

# Re-evaluating Oversight of South African Defence Procurement: Can Combined Assurance Help Extract Full Accountability from the Department of Defence?

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## Abstract

The Department of Defence and the South African National Defence Force have been plagued by defence procurement irregularities since the inception of democracy. As a result, several scholars have questioned the ability of certain oversight mechanisms to conduct proper oversight of the military, and of defence procurement specifically. The study on which this article reports therefore aimed to evaluate the ability of Parliament, the Military Ombud, the Auditor-General of South Africa, and the Public Protector to extract accountability from the Department of Defence for its defence procurement activities. Discussion of these four mechanisms will constitute the basis for evaluating whether a renewed approach to oversight, in the form of combined assurance, might be able to allow for extracting greater accountability from the military for its non-compliance with the regulatory frameworks of South African defence procurement.

**Keywords:** Department of Defence, South African National Defence Force, Defence Procurement, Combined Assurance, Oversight, Accountability.

## Introduction

The South African National Defence Force (SANDF) has been plagued by defence procurement irregularities since the inception of democracy. Well-known examples include the Strategic Defence Procurement Package (SDPP) or “Arms Deal”,<sup>75</sup> the upgrade of 1 Military Hospital,<sup>76</sup> the procurement of the immune booster Interferon from the Republic of Cuba,<sup>77</sup> and the non-delivery of deliverables under Project Hoefyster (well into its second decade of existence).<sup>78</sup> Irregularities are often accompanied by allegations of fraud and corruption,<sup>79</sup> and remain highly publicised in the South African media.<sup>80</sup> It is also an environment well known for its lack of transparency.<sup>81</sup> It is, therefore, common knowledge that South African defence procurement remains within a state of chaos, and that there is an urgent need for proper oversight, transparency, and consequence management (accountability) in the Department of Defence (DoD).

Several scholars have cast doubt over the ability of certain oversight mechanisms to do

proper oversight of the military,<sup>82</sup> and of defence procurement specifically.<sup>83</sup> Scholars also highlight gaps in oversight over the various mechanisms.<sup>84</sup> Accordingly, the study reported here aimed to evaluate the ability of four oversight mechanisms to extract accountability from the DoD for its defence procurement activities.<sup>85</sup> This evaluation will inform a discussion of the following questions:

- What is the meaning of the concept of accountability?
- What is the meaning of “full” accountability?
- Can any oversight mechanism really extract “full” accountability from the DoD?
- Is it still effective to view oversight mechanisms as separate from one another?

Would a holistic and collaborative approach to military oversight by these various mechanisms not perhaps present one with an opportunity to reconsider their role and help address the balancing exercise often required within the context of defence procurement due to national security concerns?

These questions are answered by considering the impact of national security within the context of defence procurement, and its link with the concepts of oversight and accountability. The study consequently evaluated the ability of Parliament, the Military Ombud, the Auditor-General of South Africa (Auditor-General), and the Public Protector to exercise oversight of defence procurement. Finally, the article focuses on the concept of combined assurance, and how it can assist in re-evaluating oversight of defence procurement to understand the relationship between different oversight mechanisms better. This evaluation is summarised in the schematic diagram in Figure 1 below for ease of reference.

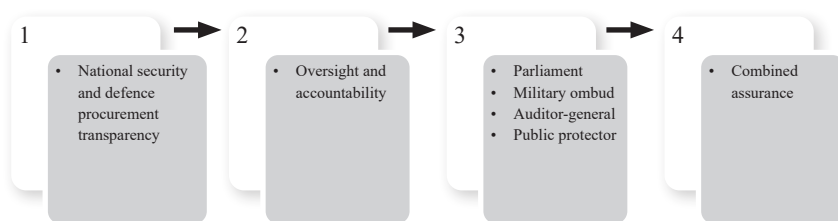


Figure 1: Schematic diagram summarising evaluation of oversight of defence procurement.

### National security and defence procurement transparency

National security and secrecy serve legitimate interests. The state has a duty to secure its borders, ensure internal and external safety of its interests, and safeguard its sovereignty.<sup>86</sup> For this reason, the state or military normally classifies information where disclosure thereof could:

- Boost efforts of foreign enemies to attack the state;
- Reduce the fighting capability of the armed forces of a state; or
- Enable the military of a foreign state to gain the technological upper hand.<sup>87</sup>

Information regarding details of advanced system design and operational characteristics of weapon systems or details of plans for military operations are also presumed secret.<sup>88</sup>

Notwithstanding the above, defence procurement transparency is deemed highly problematic, as national security exceptions allow military and security issues ‘to be treated as a special case with special privileges’.<sup>89</sup> Secrecy is often used as a ‘blanket justification’ to avoid scrutiny of security issues – it can hide corruption, and generally ‘inhibits the ability of parliament, civil society and the public to hold the executive to account’.<sup>90</sup>

Audit and other relevant information relating to *military procurement*, working hours, personnel allocations, salaries, *acquisitions* and *asset management* should, however, be provided on an appropriate and routine basis to allow for appropriate oversight and military transparency.<sup>91</sup> Where the state and/or military is not transparent, oversight mechanisms must step in, which indicates that the link between military transparency<sup>92</sup> and accountability cannot be ignored.

## Oversight and Accountability

### *Oversight*

The *Cambridge Dictionary* defines oversight as ‘systems or actions to control an activity and make sure that it is done correctly and legally’.<sup>93</sup> Within the context of legislative oversight, Pelizzo and Stapenhurst write:

Regardless of whether oversight is viewed as a sort of *ex post* review of the government policies and programs or whether it is viewed instead as a supervision of government activities that can be performed both *ex post* and *ex ante*, scholars have generally agreed on the fact that *effective oversight is good for the proper functioning of a democratic political system*.<sup>94</sup> [author’s italics]

Effective oversight holds two benefits for the political system. First, it can contribute to improving the quality of the policies or programmes initiated by government.<sup>95</sup> Second, legislative oversight ensures that government policies have greater legitimacy.<sup>96</sup> The purpose of oversight, therefore, is to ensure that the government’s ‘policies, plans, programs, and projects’<sup>97</sup> are ‘achieving expected results; represent good value for money; and are in compliance with applicable policies, laws, regulations, and ethical standards’.<sup>98</sup>

### *Accountability*

Accountability is not a ‘straightforward’<sup>99</sup> concept, as it depends on ‘time, context, cultural orientation or ideological persuasion’.<sup>100</sup> Bovens acknowledges that, while accountability can be seen as both a broad and a narrow concept, it is better to adopt a narrower and sociological view.<sup>101</sup> This is because accountability is not a ‘political catchword’; it is rather a set of ‘concrete practices of account giving’.<sup>102</sup>

Accountability can thus be seen to encompass three broad stages:

- First, the actor is obliged to inform the forum (an oversight mechanism) about the conduct of the actor, providing information about its tasks, decisions, and conduct.<sup>103</sup>
- Second, the forum must have an opportunity to question the actor about the accuracy and/or legitimacy of the information provided to the forum and the conduct of the actor.<sup>104</sup>
- Third, the forum should be able to ‘pass judgment on the conduct of the actor’.<sup>105</sup>

The first two stages refer to the connection between accountability and answerability. The third stage refers to sanction. While it has been a point of discussion whether sanctions ‘is a constitutive element of accountability’, I concur with Bovens that it should be seen as such. The possible imposition of sanctions on actors ‘makes the difference between non-committal provision of information and being held to account’.<sup>106</sup>

In this article, I therefore treat the first two stages as one element of the concept of accountability, and consider the ability of specific forums to obtain answers (“answerability”) from the DoD. Sanction shall be the second element.

In addition, the meaning of “accountability” within the defence context requires a different approach considering national security limitations and the secrecy of information. “Full” accountability goes beyond ordinary accountability (answerability and sanction). It specifically means that no DoD conduct is beyond reproach or excluded from oversight mechanisms. Accountability may be important, but it is “full” accountability that must flow from military oversight.

### *“Full” Accountability Must Flow from Oversight*

According to Klaus, accountability can only occur once there are serious transparency mechanisms (or forums), as well as laws that are ‘truly, timely and coherently applied by government legal systems’ to keep direct and indirect perpetrators (or actors) responsible for their actions.<sup>107</sup> Oversight can only lead to effective transparency when it can ensure effective accountability. To achieve effective accountability, the public or forum(s) responsible for extracting accountability must be able to sanction the offending party or remedy the contravening behaviour.<sup>108</sup> Oversight alone would be insufficient, as it would merely allow for information to enter the public domain. Instead, the forum(s) charged with doing oversight should have at its disposal remedies to force an actor to correct its irregular behaviour. The forums should also not be limited in their access to information. In testing whether a specific forum can extract “full” accountability from the DoD (and SANDF) in terms of defence procurement, I analysed the regulatory framework of different forums to determine whether their oversight encapsulates both answerability and sanction and the general limitations placed on their power.

## Evaluating the State of Oversight Forums of South African Defence Procurement

### *General*

Several forums are charged with exercising oversight of defence procurement. Parliament and the Auditor-General, by virtue of their mandates discussed below, are responsible for oversight of defence procurement on an annual basis. On the other hand, the Military Ombud and Public Protector exercise oversight of defence procurement if and when their mandates allow for it.<sup>109</sup> In addition, the Internal Audit Division (IAD) of the DoD, located within the Defence Secretariat, serves as an internal transparency mechanism. I classify it as such because the IAD, at least conceptually, ‘cannot strictly be viewed as an oversight structure’ as an ‘organisation cannot do oversight of itself’.<sup>110</sup> Finally, the Defence Inspectorate, located within the SANDF, serves as the Audit Authority of the DoD, and is also responsible for oversight of defence procurement.<sup>111</sup> The current study however only focused on those mechanisms external to the DoD and thus did not consider the IAD and Defence Inspectorate.

### *Parliament*

#### *Mandate and oversight tools*

Sections 42(3) and 55(2) of the Constitution of the Republic of South Africa, 1996 (“Constitution”) assign Parliament oversight powers. Accordingly, Parliament has adopted an “oversight and accountability model”, which established ‘mechanisms to fulfil its oversight and accountability mandates in terms of the Constitution and under the rules established by the two Houses, individually and jointly’.<sup>112</sup>

Parliamentary oversight primarily occurs by means of five broad tools, namely parliamentary debates; parliamentary questions; special inquiries; oversight visits and study tours; and external audits.<sup>113</sup> Two oversight bodies, which incorporate different elements of these five tools, are the Joint Standing Committee on Defence (JSCD) and the Portfolio Committee on Defence and Military Veterans (PCDMV).

The JSCD deals with classified and sensitive military information with the potential to affect national security, and must ensure the executive is accountable to Parliament. The committee tends to focus on higher-order defence issues, such as the defence budget, defence policy, *defence procurement*, human resources, and military deployments.<sup>114</sup> The PCDMV, a committee of the National Assembly, is required to consider legislation tabled in Parliament, and plays a general oversight role regarding the structure, functioning and policy of the DoD. It also reviews the annual DoD budget, holds budgetary hearings prior to the budget debate, and endeavours to ensure an alignment between the planning and budgetary priorities of the DoD.<sup>115</sup>

With regard to the overall utilisation of each of the five tools, Janse van Rensburg completed a thorough analysis of the first four parliamentary sessions (1994–2014).<sup>116</sup> Janse van Rensburg and other scholars subsequently highlighted a decline in effective

parliamentary oversight of the DoD, especially during the Zuma presidency (2009–2018).<sup>117</sup> This required an analysis of parliamentary oversight during the fifth and sixth parliamentary sessions as well. In the discussion below, I aim to provide a succinct overview of parliamentary oversight of defence procurement for the periods 1994–2014 and 2015–2022.

### *Parliamentary Oversight: 1994–2014*

Four of the five tools of parliamentary oversight showed a decline in oversight during this period.<sup>118</sup> First, there were only two defence-related parliamentary debates during the third and fourth Parliaments.<sup>119</sup> There was a general decline in the activity of the JSCD, offset, in part, by increased activity on the part of the PCDMV. Both committees also showed a sudden decline in activity in 2012 and 2013. Second, during the first four Parliaments, there were 2 045 parliamentary questions. Several questions however went unanswered. During the fourth Parliament, questions were primarily posed by opposition Members of Parliament (MPs), and from 2007–2008 onwards, questions which had previously been answered in detail, became classified, as they were deemed to relate to ‘operational matters’.<sup>120</sup> Third, special defence inquiries were ‘a highly underutilised oversight tool’.<sup>121</sup> Finally, there were five official study tours between 1994 and 2014, but none took place during the fourth Parliament.<sup>122</sup> There was, nonetheless, an increase in the use of local oversight visits from 2009 onwards.<sup>123</sup> Janse van Rensburg however deemed committee reports in this regard to be so problematic that he still found a clear reduction in efficiency of this tool. Only the fifth tool, external audit, showed ‘the most significant areas of growth in terms of defence oversight between 1994 and 2014’.<sup>124</sup> Reliance on audit reports by the Auditor-General became fully entrenched during the fourth Parliament. The only concern Janse van Rensburg highlights regarding this tool is the limited engagement between the Auditor-General and the JCS and PCDMV committees regarding the annual report reviews, as well as the fact that the Auditor-General did not entertain requests for special audits.

Within the context of defence procurement, Janse van Rensburg also raises several concerns.<sup>125</sup> Defence procurement oversight initially had a positive start, and the JSCD and PCDMV held several procurement-related meetings between 1998 and 2004. The events of the SDPP<sup>126</sup> had however become a point of contention between MPs, and signalled a turning point in effective parliamentary oversight. One MP commented:

[V]ery little information was forthcoming regarding the procurement process. There was a sense of defensiveness regarding the procurement process and the chairperson at the time stifled transparency in this regard and possibly conspired with members of the executive to provide as little details as possible on the SDPP.<sup>127</sup>

This indicates a decline in defence procurement oversight from the second Parliament onwards.

Janse van Rensburg nonetheless notes that an effort was made to improve parliamentary oversight, particularly through the promulgation of the National Conventional Arms Control Act (No. 41 of 2002). Despite its enactment,<sup>128</sup> there was nevertheless limited engagement with the National Conventional Arms Control Committee (NCACC) during the third and fourth Parliaments. This can largely be attributed to the committees whose responsibility it is to request the presence of the NCACC before it in the first place. Accordingly, Janse van Rensburg writes:

[W]hile mechanisms exist for parliamentary oversight of defence procurement, the handling of the 1999 SDPP, as well as a continued inability to regularly engage with the NCACC, *highlight major concerns in Parliament's capacity to effectively oversee defence procurement.*<sup>129</sup>  
[author's italics]

Finally, research indicates a general lack of engagement at committee level on defence procurement during the fourth Parliament. Instead of proactively engaging with defence procurement matters, the committees seemed to engage reactively only after a controversy surrounding a specific procurement contract would come to light. Janse van Rensburg concludes that oversight of defence procurement shows a 'downwards trajectory'<sup>130</sup> for the period 1994–2014.

#### *Parliamentary oversight: 2015–2022*

The five tools of parliamentary oversight showed improvement over this period.<sup>131</sup> At plenary level, defence matters remained non-prioritised, with only a limited number of dedicated defence debates during the fifth and sixth Parliaments. There was however considerable improvement at committee level. Between 2015 and 2022, the PCDMV held an average of 22 meetings per annum, while the JSCD increased its average of 7 meetings per annum between 2015 and 2019, to an average of 19 per annum between 2020 and 2022.

In terms of parliamentary questions, 616 questions are indicated on the website of the Parliamentary Monitoring Group.<sup>132</sup> While this is a reduced number compared to the number of questions posed between 1994 and 2014,<sup>133</sup> all but one of the questions<sup>134</sup> received an answer. This is a positive development. Of concern was that the preference for written as opposed to oral questions have remained in the fifth and sixth Parliaments (up to 2022), which is on a par with Janse van Rensburg's findings for the third and fourth Parliaments. The Minister of Defence also continued to reply to certain questions that the information could not be provided due to confidentiality or national security. The Minister nevertheless indicated that, in certain instances, the information could be provided in a closed session of the JSCD. While this might have limited information entering the public domain, it at least enabled the JSCD to scrutinise the actions of the department. Finally, former Minister of Defence, Thandi Modise,<sup>135</sup> seemed more inclined to provide in-depth replies to questions than her predecessor, Nosiviwe Mapisa-Nqakula.<sup>136</sup> There are thus both positive and negative developments regarding the usage of this oversight tool, with the positive developments providing room for hope.

The third tool, special defence inquiries, also showed significant improvement from 2019 onwards, especially within the context of the JSCD. In 2020, the JSCD held a mini-symposium where it invited several experts to speak on the future force design of the SANDF, and heard from external experts in 2022 regarding SANDF succession planning. The JSCD also established a task team, and was prepared to hear from a whistle-blower regarding allegations against the former Minister of Defence, Nosiviwe Mapisa-Nqakula, as raised by General Bantu Holomisa from the United Democratic Movement party.

Regarding the fourth tool of parliamentary oversight, study tours remained highly problematic, with zero tours during the fifth Parliament, and none up to 2022 in the sixth Parliament.<sup>137</sup> On the other hand, oversight visits improved, with the JSCD undertaking 6 visits and the PCDMV 14 visits over the period 2015–2022.

The fifth tool, external audit, also showed further improvement during this period. The Auditor-General's reports remain the primary external audit opinion utilised by both the JSCD and PCDMV, with the Auditor-General providing annual briefings to both committees on the DoD audit outcomes. There were also instances of ad hoc briefings to the PCDMV. For example, in 2021, the Auditor-General briefed the committee on certain findings in relation to the procurement of Interferon from Cuba, and the Auditor-General provided input on Project Thusano during a meeting in 2022.

Finally, parliamentary oversight of defence procurement improved significantly.<sup>138</sup> This is particularly true within the context of the PCDMV, the committee that scrutinises the defence budget, which ultimately allocates finances for defence procurement.<sup>139</sup> The PCDMV conducted oversight of Projects Thusano, Hoefyster, Hotel, and Biro, and held several meetings regarding the procurement of Interferon from Cuba. The committee held a meeting on the ongoing upgrades at 1 Military Hospital, and the SANDF was required to answer questions regarding its fleet management policy and the various procurement challenges it faced in relation to food rations and fuel in November 2022. Finally, the PCDMV had briefings regarding SANDF procurement and/or supply chain management concerns in 2016 and 2021. The JSCD also conducted oversight of defence procurement, with several meetings being held regarding the upgrade of 1 Military Hospital, as well as a meeting, which scrutinised issues concerning Projects Hoefyster, Hotel, and Biro.

Based on the above, there was general improvement in parliamentary oversight over the period 2015–2022. There was also an upwards trajectory in oversight of defence procurement in the fifth and especially sixth Parliaments. This is a positive development that will go a long way in countering the lack of defence procurement oversight, which transpired specifically between 2009 and 2014.

#### *The Consequence Management “Gap” between Parliament and the DoD*

From 2019 onwards, the PCDMV increased their focus on consequence management.<sup>140</sup> This led to the DoD being questioned on numerous occasions, as well as being requested to furnish the committee with explanations for why it failed to deal with identified irregularities timeously. In May 2022, the Secretary for Defence actually confessed:



[T]he issue of *consequence management gave her sleepless nights*. She said she had been brought to the DoD to implement control measures, to act, and assist. *However, all this time she had only been working on historical cases on a daily basis.*<sup>141</sup> [author's italics]

Despite the upwards trajectory in oversight, there is not a similar trajectory in terms of consequence management and accountability from the DoD yet. This conclusion can partly be explained by the fact that Parliament only recently started the process of reversing its previous lack of oversight during the third and fourth Parliaments. It will, therefore, take some time before the increase in oversight results in improved consequence management and accountability by the DoD. Acceptance by the DoD is however required. The department consistently fails to deal with identified irregularities, problems, and challenges. In a briefing to the PCDMV on 8 June 2022, it was highlighted that there appears to be a 'poor appreciation' of the responsibility, which the Public Finance Management Act (PFMA) (No. 1 of 1999) places on both the Secretary for Defence as accounting officer 'and by default, on management'.<sup>142</sup> Furthermore, the Supply Chain Management system had the highest number of findings from the IAD and the Auditor-General; and the highest number of unresolved findings.

Similarly, the Auditor-General has raised concerns regarding failure by the DoD to comply with her recommended remedial action. In a report dated 30 September 2022, the Auditor-General noted, '[s]ince the [Material Irregularity (MI)] process was implemented at the DoD, we notified the Secretary of Defence [...] of five MIs.'<sup>143</sup> At the time, the Auditor-General nevertheless noted that four of the five MIs remained resolved. The Auditor-General believes that the complex internal accountability arrangements of the DoD (as defined in the Defence Act, No. 42 of 2002) contribute to this state of affairs. In addition, the Minister of Defence stated on 23 May 2023 that the DoD received nine MIs from the Auditor-General for the financial year 2022–2023.<sup>144</sup> In this regard, the DoD is listed in the Auditor-General's 2022–2023 Report on National and Provincial Audit Outcomes as one of the departments, which are 'typically slow to respond to our findings and to improve the control environment'.<sup>145</sup> This is deeply concerning, and in my mind, indicates that the DoD is either unwilling or incapable of getting its affairs in order.

### *Accountability as Answerability and Sanction*

The analysis of parliamentary oversight, as well as the discussion on consequence management above, illustrates a clear improvement in answerability, the first element of accountability.<sup>146</sup> The DoD increasingly faces questions on its decisions and actions and is required to explain themselves. What appears to be absent however is sanction, the second element of accountability, which in this context refers specifically to consequence management.

Regarding sanction, it is important to note that the Minister of Defence is an MP, which binds her to the rules of Parliament. She is also the executive authority of the DoD. In accordance with sections 14(1)(a)–(b) and 17(1)(a) of the Powers, Privileges and Immunities of Parliaments and Provincial Legislatures Act (No. 4 of 2004), where DoD

staff fail to provide a committee with sufficient answers or fail to appear before the committee, the committee can ask the Minister to appear before it. Should the Minister fail to appear, a portfolio committee has the power to “summons” the Minister. Failure to comply with the summons could result in an offence, which may lead to a fine or imprisonment not exceeding 12 months. This indicates that Parliament has “teeth”, and that sanction mechanisms are in place.

Highly problematic, however, is that a senior parliamentary legal advisor informed the Portfolio Committee on Tourism on 15 November 2022, who wanted to summon the Minister of Tourism, that ‘the process of summoning anybody to come before Parliament is an *extraordinary action*. It is *not something that Parliament does often*.’<sup>147</sup> The sanction mechanism therefore does not currently appear to contribute to ensuring greater accountability on the part of actors such as the DoD.

This argument should, nonetheless, not be construed to mean that Parliament cannot ensure accountability on the part of the DoD, or that accountability is decreasing or is still as problematic as before 2015. The analysis above has shown a clear improvement in Parliament holding the DoD accountable. But, ‘if one examines this improved accountability closer, then it is primarily a case of improved answerability’.<sup>148</sup> Parliamentary procedures are successful in terms of answerability, but not sanction.

### *The Military Ombud*

#### *Mandate – Does It Include Oversight of Defence Procurement?*

Section 4 of the Military Ombud Act (No. 4 of 2012), sets out the mandate of the Ombud, and provides that the Ombud must investigate complaints lodged in writing by:

- (a) A member of the armed forces regarding his or her conditions of service;
- (b) A former member of the armed forces regarding his or her conditions of service;
- (c) A member of the public where it concerns the conduct of a member of the armed forces; or
- (d) A person acting on behalf of a member of the armed forces.

Furthermore, section 6(7)(c) empowers the Ombud to refer a complaint after some form of investigation. Section 7(1) bars the Ombud from investigating certain matters, while section 7(2) allows the Ombud a discretion to refuse to investigate a matter if certain criteria are met.

These provisions read together indicate that the Ombud decides, based on discretionary powers, whether to investigate a particular matter. It is also possible, in accordance with section 7(2)(e), for the Ombud to decline to assume jurisdiction if another institution is already investigating the matter. In this regard, the Ombud has entered into memorandums of agreement (MOAs) with various institutions to ensure cooperation, expertise, and non-duplication of matters.<sup>149</sup>

It is not readily apparent, however, from a reading of section 4(a)–(d) whether the mandate of the Ombud includes oversight of defence procurement. The Act also does not mention procurement in any of its provisions. Analysis of section 4(c) could nevertheless provide an answer, and more than one meaning can be ascribed to the text, which has not been defined.<sup>150</sup> “[M]ember of the public”, for example, could refer to a natural or juristic person.<sup>151</sup> Regulation 1 of the Military Ombud Complaints Regulations 2015,<sup>152</sup> further defines “official conduct” to mean ‘any act or omission committed by a member of the Defence Force in execution of his or her duties, including that of a member deployed to another state’.

If one applies a holistic reading to the discretionary powers of the Ombud under section 7(2), and its mandate under section 4(c) coupled with the definitions in regulation 1, it seems possible for the Ombud to assume jurisdiction and investigate defence procurement matters.<sup>153</sup> In fact, a redacted document<sup>154</sup> received from the Office of the Ombud shows three instances where it has in the past done oversight of procurement as it related to the defence value chain, and all three complaints emanated from members of the public.<sup>155</sup>

### *Remedial Powers and Institutional Challenges*

Despite the Ombud being able to exercise oversight of defence procurement, section 6(7)(b) and (8) of the Military Ombud Act provides that the Ombud makes recommendations to the Minister, whose mandate it is to implement the recommendations. These recommendations are non-binding on the Minister.<sup>156</sup> In addition, the ability of the Ombud to carry out its mandate is affected by several challenges, including:

- A lack of institutional independence;<sup>157</sup>
- A shortfall regarding compensation of employees; and
- A slow turnaround in the finalisation of its investigations due to slow response rates by services and divisions. At 4 May 2023, the Ombud was also functioning on a minimal strength of 63 posts as against the 89 approved posts.<sup>158</sup>

### *Answerability but not Sanction*

While the Ombud may possess the ability to exercise oversight of defence procurement, it is not readily apparent to me which provisions of the Military Ombud Act serve as the empowering provisions for the exercise of this oversight power. The focus is therefore on a holistic reading of the Act and regulations. The findings by the Ombud are nevertheless not binding on the Minister of Defence, and the Ombud faces concerning challenges. The Military Ombud is thus an oversight mechanism capable of extracting accountability from the DoD in terms of its first element only, namely answerability.

### *The Auditor-General of South Africa*

The Auditor-General conducts an external audit of the DoD annually and reports to the Standing Committee on Public Accounts (SCOPA), a parliamentary portfolio committee. SCOPA assesses the efficiency of the state finances, and determines whether DoD expenditure is in line with its budget.<sup>159</sup>

The discussion above has shown a clear improvement in Parliament's reliance on the Auditor-General's reports, as well as increased cooperation between the two institutions. The effectiveness of the Auditor-General as an oversight mechanism was significantly improved through the Public Audit Amendment Act (No. 5 of 2018), which expanded the mandate of the Auditor-General under section 5 of the Public Audit Act (No. 25 of 2004).

The Auditor-General now has the power to issue departments with an MI. Section 1 of the Act provides that an MI –

[M]eans any noncompliance with, or contravention of, legislation, fraud, theft or a breach of a fiduciary duty identified during an audit performed under this Act that *resulted in or is likely to result in a material financial loss, the misuse or loss of a material public resource or substantial harm to a public section institution or the general public.* [author's italics]

Section 5(1A) and (1B) allow the Auditor-General to refer MIs to relevant public bodies for further investigation, recommend actions to resolve the MIs, take binding remedial action against an institution for refusal to implement her recommendations, and issue a certificate of debt for failure to implement remedial action where a financial loss was involved.<sup>160</sup> This expanded mandate allows the Auditor-General to extract accountability from departments in terms of both its elements, that is, answerability and sanction. The mandate further provides the Auditor-General with substantial power to deal with irregularities, including defence procurement-related irregularities, fraud, and corruption.

An example of the utilisation of this expanded mandate regarding the DoD, was the investigation<sup>161</sup> by the Auditor-General into the procurement of Interferon from Cuba.<sup>162</sup> In this instance, the DoD purchased 970 895 vials of the immune booster Interferon for its forces deployed during the Covid-19 pandemic at an approximate cost of R260 million. By 31 March 2022, the department had however only paid R33,5 million.<sup>163</sup> The Auditor-General found that:

- The department had failed to comply with the import regulations for unregistered medicine as required by the South African Health Products Regulatory Authority (SAHPRA);
- There were shortcomings in the procurement processes followed; and
- There was insufficient record-keeping for the transportation and warehousing of the immune boosters.

The non-compliance by the DoD would also likely 'result in a material financial loss of R260 342 813' as SAHPRA had only authorised the use of 10 vials. The Auditor-General issued the department with an MI on 13 August 2021 and invited a written submission from the accounting officer. In the 2021–2022 Annual Report of the DoD, the Auditor-General indicated that she did not receive adequate responses from the accounting officer on actions taken to resolve the MI.<sup>164</sup> The Auditor-General however referred to the report by the Public Protector on Interferon (discussed below) in the 2022–2023 DoD Annual Report, noting that the remedial action recommended and the accounting officer's actions in line with that remedial action meant that the Auditor-General viewed the MI as resolved.<sup>165</sup>

The discussion of the number of MIs issued to the DoD as well as the expanded mandate of Auditor-General makes the Auditor-General one of the most effective oversight structures of the DoD, both in general and in relation to defence procurement.

### *The Public Protector*

The Public Protector is one of the institutions established under Chapter 9 of the Constitution, and is regulated by the Public Protector Act (No. 23 of 1994), which gives effect to section 182 of the Constitution. The mandate and investigative powers of the Public Protector are set out in both the Act and in the Rules Relating to Investigations by the Public Protector and Matters Incidental Thereto, 2018 (Public Protector Rules, 2018).<sup>166</sup>

Section 6(3) of the Public Protector Act provides that:

The Public Protector may refuse to investigate a matter reported to him or her, if the person ostensibly prejudiced in the matter is –

- (a) an officer or employee in the service of the State or is a person to whom the provisions of the Public Service Act, 1994 [...], are applicable and has, in connection with such matter, not taken all reasonable steps to exhaust the remedies conferred upon him or her in terms of the said Public Service Act, 1994; or
- (b) prejudiced by conduct referred to in subsections (4) and (5) and has not taken all reasonable steps to exhaust his or her legal remedies in connection with such matter.<sup>167</sup>

Rule 11(1) then provides:

The Public Protector shall, if he or she refuses to investigate a complaint [...], in writing inform the complainant of –

- (a) the decision;
- (b) the grounds on which the decision is based; [and]
- (c) the remedy available to the complainant in terms of sub-rule (2).

In addition, section 7(1)(a) of the Public Protector Act states that the Public Protector shall –

*[H]ave the power, on his or her own initiative or on receipt of a complaint or an allegation or on the ground of information that has come to his or her knowledge ..., to conduct a preliminary investigation for the purpose of determining the merits of the complaint, allegation or information and the manner in which the matter concerned should be dealt with.*<sup>168</sup>  
[author's italics]

Read together, these provisions seemingly provide the Public Protector with discretion, and he or she is, therefore, not compelled to investigate a matter. Nonetheless, the Constitutional Court judgment in *Economic Freedom Fighters v Speaker of the National*

*Assembly; Democratic Alliance v Speaker of the National Assembly*<sup>169</sup> expanded the mandate of the Public Protector. The Court unanimously confirmed the legally binding effect of the Public Protector’s remedial action,<sup>170</sup> which would mean that a party affected by a finding of the Public Protector must comply with his or her recommended remedial action. As in the case of the expanded mandate of the Auditor-General, the Public Protector can extract accountability from an actor in terms of both its elements (answerability and sanction).

The current Public Protector recently utilised her expanded mandate in relation to the DoD when she launched an investigation into the procurement of the drug Interferon from Cuba in 2021. The Public Protector confirmed that she launched ‘an own-initiative investigation’ on 17 February 2021, while also receiving a separate complaint on the matter on 19 February 2021 from Democratic Alliance MP Kobus Marais.<sup>171</sup> She released her report<sup>172</sup> in 2022, which found that the DoD did not follow a proper procurement process. Specifically, the DoD contravened –

[S]ections 195(1)(a)(b) and (f) and 217 of the Constitution, Treasury Regulations 16A3, 16A3.2, 16A6.2(b) and 16A6.4, the DOD Policy “*Process and Procedures for procurement and sales in respect of commercial goods and services*”. [...] The conduct of the DOD [...] constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) and (ii) of the Public Protector Act.<sup>173</sup>

Recognising the binding nature of her findings, the Public Protector’s remedial action included, inter alia, that:

- The President and Minister of Defence ‘[t]ake cognisance of the findings of maladministration and improper conduct’ as required under section 202(1) and (2) of the Constitution;
- The Secretary for Defence as accounting officer ‘[w]ithin sixty (60) days from the date of this report, initiate an investigation [...] and take appropriate action [...] against the DOD officials involved in the irregular procurement’; and
- The Chief of the SANDF (CSANDF) ‘render the necessary assistance’ to the Secretary to ensure effective implementation and fulfilment of the duties of the Secretary, with the CSANDF required to ‘adhere to all the delegated lawful instructions received’ from the Secretary ‘in terms of section 10 of the Defence Act relating to disciplinary action or departmental investigations on this matter’.<sup>174</sup>

As mentioned above, the Auditor-General notes in the 2022–2023 DoD Annual Report:

[T]he accounting officer referred certain remedial actions from the acting public protector to the Special Investigation Unit (SIU) [...] On 4 July 2023, the SIU advised me that the investigation into this matter has commenced and that should the investigation identify any losses that have been incurred, these will be recovered through the civil litigation proceedings in the special tribunal for the appropriate relief.

The above illustrates that the Public Protector can exercise oversight of defence procurement, and her remedial action is binding. The only inherent limitation of this office is that she is not compelled to investigate all instances of alleged irregularities within the DoD. Instead, it depends on whether she exercises her choice to launch an own-initiative investigation, or receives a request to investigate as required under the Public Protector Act.<sup>175</sup>

### **Can any Oversight Mechanisms extract “Full” Accountability?**

The discussion above revealed two important findings. First, the Military Ombud and Parliament are capable of getting the DoD to answer for its actions, with Parliament showing considerable improvement from 2015, but especially from 2019, onwards. The primary focus of Parliament on answerability however means that the first two mechanisms primarily succeed in terms of answerability. Second, the Auditor-General and Public Protector are also capable of extracting answerability, while their expanded mandates mean that they can also sanction the DoD when its actions contravene procurement laws and rules. The latter two mechanisms can therefore ensure both answerability and sanction (accountability).

“Full” accountability however goes beyond answerability and sanction. Closer analysis reveals that the oversight mechanisms are often limited in their ability to exercise oversight given national security and secrecy concerns. Oversight mechanisms do not always have access to all relevant information, meaning that, even if the mechanism can extract answers and issue sanctions, their lack of access to all audit and other relevant information means that they are not necessarily positioned to “see” the whole picture.

For example, in relation to the Special Defence Account (SDA),<sup>176</sup> the Auditor-General repeated the following statement in the DoDs Annual Reports for 2018–2019 to 2022–2023:

I was unable to obtain sufficient appropriate audit evidence regarding sensitive projects expenditure and related investments due to the sensitivity of the environment and the circumstances under which the related transactions were incurred and recorded.<sup>177</sup>

This limitation is, nonetheless, deemed reasonable, with the DoD stating on 15 March 2023, that the Auditor-General ‘had full access to 99.3% of the Department’s spending’.<sup>178</sup>

An important question then is whether this is satisfactory. Should it not be possible, indeed mandatory, for each mechanism to have access to all relevant information so that each mechanism can extract “full” accountability on its own?

Ideally, one would want the answer to be yes. The Military Ombud can however only extract answerability due to the limitations of its regulatory framework. Similarly, Parliament appears unprepared to move over into the realm of sanction. Parliament and its committees however do have a very broad mandate,<sup>179</sup> while the Military Ombud, the Auditor-General, and the Public Protector do not have *carte blanche* access to DoD

information. The time has thus come to reconsider the relationship between each of these oversight mechanisms. A different view of accountability and how to extract “full” accountability is required, which could assist in understanding the impact of national security and secrecy better and to enable a flexible system in which there is an appropriate balance between national security and defence procurement transparency. This is where a system of combined assurance becomes relevant.

### **Combined assurance**

Combined assurance is a financial term applicable to corporate governance.<sup>180</sup> It was found that assurance providers often work in silos, which inhibits proper risk assessment. Combined assurance addresses the risk gap, seeing that –

[IT] incorporates and optimises all assurance services and functions so that, taken as a whole, these enable an effective control environment; support the integrity of information used for internal decision-making by management, the governing body and its committees; and support the integrity of the organization’s external reports.<sup>181</sup>

Through combining efforts, risk assessment could be improved. This approach could also assist the SANDF, a deeply hierarchical institution where everything is done in silos in line with the concept of command and control.<sup>182</sup> It is not hard to imagine that oversight mechanisms often function similarly. Each often carries out its task in a vacuum and face obstacles in obtaining access to information. There should nevertheless be a connecting point between the mechanisms. There should, for example, be a mechanism that can take over from where the oversight duties of the Auditor-General stop – some mechanism that can “see” the information the Auditor-General cannot see. Combined assurance within the military context could allow such “full” assurance. This however raises a question: is there not already some kind of combined assurance system in place within the military context? While the answer may be yes, the operation of such a system is questionable.

First, there are four primary oversight mechanisms in place. Second, the Auditor-General – referring to the Public Protector’s report on Interferon and deeming the MI resolved on this basis – certainly supports the notion that one mechanism can rely on the work done by another, and the mechanisms can support each other in oversight responsibilities. Third, Parliament has a broad oversight mandate, and committee meetings can be closed to the public if sensitive information is being discussed.<sup>183</sup> The Joint Standing Committee on Intelligence is also mandated to do oversight of the “covert space”, with these meetings always closed to the public.<sup>184</sup> The accounting officer of the DoD specifically highlighted the existence of this committee, especially in relation to the SDA, where the Auditor-General has continuously highlighted constraints in gaining access to auditing information.<sup>185</sup> Parliament, therefore, has the ability to gain access to a broad scope of DoD information, albeit within a closed space at certain times. This means, at least theoretically, that Parliament can extract “full” accountability, and step in at times when other oversight mechanisms may face certain limitations.



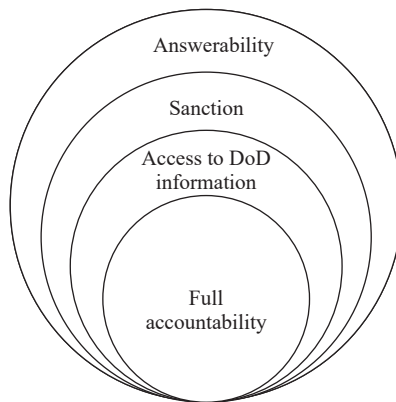
Analysis in the current study however showed that Parliament primarily focuses on answerability, and much remains to be done in terms of its ability to sanction. The proper functioning of the Portfolio Committee on Intelligence is also questionable, seeing that the DoD stated in March 2023 that there is no consensus yet among the ‘Portfolio Committee [...], on how to manage the possible risk of completeness and accountability within the covert space’, and, at that stage, a date still had to be determined for further discussions on how to manage risk in area.<sup>186</sup> In addition, the regulatory frameworks, mandates and purposes of the Military Ombud, the Auditor-General and the Public Protector ultimately differ, regardless of their ability to sanction or not.

In view of the gaps in the current system, military oversight mechanisms require renewed focus, and consequence management should be seen as a group effort. The only way to extract “full” accountability from the DoD in relation to defence procurement, is to look beyond the individual oversight responsibilities of each mechanism. Indeed, I propose a new and multi-dimensional view of oversight in which the extraction of “full” accountability is achieved through combined effort. This is discussed below.

## **Moving Beyond Individual Oversight Responsibilities**

### *The Ability of the System to Extract Full Accountability*

Combined assurance requires one to focus on the system itself, not on its individual elements. Procurement is after all an administrative process. In this administrative process, we are not concerned with whether an individual element complied with good governance and the applicable regulatory framework; instead, one asks whether the elements together were able to ensure a fair and impartial administrative process. The same argument should apply to oversight of defence procurement. Instead of focusing on the ability of an individual mechanism to extract full accountability, one should ask whether all the mechanisms working in unison are able to achieve the target. This approach is practically illustrated by means of the schematic diagram in Figure 2 below.



*Figure 2: Combined assurance within the context of defence procurement.*

Oversight of defence procurement should be viewed as a three-dimensional system. The first dimension is answerability. All four mechanisms discussed in this article contribute at this level. The second dimension is sanction, to which Parliament, the Auditor-General and the Public Protector in theory contribute, although in practice, primarily only the latter two contribute. Finally, the third dimension is whether one or more mechanism could gain access to information which either falls within the “covert space” or is classified, i.e. oversight gaps, which exist due to national security and secrecy. If so, then the work done by each of the mechanisms – if put together – leads to the system extracting full accountability from the DoD for its defence procurement actions.

This three-dimensional system will succeed under the following conditions. First, Parliament addresses, at the earliest opportunity, shortcomings in the functionality of the Portfolio Committee on Intelligence, and reconsider its position regarding the use of summons under sections 14(1)(a)–(b) and 17(1)(a) of the Powers, Privileges and Immunities of Parliaments and Provincial Legislatures Act. Second, all four mechanisms should consider areas of complementarity and, as the Auditor-General did when she referred to the remedial action of the Public Protector relating to Interferon, refer to work done by another or determine whether the other mechanism has the ability to cover an information gap, which it cannot.

Notwithstanding the above, an argument can be made that the existence of multiple oversight mechanisms implies a tension between them, especially if there is more than one exercising oversight over the same issue. This was, for example, seen with the procurement of Interferon.<sup>187</sup> In this article, however, I argue that it is not an issue of tension; rather, it is one of a mechanism passing the baton to the next one, which can continue with oversight from where the previous mechanism was justifiably required to stop. This nevertheless raises the issue of overlap and duplication.

## **The Concern of Overlap and Duplication**

The *Oxford English Dictionary* defines overlap as ‘[a]n occurrence or instance of overlapping; the point at or degree by which one edge or thing overlaps another; an overlapping thing’,<sup>188</sup> and duplication as ‘[t]he action of doubling. The making anything twice as many or as much; the repetition of an action or thing’.<sup>189</sup> The two concepts should not be conflated based on these two definitions, and I do not view them as synonymous. In the current context, “overlap” means that two mechanisms primarily investigate an issue from two different perspectives, touching – to a limited extent – on the same or similar aspects. On the other hand, “duplication” means two mechanisms do the exact same thing. In line with this understanding, overlap per se is not problematic, but duplication is. Two different mechanisms should not be investigating a matter based on the same investigative question, regulatory framework, or area of compliance.

The multi-mechanism investigation into the procurement of Interferon supports this conclusion. The Auditor-General flagged certain shortcomings in the procurement processes followed, but primarily focused her initial investigation on the DoD’s lack of compliance with the Medicines and Related Substances Act (No. 101 of 1965), its failure to

obtain approval for importation from SAHPRA,<sup>190</sup> and issuing the department with an MI under section 5 of the Public Audit Act. On the other hand, the investigation by the Public Protector focused on the regulatory framework set out in the Constitution, the PFMA, the DoD's own internal policies, and maladministration under section 6(4)(a)(i) and (ii) of the Public Protector Act. While there was overlap to the extent that both mechanisms investigated the same irregularity, identified shortcomings, and issued certain remedial actions, there was no duplication, as they utilised two different regulatory frameworks aimed at different dimensions of compliance. While duplication should be avoided as far as possible, overlap is not problematic if it occurs in the correct manner, and duplication can be prevented through MOAs, such as those entered into by the Military Ombud.<sup>191</sup>

If mechanisms exercise oversight over the same issue, but rely on different regulatory frameworks and their investigations merely overlap, combined assurance therefore emerges, not merely duplication. This ensures the extraction of “full” accountability from the DoD.

## **Conclusion**

Defence procurement is a ‘key activity of the modern state that allows it to defend its sovereignty and ensure its survival’.<sup>192</sup> ‘[L]arge defence projects [...] and secrecy allow opportunities for corruption.’<sup>193</sup> To prevent fraud, corruption, and procurement irregularities, and to ensure fiscal responsibility on the part of the DoD, the department must be held accountable when it has transgressed. As discussed throughout this contribution, the DoD is however not being held accountable in the full sense of the word. In fact, the current accountability structures in place possess varying powers and capabilities. Parliament and the Military Ombud primarily extract answerability from the DoD while the Auditor-General and the Public Protector can extract answerability as well as sanction the DoD. The latter two mechanisms also appear more willing than Parliament to use its sanction powers. At the same time, some of the mechanisms exercise oversight of the same irregularities, while simultaneously facing challenges in gaining access to DoD information, especially information pertaining to the covert space and the SDA.

The above can, nonetheless, be addressed through a well-functioning system of combined assurance. Despite Parliament primarily extracting answerability only, it has committees in place that can gain access to information not necessarily available to the Military Ombud, the Auditor-General and/or the Public Protector. To address the pros and cons of each mechanism, the different mechanisms should therefore not be viewed as individual elements; instead, they are all cogs feeding into the same wheel of “full accountability”. A system of combined assurance ultimately limits the pressure on an individual element, as a single mechanism, such as the Auditor-General for example, is not per se required to extract answerability, impose sanctions, and have access to all DoD information. A single mechanism is not deemed to have failed in the exercise of extracting accountability simply because it could not gain access to all relevant DoD information or because it could only address an irregularity to a certain extent. Instead, one should ask whether the whole system, having worked together, was able to cover all necessary areas and ensure both transparency of and accountability for DoD actions. Extracting “full accountability” is

achieved through all the different mechanisms working together, passing the baton from one to the other until the task of oversight is complete.

A holistic and collaborative approach to military oversight by these various mechanisms will therefore help address the balancing exercise often required within the context of defence procurement due to national security concerns. For this system to function optimally, the four mechanisms should however strengthen their cooperation and avoid duplication. Parliament should also address the shortcomings in the functionality of the Portfolio Committee on Intelligence and reconsider its position regarding the use of summons under sections 14(1)(a)–(b) and 17(1)(a) of the Powers, Privileges and Immunities of Parliaments and Provincial Legislatures Act.

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## ENDNOTES

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- <sup>74</sup> Dr Ernst Heydenrych is an Academic & Quality Manager in the Faculty of Law at Boston City Campus and Business School. This contribution flows from research conducted by the author for his LLD dissertation titled *An Analysis of Defence Procurement in South Africa*, Stellenbosch University (2023). The article summarises the author's fifth chapter and develops the research presented in the dissertation further. The author wishes to thank Prof Geo Quinot and Lt Col (Prof) Michelle Nel, his doctoral supervisors, for their guidance and support.
- <sup>75</sup> P Holden & H van Vuuren, *The Devil in the Detail: How the Arms Deal Changed Everything* (Jeppestown: Jonathan Ball, 2011), 5–11.
- <sup>76</sup> Abacus Financial Crime Advisory, *Investigation into the 1 Military Hospital Repair and Maintenance Program and the Refurbishment project – Final Executive Summary* (2020), 1–42.
- <sup>77</sup> Ministerial Task Team, *The South African Biography of Heberon® Alfa R (Human Recombinant Alpha 2B Interferon: On Allegations of Fraud, Corruption and Misuse of State Funds Made against the Department of Defence*, 2021. <[https://static.pmg.org.za/220420MTT\\_Report\\_on\\_Interferon\\_24Oct2021\\_FINAL.pdf](https://static.pmg.org.za/220420MTT_Report_on_Interferon_24Oct2021_FINAL.pdf)> [Accessed on 24 August 2024].
- <sup>78</sup> *DefenceWeb*, 'Life Being Breathed Back into Hoefyster – with Conditions', 26 August 2022. <<https://www.defenceweb.co.za/featured/life-being-breathed-back-into-hoefyster-with-conditions/>> [Accessed on 20 September 2023]; *DefenceWeb* 'Denel Concluding Hoefyster Development but Fewer Vehicles to be Manufactured', 23 February 2024. <<https://www.defenceweb.co.za/land/land-land/denel-concluding-hoefyster-development-but-fewer-vehicles-to-be-manufactured/>> [Accessed on 25 February 2024].
- <sup>79</sup> According to Transparency International's Corruption Perceptions Index, South Africa ranked 83<sup>rd</sup> out of 180 countries in 2023, with a score of 41/100. The rank is not as important as the score, seeing as the score is 'the perceived level of public sector corruption on a scale of 0-100, where 0 means highly corrupt and 100 means very clean'. See Transparency International, 'Corruption Perceptions Index', 2024. <<https://www.transparency.org/en/cpi/2023/index/za>> [Accessed on 2 June 2024].
- <sup>80</sup> Examples include personal protective equipment-related fraud and corruption during the Covid-19 pandemic, spouses of high-ranking uniformed personnel submitting fraudulent documents to obtain tenders and corrupt procurement deals within the Defence Intelligence Division. See *DefenceWeb*, 'SANDF PPE Scandal Brought to Light', 31 July 2023. <<https://www.defenceweb.co.za/sa-defence/sa-defence-sa-defence/sandf-ppe-scandal-brought-to-light/>> [Accessed on 20 September 2023]; M Zuzile, 'High-flying Wife of Army General Arrested in R100m Tender Fraud', *TimesLIVE*, 14 October 2020. <<https://www.timeslive.co.za/news/south-africa/2020-10-14-high-flying-wife-of-army-general-arrested-in-r100m-tender-fraud/>> [Accessed on 20 September 2023]; S Mahlangu, 'More Corruption Unearthed at Department of Defence's Intelligence Unit', *The Star*, 11 February 2021. <<https://www.iol.co.za/the-star/news/more-corruption-unearthed-at-department-of-defences-intelligence-unit-52398a14-cc99-4d06-9dbe-43f95972efae>> [Accessed on 20 September 2023].

- <sup>81</sup> LCO Klaus, 'Transforming Armed Forces through Military Transparency: Open Government Challenges in a World of Secrecy', *Transforming Government: People, Process and Policy*, 10, 1 (2016), 108; S Perlo-Freeman & C Solmirano, *Why Arms Procurement Go Wrong* (Stockholm: Stockholm International Peace Research Institute, 2012), 1; Heydenrych, *An Analysis of Defence Procurement in South Africa*, 188, 252–253.
- <sup>82</sup> J Piombo, 'Civil-military Relations in an Emerging Democracy – South Africa', in TC Bruneau & FC Matei (eds.), *The Routledge Handbook of Civil-military Relations* (Oxfordshire: Routledge, 2013), 266; WK Janse van Rensburg, *Twenty Years of Democracy: An Analysis of Parliamentary Oversight of the Military in South Africa since 1994* (PhD dissertation, Stellenbosch University, 2019), 1–2; L Heinecken, *South Africa's Post-Apartheid Military: Lost in Transition and Transformation* (Cape Town: UCT Press, 2019), 71–73.
- <sup>83</sup> Janse van Rensburg, *Twenty Years of Democracy*, 204–209; Heinecken, *South Africa's Post-Apartheid Military*, 73.
- <sup>84</sup> Heydenrych, *An Analysis of Defence Procurement*, 261–263, 297–309.
- <sup>85</sup> Note that this contribution does not address processes internal to the DOD (the South African National Defence Force) or Armscor. The DOD and Armscor certainly have internal procedures in place included in various Department of Defence Instructions, Joint Defence Publications and other internal policies that aim to regulate defence procurement and defence expenditure. However, the scope of this contribution does not permit discussion and analysis of these processes as well.
- <sup>86</sup> M Uttley, 'Defence Procurement', in DJ Galbreath & JR Deni (eds.), *Routledge Handbook of Defence Studies* (Oxfordshire: Routledge, 2020), 72.
- <sup>87</sup> BE Fein, 'Access to Classified Information: Constitutional and Statutory Dimensions', *William & Mary Law Review*, 26, 5 (1985), 810.
- <sup>88</sup> MH Halperin & DN Hoffman, 'Secrecy and the Right to Know', *Law and Contemporary Problems*, 40, 3 (1976), 135.
- <sup>89</sup> Perlo-Freeman & Solmirano, *Why Arms Procurement Go Wrong*, 1.
- <sup>90</sup> Perlo-Freeman & Solmirano, *Why Arms Procurement Go Wrong*, 1.
- <sup>91</sup> Klaus, 'Transforming Armed Forces through Military Transparency', 108.
- <sup>92</sup> For the difference between military transparency and secrecy, see Klaus, 'Transforming Armed Forces through Military Transparency', 106–110.
- <sup>93</sup> *Cambridge Dictionary*, 'Oversight', 2022. <<https://dictionary.cambridge.org/dictionary/english/oversight>> [Accessed on 23 September 2023].
- <sup>94</sup> Emphasis added. See R Pelizzo & R Stapenhurst, 'Democracy and Oversight', Paper 130, Research Collection School of Social Sciences, 2006. <[https://ink.library.smu.edu.sg/soass\\_research/130/](https://ink.library.smu.edu.sg/soass_research/130/)> [Accessed on 23 on September 2023].
- <sup>95</sup> Pelizzo & Stapenhurst, 'Democracy and Oversight'.
- <sup>96</sup> Pelizzo & Stapenhurst, 'Democracy and Oversight'.
- <sup>97</sup> Canadian Audit and Accountability Foundation, 'What is Oversight and How Does it Relate to Governance?', 2023. <<https://www.caaf-fcar.ca/en/oversight-concepts-and-context/what-is-oversight-and-how-does-it-relate-to-governance>> [Accessed on 23 September 2023].
- <sup>98</sup> Canadian Audit and Accountability Foundation, 'What is Oversight'.

- <sup>99</sup> DM Chirwa & L Nijzink, 'Accountable Government in Africa: Introduction', in DM Chirwa & L Nijzink (eds.), *Accountable Government in Africa: Perspectives from Public Law and Political Studies* (Claremont: UCT Press, 2012), 5.
- <sup>100</sup> Chirwa & Nijzink, 'Accountable Government in Africa: Introduction', 5.
- <sup>101</sup> M Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework', *European Law Journal*, 13, 4 (2007), 449–450.
- <sup>102</sup> Bovens, 'Analysing and Assessing Accountability', 450.
- <sup>103</sup> Bovens, 'Analysing and Assessing Accountability', 451.
- <sup>104</sup> Bovens, 'Analysing and Assessing Accountability', 451.
- <sup>105</sup> Bovens, 'Analysing and Assessing Accountability', 451.
- <sup>106</sup> Bovens, 'Analysing and Assessing Accountability', 451.
- <sup>107</sup> Klaus, 'Transforming Armed Forces through Military Transparency', 108.
- <sup>108</sup> NM Mpani, 'The Role of Legislatures' Oversight Committees in Deepening Democracy and Accountability for the Use of Public Resources in South Africa', Democracy Development Program, 20 October 2021. <<https://ddp.org.za/blog/2021/10/20/the-role-of-legislatures-oversight-committees-in-deepening-democracy-and-accountability-for-the-use-of-public-resources-in-south-africa/>> [Accessed on 24 September 2023].
- <sup>109</sup> This is clarified below.
- <sup>110</sup> Heydenrych, *An Analysis of Defence Procurement*, 298–299.
- <sup>111</sup> Heydenrych, *An Analysis of Defence Procurement*, 301–303.
- <sup>112</sup> Parliament of the Republic of South Africa, *Oversight and Accountability Model: Asserting Parliament's Oversight Role in Enhancing Democracy* (Pretoria, 2008), para 3.1.
- <sup>113</sup> Janse van Rensburg, *Twenty Years of Democracy*, 75.
- <sup>114</sup> Heinecken, *South Africa's Post-Apartheid Military*, 70.
- <sup>115</sup> Heinecken, *South Africa's Post-Apartheid Military*, 70–71.
- <sup>116</sup> Janse van Rensburg, *Twenty Years of Democracy*, 12–245.
- <sup>117</sup> Heinecken, *South Africa's Post-Apartheid Military*, 73; J van Wyk, 'The Executive and the Military in South Africa during the Zuma Presidency', in S Ratuva, R Compel & S Aguilar (eds.), *Guns and Roses: Comparative Civil-military Relations in the Changing Security Environment* (Singapore: Palgrave Macmillan, 2019), 98.
- <sup>118</sup> For this discussion, see Janse van Rensburg, *Twenty Years of Democracy*, 196–205.
- <sup>119</sup> There were six dedicated debates during the first Parliament, and regular debates during the second. See Janse van Rensburg, *Twenty Years of Democracy*, 196.
- <sup>120</sup> Janse van Rensburg, *Twenty Years of Democracy*, 200.
- <sup>121</sup> Janse van Rensburg, *Twenty Years of Democracy*, 202.
- <sup>122</sup> Janse van Rensburg, *Twenty Years of Democracy*, 202–203.
- <sup>123</sup> Three visits from 1998 to 2004, and 13 visits from 2004 to 2014 (three by the JSCD and 10 by the PCDMV). See Janse van Rensburg, *Twenty Years of Democracy*, 202–203.
- <sup>124</sup> Janse van Rensburg, *Twenty Years of Democracy*, 204.
- <sup>125</sup> For this discussion, see Janse van Rensburg, *Twenty Years of Democracy*, 208–209; Heydenrych, *An Analysis of Defence Procurement*, 279–280.

- <sup>126</sup> I discussed the SDPP in considerable detail in my dissertation. See Heydenrych, *An Analysis of Defence Procurement*, 217–230.
- <sup>127</sup> Janse van Rensburg, *Twenty Years of Democracy*, 208.
- <sup>128</sup> Section 23(1)(b)–(c) of the National Conventional Arms Control Act 41 of 2002 requires the National Conventional Arms Control Committee to submit quarterly and annual reports to Parliament.
- <sup>129</sup> Emphasis added. Janse van Rensburg, *Twenty Years of Democracy*, 208.
- <sup>130</sup> Janse van Rensburg, *Twenty Years of Democracy*, 209.
- <sup>131</sup> For this discussion, see Heydenrych, *An Analysis of Defence Procurement*, 282–288.
- <sup>132</sup> Through use of the “questions and replies” tab, the number of questions and replies for each year was manually counted. See Parliamentary Monitoring Group (PMG), ‘Questions and Replies’, 2023. <[https://pmg.org.za/question\\_replies/](https://pmg.org.za/question_replies/)> [Accessed on 17 October 2023]. See also an additional document on the 2015 tab, labelled ‘23 March 2015 – Questions Asked to Minister of Defence & Military Veterans’.
- <sup>133</sup> Considering that 2015–2022 is also a considerably shorter period than 1994–2014, the number of questions will increase over the remainder of the Parliamentary term.
- <sup>134</sup> Question NW2014 of 2018 did not receive an answer. See PMG, ‘11 September 2018 - NW2014’, 11 September 2018. <<https://pmg.org.za/committee-question/9908/>> [Accessed on 17 October 2023].
- <sup>135</sup> Minister Thandi Modise served as Minister of Defence and Military Veterans from 5 August 2021 until 19 June 2024.
- <sup>136</sup> Heydenrych, *An Analysis of Defence Procurement*, 284–285.
- <sup>137</sup> Heydenrych, *An Analysis of Defence Procurement*, 286. The impact of the Covid-19 pandemic can, however, not be ignored regarding the period 2020–2022.
- <sup>138</sup> For this discussion, see Heydenrych, *An Analysis of Defence Procurement*, 288–290.
- <sup>139</sup> The link between defence procurement and the defence budget cannot be ignored. It is not possible to fully grasp defence procurement if one does not understand what the defence budget is or the ultimate process it encapsulates.
- <sup>140</sup> See Heydenrych, *An Analysis of Defence Procurement*, 293.
- <sup>141</sup> PMG, ‘Progress by DOD on Cases of Fraud and Corruption and Consequence Management; Committee’s Annual Report and Performance Plan’, 25 May 2022. <<https://pmg.org.za/committee-meeting/35057/>> [Accessed on 23 October 2023].
- <sup>142</sup> PMG, ‘Project Thusano: DOD Response to AGSA Findings; DOD Audit Committee and Internal Audit Division on Challenges and Monitoring of Internal Audit Action Plan; with Deputy Minister’, 8 June 2022. <<https://pmg.org.za/committee-meeting/35176/>> [Accessed on 17 October 2023].
- <sup>143</sup> Auditor-General of South Africa (AGSA), *Material Irregularities in National and Provincial Government* (Pretoria, 30 September 2022), 20.
- <sup>144</sup> South African Government, ‘Minister Thandi Modise: Defence and Military Veterans Dept Budget Vote 2023/24’, 23 May 2023. <<https://www.gov.za/speeches/minister-thandi-modise-defence-and-military-veterans-dept-budget-vote-202324-23-may-2023>> [Accessed on 17 October 2023].
- <sup>145</sup> AGSA, *Consolidated General Report on National and Provincial Audit Outcomes 2022/2023* (Pretoria, 27 November 2023), 69.



- <sup>146</sup> For this discussion, see Heydenrych, *An Analysis of Defence Procurement*, 296–297.
- <sup>147</sup> Emphasis added. PMG, ‘Minister Lindiwe Sisulu Non-compliance with Committee Summons’, 15 November 2022. <<https://pmg.org.za/committee-meeting/36013/>> [Accessed on 17 October 2023].
- <sup>148</sup> Heydenrych, *An Analysis of Defence Procurement*, 297.
- <sup>149</sup> Military Ombud, ‘Annual Activity Report 2021/2022’, 2022. <[https://static.pmg.org.za/Office\\_of\\_the\\_Military\\_Ombud\\_Annual\\_Activity\\_Report\\_FY202122.pdf](https://static.pmg.org.za/Office_of_the_Military_Ombud_Annual_Activity_Report_FY202122.pdf)> [Accessed on 18 October 2023].
- <sup>150</sup> Heydenrych, *An Analysis of Defence Procurement*, 300.
- <sup>151</sup> This appears to be in line with the definition of “person” in section 2 of the Interpretation Act 33 of 1957.
- <sup>152</sup> GN R 611 in *Government Gazette* 39375 of 6 November 2015.
- <sup>153</sup> For example at the instance of a disgruntled bidder, whether a company or individual.
- <sup>154</sup> A redacted document is one that has been edited ‘to remove sensitive or private information before sharing it’. See R Heinrich, ‘What Does Redacted Mean in Law?’, *One Legal*, 11 August 2023. <<https://www.onelegal.com/blog/what-does-redacted-mean-in-law/>> [Accessed on 22 August 2024].
- <sup>155</sup> Document on file with the author.
- <sup>156</sup> This was confirmed in *Lambede v Minister of Defence and Military Veterans* 2021 ZAGPPHC 858 para 41; *Dauids v Minister of Defence and Military Veterans*; *Miles v Minister of Defence and Military Veterans* 2023 ZAGPPHC 160 paras 62–63.
- <sup>157</sup> *Khosa v Minister of Defence and Military Veterans* 2020 2 SACR 461 (GP) para 139.
- <sup>158</sup> Heydenrych, *An Analysis of Defence Procurement*, 300–301.
- <sup>159</sup> Heinecken, *South Africa’s Post-Apartheid Military*, 71.
- <sup>160</sup> At the time of writing this article, the Auditor-General had not yet issued this specific sanction. However, this is not regarded as proof that the Auditor-General’s new powers are ineffective. The amendment only came into force in 2019. Based on the MIs issued to various departments, one might well see this sanction issued very soon.
- <sup>161</sup> AGSA, *Second Special Report on the Financial Management of Government’s Covid-19 Initiatives*, 2021.
- <sup>162</sup> Heydenrych, *An Analysis of Defence Procurement*, 237–246, 303–305.
- <sup>163</sup> DOD, *Annual Report for the FY2021/2022*, 164. <[https://nationalgovernment.co.za/departments/annual/408/2022-department-of-defence-\(DOD\)-annual-report.pdf](https://nationalgovernment.co.za/departments/annual/408/2022-department-of-defence-(DOD)-annual-report.pdf)> [Accessed on 24 August 2024].
- <sup>164</sup> DOD, *Annual Report for the FY2021/2022*, 165.
- <sup>165</sup> DOD, *Annual Report for the FY2022/2023*, 195–196. <[https://nationalgovernment.co.za/departments/annual/461/2023-department-of-defence-\(DOD\)-annual-report.pdf](https://nationalgovernment.co.za/departments/annual/461/2023-department-of-defence-(DOD)-annual-report.pdf)> [Accessed on 24 August 2024].
- <sup>166</sup> GN R 945 in *Government Gazette* 41903 of 14 September 2018.
- <sup>167</sup> See also rule 9(1) of the Public Protector Rules, 2018.
- <sup>168</sup> Emphasis added. See also rule 20(1) and (2) of the Public Protector Rules, 2018.
- <sup>169</sup> 2016 ZACC 11.
- <sup>170</sup> Para 76.

- <sup>171</sup> S Tshikalange, ‘Public Protector Finds Procurement of Cuban Covid-19 Drug was “Improper”’, *BusinessDay*, 21 October 2022. <<https://www.businesslive.co.za/bd/national/2022-10-01-public-protector-finds-procurement-of-cuban-covid-19-drug-was-improper/>> [Accessed on 20 October 2023].
- <sup>172</sup> Public Protector, *Report on an Investigation into Allegations of Maladministration and Irregularities Associated with the Procurement of Unauthorised Medicines from Cuba by the Department of Defence* (Report No. 34 of 2022/23). <[https://www.pprotect.org/sites/default/files/legislation\\_report/SANDF%20%28Cuba%29%20-%20Final.pdf](https://www.pprotect.org/sites/default/files/legislation_report/SANDF%20%28Cuba%29%20-%20Final.pdf)> [Accessed on 24 August 2024].
- <sup>173</sup> Public Protector, *Interferon Report*, 126.
- <sup>174</sup> Public Protector, *Interferon Report*, 126–128.
- <sup>175</sup> Heydenrych, *An Analysis of Defence Procurement*, 308.
- <sup>176</sup> Established under section 1 of the Defence Special Account Act 6 of 1974.
- <sup>177</sup> DOD, *Annual Report for the FY2018/2019*, 200 <[https://www.gov.za/sites/default/files/gcis\\_document/202002/DOD-annual-report-fy2018-19-final-web-layout.pdf](https://www.gov.za/sites/default/files/gcis_document/202002/DOD-annual-report-fy2018-19-final-web-layout.pdf)> [Accessed on 24 August 2024]; DOD, *Annual Report for the FY2019/2020*, 219 <[https://www.gov.za/sites/default/files/gcis\\_document/202104/DOD-annual-report-2019-20.pdf](https://www.gov.za/sites/default/files/gcis_document/202104/DOD-annual-report-2019-20.pdf)> [Accessed on 24 August 2024]; DOD *Annual Report for the FY2020/2021*, 179 <[https://www.gov.za/sites/default/files/gcis\\_document/202110/defenceannualreport202021.pdf](https://www.gov.za/sites/default/files/gcis_document/202110/defenceannualreport202021.pdf)> [Accessed on 24 August 2024]; DOD, *Annual Report for the FY2021/2022*, 156, DOD, *Annual Report for the FY2022/2023*, 180.
- <sup>178</sup> PMG, ‘DOD Responses to AGSA Status of Records Review and Material Irregularities; with Deputy Minister’, 15 March 2023. <<https://pmg.org.za/committee-meeting/36568/>> [Accessed on 24 October 2023].
- <sup>179</sup> See the discussion below.
- <sup>180</sup> S Zhou, R Simnett & H Hoang, ‘Evaluating Combined Assurance as a New Credibility Enhancement Technique’, *Auditing: A Journal of Practice and Theory*, 38, 2 (2019), 235; J Forte & K Barac, ‘Combined Assurance: A Systematic Process’, *Southern African Journal of Accountability and Auditing*, 17, 2 (2015), 71; Galvanize, ‘What is Combined Assurance?’, 14 August 2019. <<https://www.wegalvanize.com/risk/combined-assurance/>> [Accessed on 24 October 2023].
- <sup>181</sup> Galvanize, ‘What is Combined Assurance’.
- <sup>182</sup> Heydenrych, *An Analysis of Defence Procurement*, 58, 321.
- <sup>183</sup> See rule 184 of the Rules of the National Assembly (9th ed.), 2016. <[https://www.parliament.gov.za/storage/app/media/Rules/NA/2016-09-28\\_NA\\_RULES.pdf](https://www.parliament.gov.za/storage/app/media/Rules/NA/2016-09-28_NA_RULES.pdf)> [Accessed on 8 November 2023]. An example was the PCDMV who held a closed meeting on 7 September 2022. See PMG, ‘AGSA Audit Findings/Outcomes and Investigation Reports’, 7 September 2022. <<https://pmg.org.za/committee-meeting/35499/>> [Accessed on 8 November 2023].
- <sup>184</sup> See the website of the PMG at <<https://pmg.org.za/committee/84/>> [Accessed on 8 November 2023].
- <sup>185</sup> DOD, *Annual Report for the FY2019/2020*, 215.
- <sup>186</sup> Emphasis added. PMG, ‘DOD Responses to AGSA Status’.
- <sup>187</sup> See also Ministerial Task Team, *The South African Biography of Heberon*.
- <sup>188</sup> *Oxford English Dictionary*, ‘Overlap’. <<https://www.oed.com/search/dictionary/?scope=Entries&q=overlap>> [Accessed on 7 November 2023].

<sup>189</sup> *Oxford English Dictionary*, 'Duplication'. <<https://www.oed.com/search/dictionary/?scope=Entries&q=duplication>> [Accessed on 7 November 2023].

<sup>190</sup> AGSA, *Second Special Report*, 2021, 127–128.

<sup>191</sup> See the discussion of the Military Ombud's mandate above.

<sup>192</sup> Uttley, 'Defence Procurement', 72.

<sup>193</sup> K Hartley, 'Defence Budgets', in Galbreath & Deni, 53.

