

# P O L I C Y   B R I E F

G.D. PIENAAR and N. BOHLER-MULLER | OCTOBER 2023



## Implementing the Zondo Commission recommendations: **A perspective on ethics and accountability**

### Summary

The Human Sciences Research Council (HSRC) is collaborating with the “Judicial Commission of Inquiry into allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State” (the “Commission”) and the Department of Science and Innovation (DSI) in the ‘Future of Democracy’ project. One element of the project is to track Government’s and Parliament’s implementation of the Commission’s recommendations. The Commission recommended extensive reforms to prevent corruption and state capture. Government and Parliament published response plans, in October and November 2022, respectively. Government’s response contained some timeframes and promised regular progress reports, but Parliament’s contained neither. This policy brief assesses progress with implementation, which is uneven.

### Background: Key mechanisms of state capture

The Commission’s detailed Report records the mechanisms used to capture the state. Placements of politically connected individuals were used to control and manipulate public procurement, financial and contracting processes in SOEs and the public sector for private gain. This strategy was bolstered by the appointment of individuals in positions of power in law enforcement and tax administration to ensure that perpetrators were protected. This breached s195 of the Constitution, which requires a public administration that is ethical, professional, effective, impartial and developmental. Lack of compliance, transparency and accountability in appointments of board members and senior executives enabled state capture. No effective mechanisms existed to prevent cronyism and cadre deployment from continuing to dominate appointment to Boards and senior posts.

## State-Owned Entities

The Commission recommended the establishment of a Standing Appointment and Oversight Committee to ensure that nominees for Board appointment, or senior executives at SOEs, meet professional, reputational and eligibility requirements for these positions.

Government accepted 'the principle of greater transparency and rigour in the appointment of SOE boards and executive leadership', but expressed concerns, including potential delays due to a single Committee overseeing all appointments.

Guided by the Commission's principles, the President's SOE Council (2020) continues its work to develop a governance framework for SOEs, including 'clarifying roles'.

 **No timeframe was provided for finalising this work.**

## Tracking disciplinary cases

The Commission recommended that public servants, and SOE employees and officials implicated in state capture, be investigated and where necessary be subjected to disciplinary and/or legal processes.

A challenge identified by Government is that employees resign before disciplinary proceedings commence or conclude, and there is currently no centralised register of people dismissed from organs of state or those who resign to avoid disciplinary action. The Department of Public Service and Administration (DPSA), together with other departments, is developing a tracking mechanism that was due to be rolled out in April 2023.

 **As at 31 August 2023, it could not be established whether this tracking mechanism exists.**

## National Prosecuting Authority

The Commission found that the National Prosecuting Authority (NPA) was the principal law enforcement agency captured. The Commission made detailed and far-reaching recommendations for the establishment of a permanent anti-corruption commission. This is dealt with below.

Government's response was that it was recruiting more senior prosecutors and managers to fill vacant posts in the NPA, and enhancing coordination across the criminal justice system (CJS). In a significant step by the President in 2019, the Investigating Directorate (ID) was established as a 'multidisciplinary anti-corruption law enforcement agency' within the office of the National Director of Public Prosecutions (NDPP). The ID's objective is to address 'unlawful activities relating to serious, high profile or complex corruption cases and offences or criminal or unlawful activities arising from

the State Capture Commission'. The ID would be made permanent and its powers enhanced.

 **Almost a year later, in August 2023, Cabinet approved the submission to Parliament of the NPA Amendment Bill of 2023. The Cabinet statement indicates that the Bill provides for the establishment of the ID as a permanent entity within the NPA. The Bill will give ID prosecutors the authority to lead, not merely guide investigations.**

Government's response acknowledged longstanding concerns about the NPA's independence and undertook to introduce legislative amendments for greater transparency and consultation in the process for selection and appointment of the NDPP. The Minister's "final responsibility" over the NPA as set out in section 33 of the NPA Act [and in s179(6) of the Constitution] would be clarified.

 **No timeline was given for this work and no indication of which institution would be responsible for undertaking it.**

## South African Revenue Service

The South African Revenue Service (SARS) was another key state agency hollowed out through state capture.

The Commission endorsed the findings of the Nugent Commission of Inquiry established by President Ramaphosa in 2018. The Nugent Commission found a 'massive failure of integrity and governance' at SARS.

The Nugent Commission recommended governance and other actions 'to rebuild SARS and reverse its capture'. The Zondo Commission made an additional recommendation – that the SARS Act of 1997 be amended to provide for an 'open, transparent and competitive process for the appointment' of the SARS Commissioner.

Government's response recorded the substantial progress already made. National Treasury has initiated the process to amend the SARS Act to implement the recommendations of both Commissions, including to provide for –

- an 'open, transparent and competitive process for the appointment' of the SARS Commissioner
- the appointment of adequate oversight mechanisms such as an inspector-general
- legislation to be tabled by June 2023

 **As of 31 August 2023, no such legislation had been tabled in Parliament.**

## Professionalisation of the public administration

In addition to the positioning of politically connected individuals in positions of power through the abuse of public sector appointment and dismissal processes, there was also inappropriate interference by Executive Authorities (EAs) in the operational and administrative matters that are the responsibility of Accounting Officers (AOs). This frequent practice has led to tensions at the 'political-administrative interface', compromising effective public administration and efficient service delivery. The Commission recommended clear lines of separation between EAs and AOs, clearer delegation of authority to AOs, and regular ethics and governance training for all public representatives and public servants.

Government's response was that work is under way to give effect to the recommendations, including amendments to relevant legislation and the implementation of the National Framework for the Professionalisation of the Public Sector (NFP).

- Compulsory lifestyle audits have been implemented with effect from 1 April 2021. As at 31 March 2023, only 36 of 44 national departments and 89 of 103 provincial departments had done so.
- Psychometric integrity testing mechanisms are under development.
- Cabinet adopted the NFP in October 2022.
- However, in a contradictory decision, in December 2022 the governing African National Congress (ANC) agreed to retain cadre deployment as party policy, despite the Commission finding that the policy is unlawful.

✔ **Legislation tabled in Parliament that promises to promote integrity in and professionalisation of the public sector includes the Public Administration Management Amendment Bill 2023 and the Public Service Amendment Bill.**

Implementation of the NFP depends to a significant extent on an independent Public Service Commission (PSC). Although the PSC is established as an independent constitutional body by Chapter 10 of the Constitution, its enabling legislation treats the Office of the PSC as a government department. This incongruent legislative framework undermines the independence and effectiveness of the PSC.

✔ **The PSC Amendment Bill, which has been around in various forms since 2015, was approved by Cabinet on 13 September 2023 for tabling in Parliament.**

## Financial management and audit reforms

The Commission recommended that only the Auditor-General of South Africa (AGSA), or auditors who demonstrate requisite capacity, should audit SOEs, and that there should be a return to the original intent of the PFMA to let managers manage, while holding them accountable. At the same time, Accounting Officers (AOs) should be protected from criminal or civil liability for good faith actions that are not negligent.

Government's response states that National Treasury and the AGSA are reviewing the usefulness of the concept of irregular expenditure and may focus instead on identifying corrupt or suspicious expenditure, or expenditure incurred in bad faith.

✔ **The Public Service Amendment Bill of 2023 provides for clearer delegation of administrative and financial responsibilities to AOs.**

✘ **However, a complementary PFMA Amendment Bill to clarify the delegation of financial authority to AOs has not yet been tabled.**

✘ **No timeframe is provided for this review and progress is unclear.**



## Anti-Corruption Agencies

The Commission recommended the establishment of two anti-corruption agencies discussed below.

### Anti-Corruption Commission

Government's response highlighted the need for a 'fundamental redesign and review of the country's anti-corruption architecture'. This is being undertaken by the National Anti-Corruption Advisory Council (NACAC) established in terms of government's National Anti-Corruption Strategy (NACS) and the Department of Justice and Constitutional Development (DOJ&CD).

The NACAC was appointed in August 2022, two years after adoption of the NACS. It would develop its plan by 31 March 2023.



**At the HSRC's Future of Democracy Colloquium in June 2023, the NACAC chairperson indicated that the research and review were still under way.**

### Public procurement reform

The Commission identified the public procurement system as the primary site for the diversion of state resources, particularly from SOEs, which have the largest budgets. Procurement reform is thus prominent in the Commission's recommendations. The Commission recommended the establishment of an independent Public Procurement Anti-Corruption Agency (PPACA), and –

- Compulsory transparency standards consistent with the OECD principles for integrity in public procurement.
- Legislation for greater centralisation and harmonisation of public procurement and training.
- Government and business should develop a National Charter against corruption in public procurement, including a Code of Conduct with ethical standards.
- A procurement officer's profession should be created through legislation to establish a professional body to which all procurement officials belong.



**The Public Procurement Bill 2023 was tabled in Parliament on 30 June 2023. It acknowledges existing constitutional requirements for a public procurement system which is fair, equitable, transparent, competitive and cost-effective (s.217(1)).**

The Bill envisages broad application to all spheres of government, to constitutional institutions, and to public entities listed in Schedules 2 and 3 of the PFMA. The Bill also provides for a binding code of conduct applicable to key stake-

holders involved in procurement, and for other measures to ensure probity and integrity. It goes some way to responding to the Commission's recommendation for the establishment of a procurement profession by including provisions to 'ensure the professional development and training of officials involved in procurement'.



**However, the Bill does not implement possibly the most significant recommendation – establishment of an independent PPACA. Instead, it proposes a Public Procurement Office (PPO) within National Treasury.**



**The Bill arguably fails in its aim to 'create a single framework that regulates public procurement... by all organs of state'.**



**More positively, the PPO is mandated to 'ensure' transparency. The Bill specifies many relevant categories of information to be made proactively available online and free of charge to officials, bidders, suppliers and the public.**

## Accountability

### Responsibility of President and Premiers for actions of Ministers and MECs

The Commission recommended that the President and Premiers must ensure that Ministers and MECs are accountable for their actions and should apply appropriate sanctions, including dismissal, should performance fall short of Performance Agreements and ethics standards.

Government's response notes that the basic standards for members of national and provincial Executives are contained in their constitutional affirmation or oath of office, and they're bound by the Executive Members Ethics Act 1998 and Code.

The Commission recommended consideration of a statutory criminal offence for any person vested with public power who abuses that power by intentionally using it otherwise than in good faith for a proper purpose.

The Commission also recommended that, given 'the premium that the Constitution places on accountability', public representatives should be criminally sanctioned for "constitutional and political malpractice".



**Government's response reported that the DOJ&CD has been directed to undertake research on the creation of these offences, which is due to be completed by December 2023.**

## Parliamentary oversight

The Commission found that in several instances Parliament had not been effective in holding the Executive to account, thereby facilitating state capture. Included among many recommendations were -

- Direct election of the President.
- A constituency-based electoral system to enhance the capacity of Members of Parliament to hold the executive accountable.
- Appointing more opposition MPs to chair parliamentary committees.
- Legislation to protect MPs from losing their party membership merely for exercising their oversight duties reasonably and in good faith.

Government's responded that direct election of the President 'would require constitutional amendments ... [and] should be considered by the various political parties represented in Parliament and by the Parliament's Joint Constitutional Review Committee'.

**X** No indication could be found that this matter has been referred to or considered by this Joint Committee. It has considered a submission concerning an independent anti-corruption agency.

Parliament's response was set out in its Implementation Plan dated 3 November 2022. It recorded the Commission's recommendations and Parliament's procedures for considering them.

**X** Parliament provided no timeframes for concluding these considerations, envisaging that some work would be carried over into the Seventh Parliament.

## Electoral reform

By adopting the Electoral Amendment Act 2023, Parliament rejected the recommendation of a partial constituency system. However, the Amendment Act requires that changes to the electoral system must be considered. The Act stipulates that an Electoral Reform Consultation Panel must be established within four months of the promulgation of the Act and that the Panel must, within 12 months after the 2024 general election, submit electoral proposals to the Minister of Home Affairs.

**✓** In May 2023, nominations were invited for members of the Panel.

## Opposition MPs chairing parliamentary committees

**X** A sub-committee of the National Assembly's Rules Committee advised against accepting this recommendation.

## Protection of MPs

Parliament's response views this matter as related to electoral reform, which it addressed in the Electoral Amendment Act.

**X** Despite ample evidence to the contrary, the Speaker expressed the view that the provisions of the Constitution and of the Powers Privileges and Immunities of Parliament and Provincial Legislatures Act 2004 (PPIPLA) provide MPs with adequate protection from retribution for the performance of their responsibilities.

## Parliament and The Presidency

The Commission recommended that Parliament should consider establishing a committee to exercise oversight over the President and Presidency.

**?** Parliament scheduled a study tour for July 2023 to consider various models of presidential oversight.

## Improved Protection for Whistleblowers

Whistleblower testimony was fundamental to revealing state capture, and to uncovering the identity and roles of perpetrators, enablers and beneficiaries in the public and private sectors. Despite widespread recognition of the vital role played by whistleblowers, it has been recognised that inadequate protections are available in the Protected Disclosures Act of 2000 (PDA) and other legislation.

The Commission made several recommendations to improve whistleblower protections, including –

- Ensuring the protections stipulated in article 32(2) of the United Nations Convention Against Corruption (UNCAC), including anonymity and physical protection.
- Identifying the Inspectorate of the recommended ACC as the channel for making disclosures.
- Authorising incentives and rewards for whistleblowers following successful recoveries of the proceeds of crimes.
- Authorising immunity from criminal or civil proceedings for honest disclosure.

The DOJ&CD has commenced a review of the PDA and the Witness Protection Act, including consultation with stakeholders and the NACAC.



**In late July 2023, the DOJ&CD published a Discussion Document on proposed reforms for the whistleblower protection regime in South Africa, and invited public comments.**

## Private sector and professions

The Commission found that private sector service providers and professional firms such as Bosasa, McKinsey and Bain engaged in corruption to secure state contracts. This was enabled by a failure to enforce procurement rules, anti-corruption laws and professional ethics standards.

There has been a strong response by the auditing profession to these lapses.



**New regulations promulgated by the Independent Regulatory Board for Auditors (IRBA) authorise fines against errant auditors of up to R10-million and up to R25-million on auditing firms per offence of 'improper conduct'.**

The Commission recommended strengthening the duty of private sector entities to prevent bribery by amending the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA) to make it a criminal offence for any member of the private sector or any incorporated SOE to fail to prevent bribery.



**The Judicial Matters Amendment Bill of 2023 being considered in Parliament makes it an offence for a public or private entity, including SOEs, to take 'inadequate measures' to prevent offering, giving or receiving a 'gratification'.**

Lastly it was recommended that the Political Party Funding Act 6 of 2018 (PPFA) be amended to criminalise donations to political parties made in the expectation of or with a view to the grant of procurement tenders or contracts as a reward for or in recognition of such grants.



**The NACAC is considering this issue.**

## Concluding remarks

The Commission's recommendations must be seen to be implemented and justice served against those who profited from the abuse of power and state capture, or the money spent on the Commission will be regarded as fruitless and accountability as an empty promise.

Government has undertaken to implement certain remedial and corrective measures and to report publicly on progress. Some are already being implemented, but reforms should occur more rapidly and transparently.

A centralised Project Management Office (PMO) and a Steering Committee have been established in the Presidency to coordinate implementation. This Committee should report quarterly to Cabinet to 'inform regular updates to the country by the President.' The public should also be updated each quarter. The NACAC should provide an independent annual report to the public on progress made by the state in implementing its responses.

Unfortunately, Parliament appears to have been forced to issue its first update to the public in June 2023 after its presiding officers objected to Chief Justice Zondo's expressed reservations about Parliament's ability to resist a repeat of state capture.

## References

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## Authors

Adv Gary Pienaar, LLB MPhil, Senior Research Manager, Human Sciences Research Council (HSRC)  
Prof Narnia Bohler-Muller, LL.D, Divisional Executive, Human Sciences Research Council (HSRC)

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