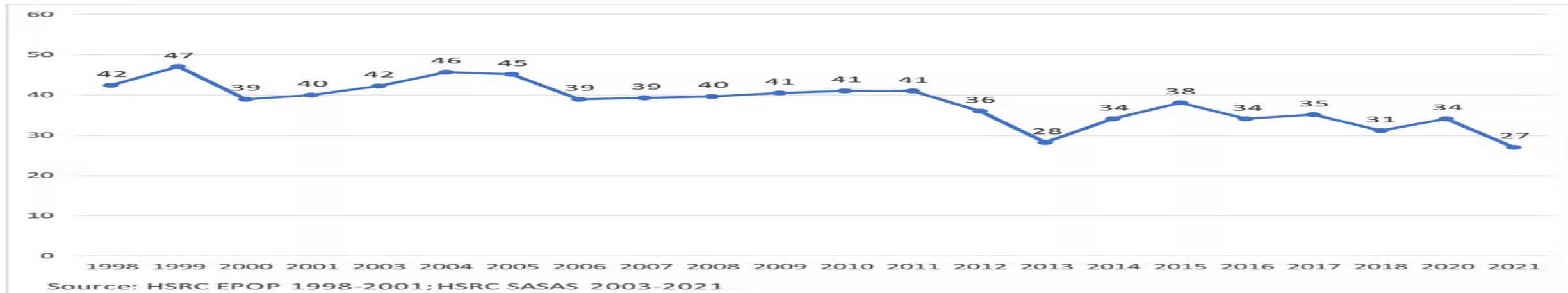


Figure 1: Confidence in the police, 1998-2021 (% trust/ strongly trust) HSRC EPOP 1998-2001; HSRC SASAS 2003-2021

- Trust levels have remained **relatively low** over this period. Issue of **low trust in the police is not new.**
- Sharp **decline between 2011 and 2013 (following Marikana, August 2012)**, but confidence had almost returned to the 2011 level by 2015.
- The **hard COVID-19 lockdown in 2020** saw instances of police brutality. However, did not observe a decline in public confidence in the police during the 2020 period.
- **In 2021 public trust in the police dipped to a low 27%.** This appears to be linked to the July 2021 social unrest



# Perceptions and the issue of trust

## SELECTED CAUSATIVE FACTORS MURDER, ATTEMPTED MURDER AND ASSAULT GBH JAN TO MAR 2021/2022



<i>Causative factors</i>	<i>Murder</i>	<i>Attempted murder</i>	<i>Assault GBH</i>
<i>Arguments/Misunderstanding (not domestic-related)/Road Rage/Provocation</i>	875	986	17 964
<i>Retaliation/Revenge/Punishment</i>	341	292	1 248
<i>Robbery</i>	262	643	271
<i>Gang-related</i>	166	244	24
<i>Vigilantism/Mob justice</i>	358	73	570
<i>Law enforcement &amp; security guards in line of duty (excl. police murder)</i>	22	290	185
<i>Intervention in a fight</i>	23	35	629
<i>Taxi-related</i>	9	27	13
<i>Rape-related</i>	18	33	15
<i>During commission of another offence - (not robbery or rape)</i>	38	57	1 435
<i>Illicit mining</i>	8	7	0
<i>Carjacking/attempted</i>	31	121	6

Sample size: murder = 5 226 counts, attempted murder = 4 276, assault GBH = 27 565



# Perceptions and the issue of trust

Carjacking/attempted	Murder	Attempted murder	Assault GBH	Total
Arguments/Misunderstanding (not domestic-related)/Road Rage/Provocation	875	986	17964	<b>19825</b>
Retaliation/Revenge/Punishment	341	292	1248	<b>1881</b>
During commission of another offence (not robbery or rape)	38	57	1435	<b>1530</b>
Robbery	262	643	271	<b>1176</b>
Vigilantism/Mob justice	358	73	570	<b>1001</b>
Intervention in a fight	23	35	629	<b>687</b>
Law enforcement & security guards in line of duty (excl. police murder)	22	290	185	<b>497</b>
Gangrelated	166	244	24	<b>434</b>
Carjacking/attempted	31	121	6	<b>158</b>
Rape-related	18	33	15	<b>66</b>
Taxi-related	9	27	13	<b>49</b>
Illicit mining	8	7	0	<b>15</b>

# Perceptions and the issue of trust

## Factors affecting confidence in the police:

- **“Experiences of crime:** Those who had been recent victims of crime displayed significantly lower levels of trust in the police.
- **Fear of crime:** Higher levels of fear are associated with lower trust in the police. This applies to classic measures such as fear of walking alone in one’s area after dark, as well as worrying about home robbery or violent assault.
- **Experiences of policing:** Negative experiences with police have a bearing on how the public judge police. Those reporting unsatisfactory personal contact with police officers expressed lower trust levels than those reporting satisfactory contact.
- **Well publicised instances of police abuse or failure:** These can also reduce public confidence in police. Apart from the 2012 Marikana massacre, another prominent example is the perceived ineffectiveness of the police in responding to the July 2021 social unrest. (or recently in Kirkwood?)
- **Perceptions of police corruption:** These have a strong, negative effect on confidence in police.
- **Perceived fairness and effectiveness:** Past in-depth research has shown that the South African public strongly emphasises both fairness and effectiveness as important elements in their overall assessments of confidence in police. The more the police are seen to be acting unfairly on the basis of race, class or other attributes, the more people are likely to view them as untrustworthy.
- Similarly, **perceptions that the police treat people disrespectfully, lack impartiality in their decision making, or transparency in their actions**, can also undermine public confidence. If the police are seen as ineffective in preventing, reducing and responding to crime, this will also diminish confidence.
- Another factor influencing how the public view the police is **the broader evaluation of the government’s democratic performance and trustworthiness**. Importantly, public confidence in democratic institutions has shown a strong downward trend over the past 15 years. This has had a bearing on confidence in the police.”

# Perceptions and the issue of trust

- Our role in the legal environment



# Perceptions and the issue of trust



- **Hermes – the messenger**
- Messenger of the gods of trade, thieves, travellers, sport, athletes, border posts, guide to the underworld
- **Trust:**
  - Integrity
  - Independence



## **7. Attribute standards**

# Attribute standards

## 1. Introduction

- 1.001 In Commercial Forensic Practice, **expertise and integrity** are combined to serve the public interest. Commercial Forensic Practitioners collect, analyse, scrutinise and present data, facts, information and evidence in an objective and impartial way, allowing clients, employers and society to prevent, detect and respond to economic crime and related irregularities.
- 1.002 **Reliability and quality** in this profession **follows from rigour** in the application of professional standards, and a **commitment to** ethical standards.

# Attribute standards

- 1.004 **The aims** of this document, and of the principles and standards outlined herein, are to:
- a. **Articulate the shared ethical aspirations and commitments** of the profession (representing our collective conscience).
  - b. **Offer guidance and clarity** to professionals when making ethical decisions and evaluating different courses of action (representing the profession's moral "compass").
  - c. Provide **a foundation** for professional development activities.
  - d. Enable our clients, stakeholders and the general public to **understand the role and values** of the profession, and **to evaluate** the conduct and performance of its members.



# Attribute standards

## 2. Core Ethical Guidelines: Principles

### 2.001 Commercial Forensic Practitioners shall apply and uphold the following principles:

#### a. Integrity

- The integrity of Commercial Forensic Practitioners **establishes trust** and thus provides **the basis for reliance** on their professional services and advice.

#### b. Objectivity

- Commercial Forensic Practitioners exhibit the **highest level** of professional objectivity in gathering, evaluating, and communicating information about the activity or process being examined. Commercial Forensic Practitioners make a balanced assessment of **all the relevant circumstances** and are not unduly influenced by their own interests or by others in drawing inferences and conclusions.

# Attribute standards

## d. Confidentiality

- Commercial Forensic Practitioners **uphold the right to privacy**, respect the value and ownership of the information they receive and do not disclose information without appropriate authority, unless there is a legal or professional obligation to do so.

## e. Competency

- Commercial Forensic Practitioners apply the knowledge, skills, and experience needed in the performance of commercial forensic services.

## f. Legality

- Commercial Forensic Practitioners **respect and apply the law** as applicable to the profession, particularly the provisions contained in the bill of rights as set out in the Constitution of the Republic of South Africa, 1996.

# Attribute standards

## 3. Core Ethical Guidelines: Attribute Standards

### 3.1 Integrity

#### 3.101 Commercial Forensic Practitioners shall:

- a. Perform their work with honesty, diligence, and in a responsible manner.
- b. Not knowingly be a party to any illegal activity or engage in acts that are discreditable to the profession of commercial forensics or to the Institute.
- c. **Respect and contribute** to the legitimate and ethical objectives of the Institute.
- d. **Comply** with the rules of the Institute.
- e. On a confidential basis bring any professional conduct by a member of the Institute that comes to his or her attention and which contravenes the **letter or spirit of this code** to the attention of the chairperson of the Board, or to any other person designated for that purpose by the Board, and shall participate fully in any appropriate steps that may be taken to address the contravention.

# Attribute standards

## 3.2 Objectivity

3.201 Commercial Forensic Practitioners shall:

- a. Refrain from any activity or relationship that may impair or be seen to **impair their unbiased assessment**, including activities or relationships that may **conflict with the interests** of the Institute.
- b. Not accept anything that may impair or be seen to **impair their professional judgment**.
- c. **Disclose all material facts** known to them that, if not disclosed, may distort the reporting of activities under investigation or review.

# Attribute standards

## 3.3 Confidentiality

3.301 Commercial Forensic Practitioners shall:

- a. **Take all reasonable steps** in order to protect the confidentiality of information acquired in the course of performing their duties.
- b. Not use information for any personal gain or in any manner that would be contrary to the law or detrimental to the legitimate and ethical objectives of the Institute.

# Attribute standards

## 3.4 Competency

### 3.401 Commercial Forensic Practitioners shall:


- a. Engage only in those services for which they have the necessary knowledge, skills, and experience.
- b. Continually improve their proficiency and the effectiveness and quality of their services.
- c. Comply with continuous learning and development measures approved by the Institute.

# Attribute standards

## 3.5 Adherence to the law and professional standards

3.501 Commercial Forensic Practitioners shall:

- a. Ensure that they have an adequate knowledge of the applicable laws and professional standards.
- b. **Act in accordance with the applicable legal provisions**, especially the fundamental human rights as enshrined in the Constitution of the Republic of South Africa, 1996, in the execution of their work, as per the particular mandate entered into between them and their respective clients.
- c. Observe the law and make disclosures expected by the law and the profession.



## **8. Information gathering standards**



# Information gathering standards

## 1. General principles and considerations prior to gathering information

1.001 Commercial Forensic Practitioners should gather and consider both inculpatory and exculpatory information.

### Explanatory note

- **Inculpatory information** refers to information that **tends to establish guilt** with regards to allegations.
- **Exculpatory information** refers to information that **tends to establish innocence** with regards to allegations.
- The standard to gather and consider both inculpatory and exculpatory information, **stems from the audi alteram partem-principle**.
- The audi alteram partem-principle forms the **foundation of natural justice**, and natural justice forms a central part of the **objective of a forensic investigation**.
- It is important for Commercial Forensic Practitioners to **continuously consider** the audi alteram partem-principle throughout the processes of identifying, gathering, analysing and evaluating information in order to ensure that a **balanced assessment** is made of the case at hand.

# Information gathering standards

- 1.002 It is a practice standard that Commercial Forensic Practitioners only commence with gathering information after the scope and objectives of an engagement have been established.
- 1.003 It is advised that Commercial Forensic Practitioners establish a legal framework and acquaint themselves with applicable regulations and legislation prior to commencing with gathering information in order to ensure that all tasks performed reflect adherence to constitutional and legal requirements.

## Explanatory note

- A legal framework can include legislation, policies, regulations and contracts and serves as the framework for measuring the behaviour and actions of Commercial Forensic Practitioners against.
- The legal framework also serves as a guideline for Commercial Forensic Practitioners to measure events or facts of an engagement against, and to properly advise clients of the best approach to an engagement.
- The following legislature will always form part of the legal framework within which Commercial Forensic Practitioners operate: the Constitution of South Africa (1996), the Protection of Personal Information Act, 9 of 2009, the Regulation of Interception of Communications and Provision of Communication-related Information Act 70 of 2002; the Promotion of Access to Information Act, 2 of 2000.
- Depending on the nature of the investigation, the following legislature might form part of the legal framework within which Commercial Forensic Practitioners operate:
  - a. The Prevention and Combatting of Corrupt Activities Act, 2004.
  - b. The Prevention of Organized Crime Act, 121 of 1998.
  - c. The Protected Disclosures Act, 26 of 2000.
  - d. The Witness Protection Act, 112 of 1998.
  - e. The Labour Relations Act 66 of 1995.
  - f. The Companies Act 71 of 2008.
  - g. The Protection Against Harassment Act 17 of 2011.
- It is essential for Commercial Forensic Practitioners to ensure that they obtain and maintain sufficient knowledge of the legislature listed above, as well as other legislation, policies, regulations and contracts that might be relevant to a specific engagement. A lack of such knowledge might lead to a transgression of the legal framework by Commercial Forensic Practitioners, which can ultimately cause information that was identified, gathered, analysed and evaluated to be inadmissible in a court of law.

# Information gathering standards

- 1.004 It is advisable that Commercial Forensic Practitioners perform **thorough planning** prior to commencing with gathering information.
- It is considered a good practice to draft a planning document for the information gathering process that reflects *inter alia*:
    - a. **The type of information** to be gathered.
    - b. **Where** the information might be located.
    - c. The date and time when gathering of different information sources ought to take place, taking into account the time and budgetary constraints of the engagement.
    - d. The volume of information that is expected to be gathered, and the corresponding amount and nature of resources required (such as the amount of team members, time and skills) to gather such information.
    - e. The possibility that the assistance of specialists might be required when gathering certain information sources.
    - f. The approaches, techniques and procedures to be used to gather information.
    - g. The **precautionary measures** that might have to be taken in order to secure the gathered information.

# Information gathering standards

- 1.005 It is advisable that Commercial Forensic Practitioners determine a **hierarchy of the importance** of information to be gathered prior to commencing with gathering information. Information that is deemed more important to the engagement at hand, should be gathered firstly, if possible.
- 1.008 The **confidentiality of information** should be safeguarded throughout the processes of gathering, analysing, evaluating, documenting and retaining information.

# Information gathering standards

1.009 It is advisable that Commercial Forensic Practitioners **already plan for the securing of information and maintaining the chain of custody of information before commencing** with the gathering of information.

## Explanatory note

- The chain of custody of information that might possibly be used as evidence starts as soon as information is obtained or gathered. It is therefore important for CFP's to take into account the methods, tools or resources that might be required to ensure that information, especially information in its original format and information of such a nature that it is susceptible for modification or destruction, is properly secured as soon as it is gathered.
- Information refers to all the articles or items that were gathered that contains some form of information, regardless of whether it is relevant or not.
- Evidence refers to relevant information, thus information indicating whether allegations or beliefs in dispute are true or untrue. Evidence can be intended to be presented to a disciplinary panel or a court of law.

# Information gathering standards

1.010 **Professional scepticism** should be exercised throughout the process of identifying, gathering, analysing and evaluating information.

## Explanatory note

- Professional scepticism refers to an attitude that includes a questioning mind and being cognizant of the possibility that information might be inaccurate, incomplete, biased, false or misleading. It also refers to the critical analysis and evaluation of gathered information.
- Analysis refers to the process of separating and associating of gathered information in order to gain a better and more complete understanding of such information.
- Evaluation refers to the process of assessing gathered information and making a judgment about the relevance, reliability and ultimately the value of such information.

# Information gathering standards

## 2. Gathering Information

### 2.1 General

- 2.101 Commercial Forensic Practitioners should only gather information that falls within the scope of an engagement.
- 2.102 It is advisable that **formal requests for information** are drafted and sent to clients to gather information.
- 2.103 Requests for information should be clear, well worded and accurate.
- 2.104 It is advisable that Commercial Forensic Practitioners gather information from **various sources in order to test the credibility of sources and information.**
- 2.105 Information must be gathered in compliance with applicable laws and regulations.
- 2.106 Commercial Forensic Practitioners should ensure that they gather sufficient, relevant and reliable information.
- 2.107 Precautionary measures must be taken to ensure that information is properly secured at the time of gathering to prevent modification or destruction of information.

# Information gathering standards

## 3. **Analysing and documenting gathered information**

### 3.1 **Information analyses**

- 3.101 Gathered information should be critically **analysed in an impartial manner.**
- 3.102 The focus of information analyses should be on testing or evaluating information to identify any inconsistencies or contradictions and to establish the relevance and reliability of the information.

### 3.2 **Documenting information**

- 3.201 It is the best practice for Commercial Forensic Practitioners to document the analyses performed on working papers.
- 3.202 Working papers should be cross-referenced with the sources of information on which the analyses were performed.
- 3.203 It is advised that Commercial Forensic Practitioners only document information that, after analyses were performed, were determined to be reliable and relevant.
- 3.204 An adequate amount of the gathered information is documented to satisfactorily support their conclusions and / or findings.
- 3.205 **All information must be documented thoroughly and accurately.**



# Information gathering standards

- 3.206 It is advisable that Commercial Forensic Practitioners also document the following:
- a. The standards, regulations and policies relevant to the engagement.
  - b. All the work that was performed during the engagement.
  - c. All the information or materials that was requested and received throughout the engagement.
  - d. The underlying facts of the engagement that were established, including conclusions and / or findings.
  - e. The methods that were used to perform analyses on information and to subsequently reach conclusions, as well as the rationale for using such methods.
  - f. **Communications with the client, witnesses, suspects and third parties.**

## Explanatory note

- *It is advisable that **all communications with** clients, witnesses, suspects and third parties, which may include letters, emails, meeting minutes, interviews and phone-calls, are documented. This serves as a **precautionary measure** for if a communication becomes contested, the Commercial Forensic Practitioner **has a record of such communication**. It also assists in **minimising the risk of misrepresentation** if communication decisions and instructions are documented.*

# Information gathering standards

## 3.3 Working papers

- 3.301 Working papers should be identifiable, clear, concise, organised and easy to comprehend.
- 3.302 Working papers should be generated in such a manner that it can be produced independently to third parties and as if it is expected to be reviewed by such third party or a regulatory body.

### Explanatory note

- Working papers **may form part of evidence** that is used in legal or disciplinary proceedings or presented to a court of law and should thus be properly documented and maintained.

- 3.303 The following information should be included in working papers:
- a. The name of the creator of the working paper.
  - b. The date of the working paper.
  - c. A concise and clear heading that indicates the purpose of the working paper.
  - d. The sources of information that were used to generate the working paper.
  - e. The issues that are addressed by the information analysed and subsequently documented on the working paper.

# Information gathering standards

4.109 Commercial Forensic Practitioners should, throughout an engagement, be **cognizant of the confidentiality of information and safeguard such confidentiality.**

- The best practice is to treat all information as if it is confidential and privileged information.
- Accordingly, information should be recorded and secured in such a manner that parties that have no role in the engagement, do not have access to such information or to records thereof.

4.204 The **confidentiality of working papers and related information sources** should be properly safeguarded.

## Explanatory note

- *Since working papers can be created from confidential information sources, and consequently also contain confidential information, it is important that working papers are also treated as confidential information sources.*



## 9. Reporting Standards

# Report writing standards

## 2. The format, extent and nature of a forensic report

2.001 It is advisable that the format, extent and nature of the report are agreed with the client.

2.002 There are various reporting formats.

2.003 **The format of the report should be informed and ultimately determined by consideration of the following:**

- a) Purpose and intended utilisation of the report;
- b) Circumstances underpinning the request;
- c) Nature of the procedures performed; and
- d) Recipients of the report.

# Report writing standards

## 3. Qualitative characteristics of a forensic report

- 3.001 The contents of the report must reflect that the investigation and compilation of the report were conducted in an objective and independent manner.
- 3.002 The report should only address the scope of work and mandate for which the Commercial Forensic Practitioner was appointed.
- 3.003 The report must be confined to the field of expertise of the Commercial Forensic Practitioner.
- 3.004 The rationale for selecting the procedures and analysis performed should be recorded in the report.
- 3.005 The report should only address aspects within the ambit of procedures and analysis performed.

# Report writing standards

3.006 The report must reflect adherence to constitutional and legal requirements.

## Explanatory note

- The constitutional framework within which the Commercial Forensic Practitioner executes his/her work, demands consideration of the applicability of constitutional and various other legal requirements and principles, **such as the audi alteram partem principle.**
  - Concerning last mentioned principle, an implicated party **may be given an opportunity to provide facts and personal insight, to refute or substantiate known facts.**
  - However, **concerns of witness intimidation, evidence destruction, fleeing, or asset dissipation, should also be weighed up against the appropriateness of how and when to apply this principle,** as it may have an impact on the findings and conclusions.
  - **Legal advice** should be obtained should last mentioned eventualities occur.
- If the version of those implicated/potentially implicated is not obtained, the Commercial Forensic Practitioner, **may not be in a position to make adverse findings, conclusions and recommendations against them.**
  - This will then **be a limitation in the report** as the findings may be subject to being adjusted upon consideration of the implicated party's response.
  - The report, when considered holistically, should illustrate that during the execution of the investigation as well as the compilation of the report, these requirements were considered and complied with.

3.007 The report should **reflect all relevant evidential material, information and views collated and considered.**

# Report writing standards



THE GREAT BANK HEIST  
Investigator's Report to the Prudential Authority



ADVOCATE TERRY MOTAU SC  
Assisted by





# Report writing standards

3.009 In instances where confidentiality, secrecy and/or legal privilege is applicable, it must be clearly indicated in the report

## *Explanatory note*

- Consider conditions and requirements of non-disclosure arrangements and/or agreements.
- Consider the impact of secrecy undertakings (for example work performed for the South African Revenue Services or the Special Investigating Unit).
- The inherent intersection between confidentiality and legal privilege
- Although confidentiality and legal privilege are two distinctly different concepts, reference to them appears to be inseparably intertwined. [Reference to legal privilege, includes both legal advice privilege and legal professional privilege, unless the text specifically indicates a specific type of legal privilege] The reason for their interchangeability may originate from their obligate symbiosis, i.e., legal privilege cannot exist without confidentiality.
- All forensic engagements have to be executed in a confidential manner but is incorrect to assume that all forensic engagements are executed under legal privilege.
- The reasons underpinning the demarcation between, and applicability of confidentiality and legal privilege are set out below.

# Report writing standards

## **Confidentiality**

*One of the professional attribute standards that the Commercial Forensic Practitioner is expected to apply and uphold, is confidentiality. Consequently, there is a **professional duty** on the Commercial Forensic Practitioner to perform her/his work in a confidential manner. The existence of this duty establishes professional trust and fosters client collaboration and witness cooperation which in turn enable and enhance the ability of the Commercial Forensic Practitioner to **objectively and independently obtain and consider all facts** during the execution of an investigation.*

*The Commercial Forensic Practitioner should, at all times, even after the conclusion of a forensic engagement, ensure that confidentiality is: **Respected, Protected, Upheld***

*Communication, whether written or verbal, made in confidence, is confidential and should be treated as such.*

*Confidentiality can be established tacitly, contractually or legislatively. In the forensic field, confidentiality is generally contractually established.*

*Confidentiality is perpetual.*

*The ambit of confidentiality is broader than the protection emanating from legal privilege as information may be confidential, even when not protected by legal professional privilege.*

# Report writing standards

## **Legal privilege**

*The doctrine of legal privilege is a common law construct and is foundational to the independence of the legal system. Legal privilege facilitates the effective functioning of the legal system as it creates an environment wherein communication between a legal practitioner and client can be shared freely and without fear or disclosure.*

*Confidentiality is a prerequisite for legal privilege, i.e., a client cannot claim that information is legally privileged, if the information was not confidentially disclosed.*

*There are two types of legal privilege, being legal advice privilege and legal litigation privilege. It is important for the Commercial Forensic Practitioner to understand the difference between the two types of legal privilege:*

- 1. Legal advice privilege pertains to all communication between a client and a legal practitioner (attorney or advocate) for the purpose of obtaining or providing legal advice. The purpose of this privilege is to enable a legal professional to provide legal advice in a professional capacity; and*
- 2. Legal professional privilege pertains to all communication between a client, a legal practitioner (attorney and advocate) and third parties, such as Commercial Forensic Practitioners, in contemplation of litigation, including investigations and/or preparation for trial. Legal professional privilege is sometimes referred to as litigation privilege. The ambit of legal professional privilege is broader than that of legal advice privilege and extends to communication between and material produced by non-legal practitioners.*

*Legal privilege belongs to a client and not to the legal practitioner (or third parties) and only the client may waive the privilege.*

*It is recommended that work executed by Commercial Forensic Practitioners, under legal professional privilege, is indicated as such. All related reports, whether progress, interim or final, should also be marked accordingly.*

# Report writing standards

3.10 If a draft report is issued, it should clearly be indicated that it is a draft report.

## Explanatory note

- Draft reports are often **issued to solicit comments, contributions and/or input from the mandator.** The purpose of issuing a draft report should be to ensure factual accuracy.
- The Commercial Forensic Practitioner should ensure that previous working versions and initial draft reports are dealt with appropriately to ensure that confidentiality and security is maintained. The rationale underpinning this suggestion is to protect the credibility of the final report – the unauthorised disclosure of working and/or incomplete draft reports may undermine the integrity of the final report (and investigation).
- When a mandator provides comments, contributions and/or input, the Commercial Forensic Practitioner is not obligated to amend his/her report. Comments, contributions and/or input should be considered and if, after consideration, it is determined that a factual inaccuracy should be corrected, the correction should be incorporated into the final report.



## **10. Whistle blowing practice note**

# Whistle-blowing practice note

## Protection of Whistle blowers

- South Africa has had a dedicated whistleblower protection law since 2000, the Protected Disclosures Act, 2000. Provision is also made for the protection of whistle blowers in the Companies Act and the Labour Relations Act.
- According to **Blueprint for Free Speech**: *“Given the increase in corruption, and more importantly, in the perceived level of corruption amongst the public in South Africa, we should be seeing an increase in the rate of whistleblowing. In summary, the statistics that are available tend to show that **the current framework is not adequate to meet the challenges of growing corruption and fear of retribution in South Africa.**”*
- **2021 Freedom in the World Report**: *“The August 2021 murder of Babita Deokoran, a whistleblower who tipped off the Special Investigations Unit (SIU) to corruption in the Gauteng health department, **suggests that protection measures for whistleblowers are weak.**”*
- The **Open Democracy Advice Centre’s** study on the experiences of whistleblowers described the experience of whistleblowers in South Africa as **“harrowing”**. And further that South Africa **“cannot move forward if these experiences are not given full consideration – and innovative solutions are then explored to ensure a transparent South Africa that encourages citizens to blow the whistle safely, and effectively”**.
- National Director of Public Prosecutions **Shamila Batohi** after a December 2021 shooting of a regional prosecutor in Umlazi, KZN: **“The increase in attacks on those fighting for justice in our country should concern all of us. We need to significantly improve the protection of criminal justice officials, whistle-blowers and witnesses in South Africa. The rule of law depends on it. The future of our country depends on it. And we owe it to these brave men and women. This will require a multi-stakeholder effort driven by government. And time is not on our side.”**

# Whistle-blowing practice note

## Progress?

- **Dudu Myeni**

[https://www.dailymaverick.co.za/article/2022-06-14-dudu-myeni-plans-to-plead-guilty-to-obstructing-justice-after-naming-state-capture-witness-mr-x/?utm\\_medium=email&utm\\_campaign=First%20Thing%20Wednesday%202015%20June%202022&utm\\_content=First%20Thing%20Wednesday%202015%20June%202022+CID\\_162e048c595973dfad11bd59dde97d2a&utm\\_source=TouchBasePro&utm\\_term=Dudu%20Myeni%20plans%20to%20plead%20guilty%20to%20obstructing%20justice%20after%20naming%20State%20Capture%20witness%20Mr%20X](https://www.dailymaverick.co.za/article/2022-06-14-dudu-myeni-plans-to-plead-guilty-to-obstructing-justice-after-naming-state-capture-witness-mr-x/?utm_medium=email&utm_campaign=First%20Thing%20Wednesday%202015%20June%202022&utm_content=First%20Thing%20Wednesday%202015%20June%202022+CID_162e048c595973dfad11bd59dde97d2a&utm_source=TouchBasePro&utm_term=Dudu%20Myeni%20plans%20to%20plead%20guilty%20to%20obstructing%20justice%20after%20naming%20State%20Capture%20witness%20Mr%20X)

- **Dr Tim de Maayers**

[https://www.dailymaverick.co.za/article/2022-06-13-dr-tim-de-maayers-act-of-conscience-highlights-new-power-balance-between-politicians-and-civil-servants/?utm\\_medium=email&utm\\_campaign=First%20Thing%20Tuesday%202014%20June%202022&utm\\_content=First%20Thing%20Tuesday%202014%20June%202022+CID\\_5528fd93a5b1dca19c60d6c5234f6869&utm\\_source=TouchBasePro&utm\\_term=Dr%20Tim%20de%20Maayers%20act%20of%20conscience%20highlights%20new%20power%20balance%20between%20politicians%20and%20civil%20servants](https://www.dailymaverick.co.za/article/2022-06-13-dr-tim-de-maayers-act-of-conscience-highlights-new-power-balance-between-politicians-and-civil-servants/?utm_medium=email&utm_campaign=First%20Thing%20Tuesday%202014%20June%202022&utm_content=First%20Thing%20Tuesday%202014%20June%202022+CID_5528fd93a5b1dca19c60d6c5234f6869&utm_source=TouchBasePro&utm_term=Dr%20Tim%20de%20Maayers%20act%20of%20conscience%20highlights%20new%20power%20balance%20between%20politicians%20and%20civil%20servants)

# Whistle-blowing practice note

- Read the Practice Note
- Implement it!





## 9. A final word...

# Concluding remarks

## Some relevant recommendations by the SCC:

- **Recommendation 1: The National Charter against Corruption**

- *“That the Government, in consultation with the business sector prepare and publish a National Charter against corruption in public procurement, such Charter to include a Code of Conduct setting out the ethical standards which apply in the procurement of goods and services for the public”*
- *“The National Charter should be signed by or on behalf of: the President and the Cabinet; the Provincial Premiers and members of the Provincial Cabinets; the local authorities; all State-Owned enterprises; the political parties represented in Parliament; constitutional entities; the institutional representatives of the business sector; listed public companies; Trade Unions; Anti-corruption bodies in civil society; every procurement officer in the public service shall, on assuming duty, be required to sign a commitment to observe and uphold the terms of the National Charter; every natural or juristic person tendering or contracting to supply goods or services by way of public procurement must sign a like commitment to uphold and to adhere to the terms of the Charter and its Code of Conduct”;*
- *“The content of the National Charter and the Code of Conduct should be widely publicised”;*
- *“The National Charter and Code of Conduct should be given legal status and effect by an Act of Parliament”.*

# Concluding remarks

- **Recommendation 2: The establishment of an Independent Agency against corruption in public procurement**
  - “That the Government introduce legislation for the establishment of an independent Public Procurement Anti-Corruption Agency (PPACA)”.
  - Detailed proposals for independence, financing (e.g. fees payable to the Agency by all tenderers for public procurement contracts), Powers and Composition:
    - a) Governing Council (to be selected by a panel consisting of the Chief Justice, the Auditor-General and the Minister of Finance following a public process; guidelines for transparency and betterment of public procurement; formulate measures for the making of reports to the Agency by whistle blowers and for their protection and incentivisation; negotiate agreements with any regulatory or oversight authority to co-ordinate and harmonise the exercise of jurisdiction over public procurement);
    - b) Inspectorate (monitor and inspect public procurement activity to detect and expose corruption; establish, maintain and update a comprehensive and secure data base recording and listing, e.g. information obtained from Whistle Blowers and complaints registered by tenderers; institute electronic procedures to facilitate the monitoring and inspection of public procurement activity);
    - c) Litigation Unit (apply to the Tribunal for the giving of authority to the Inspectorate to exercise powers of search and seizure; receive and negotiate Deferred Prosecution Agreements and refer such Agreements to the Tribunal for approval; apply to the Tribunal for an order debaring any person from participating in any tender process or the grant of any procurement contract either permanently or for a stipulated time and either conditionally or unconditionally)
    - d) Tribunal (consider search and seizures, Deferred Prosecution Agreements; debarment)
    - e) Court (determine civil actions instituted by the Litigation Unit for recompense to the State in respect of losses suffered through corrupt acts)

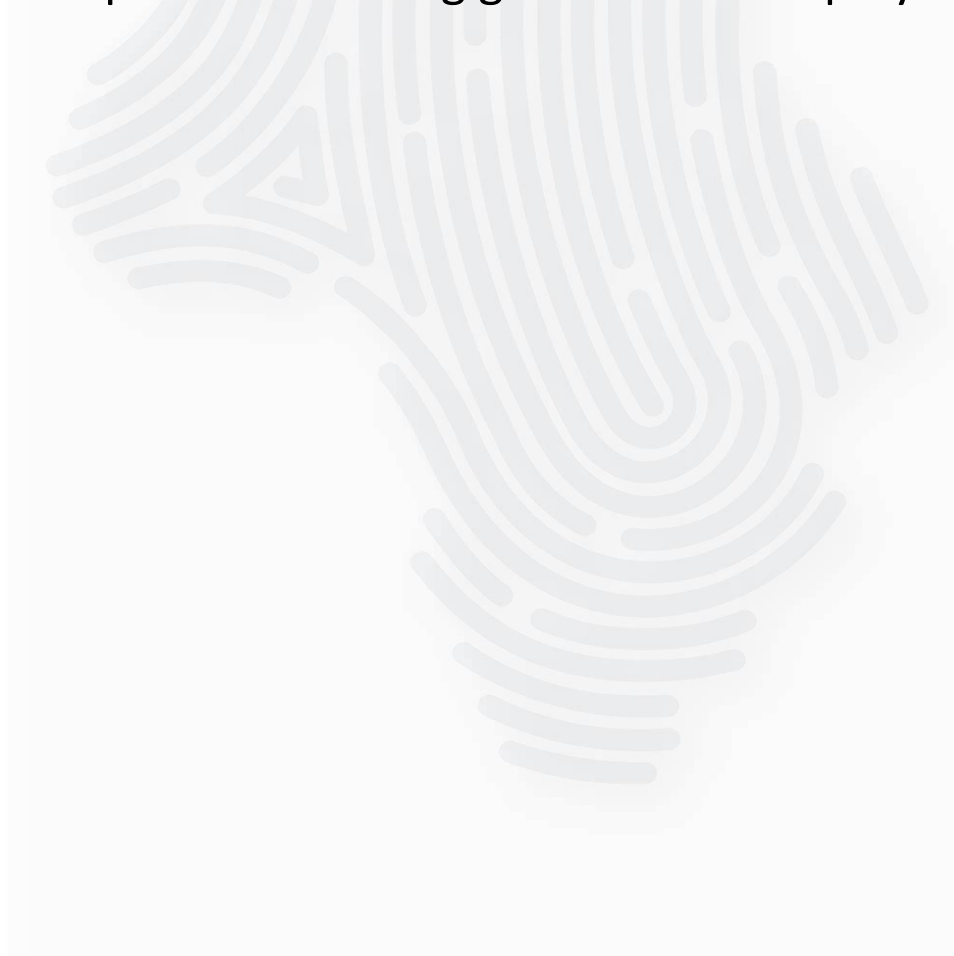
# Concluding remarks

- **Recommendation 3: Protection for whistle blowers**

- *“That the Government introduce legislation or amend existing legislation:*
  - *(i) to ensure that any person disclosing information to reveal corruption, fraud or undue influence in public procurement activity be accorded the protections stipulated in article 32(2) of the United Nations Convention Against Corruption;*
  - *(ii) identifying the Inspectorate of the Agency as the correct channel for the making of such disclosure;*
  - *(iii) authorising the Litigation Unit of the Agency to incentivise such disclosures by entering into agreements to reward the giving of such information by way of a percentage of the proceeds recovered on the strength of such information;*
  - *(iv) authorising the offer of immunity from criminal or civil proceedings if there has been an honest disclosure of the information which might otherwise render the informant liable to prosecution or litigation”.*
- *This recommendation introduces an idea similar to what is, inter alia, found in the US False Claims Act's qui tam provision which is one of the strongest whistle-blower protection laws in the US. (“In common law, a writ of qui tam is a writ through which private individuals who assist a prosecution can receive for themselves all or part of the damages or financial penalties recovered by the government as a result of the prosecution”.) What is your view on this recommendation?*

# Concluding remarks

- **Recommendation 5: The creation of a procurement officer's profession.**
  - It is recommended that consideration is given to enacting legislation that will establish a professional body to which all officials who work in the area of public procurement should belong.
  - Illustrating the potential seen in professionalizing government employees.



# Concluding remarks

- **The Commission calls for those who were duty-bound to report corruption but failed to do so, to be held accountable in terms of section 34 of PRECCA.**
  - *Are we doing enough to advise our clients of their duties in this regard, in applicable circumstances?*
  - *What can be done to enhance preventative measures to combat corruption and fraud, like what is envisioned in section 34 of PRECCA?*

# Concluding remarks

- **Recommendation 8: Suggested amendment of the Prevention and Combatting of Corrupt Activities Act 12 of 2004**
- In order to strengthen the duty of private sector entities to put in place measures against bribery it is recommended that PRECCA be amended by the introduction of a section 34A reading as follows:

*"34A Failure of persons or entities to prevent bribery*

*(1)Any member of the private sector or any incorporated state-owned entity ('A') is guilty of an offence under this section if a person ('B') associated with A gives or agrees or offers to give any gratification prohibited under Chapter 2 to another person ('C') intending-*

*(a)to obtain or retain business for A or*

*(b)to obtain or retain an advantage in the conduct of business for A, save that no offence shall be committed where A had in place adequate procedures designed to prevent persons associated with A from giving, agreeing or offering to give any gratification prohibited under Chapter 2.*

*For the purposes of section 34A(1), a person ('B') is associated with A if (disregarding any gratification under consideration) B is a person who performs services for or on behalf of A. The capacity in which B performs services for or on behalf of A does not matter."*

# Concluding remarks

- **Recommendation 8: Suggested amendment of the Prevention and Combatting of Corrupt Activities Act 12 of 2004**
- In order to strengthen the duty of private sector entities to put in place measures against bribery it is recommended that PRECCA be amended by the introduction of a section 34A reading as follows:

*"34A Failure of persons or entities to prevent bribery*

*(1)Any member of the private sector or any incorporated state-owned entity ('A') is guilty of an offence under this section if a person ('B') associated with A gives or agrees or offers to give any gratification prohibited under Chapter 2 to another person ('C') intending-*

*(a)to obtain or retain business for A or*

*(b)to obtain or retain an advantage in the conduct of business for A, save that no offence shall be committed where A had in place adequate procedures designed to prevent persons associated with A from giving, agreeing or offering to give any gratification prohibited under Chapter 2.*

*For the purposes of section 34A(1), a person ('B') is associated with A if (disregarding any gratification under consideration) B is a person who performs services for or on behalf of A. The capacity in which B performs services for or on behalf of A does not matter."*



# Concluding remarks

- **Recommendation 9: Suggested amendment of the Political Party Funding Act, 6 of 2018**
  - *“It is recommended that the Act be amended to criminalise the making of donations to political parties in the expectation of or with a view to the grant of procurement tenders or contracts as a reward for or in the recognition of such grants having been made”.*

# Concluding remarks

- **Recruitment of Board Members and Executives of SOEs**
  - *“The appointment of individuals to boards of SOEs must be justifiable based on their skills expertise, experience and knowledge”.*
  - *“It is therefore necessary that a body be established which will be tasked with the identification, recruitment and selection of the right kind of people who will be considered for appointment as members of Boards of SOEs and those who will be appointed as Chief Executive Officers and Chief Financial Officers at these SOEs.”*

# Concluding remarks

- **Creation of a statutory offence: the abuse of public power**

- *“Abuse of public power per se is not a criminal offence and, as has been shown in the present case, egregious abuses of public power tend not to be identified by legal processes until the perpetrators or those that protect them are out of power and then the assessment of the relevant facts will be a cumbersome, time consuming exercise, requiring as it does procedural fairness towards those accused of such abuse. It is therefore recommended that the Government give consideration to the creation of a statutory offence rendering it a criminal offence for any person vested with public power to abuse public power vested in that person by intentionally using that power otherwise than in good faith for a proper purpose. Such a statutory offence would therefore require considerable sentencing powers and might provide as follows in the operative section of the statute creating the offence: Any person who exercises or purports to exercise any public power, including any such power vested in such person by the Constitution, national or provincial legislation, any regulation made pursuant to national or provincial legislation or by municipal by law, otherwise than in good faith and for the purpose for which such power was conferred, shall be guilty of an offence and liable on conviction to a fine of up to R200 million or imprisonment for up to 20 years or to both such fine and imprisonment.”*

# Concluding remarks

## Recommendations pertaining to the award of state tenders

- *“It is recommended that every tender or contract between a government department and/or government entity and a service provider or a provider of goods or services should contain a **prominent clause** to the effect that **no service provider may subcontract or cede its/her/his right to provide the services or the goods to another person or entity or company unless the intended sub-contractor was disclosed in the bid documents as an entity to which the bidder would sub-contract.** Consideration may also be given to whether there should not be a statutory provision to this effect that will apply to all tenders in the public service. It is recommended that to the extent that current legislation or government policies of state owned entities or companies do not prohibit the awarding of a tender or the concluding of a contract for the provision of services or delivery of goods by a person or entity or service provider that does not produce proof that it has the requisite educational qualifications, knowledge or skills and experience for the job awarded to it, consideration should be given to ensuring that **legislation and policies of government departments or of state-owned entities require that no entity or person or service provider may be awarded a tender or may conclude any contract with a government department or a state-owned entity or company unless it has produced proof of relevant qualifications, skills experience or expertise required to perform the work.** It is recommended that consideration be given to the enactment of legislation that will make it a criminal offence for any official or office-bearer of a government department or of a state-owned entity or company to award a tender to or conclude a contract for the provision of services goods or with any person or entity unless he or she has satisfied himself or herself or itself that such person or entity has produced proof of possession of the minimum academic qualifications or experience or expertise”.*

# Concluding remarks

## Recommendations pertaining to money laundering and illicit money flows

- A **co-ordinated and co-operative** approach to targeting money laundering is required from all of the relevant enforcement agencies
- Second, it is necessary to use the anti-money laundering resources of the banks in a **more pro-active manner** than is currently the case. The South African Anti-Money Laundering Integrated Task Force ("SAMLIT") has been set up under the auspices of the FIG to **enable banks to share with each other** and with the authorities anonymized information and to discuss general trends. However, the absence of a statutory framework providing for the controlled sharing of detailed anti-money laundering information by banks appears remain an obstacle to fighting financial crime.
- Third, there is a need to investigate the **effectiveness of the current system of suspicious transaction and cash threshold reporting to the FIC under the FIC Act**. If banks are failing to make the necessary reports to the FIC, the FIC needs to take action against them, but if Banks are making the necessary reports to the FIC but no action is being taken against the money laundering networks, that suggests either a flaw in the current system or its implementation by the FIC and downstream enforcement agencies. In this context, the Commission recommends that the FIG should conduct an urgent review: (i) into the compliance of the South African banks with the FIG Act in relation to proceeds of State Capture laundered through accounts held by them, identifying whether, and to what extent, the FIC was alerted to these activities by reports under the FIC Act; (ii) what action was taken by the FIG pursuant to any relevant reports received from South African banks in this regard; (iii) what reports or recommendations were made by the FIG to other law enforcement agencies; and (iv) what steps, if any, were taken by those enforcement agencies to act on the recommendations of the FIC.

# Concluding remarks

## Regarding lifestyle audits:

- *“Lord Hain was asked to comment on a possible recommendation that public officials above a certain level as well as executives of companies wishing to do business undergo compulsory and regular lifestyle audits. He commented favourably on the suggestion, noting that this would supplement the proposal in relation to unexplained wealth orders”*

# Concluding remarks

## Establishment of a permanent Anti-State Capture and Corruption Commission

- “...the main function of which will be to **investigate, publicly expose acts of state capture and corruption in the way that this Commission did over the past four years, make findings and recommendations to the President.**”
- “...since it has been found by this Commission that the failure of Parliament to hold the executive, particularly President Zuma, accountable contributed to the Gupta-Zuma state capture, it will be necessary for the Anti-State Capture and Corruption Commission to **keep an eye on how Parliament performs its oversight function** and whether, in respect of any particular matters, it is performing or it has performed its oversight function effectively and has held the Executive including the President, accountable. Where the Anti-State Capture and Corruption Commission is of the view that Parliament has failed or is failing to perform its oversight function effectively and has not effectively held the executive effectively to account, it must step in, investigate the matter itself properly and call upon anyone to appear before it, testify and answer questions that may be put to him or her by the Chairperson of the Anti-State Capture and Corruption Commission in public and in the full glare of cameras unless...”
- “It must have power to call anyone within the National Executive and officials of government departments, state owned entities and members of Boards of Directors of state owned entities or anyone in the private sector including private businesses. With the Anti-State Capture and Corruption Commission, it will be possible for the Commission to call upon the President to appear before it and answer questions relating to certain matters. Anyone involved in acts of state capture and corruption must dread the day he or she may appear before the Commission and be subjected to intense questioning in front of the nation and in the full glare of TV cameras.”
- The Anti-State Capture and Corruption Commission must be chaired by a Judge. Preferably, the Judge should be a retired Judge. The Chairperson of the Anti-State Capture and Corruption Commission must have power to appoint evidence leaders and investigations... and other personnel that he or she considers the Commission needs and will do a good job.”

# Concluding remarks

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# Concluding remarks

- **Do we have the necessary structures and measures to significantly improve the combating of corruption in South Africa...**
- Chapter 9
- AG, the eyes and ears. A crucial line of defense!



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# Thank you

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