

Implementation of the State Capture Commission recommendations
An institutional perspective on ethics and accountability

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The HSRC is collaborating with the Zondo Commission to track the government's implementation of the extensive reforms that were recommended to prevent corruption and a recurrence of state capture. Government and Parliament published response plans in late 2022. Government's response contained some timeframes and promised regular progress reports, but Parliament was silent on both. Some recommendations are being implemented, but others are not. This article assesses progress with implementation in some crucial areas in the year since the Zondo reports were released to the public.

When avarice takes the lead in a state, it is commonly the forerunner of its fall.

– Alexander Hamilton, 1778

Introduction

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 in the ‘Future of Democracy’ project.¹ One element of the project is to track the government's implementation of the Commission's recommendations. The Commission recommended extensive reforms to prevent corruption and a recurrence of state capture. Government and Parliament have published response plans, in October and November 2022, respectively. Government's response contained some timeframes and promised regular progress reports,² but Parliament's contained neither.³ Some

recommendations are being implemented, whilst others are not. This article assesses progress with implementation in some crucial areas.

Background: Key mechanisms of state capture identified by the Zondo Commission

The Commission's detailed Report attests to the extent and gravity of state capture as revealed through the evidence painstakingly assembled and distilled by the Commission – evidence which has far-reaching implications for the democratic future of the South African state and society. It records the mechanisms used to capture the state, primarily the strategic placement of individuals in positions of power through the abuse of the appointment and dismissal process in the public administration and State Owned Entities (SOEs) such as Eskom, Transnet, Passenger Rail Agency of South Africa (PRASA), South African Airways (SAA) and Denel. These placements of politically connected individuals were “the essential mechanism of state capture” and were used to control and manipulate public procurement, financial and contracting processes in SOEs and the public sector more widely for private gain.

This strategy was bolstered by the strategic appointment of individuals in positions of power in law enforcement and tax administration to ensure that perpetrators were protected from detection and sanction.⁴ This entailed disregard for s.195 of the Constitution, which requires a public administration that is ethical, professional, effective, impartial and developmental.

In essence, lack of compliance, transparency and accountability in appointments of board members and senior executives enabled state capture. Many experienced and honest officials were sidelined or dismissed to make way for those facilitating state capture and corruption. No effective mechanisms existed to prevent cronyism and cadre deployment (which the Commission found to be unlawful and unconstitutional) from continuing to dominate appointment to the Boards and senior executive offices.

State-Owned Enterprises

The Commission recommended several reforms, including the adoption of an independent and transparent process for appointment of SOE Boards and Executives free from political manipulation, so that appointments made by a Minister are genuinely the result of a merit-based selection process.

The Commission therefore recommended the establishment of a Standing Appointment and Oversight Committee to ensure, in public hearings, that any nominee for Board appointment, or as CEO, CFO or CPO of an SOE, meets professional, reputational and eligibility requirements for such a position. This Committee should also investigate and act upon complaints concerning misconduct by Board members or senior executives in the discharge of their duties.⁵

Government's response accepted “the principle of greater transparency and rigour in the appointment of SOE boards and executive leadership”, but expressed some concerns, including potential delays due to a single Committee overseeing appointments to a large number of SOEs.

- Nevertheless, guided by the Commission's principles, the President's SOE Council (appointed in 2020) would continue its work to develop a legislated

governance framework for SOEs, including “clarifying roles”.

- No timeframe was provided for finalising this work.

Tracking disciplinary cases

The *Commission recommended* that 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. To this end, the Department of Public Service and Administration (DPSA), Department of Cooperative Governance and Traditional Affairs (COGTA), Department of Public Enterprises (DPE) and National Treasury are 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 has been developed and is being implemented.

National Prosecuting Authority

The Commission found that the National Prosecuting Authority (NPA) was the principal law enforcement agency that was captured and hollowed out in order to protect perpetrators.

The Commission was so concerned about the extent and impact of the weakening of law enforcement agencies, that it made *detailed and far-reaching recommendations* for the establishment of a permanent anti-corruption commission. These recommendations are dealt with separately below.

Government’s response indicated that it had already embarked on “far-reaching measures to restore the integrity and rebuild the capability of the country’s law enforcement agencies and the criminal justice system [CJS] more broadly”.⁶ This included recruiting more senior prosecutors and managers to fill vacant posts in the NPA, and enhanced coordination across the 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) as head of the NPA.

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”.⁷ However, the NPA and other stakeholders have observed that the ID’s temporary status (it was established by Presidential proclamation, which can be easily revoked) has meant that it struggles to attract, train and retain staff with the specialised skills and experience necessary to successfully prosecute high-profile or complex crimes and corruption including state capture cases. It is necessary to urgently establish the ID as a permanent structure within the NPA.⁸

Government undertook that “[T]o further strengthen the current anti-corruption capabilities, the Investigating Directorate will be established as a

permanent entity within the NPA and

ID investigators will be provided with the requisite criminal investigatory powers as contemplated in the Criminal Procedure Act, Act No. 51 of 1977.”⁹

- Almost a year later, in August 2023, Cabinet approved the submission to Parliament of the NPA Amendment Bill of 2023.¹⁰ The Cabinet statement indicates that the Bill provides for the establishment of the ID as a permanent entity within the NPA and will also strengthen its investigative powers.
- The Bill will reportedly give ID prosecutors the authority to lead not merely guide investigations,¹¹ thereby restoring the model that characterised the highly effective Scorpions before their dissolution.

While this is a welcome development, envisaged further “fiscal consolidation” may constrain the ID’s staffing plans.¹²

Despite these enhancements to its status and powers, a permanent ID doesn’t meet the STIRS criteria established by the Constitutional Court in *Glenister II*¹³ as the essential features of an independent anti- corruption agency. (**S** for a specialised unit dedicated to investigating and prosecuting the corrupt; **T** for properly trained and equipped staff; **I** for independence from political influence and interference; **R** for guaranteed and sufficient resources; and **S** for security of tenure of office.) Among other factors, although s.179(4) of the Constitution provides that “[n]ational legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice”, s.179(6) of the Constitution provides that “[t]he Cabinet member responsible for the administration of justice must exercise final responsibility over the prosecuting authority”.

Government’s response acknowledged these longstanding concerns and undertook:

To address concerns with respect to the independence of the NPA, legislative amendments will be introduced to introduce greater transparency and consultation in the process for selection and appointment of the NDPP, drawing on the process adopted for the selection of the current NDPP. Work will be undertaken to clarify the Minister’s “final responsibility” over the NPA as set out in section 33 of the NPA Act and settling aspects related to the NPA’s financial and administrative independence.¹⁴

- Notably, no timeline was given for this work and there was no indication of which institution or body was to be responsible for undertaking it. The August 2023 Cabinet statement (above) makes no mention of this pivotal concern.

South African Revenue Service

The South African Revenue Service (SARS) was one of the key state agencies hollowed out through state capture. The *Commission endorsed* the findings of the Nugent Commission of Inquiry into Tax Administration and Governance by SARS established by President Ramaphosa in 2018. The Nugent Commission found a “massive failure of integrity and governance” at SARS under the tenure of the former SARS Commissioner, Mr Tom Moyane, describing the internal restructuring

project led by international management consulting firm Bain and Company as a “premeditated offensive against SARS, the result of which was the dismembering of the organisation, rendering it severely weakened”.¹⁵

The Nugent Commission recommended “a series of governance, organisational, operational and stakeholder actions to rebuild SARS and reverse its capture”. The 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 that substantial progress has indeed been made in these efforts. It also reported that National Treasury has initiated the process to amend the SARS Act to implement the recommendations of the Nugent Commission and the State Capture Commission, 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 would 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 strategic 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) – ministers and MECs – in the operational and administrative matters that are the responsibility of Accounting Officers (AOs) – Directors General, Heads of Department and Municipal Managers. This frequent practice has led to tensions at the “political-administrative interface”, compromising effective public administration and efficient service delivery. The *Commission therefore 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 accepted that these appointments and dismissals were indeed “in contravention of the Constitution and applicable legislation”.¹⁶

Work is underway to give effect to the recommendations, including amendments to the Public Service Act (PSA), the Public Administration Management Act (PAMA), the Public Finance Management Act (PFMA), the Public Procurement Bill (PPB) and the implementation of the National Framework for the Professionalisation of the Public Sector (i.e. not merely the public service).

- Compulsory lifestyle audits have been implemented with effect from 1 April 2021, although as at 31 March 2023, only 36 of 44 national departments and 89 of 103 provincial departments had done so for the 2022 financial year.
- Psychometric integrity testing mechanisms are under development, presumably by the DPSA.

- In October 2022, Cabinet adopted the NFP.
- 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 [B 10—2023] and the Public Service Amendment Bill [B 13—2023]. Key reforms contained in these Bills include:

- Local government and most public entities (but not SOEs) will be included in the public administration and subject to the same integrity, professional and performance standards

as national and provincial government departments.

- The Director-General in The Presidency will be established in law as the Head of Public Administration (reflecting recent practice), and will be responsible for recruitment, promotion and dismissal of senior managers (AOs), such as directors-general (DGs), their deputies (DDGs), provincial heads of department (HoDs) and municipal managers (MMs). No longer will Ministers, Premiers, MECs and Mayors (EAs) be able to hire, fire, promote or sideline senior public servants.
- There would be a clearer delegation of administrative functions from EAs to AOs.
- AOs and employees reporting directly to them will be prohibited from holding senior office in a political party.
- A clearer prohibition on public servants doing business with the state.
- A one-year “cooling off” period after leaving the employ of the state will be introduced for public servants involved in public procurement. During this year, erstwhile public servants will be prohibited from being employed by companies who are service providers to the state.

Implementation of the NFP depends to a significant extent on a Public Service Commission (PSC) whose independence is definitively established in law. The PSC’s role includes ensuring that candidates have the required qualifications, expertise, experience and training, i.e. that they are recruited and appointed based on merit, thereby promoting professionalisation. Although the PSC is established as an independent constitutional body in terms of Chapter 10 of the Constitution, its enabling legislation (the PSC Act 1997) treats the Office of the PSC as a government department. This incongruent legislative framework undermines the independence and effectiveness of the PSC, both in the way in which it is funded and how its activities and recommendations are perceived and dealt with by government departments.

- It is therefore a matter for concern that the PSC Amendment Bill, which has been around in various forms since 2015, has as of 31 August 2023 still not been tabled in Parliament. Time is running out to pass this vital legislation before the 2024 general election.

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, AOs should be protected from criminal or civil liability for good faith actions that are not negligent.¹⁷

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.¹⁸

- The Public Service Amendment Bill [B13-2023] 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 it is unclear what progress has been made.

Anti-corruption agencies

The *Commission recommended*

the establishment of a permanent “Anti-State Capture and Corruption Commission” (ACC) and a specialised and “independent Public Procurement Anti-Corruption Agency” (PPACA).

Anti-Corruption Commission

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Government's response recognised that the Commission's recommendations concerning the ACC and the PPACA highlighted the need for a “holistic, coherent and integrated approach to combating corruption, fraud and maladministration [and should] form part of a fundamental redesign and review of the country's anti-corruption architecture”.¹⁹ This is already being reviewed 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).

While strengthening “the country's anti-corruption capabilities should not await the conclusion” of this review and redesign, the NACAC had been appointed only in August 2022, two years after adoption of the NACS, and was to conclude their research and develop their 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 was still under way.²⁰

Public procurement reform

The public procurement system was identified by the Commission as the primary site for the diversion of state resources, particularly from SOEs, which have the largest procurement, capital and operational 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 –

- National Treasury should formulate compulsory transparency standards consistent with the OECD principles for integrity in public procurement.
- Enact legislation for greater centralisation of aspects of public procurement; harmonisation of legislation and training.
- Government and business should develop a National Charter against corruption in public procurement, including a Code of Conduct with ethical standards. Both should be legislated.
- Every public procurement officer, bidder, contractor, public representatives and officials should commit to observe and uphold the Charter.
- A procurement officer's profession should be created through legislation to establish a professional body to which all procurement officials should belong. This body should determine qualifications, training and experience necessary for membership, and every procuring entity's system should be managed by a duly qualified member in good standing.

Government's response repeated “the need for a holistic, coherent and integrated approach to combating corruption, fraud and maladministration” and a “fundamental redesign and review of the country's anti-corruption architecture”. It also echoed several STIRS criteria, accepting as “a guiding principle” that this architecture “should incorporate robust mechanisms for appointing senior leaders and mechanisms to ensure insulation against capture and political interference, with carefully drafted rules for the selection and removal of senior leadership”. Furthermore, the “system should be amply resourced” and efficiently coordinated. Urgent reforms to strengthen anti-corruption capabilities should proceed²¹ and “not await the conclusion of the review and redesign of the broad architecture”.

Thus, the Public Procurement Bill [B18 -- 2023] was tabled in Parliament on 30 June 2023. It acknowledges the existing constitutional requirements for a public procurement system which is fair, equitable, transparent, competitive and cost-effective (s.217(1)). The Bill also recognises that s.195(1) and (3) of the Constitution require that national legislation must ensure the promotion in public administration of several principles, including:

- A high standard of professional ethics.
- Efficient, economic and effective use of resources.
- Developmental orientation;
- Accountability and transparency.

The Bill aims to “create a single framework that regulates public procurement, including preferential procurement, by all organs of state, which among others:

- promotes the use of technology for efficiency and effectiveness; and
- enhances transparency and integrity ... to combat corruption”.

The Bill commendably envisages broad application to all spheres of government, to constitutional institutions, and to public entities listed in Schedules 2 and 3 of the PFMA.

In accordance with the Commission's recommendations, the Bill provides for a binding code of conduct applicable to key stakeholders involved in procurement, and for other measures to ensure probity and integrity. The Bill also 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 Commission recommendation – establishment of an independent PPACA. Instead, it proposes a Public Procurement Office (PPO) within National Treasury. While the "Head and officials of the [PPO] must perform their functions in terms of this Act impartially and without fear, favour or prejudice", the Bill doesn't ensure security of tenure for the Head. Notably, the PPO's oversight powers are weakly phrased (e.g. "promoting"; "guidance and assistance") and its intervention powers are only "as may be prescribed" by regulation, affording the Executive considerable discretion.

More positively, the PPO is mandated to "ensure" transparency. The Bill prescribes an ICT-based procurement system for "all procurement, in order to enhance efficiencies, effectiveness, transparency and integrity and to combat corruption". 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, with only defined "confidential" information being redacted. This information must be made available online "as soon as possible" to enable "effective monitoring" by all interested stakeholders.

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.

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

However, given the extent and scale of departure from these standards evident during state capture, the Commission recommended consideration of more stringent standards to govern certain forms of misconduct.

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

Government's response indicated that the DOJ&CD would "research possible

legislative provisions for the creation of a statutory offence for the abuse of public power” and that this work would be finalised “by mid-December 2023”.

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 responded by saying that the DOJ&CD “has been directed to undertake research [on] the creation of an offence of political or constitutional malpractice. It will 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 permitting state capture. Among *many recommendations* were consideration of electoral system reforms and two ways to improve the quality and effectiveness of oversight:

- Direct election of the President to render the President more accountable to voters.
- 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 response

- 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”.

- No indication could be found that this matter has been referred to or considered by this Joint Committee,²² although the Committee has considered a submission concerning an independent anti-corruption agency.

- There are historical reasons for adopting the current electoral system, and changes had been the subject of repeated studies. The “far-reaching consequences of the Commission’s recommendations” and “whether the deficiencies identified by the Commission justify revisiting previous decisions” on electoral reform require “an extensive process of consultation and deliberation that involves the whole of society” and also awaiting the then-pending decision by Parliament on the Electoral Amendment Bill.

Parliament’s procedural response was set out in its *Implementation Plan* dated 3 November 2022. It recorded the

Commission’s recommendations and its procedures for considering them.

- Parliament provided no timeframes for concluding these considerations, envisaging that some work would be carried over into the Seventh Parliament.²³

Electoral reform

By adopting the Electoral Amendment Act 2023, Parliament rejected the recommendation of a partial constituency system. However, the Electoral Amendment Act included a requirement that changes to the electoral system must be the subject of further consideration. The Act stipulates that an Electoral Reform Consultation Panel must be established within four months of the promulgation of the Act. After research and public consultations, 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.²⁴

Opposition MPs chairing parliamentary committees

- After consideration by a sub-committee of the National Assembly's Rules Committee, it appears to have recommended to the Rules Committee that it did not accept the Commission's recommendation.²⁵

Protection of MPs

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

- Despite ample evidence to the contrary, the Speaker expressed the view that the provisions of the Constitution and of the Powers Privileges and Immunity of Parliament and Provincial Legislatures Act (PPIPPLA) provide MPs with adequate protection from retribution for the performance of their responsibilities.²⁶

Parliament and the Presidency

The *Commission recommended* that Parliament should consider whether it would be desirable for it to establish a committee to exercise oversight over the President and the Presidency.

- Parliament scheduled a study tour for July 2023 to consider various models of presidential oversight.²⁷

Improved protection for whistleblowers

Whistleblower testimony before the Commission and elsewhere (e.g. the #GuptaLeaks), 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 in disclosing fraud, corruption and many other forms of wrongdoing, it has long been recognised that inadequate protections are available in the

Protected Disclosures Act of 2000 (PDA) and other legislation. The National Development Plan recommended in 2012 that a thorough review "should consider expanding the scope of whistleblower protection outside the limits of 'occupational detriment', permit disclosure to bodies other than the Public Protector and the Auditor- General[,] and strengthen measures to ensure the security of whistleblowers".²⁸ While the PDA was amended to expand the list of institutions to which protected disclosures can be made, the NPC's other recommendations were not fully implemented.

The Commission made *several recommendations* to improve the protection of whistleblowers, including introducing or amending existing legislation –

- To ensure that anyone disclosing information to reveal corruption, fraud or undue influence in public procurement activities be accorded 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 correct channel for making disclosures.
- Authorising incentives and rewards for whistleblowers following successful recoveries of the proceeds of crimes.
- Authorising offers of immunity from criminal or civil proceedings if there has been an honest disclosure.

Government's response accepted that “[w]histleblowing is an essential weapon in the fight against corruption”²⁹ and that “whistleblowers need protection from retaliatory action”.³⁰ The DOJ&CD has commenced a review of the PDA and the Witness Protection Act, which will include consultation with stakeholders and the NACAC, which was to be completed by the end of April 2023.³¹

- In late July 2023, the DOJ&CD published a discussion document on proposed reforms for the whistleblower protection regime in South Africa,³² and invited public comments. The document contains several welcome proposals, including:
 - The workplace limitation to protected disclosures inherent in “occupational detriment” should be replaced by a more inclusive prohibition of “detrimental action” and “improper conduct”.
 - Those to whom a protected disclosure is made have a duty to maintain the whistleblower’s anonymity.
 - The burden of proof is reversed, so that the person who causes detrimental action is presumed to have done so as a result of a possible or actual protected disclosure, unless they can show the contrary.
 - It is a criminal offence to use threats or intimidation to deter a protected disclosure, and can attract a sentence of R5 million or 5 years imprisonment or both.
 - Payment of legal costs, costs of physical protection and payment of incentives/rewards.
 - It is a criminal offence for a responsible person to fail to act upon receipt of a protected disclosure, with a sentence of R2 million or 2 years imprisonment.

Private sector and professions

The Commission’s report found that private sector service providers and professional service 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 commendably strong response by the auditing profession to these lapses.

New regulations promulgated in terms of the Auditing Professions Act 26 of 2005 allow the Independent Regulatory Board for Auditors (IRBA) to impose fines on errant auditors of up to R10 million and up to R25-million on auditing firms per offence of “improper conduct”.³³

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 include section 34A 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 [B7-- 2023] currently being considered in Parliament makes it an offence for a public or private corporate entity, including SOEs, to take “inadequate measures” to prevent offers, giving or receiving a “gratification” (bribe).

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 granting of procurement tenders or contracts as a reward for or in recognition of such grants.

- The NACAC is considering this issue.

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Concluding remarks

Anti-corruption strategies have been in place for many years in South Africa. The Commission’s findings and recommendations show that they are inadequate, and extensive and urgent reforms are necessary. 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.

Government has undertaken to implement certain remedial and corrective measures and some are already being implemented, but reforms should occur more rapidly and transparently. Indeed, *government’s response* recognises that: Robust monitoring, reporting and effective communication of the progress made in the implementation of the response is key to the success of this work.³⁴

To this end, a centralised Project Management Office (PMO) and an Commission Steering Committee have been established in the Presidency to coordinate implementation.³⁵ The Steering Committee should report quarterly on progress to Cabinet. “This will inform regular updates to the country by the President.”³⁶ The NACAC should provide an independent annual report to the public on progress made by the state in implementing its responses.

Given this recognition and these commitments, it is regrettable that updates from the Presidency appear to be only recent or relatively low-key, while some significant developments haven’t been mentioned by the Presidency. Even more unfortunately, Parliament appears to have been forced to issue its first update to the public in June 2023 only after its presiding officers objected to Chief Justice Zondo’s expressed reservations about Parliament’s ability to resist a repeat of state capture.³⁷

Remedial action of this degree of significance for the country ought to enjoy more regular and prominent communication from the Presidency.

ENDNOTES

1. See Post Zondo – The Future of Democracy Colloquium - HSRC. Available at: <https://hsrc.ac.za/post-zondo-the-future-of-democracy-colloquium/>
2. Response By President Cyril Ramaphosa To The Recommendations Of The Judicial Commission Of Inquiry Into Allegations Of State Capture, Corruption And Fraud, October 2022, para 7.1.7-8.
3. Consideration Of The Report Of The Judicial Commission Of Inquiry Into Allegations Of State Capture, Corruption And Fraud In The Public Sector Including Organs Of State And The President’s Response To The Commission’s [sic] Recommendations: Implementation Plan, 3 November 2022.
4. State Capture Commission Report, Part 6 Vol. 2 at p297.
5. State Capture Commission Report, Part 6 Vol. 4 at p1221 and Part 6, Vol. 3 at pp976-977.
6. Paragraph 4.8.2 of Government’s Response.
7. Paragraph 4.1.6 of Government’s Response.
8. NPA Annual Performance Plan 2023/24 – PC Justice and Correctional Services 12 May 2023. Available at: <https://pmg.org.za/committee-meeting/36909/>. See also NPA: ID needs to be permanent if it’s to make progress in State Capture cases,, *EWN* 10 July 2023. Available at: [NPA: ID needs to be permanent if it’s to make progress in state capture cases \(ewn.co.za\)](https://www.ewn.co.za/2023/07/10/npa-id-needs-to-be-permanent-if-it-s-to-make-progress-in-state-capture-cases).
9. Paragraph 5.2.18 of Government’s Response.
10. Statement on the Cabinet Meeting of 8 August 2023, 10 Aug 2023. Available at: <https://www.gov.za/speeches/statement-cabinet-meeting-tuesday-8-august-2023-10-aug-2023-0000>.
11. See [Scorpions 2.0: New bill to give NPA its teeth back, but critics say lack of independence a threat | News24](https://www.news24.com/news24/analysis/scorpions-20-new-bill-to-give-npa-its-teeth-back-but-critics-say-lack-of-independence-a-threat).
12. SA’s delivery of crucial services under threat after Treasury desperately calls for public ‘fiscal consolidation’, *Daily Maverick* 19 August 2023. Available at: <https://www.dailymaverick.co.za/article/2023-08-19-sas-delivery-of-crucial-services-under-threat-after-treasury-desperately-calls-for-public-fiscal-consolidation/>. See ‘Provincial Budgets: 2023/24 Financial Year First Quarter Provincial Budgets and Expenditure Report’, National Treasury media statement August 2023. Available at: https://www.treasury.gov.za/publications/PiP/2023_24/Q1/Media%20Statement-%20Q1%20Provincial%20Budgets%20and%20Expenditure%20Report.pdf.
13. *Glenister v President of the Republic of South Africa and Others* CCT 48/10 [2011] ZACC 6 (17 March 2011) (Glenister II). Available at: <http://www.saflii.org/za/cases/ZACC/2011/6.html>. The Constitutional Court held that an effective and efficient anti-corruption machinery of state must comply with the STIRS criteria. STIRS stands for – S: a specialised unit dedicated to investigating and prosecuting corruption; T: staff properly trained to do so; I: independence

from political influence and interference; R: committed resources adequate to undertake these tasks; and S: security of tenure in office.

14. Paragraph 5.2.19 of Government's Response.
15. Paragraph 5.8.3 of Government's Response.
16. Paragraph 6.2.1 of Government's Response.
17. State Capture Commission Report, Part 1, Vol. 3 Ch. 4 at p853.
18. Paragraph 6.1.8 of Government's Response.
19. Paragraph 5.2.3 ff of Government's Response.
20. Future of Democracy Colloquium Report, August 2023, at p24.
21. Paragraphs 5.2.12-14 of Government's Response.
22. See <https://pmg.org.za/committee-meeting/36590/>.
23. Section 8 of Parliament's Implementation Plan of 3 November 2022.
24. See <https://www.gov.za/documents/electoral-amendment-act-nominations-candidates-appointment-electoral-reform-consultation>.
25. See the record of a Meeting of a Subcommittee of the Rules Committee on the State Capture Commission recommendations, 21 April 2023, available at: <https://pmg.org.za/committee-meeting/36740/>.
26. Press Statement: Speaking Notes By The Presiding Officers On Parliament's Implementation Of The State Capture Commission's Recommendations, 29 June 2023. Available at: <https://www.parliament.gov.za/press-releases/press-statement-speaking-notes-presiding-officers-parliaments-implementation-state-capture-commissions-recommendations>.
27. See <https://www.parliament.gov.za/press-releases/press-release-national-assembly-rules-committee-undertakes-study-tour-presidency-oversight-committee>.
28. National Planning Commission. 2012. National Development Plan 2030.
29. Paragraph 5.7.4 of Government's Response.
30. Paragraph 5.7.5 of Government's Response.
31. Paragraph 5.7.8 of Government's Response.
32. See <https://www.justice.gov.za/legislation/invitations/invites.htm>.
33. Government Notice 3549 in Government Gazette 48790 dated 15 June 2023.
34. Paragraph 7.1.7 of Government's Response.
35. Paragraph 2.1.62 of Government's Response.
36. Paragraph 7.1.9 of Government's response.
37. Chief Justice Zondo was speaking at the HSRC's Future of Democracy Colloquium on 22 June 2023.