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**PRESS STATEMENT BY THE SOUTH AFRICAN LAW REFORM COMMISSION
CONCERNING ITS RELEASE OF DISCUSSION PAPER 165 ON NON-TRIAL
RESOLUTIONS: PROJECT 151**

The South African Law Reform Commission (Commission) has released Discussion Paper 165 for general information and public comment. The Discussion Paper outlines the Commission's preliminary research findings and puts forward proposals for possible solutions.

The Zondo Recommendations: Deferred Prosecution Agreements

The Judicial Commission of Inquiry into State Capture recommended the introduction of deferred prosecution agreements (DPAs) as an alternative to criminal prosecution for companies implicated in economic crimes. This "entails an agreement between prosecutors and the accused corporation in which the corporation admits facts from which criminal liability could be inferred and agrees to engage in specific conduct in the near future. In exchange, the prosecutor defers the criminal charges – provided that the corporation adheres to the terms and conditions of the agreement. If the corporation complies with the DPA, the charges are dropped, but if it fails to comply, the prosecution will proceed."

The international use of Non-Trial Resolutions for corruption cases

The SALRC intends to build on the strong foundation of the Zondo Recommendations. As such, it has conducted further research into the international use of DPAs and similar legal instruments. It has widened the scope of its inquiry to consider the wide use of Non-Trial Resolutions (NTRs), of which DPAs are one sub-type. NTRs are 'any agreement between a legal or natural person and an enforcement authority to resolve bribery cases without a full trial on the merits of the allegations either before or after conviction (e.g. plea deals) or a non-conviction mechanism (e.g. non-prosecution or deferred-prosecution agreements)'.

NTRs are a form of public-private cooperation, an anti-corruption strategy prescribed by the United Nations Convention Against Corruption (UNCAC), which South Africa has signed and is bound to uphold. Public-private cooperation is an essential strategy for fighting corruption because it is a uniquely complex crime to prosecute. Articles 12, 37 and 39 of the UNCAC provide that States Parties 'shall' consider encouraging cooperation between law enforcement authorities and legal and natural persons in exchange for leniency. Article 39 calls on states to encourage corporations to cooperate with anti-corruption enforcement authorities by supplying information or depriving offenders of the benefits of corruption. Article 37 provides that forms of cooperation could include the mitigation of punishment (Art. 37(2)), granting a form of immunity (Art. 37(3)), and cooperation in multijurisdictional cases (Art. 37(5)).

South Africa is a signatory of the Organisation for Economic Co-operation and Development (OECD) Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions. The 2021 OECD Anti-Bribery Recommendation recommends that Member States consider using NTRs to resolve corruption cases without a full trial. The OECD recommends that Member States develop frameworks to provide for NTRs incorporating the following principles: transparency, accountability and due process of law.

Non-Trial Resolutions for corruption are used in many countries across the world including Brazil, Canada, France, Germany, Kenya, Malaysia, Singapore, the United Kingdom and the United States of America. One example of these global resolutions is the recent payment of \$5 billion in penalties to different countries by investment bank Goldman Sachs for its role in the Malaysian 1MDB scandal.

South Africa already uses NTRs in the form of plea bargains. The SALRC is currently researching the use of non-conviction-based NTRs for corruption cases. In exchange for leniency, companies will have to: (1) admit responsibility for corruption; (2) hand over information about individuals implicated in corruption to the authorities, so they can be prosecuted; (3) pay substantial penalties; and (4) improve their corruption detection and prevention systems.

NTRs would save prosecuting authorities the time and expense of a full trial, which can take up to ten years in complex corruption cases. They would give South Africa a seat at the table where law enforcement agencies from other countries resolve corruption charges with a multinational company – and a share in the penalties. They can save companies from bankruptcy that is often a consequence of a finding of guilt – saving jobs and share value. Not all companies would be eligible for an NTR – only those who demonstrate the capacity for reform.

The NPA recently adopted a policy directive (the Corporate Alternative Dispute Resolution directive – C-ADR) to provide for a simple form of NTR, i.e. a non-prosecution decision. This instrument is designed to incentivise companies to co-operate and remediate in corruption cases. It involves the simple exercise of prosecutorial discretion not to prosecute an implicated party when it is in the public interest to do so, in accordance with criteria in the directive. Introducing a fuller range of NTRs to South Africa will require legislative amendments.

These legislative amendments must embody the principles of transparency, accountability and fairness in the OECD Anti-Bribery Recommendation and the South African Constitution. The SALRC has undertaken intensive research and stakeholder engagement on this subject and hereby invites further submissions from organisations and members of the public.

The discussion paper is available on the website of the SALRC at:

<https://www.justice.gov.za/salrc/dpapers.htm>

Respondents are requested to submit written comments or representations on the discussion paper to the Commission by no later than 31 March 2025 via email to CPAreform@justice.gov.za and copy AMakhwanya@justice.gov.za.

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**ISSUED BY THE SECRETARY: SOUTH AFRICAN LAW REFORM COMMISSION,
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