



RESPONSE BY
PRESIDENT CYRIL RAMAPHOSA
TO THE RECOMMENDATIONS OF
THE JUDICIAL COMMISSION OF INQUIRY
INTO ALLEGATIONS OF
STATE CAPTURE, CORRUPTION
AND FRAUD

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REPUBLIC OF SOUTH AFRICA

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1 PREFACE

This is a response to the report of the Commission of Inquiry into Allegations of State Capture, Corruption and Fraud that was chaired by Chief Justice Raymond Zondo in the wake of a damning account of allegations of widespread corruption provided by former Public Protector Adv Thuli Madonsela in her State of Capture report.

Corruption is a crime against the South African people.

Corruption is a betrayal of our democracy and an assault on the institutions that we established together to advance the values of our Constitution and the interests of our people. The corruption that manifested itself through state capture was a crime against the ordinary people of South Africa. The money that was stolen and abused robbed our people of resources that should have led to the development of our country and improved livelihoods.

Yet, even as state capture and corruption sought to compromise and weaken our democracy and destroy our institutions, our democracy remained resilient and the people of South Africa stood defiant and resolute.

The Executive branch of the state is submitting this response to the findings and recommendations of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud to the Legislature in fulfilment of an order by the Judiciary.

This is a firm and clear indication of the primacy of the rule of law and a demonstration of our democratic system at work.

This response constitutes an ethical, moral and institutional departure from the abuses revealed by the State Capture Commission.

This response is intended as a platform to mobilise all sectors of our society against fraud, corruption and state capture now and into the future.

We are submitting this response to Parliament six years to the month since former Public Protector Adv Thuli Madonsela released her State of Capture report.

The Public Protector's *State of Capture* report related to an investigation into complaints of alleged improper and unethical conduct by several state functionaries and private individuals and companies.

Having witnessed the proceedings of the State Capture Commission for close on to four years, South Africans naturally seek restoration, redress, and accountability. They expect their country's economy and its state to be ethical and free of corruption as it serves the needs and interests of the people.

This response is designed to provide redress in respect of the events of the past and to advance the renewal of our society. Through the implementation of the actions contained in this response, we can start a new chapter in our struggle against corruption.

We are indebted to the many courageous and brave whistle-blowers who brought various allegations of fraud and corruption to the attention of the Public Protector and those who gave evidence at the State Capture Commission.

We are indebted to the men and women who executed their functions tirelessly and honestly in our criminal justice institutions who, without fear or favour, worked to turn testimony presented to the Commission into evidence that can now be used in prosecutions.

We are indebted to the diligent public servants and public representatives, researchers, journalists, activists, workers and businesspeople who uncovered, spoke out against and resisted state capture.

Given the significance of the impact that fraud and corruption had in our country, the response to state capture must be a national effort.

In this regard, the recent establishment of the National Anti-Corruption Advisory Council, rooted in civil society, is a vital initiative towards engendering national consensus and action to safeguard South Africa against corruption into the future.

While the Commission's recommendations focus on the institutional and legislative mechanisms to tackle corruption, it is critical that we give equal attention to the responsibility of individuals – wherever they are – to act ethically and honestly. We need to ensure that we have people of integrity in the Executive, the public service and all other state organs who will execute their functions in service of the people of South Africa on an ethical basis and in accordance with the values of our Constitution.

This response seeks to contribute to the social compact we are forging as a nation. Unlike the toxic and divisive impact of state capture, our response to the work of the Commission must unite us in working even harder for a better South Africa.

As a nation, we have made extraordinary progress in the fight against state capture and corruption. But there is much work that lies ahead, to rebuild our institutions and the capacity of the state, to ensure accountability, to restore trust and confidence, and to rekindle our hope in a better future for all.

2 EXECUTIVE SUMMARY

- 2.1.1 The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State was established as part of the remedial action contained in the report of the Public Protector released on 2 November 2016.
- 2.1.2 In line with the remedial action contained in the Public Protector’s report and as required by the ruling of the Gauteng High Court on 23 February 2022, this document outlines my intentions as President of the Republic of South Africa with regards to implementation of the Commission’s recommendations.
- 2.1.3 The State Capture Commission report concludes that “there can be no doubt that state capture happened in South Africa”.¹ Government accepts in the main the findings of the Commission with respect to the existence, nature and extent of state capture in South Africa.
- 2.1.4 The greatest number of recommendations are directed to the law enforcement agencies for investigation and possible prosecution. While these agencies are within the Executive arm of the state, they are constitutionally and legislatively mandated to exercise their responsibilities independently.
- 2.1.5 This report focuses on the recommendations that are directed to the Executive and those that affect its work.

DEALING WITH THE PERPETRATORS OF STATE CAPTURE

Criminal investigations and prosecutions

- 2.1.6 The State Capture Commission made 202 recommendations with respect to criminal investigation and possible prosecution of individuals, entities and named groups of people. The recommendations are currently receiving attention from law enforcement agencies, through a Joint Task Force, working in collaboration with other agencies, including the South African Revenue Services (SARS) and the Financial Intelligence Centre (FIC).
- 2.1.7 To date, the Investigating Directorate of the National Prosecuting Authority (NPA) has enrolled **26 cases**, declared **89 investigations** and **165 accused persons** have appeared in court for alleged state capture-related offences.

Asset Recoveries

- 2.1.8 The State Capture Commission made 27 recommendations regarding the recovery of proceeds of crime and legal steps to be taken by certain entities themselves to

¹ State Capture Commission Report, Part 6, Vol 2, p 33

recover funds. These recommendations are receiving priority attention from the NPA's Asset Forfeiture Unit (AFU), the Special Investigating Unit (SIU) and the South African Revenue Service (SARS).

- 2.1.9 As of 30 September 2022, freezing or preservation orders to the value of **R12.9 billion** have been granted; a total of **R2.9 billion** has been recovered by the AFU and returned to the affected entities; the SIU has instituted four High Court cases in relation to contracts worth **R62.1 billion**; and SARS investigations arising from the Commission's findings and evidence have resulted in collections of **R4.8 billion** in unpaid taxes.

Referrals to other state entities, agencies and executive authorities

- 2.1.10 The State Capture Commission made 15 recommendations with respect to further investigation of and possible action against individuals and entities for disciplinary offences, tax offences, delinquency of directors and other activities.
- 2.1.11 The South African Revenue Service has actioned all recommendations for tax-related investigations. The South African Reserve Bank has actioned investigations against officials and other persons identified as transferring illegally-acquired funds to overseas jurisdictions. The Department of Public Enterprises is working to identify and launch delinquency proceedings against former board members of SOEs which fall under its mandate, including Eskom, Transnet, Denel and Alexkor.

Referrals to professional, regulatory and other bodies

- 2.1.12 The State Capture Commission made 11 recommendations with respect to further investigation of and possible action against individuals and entities for alleged violation of relevant statutory or professional prescripts.
- 2.1.13 Recommendations are directed to bodies such the SA Institute of Tax Practitioners (SAIT), Legal Practice Council (LPC), South African Institute of Chartered Accountants (SAICA), Independent Regulatory Board for Auditors (IRBA) and the South African Diamond and Precious Metals Regulator (SADMR).

Investigations by the Independent Police Investigating Directorate

- 2.1.14 Three recommendations arising from the Commission's investigation into the Vrede Dairy Project in the Free State have been referred to the Independent Police Investigating Directorate (IPID), which has assigned a team of investigators to deal with these allegations.

Establishment of a special Commission of Inquiry into PRASA

- 2.1.15 The State Capture Commission recommended the establishment of a Commission

of Inquiry into the Passenger Rail Agency of South Africa (PRASA).²

- 2.1.16 A decision on the establishment of a commission of inquiry into PRASA will be held in abeyance until the completion of the investigations underway by the Directorate of Priority Crime Investigation (DPCI) and SIU and a review by the PRASA board. A determination will then be made on whether these processes have sufficiently addressed the matters raised by the Commission and whether a Commission of Inquiry would serve that purpose.

Companies implicated in state capture

- 2.1.17 In addition to specific recommendations with respect to prosecution and the recovery of assets, the Commission also made broader adverse findings with respect to the conduct of a number of private entities.
- 2.1.18 The Companies and Intellectual Property Commission (CIPC) has begun reviewing the compliance of such companies with CIPC requirements. The National Treasury has imposed a 10 year ban on Bain & Co doing business with the South African state. Similar action against other companies implicated in the Commission's report is also being considered.

Building the capacity of the criminal justice system

- 2.1.19 In addition to the Commission's recommendations, government has, since 2018, embarked on far-reaching measures to restore the integrity and rebuild the capability of the country's law enforcement agencies and criminal justice system more broadly. This work, which is ongoing, includes building the capacity of the NPA and the establishment of the NPA Investigating Directorate; establishment of a dedicated Task Force to investigate and prosecute state capture matters; consideration of specialised courts and dedicated court rolls; and tracking disciplinary cases across government spheres and public enterprises.

REFORMS TO PREVENT FUTURE OCCURRENCE OF STATE CAPTURE

Creation of a permanent anti-corruption commission and a public procurement anti-corruption agency

- 2.1.20 The Commission makes a detailed recommendation about the establishment of an independent Public Procurement Anti-Corruption Agency (PPACA) and a Permanent Anti-Corruption Commission.
- 2.1.21 These recommendations need further consideration in the context of processes already underway to review and redesign South Africa's anti-corruption architecture, including by the National Anti-Corruption Advisory Council (NACAC) and the Department of Justice.

² State Capture Commission Report, Part 5, Vol 2, pp 854

- 2.1.22 To further strengthen the current anti-corruption capabilities, the Investigating Directorate will be established as a permanent entity within the NPA.
- 2.1.23 Legislative amendments will 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.

Procurement reforms

- 2.1.24 The State Capture Commission made several detailed recommendations with respect to procurement reform.
- 2.1.25 Several of the Commission's proposals are already reflected to varying degrees in the draft Public Procurement Bill, which has been consulted on with the social partners at NEDLAC. Among others, the Bill will address the Commission's recommendations with respect to a Code of Conduct setting out the ethical standards for procurement of goods and services; protecting Accounting Officers and Authorities from criminal or civil liability for actions in good faith and that are not negligent; harmonisation of public procurement legislation; standards of transparency; ensuring compliance with transformation imperatives; and establishing a professional body for public procurement officials.
- 2.1.26 The implementation of lifestyle audits for members of the National Executive will be undertaken by an independent external service provider and will be managed by the Office of the Director-General in the Presidency.

Stabilising and reforming state-owned enterprises

- 2.1.27 The Commission found that the appointment and removal of board members and senior executives in SOEs was one of the key causes of state capture, and recommended the establishment of a standing Appointment and Oversight Committee for Board and Executive appointments for State-Owned Entities.
- 2.1.28 Government accepts the recommendations on the need for a process for the appointment of SOE boards that is not open to manipulation, including the involvement of independent panels with appropriate technical expertise to recommend suitable candidates to the relevant executive authority.
- 2.1.29 In line with good governance practices, no board member will be allowed to be operationally involved in procurement processes beyond playing an oversight role. Ministers will be prohibited from playing any role in procurement within SOEs.
- 2.1.30 Provision will be made in the final 'Guide for the Appointment of Persons to Boards and Chief Executive Officers of State-Owned and State-Controlled Institutions' for independent panels of relevant stakeholders and experts to play a role in nominating suitable candidates to the relevant minister.

Responding to abuses by the private sector

- 2.1.31 The Commission exposes the central role that private sector actors played in state capture and made specific proposals to address weakness that such companies exploited.
- 2.1.32 The recommendation to amend the Companies Act so as to permit applications for a director to be declared delinquent to be brought even two years after the end of their directorship will form part of a broad review of the Companies Act, which is currently underway.
- 2.1.33 The recommendation to amend the Prevention and Combating of Corrupt Activities Act on the failure of persons or entities to prevent bribery will be included in the Judicial Matters Amendment Bill which will be submitted to Cabinet in the latter half of 2022.
- 2.1.34 The recommendation to amend the Political Party Funding Act to criminalise donations to political parties in the expectation of access to contracts will be made alongside other consequential amendments that will be required following the approval of the Electoral Amendment Bill.
- 2.1.35 The South African Law Reform Commission (SALRC) is considering deferred prosecution agreements as part of its review of the criminal justice system.

Reforming intelligence agencies

- 2.1.36 The Commission found that weaknesses in the regulatory framework made the State Security Agency (SSA) particularly vulnerable to abuse for political and personal gain.
- 2.1.37 A new General Intelligence Laws Amendment Bill has been drafted to, among other things, disestablish the SSA and establish a domestic intelligence service and foreign intelligence service in accordance with the Constitution, and strengthen oversight by the Inspector General of Intelligence, the Joint Standing Committee on Intelligence and the Auditor-General of South Africa.
- 2.1.38 The review of the Intelligence Services Act currently underway will give practical effect to the principle that no member of the Executive responsible for intelligence may be involved in the operational matters of the SSA.
- 2.1.39 The new leadership at the State Security Agency is implementing a comprehensive response plan to address the Commission's recommendations.
- 2.1.40 New National Security Policy and Strategy documents have been presented to the National Security Council, and will be recommended to Parliament for the commencement of public consultations before the end of this financial year.

Protection and incentives for whistle-blowers

2.1.41 The Department of Justice has commenced a review of the Protected Disclosures Act and Witness Protection Act to, among other things, give effect to the following Commission recommendations:

- ensure whistle-blowers receive the protections afforded by section 32(2) of the UN Convention Against Corruption;
- the possible award of a proportion of funds recovered to the whistleblower provided that the information disclosed has been material in recovering funds;
- whistle-blowers be afforded immunity from criminal or civil action arising from honest disclosures.

The review, which will include consultation with stakeholders and the National Anti-Corruption Advisory Council, will be completed by the end of April 2023.

Restoring the South African Revenue Service

2.1.42 The National Treasury has initiated the process to amend the SARS Act to implement the recommendations of the Nugent Commission, including providing for an open, transparent and competitive process for the appointment of the SARS Commissioner and the appointment of adequate oversight mechanisms such as an inspector-general.

Improving measures to combat money laundering

2.1.43 The matter of statutory frameworks for financial information sharing partnerships has been included in the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill.

2.1.44 The Financial Intelligence Centre (FIC) has appointed attorneys to conduct an urgent independent review of the effectiveness of the current regulatory reporting regime under the FIC Act.

Reforms to the electoral system

2.1.45 The Commission makes recommendations for the consideration of reforms to the country's electoral system. These include direct election of the President and the adoption of a constituency-based (but still proportionally representative) electoral system. The recommendations require an extensive process of consultation and deliberation that involves the whole of society.

2.1.46 Noting that a part of the electoral reforms proposed by the Commission are currently under consideration in Parliament in relation to the Electoral Laws

Amendment Bill, and considering that Parliament has a court prescribed deadline to approve the Bill by 10 December 2022, it will be necessary to await the finalisation of the Bill before determining whether it satisfies the concerns raised by the Commission.

- 2.1.47 Since the recommendation for the direct election of the President would require constitutional amendments, it is a matter that should be considered by the various political parties represented in Parliament and by the Parliament's Joint Constitutional Review Committee.

Creating a criminal offence of abuse of power

- 2.1.48 The Department of Justice and Constitutional Development will research possible legislative provisions for the creation of a statutory offence for the abuse of public power. This work will be finalised by December 2023.

Creating a criminal offence of constitutional or political malpractice

- 2.1.49 The Department of Justice and Constitutional Development has been directed to undertake research of the creation of an offence of political or constitutional malpractice. It will be completed by December 2023.

Responsibility of President and Premiers for actions of Ministers and MECs

- 2.1.50 The Commission made certain observations with respect to the responsibility of Premiers for the actions and failures of Members of the Executive Council (MECs). The same principles would necessarily apply at a national level, to the responsibility of the President for the actions of Ministers.
- 2.1.51 The President agrees with the observations that persons who occupy such positions must be people of integrity who conduct themselves ethically and in compliance with the law. The President is obliged to act in a manner that serves the best interests of the nation, is rational and observes the principle of legality.
- 2.1.52 The President will undertake a review of the positions of those members of his Executive implicated in wrongdoing in the report and determine, on a case by case basis, in line with his discretion in this regard and his obligation to observe the principle of legality and to act rationally, whether or not any action ought to be taken.

Interface between the Executive and Parliament

- 2.1.53 The Commission found that in several instances Parliament had not been effective in holding the Executive to account.³ Some of the recommendations it made to remedy the shortcomings refer solely to Parliament's internal arrangements while

³ See State Capture Commission Report, Part 6, Vol 2, pp 639, 677, 726

others relate to Parliament's interface with the Executive.

- 2.1.54 The Leader of Government Business will interact with Parliament's Presiding Officers on the recommendations that relate to the interface between Parliament and the Executive.
- 2.1.55 The National Treasury will engage with Parliament to determine the most appropriate way to give effect to the Commission's recommendations on the resourcing of Parliament, specifically with respect to its capacity to hold the Executive to account.

BROADER SYSTEMIC REFORMS ARISING FROM THE WORK OF THE COMMISSION

Strengthening the auditing system

- 2.1.56 The Commission made findings and recommendations with regard to strengthening the auditing of organs of state and state-owned entities.⁴ The AGSA has developed a detailed response plan to the work of the Commission.

Professionalisation of the public administration

- 2.1.57 A key mechanism of state capture was the strategic positioning of individuals in positions of power through the abuse of public sector appointment and dismissal processes.
- 2.1.58 The National Framework towards the Implementation of Professionalisation of the Public Sector, which was adopted by Cabinet on 19 October 2022, makes specific proposals to stabilise the political-administrative interface, ensure merit-based recruitment and selection and more effective consequence management. All public sector legislation governing professionalisation will be reviewed and, where necessary, amended to align with this Framework.
- 2.1.59 To clarify the relationship between political authority and the institutions they oversee, the induction for new Ministers will be revisited; relevant sections of the Ministerial Handbook will be reformulated; and a code of conduct for special advisers will be developed.

IMPLEMENTATION OF THE RESPONSE

- 2.1.60 If we are to successfully end state capture and turn the tide on corruption, the actions set out in this response will require dedicated coordination and effective implementation. Progress will need to be closely monitored and regularly communicated. All sections of society will need to be engaged and involved in the implementation of the actions to give effect to the recommendations of the

⁴ State Capture Commission Report Part 1, Vol 1, p 111; p 445

Commission.

- 2.1.61 Cabinet will have the ultimate responsibility for overseeing the successful implementation of the response, which will include prioritising actions and making available both financial and human resources. This work will be supported by the National Anti-Corruption Advisory Council (NACAC), which will advise on the implementation of the Commission's recommendations from a strategic and systemic perspective.
- 2.1.62 The Presidency has established a centralised Programme Management Office (PMO) to coordinate the efforts of the institutions that are responsible for executing the response plan, SCC Steering Committee and Cabinet. The SCC Steering Committee will report to Cabinet on a quarterly basis, which will inform regular updates to the country by the President.

3 OVERVIEW

3.1 ABOUT THE STATE CAPTURE COMMISSION

- 3.1.1 The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State (the State Capture Commission) was established as part of the remedial action contained in the report of the Public Protector entitled 'State of Capture' released on 2 November 2016.
- 3.1.2 The report was the result of an initial investigation by the Public Protector into allegations of improper conduct on the part of former President Jacob Zuma and members of the Gupta family.
- 3.1.3 Former President Jacob Zuma announced the establishment of the Commission on 9 January 2018 to be headed by the then Deputy Chief Justice Raymond Zondo. A Presidential Proclamation was published on 23 January 2018 following the President's announcement setting out the terms of reference of the Commission, which were to establish:

- "1.1. whether, and to what extent and by whom attempts were made through any form of inducement or for any gain of whatsoever nature to influence members of the National Executive (including Deputy Ministers), office bearers and/or functionaries employed by or office bearers of any state institution or organ of state or directors of the boards of SOE's. In particular, the Commission must investigate the veracity of allegations that former Deputy Minister of Finance, Mr Mcebisi Jonas and Ms Mentor were offered Cabinet positions by the Gupta family;*
- 1.2. whether the President had any role in the alleged offers of Cabinet positions to Mr Mcebisi Jonas and Ms Mentor by the Gupta family as alleged;*
- 1.3. whether the appointment of any member of the National Executive, functionary and/or office bearer was disclosed to the Gupta family or any other unauthorised person before such appointments were formally made and /or announced, and if so, whether the President or any member of the National Executive is responsible for such conduct;*
- 1.4. whether the President or any member of the present or previous members of his National Executive (including Deputy Ministers) or public official or employee of any state-owned entities (SOEs) breached or violated the Constitution or any relevant ethical code or legislation by facilitating the unlawful awarding of tenders by SOE's or any organ of state to benefit the v Gupta family or any other family, individual or corporate entity doing business with government or any organ of state;*

- 1.5. *the nature and extent of corruption, if any, in the awarding of contracts, tenders to companies, business entities or organizations by public entities listed under Schedule 2 of the Public Finance Management Act No. 1 of 1999 as amended;*
- 1.6. *whether there were any irregularities, undue enrichment, corruption and undue influence in the awarding of contracts, mining licenses, government advertising in the New Age Newspaper and any other governmental services in the business dealings of the Gupta family with government departments and SOE's;*
- 1.7. *whether any member of the National Executive and including Deputy Ministers, unlawfully or corruptly or improperly intervened in the matter of the closing of banking facilities for Gupta owned companies;*
- 1.8. *whether any advisers in the Ministry of Finance were appointed without proper procedures. In particular, and as alleged in the complaint to the Public Protector, whether two senior advisers who were appointed by Minister Des Van Rooyen to the National Treasury were so appointed without following proper procedures;*
- 1.9. *the nature and extent of corruption, if any, in the awarding of contracts and tenders to companies, business entities or organizations by Government Departments, agencies and entities. In particular, whether any member of the National Executive (including the President), public official, functionary of any organ of state influenced the awarding of tenders to benefit themselves, their families or entities in which they held a personal interest."*

- 3.1.4 The first hearing of the Commission was held on 20 August 2018 and its final hearing was on 12 August 2021. The Commission applied to the High Court for several extensions to complete its work, which were granted.
- 3.1.5 The Commission heard evidence from over 300 witnesses and held more than 400 days of hearings. The evidence has been transcribed into over 75,000 pages which are available on the website of the Commission. A total of 1,731,106 pages of documentary evidence was presented to the Commission. The report itself runs to over 5,000 pages.
- 3.1.6 The report of the Commission, consisting of six parts, was handed to the President over a period of six months: the first report was submitted on 4 January 2022 and the final report on 22 June 2022. The President made the reports publicly available by publishing these on the Presidency website immediately after receipt thereof.
- 3.1.7 On 5 October 2022, the Gauteng High Court granted an order allowing the Chairperson of the Commission to make certain corrections to the report. On 10 October 2022, Chief Justice Zondo handed to the President corrected versions of

Part 6 the report.

3.1.8 In line with the remedial action contained in the Public Protector’s report and as required by the ruling of the Gauteng High Court on 23 February 2022, I am required to submit the Commission’s report to Parliament by 22 October 2022 with an indication of my intentions regarding the implementation of the Commission’s recommendations.

3.1.9 This document outlines my intentions with regards to the implementation of the Commission’s recommendations.

3.2 APPROACH TO THE COMMISSION’S FINDINGS AND RECOMMENDATIONS

3.2.1 The State Capture Commission report concludes that “there can be no doubt that state capture happened in South Africa”.⁵

3.2.2 The report said:

“In the final analysis much of the evidence presented to the Commission indicates that state capture in the South African context evolved as a project by which a relatively small group of actors, together with their network of collaborators inside and outside of the state, conspired systematically (criminally and in defiance of the Constitution) to redirect resources from the state for their own gain. This was facilitated by a deliberate effort to exploit or weaken key state institutions and public entities, but also including law enforcement institutions and the intelligence services. As just intimated, to a large extent this occurred through strategic appointments and dismissals at public entities and a reorganisation of procurement processes. The process involved the undermining of oversight mechanisms, and the manipulation of the public narrative in favour of those who sought to capture the state.”⁶

3.2.3 This fundamental finding frames this response to the observations, findings and recommendations contained in the report – as it shapes our response to the outcomes of the Commission.

3.2.4 While it is not feasible to express a view on each of the Commission’s findings, it is necessary to indicate that in the main I accept, and this administration accepts, the findings of the Commission with respect to the existence, nature and extent of state capture in South Africa.

3.2.5 The State Capture Commission report deals extensively and at length with the defining features of state capture and the conditions that enabled widespread abuse of state power and resources, and it is neither necessary nor feasible to repeat these here. However, to provide context to the responses to the

⁵ State Capture Commission Report, Part 6, Vol 2, p 298

⁶ State Capture Commission Report, Part 6, Vol 2, p 296

recommendations that will follow, we will outline some of the enabling conditions as identified by the Commission.

- 3.2.6 It is also important to understand the enabling environment for state capture so that we can prevent state capture in the future.
- 3.2.7 The key mechanisms of state capture described in the Commission report can be summarised as follows:
- The strategic positioning of individuals in positions of power through the abuse of the appointment and dismissal process.
 - This positioning was used to control and manipulate public procurement, financial and contracting processes for private gain in SOEs and public sector more widely.
 - This was accompanied by the strategic appointment of individuals in positions of power in law enforcement and tax administration to ensure protection from sanction.
- 3.2.8 The **public procurement system** was the primary site for the redirection of state resources, particularly in state-owned entities, which have by far the largest procurement, capital and operational budgets. Enhancing the integrity of the public procurement system is therefore a central component of the state's response to the State Capture Commission. Enhancing the integrity of the public procurement system is also a pillar of our National Anti-Corruption Strategy. The strategy anticipates a public procurement system that is insulated from corruption and better structured to drive development, expand the productive base of the economy and support innovation and investment.
- 3.2.9 It seeks to reduce the fragmentation of the procurement system, enhance the capacity of the state to regulate procurement, improve procurement oversight, enhance enforcement for breaches of procurement prescripts, and enhance the transparency of the system.
- 3.2.10 The Commission argues that the ability to **place politically connected persons on boards and key posts** within SOEs and the public administration was "the essential mechanism of state capture".⁷ Corrupt politicians and officials also used disciplinary processes, suspensions and dismissals to remove non-compliant officials and replace them with complicit individuals.
- 3.2.11 The Commission found that one of the significant factors that allowed state capture to take hold was the failure to implement effectively and fully section 195 of the Constitution, which envisages a public administration that is professional, effective,

⁷ State Capture Commission, Part 6, Vol 2, p 513

impartial and development oriented.⁸ Instead, many dubious appointments were made in key positions, and many experienced and honest officials were dismissed to make way for those facilitating state capture and corruption.

- 3.2.12 State capture was further enabled by **weak law enforcement capacity** to deal with corruption. The Commission noted that state capture was facilitated by “a deliberate effort to subvert and weaken law enforcement, intelligence and revenue collection agencies at the commanding levels so as to shield and sustain illicit activities, avoid accountability and to disempower opponents”.⁹
- 3.2.13 Greater capacitation and resourcing of these bodies is needed, as are wider initiatives of institutional reform. We are determined to build law enforcement agencies that are well capacitated and independent, with clearly delineated responsibilities, and that are able and empowered to effectively collaborate. Particularly at this time in the country’s history, the law enforcement agencies must have the capacity required to implement the Commission’s recommendations.
- 3.2.14 It is critical to reform and depoliticise the appointment processes for the heads and commanding levels of these agencies to ensure that they are properly transparent and independent. It is also necessary that law enforcement officials who were complicit in corruption and state capture are held to account.
- 3.2.15 The Commission found that the sustained abuse of these institutions was facilitated by **ineffectual oversight** by both Cabinet and Parliament and other oversight bodies.¹⁰ While many red flags were identified early and continually, the Commission noted that to a large extent both Cabinet and Parliament failed to use these early warning and oversight mechanisms to intervene and act against such activities. This can be linked to wider political culture and political disincentives to effective oversight.
- 3.2.16 A **sophisticated money laundering system**, alongside ineffective or non-existent investigations, enabled state capture actors to hide the proceeds of criminal activity and to take these out of the country.¹¹ The weaknesses in our anti-money laundering environment are identified in the Commission’s report, as well as in the 2021 mutual evaluation report of the Financial Action Task Force. As a result of a process put in place by Cabinet, significant work is underway to address these weaknesses as a matter of urgency.
- 3.2.17 The Commission’s report has shown that **private company suppliers and professional service firms engaged in corruption** to secure state contracts and that this has been normalised to a significant degree. This was enabled by a lack of enforcement of procurement rules, anti-corruption laws and professional ethics.

⁸ State Capture Commission Report, Part 6, Vol 2, p 332

⁹ State Capture Commission Report, Part 6, Vol 2, p 297

¹⁰ State Capture Commission Report, Part 6, Vol 2, p 297

¹¹ State Capture Commission Report, Part 6, Vol 3, p 828-829

Those implicated in state capture must be held publicly accountable and face consequential sanctions.

- 3.2.18 This report provides a synthesis of the President’s response to the Commission’s findings and recommendations. It outlines progress already made in some areas and identifies areas in need of further reform, as well as models and options currently being considered by government. The report forms the basis for an ongoing process of reform aimed at revitalising state capacity and the accountability of public and private actors in our democracy.

3.3 METHODOLOGY FOR DEVELOPING THE RESPONSE PLAN

- 3.3.1 Starting with the hand-over of the first report in January 2022, the President has engaged all affected Ministers, Premiers, Heads of Department, leaders of state-owned enterprises, heads of agencies and Chapter 9 institutions, and has informed Parliament and other statutory and non-statutory entities of the findings and recommendations of the Commission. Where the relevant institutions fall under the control of the Executive, the President has directed that responses to the findings and recommendations, including plans to implement remedial measures, be submitted.
- 3.3.2 The responses and subsequent engagement on the responses presented provide the foundation for this response plan.
- 3.3.3 The technical work of developing this plan has been led by a Technical Steering Committee led by the Director-General in the Presidency and made up of the relevant Directors-General and other heads of agencies. This committee has guided the work of a multi-departmental task team which has synthesised the inputs of numerous workstreams into this plan.
- 3.3.4 An ad hoc committee made up of Ministers and chaired by the President has provided the political leadership to the development of this plan and will continue to provide leadership in the implementation of the multiple interventions that make up this response.
- 3.3.5 The National Anti-Corruption Advisory Council, recently appointed and chaired by Prof Firoz Cachalia, has provided important perspectives from outside of government and will continue to play an important role in both providing expert advice on the implementation of this response plan, the National Anti-Corruption Strategy, as well as on mobilising a whole-of-society response.
- 3.3.6 The Presidency has extracted all recommendations contained in the six parts of the Commission’s report. These have been recorded and categorised. The table below presents a high-level categorisation of the recommendations:

Category	Number of recommendations
Criminal or other investigations	202
Asset recovery	27
Referrals to other state bodies	15
Referrals to other bodies	11
Constitutional changes	5
Legislative changes	26
Operational or regulatory changes	64
Establishment of new institutions	2
Establishment of Commission of Inquiry	1
Grand total	353

3.3.7 While the State Capture Commission Report has been submitted to the President for consideration, certain recommendations are directed to other institutions both within and outside the state. The greatest number of recommendations are directed to the law enforcement agencies for investigation and possible prosecution. While these agencies are within the Executive arm of the state, they are constitutionally and legislatively mandated to exercise their responsibilities independently. In all instances, the President has provided all affected institutions with a copy of the report so that they may respond to specific recommendations in line with their respective mandates.

3.3.8 The Commission makes several recommendations that would require constitutional, legislative, regulatory or operational changes. It also makes recommendations on the establishment of new institutions and a commission of inquiry.

3.3.9 The Presidency sent copies of the report to the following institutions for consideration and action:

Institution	Position
African National Congress	Secretary General's Office
Airports Company South Africa	CEO
Alexkor	CEO
Auditor-General of South Africa	Auditor-General
Banking Association South Africa	Managing Director
City of Johannesburg	Mayor

Denel	Group CEO
Directorate for Priority Crime Investigation	Head
Eskom	CEO
Financial Intelligence Centre	Director
Free State Provincial Government	Premier
Independent Electoral Commission	Vice Chairperson
KwaZulu-Natal Provincial Government	Premier
Legal Practice Council	Executive Officer
Magistrates Commission	Chairperson
National Assembly	Speaker
National Council of Provinces	Chairperson
National Prosecuting Authority	National Director of Public Prosecutions
North West Provincial Government	Premier
Office of the Inspector-General of Intelligence	Inspector-General of Intelligence
Passenger Rail Agency of South Africa	Acting Group CEO
South African Airways	Interim CEO
South African Broadcasting Corporation	GCEO
South African Institute of Chartered Accountants	CEO
South African Police Service	National Commissioner
South African Reserve Bank	Governor
South African Revenue Service	Commissioner
State Security Agency	Director-General
Transnet	GCEO

3.3.10 This report will focus on the recommendations that are directed to the Executive and those that affect its work.

3.4 LEGAL STANDING OF THE RECOMMENDATIONS

3.4.1 The State Capture Commission was established in terms of section 84(2)(f) of the Constitution and is subject to the Commissions Act 19 of 1947, as amended. It is, however, no ordinary Commission. The Public Protector ordered its creation, and the High Court made her remedial action an order of court. The State Capture Commission was therefore not solely a creation of the President, but was subject to the High Court's order, determining how its Chair would be chosen and what matters it would address.

3.4.2 The State Capture Commission was appointed in terms of Proclamation R3,

published in the Government Gazette 41403 of 25 January 2018, which proclamation sets out the Commission's purpose ("*to investigate allegations of state capture, corruption and fraud in organs of state*") as well as setting out the matters the Commission shall "*inquire into, make findings, report on and make recommendations*".

- 3.4.3 It should be said that in terms of section 84(2)(f) of the Constitution, the factual findings and recommendations made by a commission of inquiry do not bind the President. This was confirmed in the judgment of the Constitutional Court handed down in January 2021, *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma*.¹²
- 3.4.4 The President's response to the recommendations of the State Capture Commission may therefore, in terms of what is set out in paragraph 3.4.3, among others, include the implementation of a recommendation as set out in the report, it may outline the implementation of aspects of a recommendation, or may detail a decision to take a recommendation on further consideration. The response may also be a decision not to implement a recommendation setting out reasons. We may also inform and advise Parliament that a recommendation overlaps with existing work currently underway within Government.

¹² (CCT 295/20) 2021 (5) BCLR 542 (CC); 2021 (5) SA 1 (CC), at paragraph 4.

4 DEALING WITH THE PERPETRATORS OF STATE CAPTURE

It must be stated categorically and unequivocally that those who have committed crimes, breached fiduciary duties and violated requirements of good governance and those who have committed crimes in pursuit of state capture, must be held accountable.

Holding individuals and companies responsible for past conduct reduces future risks of violations by signalling that those who break the law are not immune from being held to account. Equally important, failing to hold to account officials and the executive authorities who have violated norms and legal requirements has a negative impact on the morale, performance and incentives of the majority of officials who have not done so.

The response of government to the findings and recommendations of the Commission must therefore ensure significant allocation of resources and effort to dealing with the perpetrators, enablers and beneficiaries of state capture.

4.1 CRIMINAL INVESTIGATIONS AND PROSECUTIONS

Commission Recommendations

- 4.1.1 The State Capture Commission made 202 recommendations with respect to criminal investigation and possible prosecution of individuals, entities and named groups of people.

Considerations

- 4.1.2 The recommendations are directed to law enforcement agencies, in particular, the South African Police Service (SAPS), its Directorate for Priority Crime Investigation (DPCI), the National Prosecuting Authority (NPA) and its Investigating Directorate (ID).
- 4.1.3 In a few cases, the Report recommends that the President “take steps to ensure, through the relevant members of the Executive that... the NDPP immediately appoints a team to oversee the investigations and the prosecutions of those suspected of committing criminal offences in respect of wrongdoing”.¹³
- 4.1.4 These cases, as with all others contained in the report, have been referred to the NPA and other law enforcement agencies so that they may act in line with their respective mandates, as stated in paragraph 3.3.9 above through the submission of the commission’s report to the entities listed.
- 4.1.5 Since the start of the work of the commission, significant resources have been

¹³ State Capture Commission Report, Part 5, Vol 2, p 850

made available in building the capacity and capability of law enforcement agencies to respond effectively to the findings and recommendations of the State Capture Commission and rooting out crime and corruption in government entities and society more broadly.

- 4.1.6 A key initiative was the establishment of the Investigating Directorate (ID) in the Office of the National Director of Public Prosecutions in April 2019 in terms of section 7(1) of the NPA Act, with the purpose of, *inter alia*, addressing unlawful activities relating to serious, high profile or complex corruption cases and offences or criminal or unlawful activities arising from the State Capture Commission. To enable the ID and other law enforcement agencies to proceed with investigations in parallel with the State Capture Commission, the President amended the Regulations of the State Capture Commission in Proclamation 24 published in Government Gazette 43563 on 28 July 2020 to permit the sharing of information, records or documents with any state law enforcement agency.

Actions on Recommendations

- 4.1.7 As stated above, the Presidency provided each of the bodies to which such recommendations are directed with copies of each part of the State Capture Commission Report as they were received by the Commission, so that they may act on the recommendations in line with their respective mandates.
- 4.1.8 All these recommendations are currently receiving attention from law enforcement agencies, working in collaboration with other agencies, including the South African Revenue Services (SARS) and the Financial Intelligence Centre (FIC). A joint Task Force has been established to ensure coordination between the NPA Investigating Directorate (ID), SAPS Directorate for Priority Crime Investigation (DPCI), Asset Forfeiture Unit (AFU) and the offices of the Directors of Public Prosecutions who have jurisdiction over these matters.
- 4.1.9 To date, the Investigating Directorate has enrolled **26 cases**, declared **89 investigations** and **165 accused persons** have appeared in court for alleged state capture-related offences.¹⁴
- 4.1.10 The SIU has identified all state institutions mentioned in the State Capture Commission report where there are already investigations underway in terms of current proclamations and where proclamations are required. The SIU is authorised by various proclamations to investigate state institutions referred to in the report such as Denel, South African Airways (SAA), Transnet, Eskom, the South African Broadcasting Corporation (SABC) and Alexkor. In certain instances, investigations have been finalised and reports submitted to the President.

¹⁴ Due to the complex nature of the alleged crimes, and as the investigations proceed, the number of cases, investigations, charges and accused persons will inevitably differ from what is contained in the State Capture Commission report. In addition, law enforcement agencies are likely to identify further state capture-related crimes that were not identified in the State Capture Commission Report.

- 4.1.11 The Department of Public Enterprises has consulted affected SOEs and the DPCI, SIU and the ID to ensure alignment in relation to investigations and criminal cases affecting the SOEs that fall under their mandate. This is an ongoing consultative process with further instances of criminal conduct to be referred for investigation as identified. Arrests have already been made concerning former executives of Transnet and Eskom.
- 4.1.12 The South African Revenue Service (SARS) has collaborated in joint project teams with law enforcement agencies to investigate and prosecute unlawful activities relating to state capture, including with respect to Eskom, Estina Dairy Project, Bosasa, Transnet and SAPS which involves multiple investigations concerning various individuals and entities. Twelve matters relating to tax offences are currently in criminal courts and one has been finalised. There are multiple other cases under investigation or being audited.

Additional Actions

- 4.1.13 In addition to the people and companies named in the Commission's report, analysis by the Financial Intelligence Centre (FIC) has identified an additional 595 individuals and 1,044 entities that may be implicated in the flow of funds from state capture. Relevant information has been compiled into reports to various law enforcement agencies, other bodies like the SSA, SARB, Public Protector, IPID and the Financial Sector Conduct Authority (FSCA), and a number of law enforcement agencies in other countries.

4.2 ASSET RECOVERIES

Commission Recommendations

- 4.2.1 The State Capture Commission makes recommendations regarding the recovery of proceeds of crime in terms of Chapters 5 and 6 of the Prevention of Organised Crime Act (POCA). In addition, recommendations are made regarding legal steps to be taken by certain entities themselves to recover funds. A total of 27 recommendations relate to recovery of assets.

Considerations

- 4.2.2 The recovery of the proceeds of crime and other monies and assets falls within the respective mandates of the NPA's Asset Forfeiture Unit (AFU), Special Investigating Unit (SIU) and South African Revenue Service (SARS).
- 4.2.3 The AFU was established in May 1999 to implement Chapters 5 and 6 of POCA through seizing proceeds of crime as well as property that have been used to commit an offence, and to have that property and proceeds of crime forfeited to the State. Chapter 5 asset recovery proceedings are reliant on the finalisation of a

criminal case where the accused is found guilty of the crime, whereas Chapter 6 asset recoveries merely require a docket with enough information as evidence that a crime listed in Schedule 1 of POCA was committed.

- 4.2.4 Recoveries are paid to the Criminal Asset Recovery Account, which money is used to assist law enforcement agencies to combat organised crime, money laundering, criminal gang activities, and support victim organisations.
- 4.2.5 The SIU is empowered to institute and conduct civil proceedings in any court of law or a Special Tribunal in its own name or on behalf of state institutions based on evidence emanating from the investigation by such Special Investigating Unit. In this regard, section 4(1)(c) of the SIU Act empowers the SIU to recover any damages or losses and also ensure the prevention of potential damages or losses which may be suffered by such a State Institution.
- 4.2.6 The Commission also recommended that several SOEs, including Eskom, ACSA, Transnet, SABC and PRASA, and certain national and provincial government departments, take legal steps to recover funds lost because of unlawful conduct.

Actions on Recommendations

- 4.2.7 The Commission's recommendations for recovery of monies and assets are fully supported and are receiving priority attention from the NPA's Asset Forfeiture Unit, the SIU and SARS. Expertise has been reassigned to focus exclusively on state capture matters and the AFU is in the process of increasing its litigation and investigative capacity. Further, the AFU, in consultation with the Investigating Directorate, Directors of Public Prosecutions and external law enforcement agencies, is developing an asset recovery strategy in respect of state capture matters.
- 4.2.8 Key asset recovery initiatives that have been prioritised include the appointment of external forensic auditors to quantify the asset recovery potential of matters identified in the Commission's findings and the appointment of international asset recovery entities to assist with asset recovery from foreign jurisdictions using ordinary civil remedies.
- 4.2.9 The SIU has identified several matters in the State Capture Commission report which are within the scope of existing proclamations, which the SIU will investigate and, based on the evidence, will initiate civil litigation in the Special Tribunal to recover losses suffered by the state institutions.
- 4.2.10 SARS has already acted – from a civil and criminal point of view – against a range of people identified in the Commission's report.
- 4.2.11 As of 30 September 2022, the following progress had been recorded:

- Freezing or preservation orders to the value of **R12.9 billion** have been granted to the AFU and SARS.
- A total of **R2.9 billion** has been recovered by the AFU and returned to the affected entities.
- The SIU has instituted four High Court cases in relation to contracts worth **R62.1 billion** and recovered payment from a service provider to Eskom in the amount of **R1.6 billion**.
- SARS investigations arising from State Capture Commission findings and evidence have resulted in collections of **R4.8 billion** in unpaid taxes.

4.2.12 The respective state-owned enterprises and departments have embarked on various legal processes for the recovery of funds as per the Commission's recommendations.

4.3 REFERRALS TO OTHER STATE ENTITIES, AGENCIES AND EXECUTIVE AUTHORITIES

Commission Recommendations

4.3.1 The State Capture Commission made 15 recommendations with respect to further investigation of and possible action against individuals and entities for disciplinary offences, tax offences, delinquency of directors and other activities.

Considerations

4.3.2 Recommendations are made to the South African Revenue Service (SARS), South African Reserve Bank (SARB), the State Security Agency (SSA) and to the boards of some state-owned enterprises (SOEs) to investigate allegations against certain members and service providers.

4.3.3 The Commission recommended that certain SOEs investigate whether specific board members were in breach of their fiduciary duties. In some instances, the Commission suggested that SOEs determine whether proper value was received for the sale of goods or the provision of a service.¹⁵

4.3.4 The Commission also recommended that SOEs recover losses incurred because of unlawful contracts and cancel any such contracts that still exist. In the case of Eskom, there is also a specific recommendation that Eskom regularly report on the effectiveness of the recovery programme to the Executive Authority and Parliament.¹⁶

¹⁵ For examples, see the Alexkor diamond sale (Part 4, Vol 1, p 243) and Regiments contract (Part 4, Vol 1, p 256)

¹⁶ State Capture Commission Report, Part 4, Vol 4, p 1040

Actions on Recommendations

- 4.3.5 The South African Revenue Service has actioned all recommendations for tax-related investigations.
- 4.3.6 The South African Reserve Bank has actioned investigations against officials and other persons identified as transferring illegally acquired funds to overseas jurisdictions and in the process transgressing exchange control regulations.
- 4.3.7 The Department of Public Enterprises is working to identify and launch delinquency proceedings against former board members of SOEs which fall under their mandate, including Eskom, Transnet, Denel and Alexkor. Delinquency proceedings will be launched by 31 March 2023.
- 4.3.8 In addition, some SOEs, including Eskom, Denel, SAA and Transnet, are taking steps against board members and employees implicated by the Commission in wrongdoing. All actions against board members and employees will be launched by 31 March 2023.

4.4 REFERRALS TO PROFESSIONAL, REGULATORY AND OTHER BODIES

Commission Recommendations

- 4.4.1 The State Capture Commission made 11 recommendations with respect to further investigation of and possible action against individuals and entities for alleged violation of relevant statutory or professional prescripts.

Considerations

- 4.4.2 Recommendations are directed to bodies such the SA Institute of Tax Practitioners (SAIT), Legal Practice Council (LPC), South African Institute of Chartered Accountants (SAICA), Independent Regulatory Board for Auditors (IRBA) and the South African Diamond and Precious Metals Regulator (SADMR).
- 4.4.3 Recommendations were made relating to professional misconduct by some legal and financial practitioners identified as enablers and perpetrators of state capture.¹⁷ It was alleged that these practitioners played a central role in enabling corruption to manifest in various institutions.
- 4.4.4 The Commission recommended that certain professionals that were involved with the SOEs in their capacities as auditors or legal practitioners be referred to their professional bodies for an investigation into their conduct.

¹⁷ State Capture Commission Report, Part 1, Vol 1, Ch 1, p 440 & Part 3, Vol 4, p 926

Actions on Recommendations

- 4.4.5 In accepting the recommendations in this regard, we have referred these recommendations to the respective bodies identified by the Commission, and the responsible government departments will engage with the relevant bodies as we have directed that these bodies should monitor implementation of these recommendations.
- 4.4.6 The Minister of Justice has engaged the Legal Practice Council on referrals by the Commission for investigation of members of the legal fraternity. The Council is expected to determine whether these individuals should continue practicing as attorneys and advocates. Disciplinary cases are unfolding in these matters.

4.5 INVESTIGATIONS BY THE INDEPENDENT POLICE INVESTIGATING DIRECTORATE

Commission Recommendations

- 4.5.1 Three recommendations arising from the Commission's investigation into the Vrede Dairy Project in the Free State called for independent investigation of abuses and non-responsiveness or inaction by the South African Police Service.¹⁸

Actions on Recommendations

- 4.5.2 These matters have been referred to the Independent Police Investigating Directorate (IPID), which has assigned a team of investigators to deal with these allegations. The team started its work in September 2022.

4.6 ESTABLISHMENT OF A SPECIAL COMMISSION OF INQUIRY INTO PRASA

Commission Recommendations

- 4.6.1 *"Having given anxious consideration to the issues, I have decided that a special commission of inquiry be appointed to examine specifically the following matters: why PRASA was allowed to slide into almost total ruin, who should be held responsible for that and who could have benefitted from those that (sic) unacceptable state of affairs."*¹⁹

Considerations

- 4.6.2 The State Capture Commission has indicated that despite several days of hearings about PRASA, it had an "uneasy perception that there is much about the ills at PRASA that has not yet been uncovered" and has recommended the establishment

¹⁸ State Capture Commission Report, Part 6, Vol 1, pp 90, 93, 94

¹⁹ State Capture Commission Report, Part 5, Vol 2, pp 854

of a Commission of Inquiry.²⁰

- 4.6.3 The establishment of commissions of inquiry falls within the discretion of the President.
- 4.6.4 The establishment of a further commission of inquiry into PRASA must be considered against existing initiatives that are probing the collapse of PRASA. There are currently investigations into PRASA by the Directorate for Priority Crime Investigation (DPCI), which are at an advanced stage, and a wide-ranging probe by the Special Investigating Unit (SIU) under proclamation 51 of 2019. The proclamation includes investigating governance and maladministration. The SIU's mandate extends to making systemic recommendations with regard to an organ of state or state-owned entity.
- 4.6.5 The Department of Transport, which oversees PRASA, advises that the board of PRASA has embarked on a structural review of PRASA to determine an optimal model to deliver on the mandate.
- 4.6.6 The question is what the most effective mechanism would be, in terms of time, cost and impact, to address the collapse of PRASA and hold those responsible accountable.

Actions on Recommendations

- 4.6.7 A decision on the establishment of a commission of inquiry into PRASA will be held in abeyance until the completion of the investigations underway by the DPCI and SIU and the review by the PRASA board. A determination will then be made on whether these processes have sufficiently addressed the matters raised by the Commission and whether a Commission of Inquiry would serve that purpose.

Additional Actions

- 4.6.8 A proclamation will be issued to broaden the scope and set timeframes for an expanded SIU investigation into PRASA based on the evidence before the State Capture Commission. Additional dedicated resources will be brought in to augment the existing investigators who are also looking into other SOEs.

4.7 COMPANIES IMPLICATED IN STATE CAPTURE

Commission Recommendations

- 4.7.1 In addition to specific recommendations with respect to prosecution and the recovery of assets, the Commission also made broader adverse findings with respect to the conduct of a number of private entities. It found that several

²⁰ State Capture Commission Report, Part 5, Vol 2, pp 854

companies had, in various ways, aided the process of state capture.

Considerations

- 4.7.2 The Companies and Intellectual Property Commission (CIPC) has begun reviewing the compliance of companies implicated in the Commission’s report with CIPC requirements, whether there is inter-connectedness of directorships, whether there is a need for concern around audit firms and partners auditing the entities, and whether there are any solvency and liquidity concerns.

Actions on Recommendations

- 4.7.3 The National Treasury has imposed a 10-year ban on Bain & Co doing business with the South African state. This ban will run from 5 September 2022 to 4 September 2032.
- 4.7.4 Similar action against other companies implicated in the Commission’s report is also being considered. Consideration is also being given to claims for civil damages against such companies. In addition, investigative authorities overseas have been approached to investigate multinational companies involved in state capture.
- 4.7.5 The CIPC will provide quarterly reports on the progress made on holding directors and auditors accountable for their compliance with company law requirements.

4.8 BUILDING THE CAPACITY OF THE CRIMINAL JUSTICE SYSTEM

- 4.8.1 The Commission’s report notes that state capture was facilitated by “a deliberate effort to subvert and weaken law enforcement and intelligence agencies so as to shield and sustain illicit activities, avoid accountability and to disempower opponents.”²¹ In the aftermath of state capture, it is precisely these institutions that are now required to investigate, prosecute, and take other appropriate action to bring the perpetrators of state capture to book. Not only is it necessary to restore the criminal justice system to a healthy state, but also to enable it to undertake the massive task of prosecuting crimes committed over a decade of state capture.
- 4.8.2 In addition to the Commission’s recommendations, government has, since 2018, embarked on far-reaching measures to restore the integrity and rebuild the capability of the country’s law enforcement agencies and criminal justice system more broadly. This work adds to and goes beyond the Commission’s recommendations. The restructuring and the corrective work that is being done finds even greater significance in light of the findings and recommendations of the commission.

Building the capacity of the National Prosecuting Authority (NPA)

²¹ State Capture Commission Report, Part 6, Vol 2, p 297

- 4.8.3 The capacitation of the NPA with the required specialised skills and capacities is critical to ensure that perpetrators are held accountable, through effective prosecutions. Complex matters with high volumes of data require specialised skills in investigation and prosecution.
- 4.8.4 The NPA has been working hard to address the capacity constraints to prosecute complex corruption cases. As part of this:
- All Deputy Public Prosecutor posts and several Special Directors of Public Prosecutions posts have been filled.
 - Additional capacity was created in the Specialised Commercial Crimes Unit and the Investigating Directorate to respond to the increase in corruption cases emerging from the State Capture Commission report. This included a significant increase in the number of prosecutors.
 - The NPA's longer-term strategy includes the training of aspirant prosecutors to ensure career progression so that more experienced prosecutors can be released from general matters to focus on complex work.
 - The NPA has rebuilt staff morale and cohesion, put in place much needed systems and processes and deepened its collaboration with key actors in the criminal justice system.
 - Funding and other resources have been reprioritised within the NPA to effectively respond to the recommendations of the State Capture Commission.
- 4.8.5 The NPA will continue to find bold and innovative ways of leveraging private sector support while closely protecting the NPA's independence and compliance with relevant regulations. The NPA recently signed a Memorandum of Understanding with Business Leadership South Africa to assist with the provision of specialised skills to deal with complex corruption cases.
- 4.8.6 The NPA has bilateral engagements with other governments to provide training to prosecutors and enhance their skills, as well as exchanges with their counterparts in some other countries to benefit from their experience in dealing with complex matters.

Establishment of the Investigating Directorate

- 4.8.7 One of the earliest responses to what was being exposed through the proceedings of the State Capture Commission was the establishment in April 2019 of an Investigating Directorate (ID) in the Office of the National Director of Public Prosecutions (NDPP).
- 4.8.8 The ID was established as a multi-disciplinary anti-corruption law enforcement

agency in respect of unlawful activities relating to serious, high profile or complex corruption cases and offences or criminal or unlawful activities arising from the State Capture Commission.

- 4.8.9 To enable the ID and other law enforcement agencies to proceed with investigations while the State Capture Commission was busy with its work, the President amended the Regulations of the State Capture Commission to permit the sharing of information, records or documents with any State law enforcement agency. Recently, the ID has secured managed access to the Commission's digital database to facilitate its investigative work.

Establishment of the Dedicated Task Force

- 4.8.10 Following the release of the first report of the State Capture Commission, the NPA and the DPCI began the process of systematically reviewing the Commission's findings and recommendations, with a view to investigating and building cases for criminal prosecution. This included, where appropriate and supported by evidence, the freezing and forfeiture of the proceeds of crimes.
- 4.8.11 In response to the State Capture Commission's first report, the NPA created a dedicated Task Force in January 2022. The Task Force was originally composed of internal NPA units, namely the ID, the AFU, Directors of Public Prosecutions who have jurisdiction over matters, as well as coordinators from specialised units such as the Specialised Commercial Crime Unit, Tax Unit, Operations Management and a representative from the office for Strategy, Operations and Compliance. Later the DPCI became a member of the Task Force.
- 4.8.12 Resources have been pooled between the NPA and DPCI and a well-coordinated approach to prosecution-guided investigations has been implemented.
- 4.8.13 The NPA has also established an advisory panel of experienced prosecutors and investigators from the DPCI to provide advice to investigators and prosecutors dealing with complex corruption cases addressed by the ID, SCCU or the Task Force.

Specialised and Dedicated Courts

- 4.8.14 The NPA is part of a subcommittee established by the Department of Justice, mandated to establish additional Specialised Commercial Crime Courts (SCCCs), to strengthen capacity to deal with corruption and complex commercial crime. As a result, there are currently 22 Specialised Commercial Crime Courts across all provinces, including those provinces which previously did not have such dedicated courts. The subcommittee is in the process of motivating for the creation of additional SCCCs, due to the high case load in the existing courts.
- 4.8.15 Consideration will be given to the establishment of dedicated court rolls to deal with the envisaged increase of state capture-related cases.

Tracking disciplinary cases across government spheres and public enterprises

- 4.8.16 The Commission recommended that employees and officials within SOEs who were alleged to have committed transgressions during state capture be investigated and where necessary be subjected to disciplinary processes within the SOEs. Various such disciplinary proceedings have taken place and are still ongoing. Where necessary and justified, certain officials have been dismissed or corrective disciplinary action taken. The challenge remains with employees who have resigned before disciplinary proceedings commence. There is currently no legal recourse to address this.
- 4.8.17 There is currently no centralised register of people who have been dismissed from organs of state or those that have resigned to avoid being disciplined. While the Department of Public Service and Administration (DPSA) tracks disciplinary action across national and provincial departments and the Department of Cooperative Governance (DCoG) maintains a database of disciplinary actions at local government, there is no single register that covers all spheres of government and SOEs.
- 4.8.18 The DPSA, COGTA, the Department of Public Enterprises and the National Treasury have been directed to collaborate to design and implement appropriate solutions to address this challenge. The developed mechanisms will be rolled out across government in April 2023.

5 REFORMS TO PREVENT FUTURE OCCURRENCE OF STATE CAPTURE

- 5.1.1 Because state capture consisted of the simultaneous compromising of several entities across government, and because this weakened and undermined critical components of the systems of administrative accountability, law enforcement and institutional checks and balances, technical improvements in existing rules within the executive will not by themselves prevent a recurrence of state capture. Much more needs to be done to prevent a future occurrence of state capture.
- 5.1.2 Nevertheless, state capture revealed vulnerabilities and deficiencies in existing systems and processes, the tightening of which could help prevent recurrence. Many of these reforms have been identified by the State Capture Commission and have been embodied in recommendations made in its reports.
- 5.1.3 What follows in this section is a set of thematic responses to the key vulnerabilities exposed by the Commission. Many of these relate to the systemic causes and enablers of state capture outlined in the beginning of this report. These sections draw on the findings and recommendations of the Commission as well as wider analysis and sets out proposed responses for government to implement.

5.2 CREATION OF A PERMANENT ANTI-CORRUPTION COMMISSION AND A PUBLIC PROCUREMENT ANTI-CORRUPTION AGENCY

Commission Recommendations

- 5.2.1 *“It is recommended that a permanent Commission be established the main function of which will be to investigate, publicly expose acts of state capture and corruption in the way that this Commission did over the past four years, make findings and recommendations to the President. Such a Commission could be called the Anti-State Capture and Corruption Commission. In addition, ... it will be necessary for the Anti-State Capture and Corruption Commission to keep an eye on how Parliament performs its oversight function and whether, in respect of any particular matters, it is performing or it has performed its oversight function effectively and has held the Executive including the President, accountable.”²²*
- 5.2.2 It is recommended *“that the Government introduce legislation for the establishment of an independent Public Procurement Anti-Corruption Agency (PPACA).”²³*

Considerations

- 5.2.3 State capture exposed the vulnerabilities in South Africa’s anti-corruption architecture and law enforcement more widely.
- 5.2.4 The Commission makes a detailed recommendation about the establishment of an independent Public Procurement Anti-Corruption Agency (PPACA). It proposes that PPACA be comprised, *inter alia*, of an Inspectorate, a Litigation Unit, a Tribunal and a Court.
- 5.2.5 The Commission also makes a recommendation for the establishment of a Permanent Anti-Corruption Commission that would have oversight over both Parliament and the Executive.
- 5.2.6 Although these two recommendations are intended to serve different, though inter-related, purposes, they are being considered together in this response as they both have far-reaching implications for the country’s anti-corruption institutional architecture.
- 5.2.7 These recommendations need further consideration in the context of processes already underway to review and redesign the anti-corruption architecture for South Africa.
- 5.2.8 The National Anti-Corruption Strategy (NACS), approved by Cabinet in 2020, envisions an independent statutory- or constitutionally-entrenched state body for

²² State Capture Commission Report, Part 6 Vol 4 p 1227

²³ State Capture Commission Report, Part 1 Vol 1 pp 845-851

anti-corruption and provides options for the form and function of this body (see Appendix H of the NACS).

- 5.2.9 In August 2022, the National Anti-Corruption Advisory Council (NACAC) was appointed as an independent advisory body. Its task is to advise on the effective implementation of the NACS by government, civil society and the private sector; on strengthening South Africa's anti-corruption architecture; and on promoting public awareness about corruption.
- 5.2.10 In addition, the Department of Justice is in the process of researching and conducting a review of South Africa's anti-corruption architecture, which indicates a multi-disciplinary approach in the fight against corruption. Law enforcement agencies such as the DPCI and the NPA, including the Investigating Directorate and the AFU, have a broad constitutional mandate to investigate, prosecute and recover proceeds gained from corruption. The SIU plays a key role in investigating maladministration in government and its entities, the bulk of which relates to procurement.
- 5.2.11 It has been noted that with the exception of the proposed Council of the Public Procurement Anti-Corruption Agency, all the envisaged functions of the Agency, including litigation to recover monies following on investigations, are found in the current functions of the SIU.
- 5.2.12 The content and the intent of the Commission's recommendations on both the 'Anti-State Capture and Corruption Commission' and 'Public Procurement Anti-Corruption Agency' underline the need for a holistic, coherent and integrated approach to combating corruption, fraud and maladministration. It is therefore appropriate that these recommendations form part of a fundamental redesign and review of the country's anti-corruption architecture.
- 5.2.13 As a guiding principle South Africa's anti-corruption 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. The system should be amply resourced, and should have substantially enhanced mechanisms for coordination across relevant institutions and stakeholders in the anti-corruption and law enforcement space.
- 5.2.14 The strengthening of the country's anti-corruption capabilities should not await the conclusion of the review and redesign of the broad architecture.
- 5.2.15 Indeed, since 2018, in the wake of the institutional damage caused by state capture, the government has invested in strengthening the current architecture, including the SIU, the DPCI, the NPA, the Auditor-General and the creation of the Special Tribunal and additional Specialised Commercial Crime Courts.

Actions on Recommendations

- 5.2.16 The National Anti-Corruption Advisory Council (NACAC) will, in the course of its work to advise on strengthening the country's anti-corruption institutional arrangements, consider the detailed recommendations of the Commission on the establishment of an 'Anti-State Capture and Corruption Commission' and a 'Public Procurement Anti-Corruption Agency'. By the end of the current financial year (31 March 2023) the NACAC would have developed their plan, which will include research into the establishment of a permanent 'Anti-State Capture and Corruption Commission' and a 'Public Procurement Anti-Corruption Agency'.
- 5.2.17 Based on the advice of the NACAC and the outcomes of the review of South Africa's anti-corruption architecture by the Department of Justice, a comprehensive proposal on an effective and integrated anti-corruption institutional framework will be produced for public consultation, finalisation and implementation.

Additional Actions

- 5.2.18 To 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.
- 5.2.19 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.

5.3 PROCUREMENT REFORMS

Commission Recommendations

- 5.3.1 The State Capture Commission Report raised a critical issue about the Constitutional provisions with respect to procurement:

"One of the fundamental difficulties inherent in our procurement legislation is to reconcile the particular objectives separately addressed in sections 217(1) and 217(2) of the Constitution. ... The potential for misunderstanding is increased by the fact that the PFMA and the MFMA collectively address the requirements of section 217(1) leaving the correction of the disparities of the past to be dealt with in separate legislation under the PPPFA. This uncoordinated approach leaves a critical question unanswered: is it the primary intention of the Constitution to procure

goods at least cost or is the procurement system to prioritise the transformative potential identified in section 217(2)?”²⁴

“In the view of the Commission the failure to identify the primary intention of the Constitution is unhelpful and it has negative repercussions when this delicate and complex choice has to be made, by default, by the procuring official.”²⁵

“Ultimately in the view of the Commission the primary national interest is best served when the government derives the maximum value for money in the procurement process and procurement officials should be so advised.”²⁶

5.3.2 The State Capture Commission also made several detailed recommendations with respect to procurement reform. In summary, the Commission recommends consideration be given to:

- 5.3.2.1 A legally binding National Charter against Corruption in Public Procurement, including a Code of Conduct; ²⁷
- 5.3.2.2 enacting legislation that will establish a professional body to which all officials who work in the area of public procurement should belong; ²⁸
- 5.3.2.3 enacting or amending legislation protecting Accounting Officers or Accounting Authorities from criminal or civil liability for anything done in good faith unless such person acts negligently; ²⁹
- 5.3.2.4 enacting legislation for the greater centralisation of public procurement in certain aspects; ³⁰
- 5.3.2.5 enacting legislation for the better harmonisation of the legislation applying to public procurement; ³¹
- 5.3.2.6 enacting legislation for the better guidance and training of public procurement officials; ³²
- 5.3.2.7 enacting legislation for the discontinuance of any deviation based on the concept of a sole source service provider; ³³

²⁴ State Capture Commission Report, Part 1, Vol 3, pp 795-796

²⁵ State Capture Commission Report, Part 1, Vol 3, pp 796

²⁶ State Capture Commission Report, Part 1, Vol 3, pp 797

²⁷ State Capture Commission Report, Part 1, Vol 3, Ch 4, p 844

²⁸ State Capture Commission Report, Part 1, Vol 3, Ch 4, p 852

²⁹ State Capture Commission Report, Part 1, Vol 3, Ch 4, p 853

³⁰ State Capture Commission Report, Part 1, Vol 3, Ch 4, p 854

³¹ State Capture Commission Report, Part 1, Vol 3, Ch 4, p 855

³² State Capture Commission Report, Part 1, Vol 3, Ch 4, p 855

³³ State Capture Commission Report, Part 1, Vol 3, Ch 4, p 855

- 5.3.2.8 enacting legislation to criminalise the awarding of a tender unless the responsible official has satisfied themselves that the service provider is qualified; ³⁴
- 5.3.2.9 setting standards of transparency consistent with the OECD Principles for Integrity in Public Procurement for inclusion in every procurement system; ³⁵
- 5.3.2.10 preventing a service provider to a public institution from sub-contracting or ceding their right to provide the services to another entity unless the intended sub-contractor was disclosed in the bid documents; ³⁶
- 5.3.2.11 ensuring that no service provider may be awarded a tender or may conclude any contract with a public institution unless it has produced proof of relevant qualifications, skills experience or expertise required to perform the work; ³⁷
- 5.3.2.12 specific reforms to the use of implementing agents, include the use of transfer payments, re-prioritisation of budgets, oversight responsibilities of officials and structures, ensuring adequate accountability, and the keeping of reliable financial records; ³⁸
- 5.3.2.13 drafting standardised guidelines for the appointment of implementing agents; ³⁹
- 5.3.2.14 not appointing one entity as both implementing agent and managing agent; ⁴⁰
- 5.3.2.15 subjecting strategic partners brought into a project to a competitive bidding process; ⁴¹
- 5.3.2.16 ensuring project deliverables are included in business plans, and that these deliverables are monitored by the department and, where necessary, experts are brought in to do quality control; ⁴²
- 5.3.2.17 ensuring feasibility reports and business plans are available and approved prior to any funds being transferred to a service provider; ⁴³

³⁴ State Capture Commission Report, Part 4, Vol 2, p 451

³⁵ State Capture Commission Report, Part 1, Vol 3, Ch 3, p 853

³⁶ State Capture Commission Report, Part 4, Vol 2, p 449

³⁷ State Capture Commission Report, Part 4, Vol 2, p 451

³⁸ State Capture Commission Report, Part 6, Vol 1, p 196-199

³⁹ State Capture Commission Report, Part 6, Vol 1, p 197

⁴⁰ State Capture Commission Report, Part 6, Vol 1, p 197

⁴¹ State Capture Commission Report, Part 6, Vol 1, p 197

⁴² State Capture Commission Report, Part 6, Vol 1, p 197

⁴³ State Capture Commission Report, Part 6, Vol 1, p 197

- 5.3.2.18 enacting legislation to provide appropriate management, contracting, reporting and enforcement guidelines for those who implement projects on behalf of government; ⁴⁴
- 5.3.2.19 ensuring compliance with transformation imperatives and taking remedial action, including contract cancellation, where an implementing agent fails to comply; ⁴⁵
- 5.3.2.20 reporting on the recipient of the transferred funds should be noted in departments' financial statements to enable consequence management where funds have not been used for the allocated purpose; ⁴⁶
- 5.3.2.21 registering assets with a government agency until such time as the project beneficiaries are identified or secured; ⁴⁷
- 5.3.2.22 ensuring provincial treasuries have consequence management mechanisms for recalcitrant HODs or CFOs; ⁴⁸
- 5.3.2.23 institutionalising lifestyle audits for all senior managers and officials involved in supply chain management; ⁴⁹
- 5.3.2.24 subjecting executive authorities to lifestyle audits on a periodical basis.⁵⁰

Considerations

- 5.3.3 Abuse of the procurement system is one of the principal vehicles through which taxpayer funds are illicitly diverted to private interests instead of providing value to the public. Abuses are evident across all steps in the procurement value-chain, from the conception of public projects to the drafting of tenders, from the process of evaluating bids to the management of concluded contracts.
- 5.3.4 According to the Commission, one of the inherent problems with the current procurement regime is that it does not make clear whether the primary intention of the Constitution is for goods to be procured at least cost or for the procurement system to prioritise transformation. The Commission recommends that procurement officials be advised that "maximum value for money" must be primary.
- 5.3.5 Government recognises there is a need to manage the complex relationship in

⁴⁴ State Capture Commission Report, Part 6, Vol 1, p 198

⁴⁵ State Capture Commission Report, Part 6, Vol 1, p 198

⁴⁶ State Capture Commission Report, Part 6, Vol 1, p 198

⁴⁷ State Capture Commission Report, Part 6, Vol 1, p 198

⁴⁸ State Capture Commission Report, Part 6, Vol 1, p 199

⁴⁹ State Capture Commission Report, Part 6, Vol 1, p 199

⁵⁰ State Capture Commission Report, Part 6, Vol 1, p 199

public procurement between section 217(1) of the Constitution (dealing with competitive pricing) and s217(2) of the Constitution (dealing with transformation imperatives). Both policy goals are important and it is not possible to completely avoid the potential trade-offs and policy tensions.

- 5.3.6 It is worth noting that many states across the world utilise procurement to advance a range of public interest goals, which include the need to promote local industrialisation or local enterprises. In the case of South Africa, the high levels of unemployment and inequality necessitate that all available measures be used to improve local business development, empowerment and job creation. A law that provides for set-aside of procurement for local industrialists or designated groups is not inherently incapable of taking into account competitive pricing within the cohort of qualifying enterprises.
- 5.3.7 Any contradictions or uncertainty that may arise can be resolved by implementing the recommendations on public procurement. These are sufficient to protect the public purse without jeopardising the principle of economic redress that is entrenched in our Constitution. The Public Procurement Bill is, among other things, aimed at curing these defects in existing procurement legislation.
- 5.3.8 Apart from the abuse of procurement for the purposes of state capture, the country's procurement system currently faces challenges of professional capacity, fragmentation and operational flexibility. The introduction of preferential procurement goals, which is an economic and social imperative, adds a layer of complexity that some have used to manipulate procurement outcomes.
- 5.3.9 Several of the Commission's proposals are already reflected to varying degrees in the draft Public Procurement Bill, which has been consulted with the social partners at NEDLAC. Other recommendations are already covered by existing rules.
- 5.3.10 Many of the Commission's recommendations are also reflected in Pillar 4 of the National Anti-Corruption Strategy (NACS): "Improving the integrity and credibility of the public procurement system". The NACS prioritises programmes to enhance oversight and enforcement in public procurement; build professionalism within supply chain management through appropriate training and professionalisation initiatives; enhance monitoring of public procurement by civil society and the business community; and enhance transparency in public procurement by, *inter alia*, the adoption of open contracting principles.
- 5.3.11 National Treasury has initiated a modernisation and automation of supply chain management systems that will significantly contribute to effective data management and allow for information analysis across government and public entities.
- 5.3.12 It should be noted that there are certain goods and services that are provided by limited suppliers due to the uniqueness of the product or service they provide. While it is necessary to tighten regulations with respect to sole providers, it is not

feasible to completely do away with these types of deviations.

- 5.3.13 Measures to prevent the cession of rights by tender contractors unless disclosed in bid documents should make provision for instances where amendments to company ownership, such as mergers and acquisitions, make the cession of rights necessary and legally permissible.
- 5.3.14 The reforms to public procurement legislation currently underway provide an opportunity to implement the Commission's recommendations.
- 5.3.15 The centralisation of procurement will be pursued only where it is feasible and where the benefits are likely to outweigh the costs in terms of reduced flexibility and departmental accountability for spending, delivery and outcomes. A return to a fully centralised system is unlikely to improve the integrity and efficacy of procurement. However, it is recognised that extreme decentralisation has also made the procurement system more vulnerable. A multi-pronged approach is required, which builds the state's capacity in transversal contracts, reduces fragmentation, consolidates legislation, ensures enhanced regulatory and oversight capacity, and enhances transparency.

Actions on Recommendations

- 5.3.16 The Public Procurement Bill is expected to be finalised and submitted to Parliament by March 2023. The Bill will address the Commission's recommendations with respect to:
- a Code of Conduct setting out the ethical standards which apply in the procurement of goods and services for the public;
 - protecting Accounting Officers or Accounting Authorities from criminal or civil liability for anything done in good faith unless such person acts negligently;
 - harmonisation of the legislation applying to public procurement;
 - better guidance and training of public procurement officials;
 - regulations to provide clear guidance on the processes to be followed when procuring from a sole source;
 - setting standards of transparency for inclusion in every procurement system;
 - providing appropriate management, contracting, reporting and enforcement guidelines for those who implement projects on behalf of government;
 - ensuring compliance with transformation imperatives;

- institutionalising lifestyle audits for all senior managers and officials involved in supply chain management;
- the establishment of a professional body to which all officials who work in the area of public procurement should belong.

5.3.17 Recommendations that are covered under existing rules, and therefore do not require further action, include:

- the use of implementing agents, include the use of transfer payments, re-prioritisation of budgets, oversight responsibilities of officials and structures, ensuring adequate accountability, and the keeping of reliable financial records;
- standardised guidelines for the appointment of implementing agents;
- ensuring project deliverables are included in business plans and effectively monitored;
- ensuring feasibility reports and business plans are available and approved prior to any funds being transferred to a service provider;
- noting the recipient of the transferred funds in departments' financial statements to enable consequence management where funds have not been used for the allocated purpose;
- ensuring provincial treasuries have consequence management mechanisms for recalcitrant HODs or CFOs.

5.3.18 Government is giving consideration – through the draft Public Procurement Bill and amendments to the PFMA – to prohibiting the awarding of a tender unless the responsible official has satisfied themselves that the service provider is qualified. It is also considering the recommendation that no service provider may be awarded a tender or may conclude any contract with a public institution unless it has produced proof of relevant qualifications, skills experience or expertise required to perform the work. It is intended that this legislation be sent to Parliament before the end of this financial year.

5.3.19 The implementation of lifestyle audits for members of the National Executive is in process and is being managed by the Office of the Director-General in the Presidency.

5.4 STABILISING AND REFORMING STATE-OWNED ENTERPRISES

Commission Recommendations

5.4.1 *“The recommendations of the Commission, it is submitted, must insist on a truly*

independent and transparent process [for the appointment of SOE Boards and Executives] free from political manipulations so that the ultimate appointment made by a Minister is genuinely the result of a merit-based selection process.”⁵¹

- 5.4.2 *“The Commission recommends the establishment of a Standing Appointment and Oversight Committee tasked to ensure, by way of a public hearing, that any person nominated for Board appointment or as the Chief Executive Officer, Chief Financial Officer, or Chief Procurement Officer of an SOE meets the professional, reputational and eligibility requirements for such a position. The Committee will also investigate and act upon any complaints received concerning the misconduct of any Board member or senior executive in the discharge of his or her duties.”⁵²*
- 5.4.3 *“The Auditor General’s office should be further capacitated so that it can audit all public entities. To the extent that this is not practicable, serious consideration should be given to private firms being appointed to audit SOEs only if they can demonstrate that they have the requisite skills and also the requisite understanding of their obligations to the public at large when they audit an SOE.”⁵³*

Considerations

- 5.4.4 The Commission’s report highlighted shortcomings in the governance and performance of SOEs. The Commission found state capture had occurred at Eskom, Transnet, Denel, SAA, Alexkor, PRASA and ACSA.
- 5.4.5 The Commission found that the appointment and removal of board members and senior executives in SOEs was one of the key causes of state capture. The lack of compliance, transparency and accountability in the appointment of board members not only enable the capture of these companies, but also contributed to a decline in their respective operational and financial performance.
- 5.4.6 To prevent a recurrence of what happened at the SOEs, the commission recommends the establishment of a standing Appointment and Oversight Committee for Board and Executive appointments for State-owned Entities. It envisages, among other things, that the Chief Justice, the Legal Practice Council and the Independent Regulatory Board of Auditors play a role in constituting a committee to govern recommendations for appointment to the boards and senior posts of SOEs.⁵⁴
- 5.4.7 While the principle of greater transparency and rigour in the appointment of SOE boards and executive leadership is accepted, certain of the specific proposals contained in the Commission’s recommendations need to be assessed with a view of international best practice and the circumstances in which our SOEs operate.

⁵¹ State Capture Commission Report, Part 6, Vol 4, p 1221

⁵² State Capture Commission Report, Part 6, Vol 3, pp 976-977; see also pp 977

⁵³ State Capture Commission Report, Part 1, Vol 1 Ch 1, p 445

⁵⁴ State Capture Commission Report, Part 6, Vol 3, p 980-981

- 5.4.8 According to the OECD report on *Professionalising Boards of Directors of State-Owned Enterprises*: “Every SOE operates within a specific legal, institutional and economic context, and any attempt to improve its governance needs to be tailored to those circumstances. SOEs are subject to varying degrees of enforcement and restrictions depending on their regulatory environment as well as the sector in which they operate.”⁵⁵
- 5.4.9 Among other things, account must be taken of the extent of shareholding by the state in a specific entity and the technical nature of its business.
- 5.4.10 Given the number of SOEs in the country, there is significant potential for delays where a single committee is tasked with the recruitment processes for all boards and executive appointments. Such a committee would need to be constituted in a manner that recognises the shareholder role of the Executive and the responsibility that this places on the Executive to account for the performance of SOEs. It would also be important that the composition of such a committee did not compromise the independence of the judiciary and other institutions.
- 5.4.11 The Presidential SOE Council, which was appointed by the President in June 2020, has been engaged in work to strengthen the framework governing SOEs, including the introduction of overarching legislation governing SOEs and the determination of an appropriate Shareholder Ownership Model. This model would include the option of centralised holding company, which would introduce more objectivity and transparency to appointments.
- 5.4.12 In addition, the Council’s governance workstream has been tasked to consider a framework for appointing competent individuals with unquestionable integrity through a transparent and robust process to SOE Boards and Executive Director positions, and clarifying the respective role and responsibilities of the executive authority, boards and executives. This framework also needs to advance transformation and representivity policy imperatives in the leadership and management of SOEs.
- 5.4.13 The Presidential SOE Council also has a workstream on financial matters in SOEs and another working on the consolidation of SOEs and ensuring the sustainability of SOEs currently in crisis.
- 5.4.14 The principles of the Commission’s recommendations will guide government’s reform of board appointment processes to ensure greater transparency, scrutiny and checks and balances in the appointment of SOE board members.
- 5.4.15 The National Treasury has partnered with academia on a comprehensive research

⁵⁵ (OECD, 2018) *Professionalising Boards of Directors of State-Owned Enterprises: Stocktaking of National Practices*. Available at www.oecd.org/corporate/Professionalising-boards-of-directors-of-SOEs.pdf

project to enhance the oversight function and value of South Africa's public sector audit committees. The findings of this research will inform legislative reforms needed to pave the way for substantive overhaul of the functioning of audit committees. These amendments will be aligned to the current review of the PFMA.

Actions on Recommendations

- 5.4.16 Government accepts the recommendations on the need for a process for the appointment of SOE boards that is not open to manipulation, including the involvement of independent panels with appropriate technical expertise to recommend suitable candidates to the relevant executive authority. This process would need to take due regard to any legislation relevant to the particular entity.
- 5.4.17 While the boards of state-owned enterprises would submit recommendations on CEO appointments to the Presidential SOE Council, relevant executive authority and Cabinet for concurrence, the board will have the sole discretion to appoint other executive positions.
- 5.4.18 In line with good governance practices, no board member will be allowed to be operationally involved in procurement processes beyond playing an oversight role. Ministers will be prohibited from playing any role in procurement within SOEs.
- 5.4.19 Provision will be made in the final 'Guide for the Appointment of Persons to Boards and Chief Executive Officers of State-Owned and State-Controlled Institutions' for independent panels of relevant stakeholders and experts to play a role in nominating suitable candidates to the relevant minister. It is anticipated that the guide will be finalised in the 2023/24 financial year.
- 5.4.20 Government will establish a central database of potential candidates that can be appointed to the boards of SOEs. In terms of this process, an advertisement will be issued requesting nominations of potential candidates, who will be screened and vetted. In some instances, it would be necessary to ask professional bodies to propose names. The successful candidates will be part of the pool of candidates who could be appointed to the Boards of SOEs. The establishment of the database will commence upon conclusion of the 'Guide for the Appointment of Persons to Boards and Chief Executive Officers of State-Owned and State-Controlled Institutions'.
- 5.4.21 A State-Owned Enterprises Bill and its regulations will codify the appointment process so that the principles and process become legally binding and that sanctions for non-compliance are put in place. The Bill has been developed and is currently in the process of consultation. It is anticipated that the Bill will be finalised in the 2022/23 financial year.
- 5.4.22 The review of the respective roles of the Auditor-General and private auditors as well as recommendations on the public sector audit committees outlined in 5.4.15 above are expected to be completed by 30 September 2023.

5.5 RESPONDING TO ABUSES BY THE PRIVATE SECTOR

Commission Recommendations

- 5.5.1 “The Commission recommends the amendment of the Companies Act so as to permit applications [for a director to be declared delinquent] to be brought even after two years on good cause shown.”⁵⁶
- 5.5.2 “Introduce legislation for the introduction of deferred prosecution agreements by which the prosecution of an accused corporation can be deferred on certain terms and conditions.”⁵⁷
- 5.5.3 “In order to strengthen the duty of private sector entities to put in place measures against bribery it is recommended that PRECCA be amended by the introduction of a section 34A reading as follows:

34A Failure of persons or entities to prevent bribery

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

(a) to obtain or retain business for A or

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

(2) For the purposes of section 34A(1), a person ('B') is associated with A if (disregarding any gratification under consideration) B is a person who performs services for or on behalf of A. The capacity in which B performs services for or on behalf of A does not matter.”⁵⁸

- 5.5.4 “It is recommended that the [Political Party Funding Act No. 6 of 2018] be amended to criminalise the making of donations to political parties in the expectation of or with a view to the grant of procurement tenders or contracts as a reward for or in the recognition of such grants having been made.”⁵⁹

Considerations

- 5.5.5 The Commission exposes the central role that private sector actors played in state

⁵⁶ State Capture Commission Report, Part 1, Vol 1, Ch 1, p 78

⁵⁷ State Capture Commission Report, Part 1, Vol 3, Ch 4, p 852

⁵⁸ State Capture Commission Report, Part 1, Vol 3, Ch 4, p 854

⁵⁹ State Capture Commission Report, Part 1, Vol 3, Ch 4, p 854

capture, both through direct involvement in procurement corruption, fraud and money laundering, but also in weakening institutions that stood in the way of state capture. These perpetrators included management consultants, advisors, accountants, auditors, lawyers, bankers, as well as providers of goods and services, including large multinational firms.

- 5.5.6 The two-year time bar on company directors being declared delinquent was included in the Companies Act to protect directors from any prejudice that may result from former directors being able to secure evidence for their questioned decisions. However, the rights of directors against any potential prejudice need to be balanced against the rights of the public and any stakeholders. The amendment proposed by the Commission to allow any application for delinquency after the two years' time bar on "good cause" shown should therefore be supported.
- 5.5.7 The Commission made several recommendations for investigation and prosecutions by law enforcement and other regulators to pursue perpetrators in the private sector. These are all in process and dealt with in the earlier section. Similarly, anti-money laundering system reforms are also dealt with in earlier sections.
- 5.5.8 The Commission recommended the introduction of legislation to cater for deferred prosecution agreements by which the prosecution of an accused company can be deferred on certain terms and conditions. The Commission felt that there was a need for alternative methods of processing economic criminal cases to deal with the urgent corruption crisis and avoid a backlog in cases that may only be heard in years to come.
- 5.5.9 It is recommended that deferred prosecution agreements should form part of the broader investigation into the Review of the Criminal Justice System undertaken by the South African Law Reform Commission (SALRC). Adopting such an agreement will require legislative changes.
- 5.5.10 In the interim, the NPA will make use of existing alternative dispute resolution mechanisms and existing prosecution guidelines and directives to ensure accountability by companies that benefited from state capture. Such prosecution guidelines will allow prosecutors to exercise guided discretion in the public interest not to prosecute the company but reach an agreement that the company must surrender the benefits of crime. Such decisions would not prevent the prosecution of directors or companies that fail to abide by the undertakings made.

Actions on Recommendations

- 5.5.11 The recommendation to amend the Companies Act so as to permit applications for a director to be declared delinquent to be brought even after two years is accepted and will form part of a review of the Companies Act that is expected to be concluded in the third quarter of 2023.

- 5.5.12 The recommendation to amend the Prevention and Combating of Corrupt Activities Act on the failure of persons or entities to prevent bribery will be included in the Judicial Matters Amendment Bill which will be submitted to Cabinet in the latter half of 2022.
- 5.5.13 The recommendation to amend the Political Party Funding Act to criminalise donations to political parties in the expectation of access to procurement tenders or contracts is accepted. This amendment will be made alongside other consequential amendments that will be required following the approval of the Electoral Amendment Bill currently before Parliament.
- 5.5.14 The South African Law Reform Commission (SALRC) is considering deferred prosecution agreements as part of its review of the criminal justice system. This is a broad investigation that seeks to ensure efficiency in the adjudication and finalisation of criminal cases. It is expected to be finalised towards the end of the 2023/24 financial year. Deferred prosecution agreements will receive attention, in this review, during the current financial year.

Additional Actions

- 5.5.15 The draft Public Procurement Bill, which is currently being consulted on at NEDLAC, includes a provision which empowers the proposed Public Procurement Office to issue a debarment order against a bidder or supplier that, among others, provided false information in a bid document, committed any offence involving corruption, fraud, collusion, coercion or price fixing, or contravened a provision of the Public Procurement Act.
- 5.5.16 Pending the processing of the Public Procurement Bill and its enactment and commencement, National Treasury will review the current Treasury Instruction on the restriction of bidders or suppliers if an institution fails to act to provide the authority to the relevant treasuries to do so. It is anticipated that this will be completed by January 2023.

5.6 REFORMING INTELLIGENCE AGENCIES

Commission Recommendations

- 5.6.1 *“It is recommended that the Inspector General of Intelligence and the Auditor-General be given such access to relevant SSA records and to the secret accounts referred to in this Report as may be lawful but still that would enable them to their work (sic) efficiently including such investigation including as the Inspector-General of Intelligence and the Auditor-General may each consider necessary.”⁶⁰*
- 5.6.2 *“It is recommended that Parliament should consider amending section 6(1) of the Intelligence Services Oversight Act 40 of 1994, so as to ensure that, before an*

⁶⁰ State Capture Commission Report, Part 5, Vol 1, p 460

*election, the outgoing JSCI is required to report to Parliament on as much as possible of the period preceding the election.”*⁶¹

- 5.6.3 Commission recommends that *“the President must take note of the involvement of the State Security Agency in security vetting and take such steps as may be necessary to ensure that services of the State Security Agency are not abused in the future to serve the interests or agenda of certain individuals.”*⁶²
- 5.6.4 *“Any further investigation into the affairs of the SSA should be entirely independent of those persons implicated in the Project Veza investigations. This would require an entirely independent investigation.”*⁶³
- 5.6.5 *“The Commission therefore recommends a close look once more at the spirit, guidelines and principles of the Intelligence White Paper, while recognising that it, too, might need to be adapted.”*⁶⁴
- 5.6.6 *“The Commission recommends in the appropriate section and for the reasons therein stated, that a Minister should not be involved in the operations of the country's intelligence services.”*⁶⁵
- 5.6.7 *“To state the obvious, financial controls and accountability need to be tightened. As already said, the handling and use of cash is inevitable, especially in covert operations. However, consideration should be given to minimizing the amounts involved.”*⁶⁶
- 5.6.8 *“The Inspector General of Intelligence should be allowed more access into the activities of the country's intelligence services.”*⁶⁷
- 5.6.9 *“Consideration should be given to allowing the Auditor General adequate access to audit the country's intelligence agencies; without prescribing, consideration may be given to giving top clearance certificate to some staff of the Auditor General; consultations with the IGI and the Auditor General should be considered by the SSA.”*⁶⁸
- 5.6.10 *“The role of the IGI, the AG, and Parliament through its Joint Standing Committee on Intelligence, must be sharpened. Secrecy should not be used to hide criminal activity; law enforcement agencies should therefore be able to investigate and, where appropriate, the NPA should prosecute, otherwise there would be criminal*

⁶¹ State Capture Commission Report, Part 6, Vol 2, p 750

⁶² State Capture Commission Report, Part 1, Vol 1, p 441

⁶³ State Capture Commission Report, Part 5, Vol 1, p 20

⁶⁴ State Capture Commission Report, Part 5, Vol 1, p 323

⁶⁵ State Capture Commission Report, Part 5, Vol 1, p 326, 328

⁶⁶ State Capture Commission Report, Part 5, Vol 1, p 332

⁶⁷ State Capture Commission Report, Part 5, Vol 1, p 332

⁶⁸ State Capture Commission Report, Part 5, Vol 1, p 333

*impunity under the cover of secrecy.”*⁶⁹

- 5.6.11 *“Returning to the report of the JSCI, it is to be noted that in paragraphs 9 and 10, respectively, the Committee makes generic and specific recommendations. These recommendations are aimed at ensuring a better service by the country's intelligence services. It is hoped that they will be seriously considered.”*⁷⁰
- 5.6.12 *“The process for the issuance of firearms out of the SSA armoury needs to be tightened up, bearing in mind that even rifles and submachine guns were issued.”*⁷¹
- 5.6.13 *“The [SSA] recruitment criteria must be clear and be strictly adhered to; and certainly there should be no Executive involvement, let alone by bringing in people on familial or other non-professional considerations.”*⁷²
- 5.6.14 *“The use of the resources and services of national intelligence agencies to destabilise opposition parties, to benefit a ruling party and to fan intra-party factions in order to influence political or electoral outcomes, amounts to a serious threat to democracy. Steps therefore need to be taken to deal with this.”*⁷³
- 5.6.15 *“The peddling of false and unsubstantiated so-called intelligence reports can destabilise the country... The bottom line is that sound and effective mechanisms should be in place to be able to sift out false reports.... A great deal of prudence is required in dealing with intelligence reports.”*⁷⁴
- 5.6.16 *“The recommendations made in respect of false reports, irregular recruitments and abuse of secrecy made earlier in this report in respect of the SSA, also hold good with regard to SAPS Crime Intelligence.”*⁷⁵
- 5.6.17 *“Instead of being weakened or undermined, the office of the Inspector-General needs to be strengthened in many ways. It needs more staff and a budget of its own. The Inspector General should enjoy unfettered access to classified information and be better equipped. The office of the IGI must be independent and respected.”*⁷⁶
- 5.6.18 *“The findings and reports of the IGI must be taken seriously by the Executive and Parliament.”*⁷⁷

Considerations

⁶⁹ State Capture Commission Report, Part 5, Vol 1, p 334

⁷⁰ State Capture Commission Report, Part 5, Vol 1, p 347

⁷¹ State Capture Commission Report, Part 5, Vol 1, p 335

⁷² State Capture Commission Report, Part 5, Vol 1, p 339

⁷³ State Capture Commission Report, Part 5, Vol 1, p329

⁷⁴ State Capture Commission Report, Part 5, Vol 1, p 342

⁷⁵ State Capture Commission Report, Part 5, Vol 1, p 343

⁷⁶ State Capture Commission Report, Part 5, Vol 1, p 350

⁷⁷ State Capture Commission Report, Part 5, Vol 1, p 351

- 5.6.19 The Commission investigated various allegations of illegal activities and abuse of state resources and power at the State Security Agency (SSA). The Commission found that weaknesses in the regulatory framework made the SSA particularly vulnerable to abuse for political and personal gain, and a particular risk for corruption due to the need for secrecy.
- 5.6.20 The Commission's recommendations regarding the State Security Agency focused on addressing four main concerns:
- The concentration of power and resultant lack of checks and balances arising from the merger of various intelligence functions into a single agency;
 - Executive overreach whereby operational level programmes were directed by Ministers;
 - a breakdown or overriding of internal controls resulting in disappearance of large amounts of cash and firearms;
 - The need to investigate, prosecute implicated individuals and recover stolen assets.
- 5.6.21 Much of the remedial action required to correct the abuses and deficiencies with the SSA began following the report of the High-Level Review Panel on the State Security Agency of December 2018.
- 5.6.22 The Commission's findings and recommendations confirm the validity of the Panel's assessment of SSA and the appropriateness of the measures it recommended.
- 5.6.23 Legal and regulatory changes need to be supported by an institutional culture of good governance. This will be achieved if all role players – management, internal audit, the IGI, the AGSA and the JSCI – act with integrity and fulfil their mandates. It is for this reason that the notion of combined assurance – which brings together internal and external parties to identify risks and assess performance – should be used to promote transparency and accountability in the intelligence community.

Actions on Recommendations

- 5.6.24 A new General Intelligence Laws Amendment Bill has been drafted and is expected to be tabled in Parliament before the end of this financial year. The Bill will amend the National Strategic Intelligence Act (39 of 1994), Intelligence Services Act (65 of 2002) and other relevant Intelligence laws so as to, among others, disestablish the SSA and establish a domestic intelligence service and foreign intelligence service in accordance with the Constitution. The amendment will also include provisions to strengthen the oversight of the intelligence agencies by bodies such as the Inspector General of Intelligence, the Joint Standing Committee on Intelligence and the Auditor General of South Africa.

- 5.6.25 It is necessary to reaffirm the principle that no member of the Executive responsible for intelligence, whether the President, Minister or Deputy Minister, may be involved in the operational matters of the SSA. The review of the Intelligence Services Act that is currently underway will consider how to give practical effect to this principle.
- 5.6.26 The new leadership at the State Security Agency has developed and is implementing a comprehensive response plan to address the recommendations of the Commission. It is factoring in the recommendations contained in the Annual Report of the Joint Standing Committee on Intelligence (JSCI) for the Financial Year ending 31 March 2020 including the period up to December 2020.⁷⁸ This response plan is being driven by a multi-disciplinary team made up of internal resources and through enlisted expertise in restructuring and reforming organisations.
- 5.6.27 Several reports in relation to Project Veza have been completed and were shared with the NPA's Investigating Directorate (ID) in March 2021 for further investigation and possible prosecution. Subsequent to that, an independent forensic investigation firm was sourced to augment the capacity of the ID in November 2021. Consequence management is already being implemented through disciplinary action in SSA.
- 5.6.28 The peddling of fabricated information has been counteracted by the resuscitation of systems and control measures in the SSA.
- 5.6.29 National Treasury is working with the Auditor-General and SSA on tightening financial controls, especially with respect to cash, and improving accountability through a multi-pronged audit process (involving the AGSA, IGI and SSA Internal Audit).
- 5.6.30 The SSA has finalised and is implementing new gun control directives for the agency in line with applicable laws
- 5.6.31 The SSA is reviewing human resource directives to ensure they are in line with the Commission's recommendations on recruitment criteria. This is expected to be completed by March 2023.

Additional Actions

- 5.6.32 New National Security Policy and Strategy documents have been drafted and presented to the National Security Council. The policy, which returns to the principles of the White Paper on Intelligence, will be recommended to Parliament for the commencement of public consultations before the end of this financial year.

⁷⁸ 'Announcements, Tablings and Committee Reports', Parliament of the Republic of South Africa, 10 September 2021, pp 34-40

5.7 PROTECTION AND INCENTIVES FOR WHISTLE-BLOWERS

Commission Recommendations

- 5.7.1 *“Introduce legislation or amend existing legislation: to ensure that any person disclosing information to reveal corruption, fraud or undue influence in public procurement activity be accorded the protections stipulated in article 32(2) of the United Nations Convention Against Corruption.”*⁷⁹
- 5.7.2 Introduce legislation or amend existing legislation *“authorising the offer of immunity from criminal or civil proceedings if there has been an honest disclosure which might otherwise render the informant liable to prosecution or litigation.”*⁸⁰
- 5.7.3 *“Fixed percentage of monies recovered should be awarded to the whistleblower provided that the information disclosed by the whistleblower has been material in the obtaining of the award.”*⁸¹

Considerations

- 5.7.4 Whistleblowing is an essential weapon in the fight against corruption. The actions of whistle-blowers have played a vital role in exposing many of the activities that were part of state capture. Whistle-blowers need to be encouraged to report instances of fraud and corruption and need to be protected from victimisation, prejudice or harm.
- 5.7.5 Among other things, whistle-blowers need protection from retaliatory action – in the form of disciplinary action or criminal charges – by public and private bodies at which corruption has been alleged.
- 5.7.6 The Office for Witness Protection (OWP) is tasked with ensuring the safety of witnesses whose required evidence or testimony has resulted in threats to them, their family or property. The mandate of the OWP does not currently extend to whistle-blowers who are not witnesses. Consideration will therefore be given to expanding the mandate in the Witness Protection Act through amendments following a process of consultation and deliberation.
- 5.7.7 A policy of awarding a fixed percentage of monies actually recovered from procurement fraud to the whistle-blower provided that the information disclosed by the whistle-blower was material in such recovery has proved extremely effective in other jurisdictions also facing procurement fraud and corruption. It does carry some risk in that it could impute a motive to the “whistle-blower” which could prejudice a successful prosecution.

⁷⁹ State Capture Commission Report, Part 1, Vol 2, Ch 4, p 851

⁸⁰ State Capture Commission Report, Part 1, Vol 1, p 852

⁸¹ State Capture Commission Report, Part 1, Vol 3, p 809

Actions on Recommendations

5.7.8 The Department of Justice has commenced a review of the Protected Disclosures Act and Witness Protection Act to, among other things, give effect to the following recommendations:

- ensure whistle-blowers receive the protections afforded by section 32(2) of the UN Convention Against Corruption;
- the possible award of a proportion of funds recovered to the whistle-blower provided that the information disclosed has been material in recovering funds;
- whistle-blowers be afforded immunity from criminal or civil action arising from honest disclosures.

The review, which will include consultation with stakeholders and the National Anti-Corruption Advisory Council, will be completed by the end of April 2023.

5.8 RESTORING THE SOUTH AFRICAN REVENUE SERVICE

Commission Recommendations

5.8.1 The South African Revenue Service Act of 1997 *“be amended to provide for an open, transparent and competitive process for the appointment of Commissioner of SARS.”*⁸²

Considerations

5.8.2 The State Capture Commission endorsed the findings of the Commission of Inquiry into Tax Administration and Governance by SARS (Nugent Commission) established by the President in June 2018. The Nugent Commission had found that there had been a massive failure of integrity and governance at the South African Revenue Service (SARS) under the tenure of the previous Commissioner, Mr Tom Moyane.

5.8.3 The Nugent Commission described the restructuring project led by international management consulting firm Bain and Company to restructure SARS as a premeditated offensive against SARS, the result of which was the dismembering of the organisation, rendering it severely weakened.

5.8.4 The Nugent Commission recommended a series of governance, organisational, operational and stakeholder actions to rebuild SARS and reverse its capture.

Actions on Recommendations

⁸² State Capture Commission Report, Part 1, Vol 3, Ch 3, p 714

- 5.8.5 The National Treasury has initiated the process to amend the SARS Act to implement the recommendations of the Nugent Commission, including providing for an open, transparent and competitive process for the appointment of the SARS Commissioner and the appointment of adequate oversight mechanisms such as an inspector general. Legislation will be tabled by June 2023.

Additional Actions

- 5.8.6 New leadership has been appointed at SARS, and a new, flatter, more accountable organisational structure has been implemented.
- 5.8.7 Several measures have been enacted to strengthen governance as recommended by Nugent to, for example, implement a systemic review of VAT refunds. SARS also terminated the improperly procured debt collection contracts.
- 5.8.8 SARS has established a “new look” Large Business and International Unit and High Wealth Individuals Unit to service these important segments of the tax base. It has also revitalised its capability to tackle corruption and the illicit economy.
- 5.8.9 SARS is addressing the various malpractices that impact on SARS staff, and taking disciplinary action against those officials whose integrity has been compromised.
- 5.8.10 An Internal Reparations Panel was established to review the cases of staff who were negatively affected by state capture, in relation to whom the Nugent Commission recommended that reparations be considered. This process, in which 15 former SARS employees participated, was successfully completed in July 2022 with agreement between the parties on non-pecuniary and pecuniary restitution measures which included a formal apology to each individual participant, and compensation for pain and suffering and in some cases, the loss of income.
- 5.8.11 Legal proceedings are underway to recoup wasteful and fruitless expenditure.

5.9 IMPROVING MEASURES TO COMBAT MONEY LAUNDERING

Commission Recommendations

- 5.9.1 *“It is therefore recommended that [with respect to the closure of bank accounts by banks] relevant existing legislation governing banks be amended to introduce this requirement of fairness or if warranted, a new piece of legislation be enacted which will make this a requirement.”⁸³*
- 5.9.2 *“It is necessary to use the anti-money laundering resources of the banks in a more pro-active manner than is currently the case. The South African Anti-Money Laundering Integrated Task Force (SAMLIT) has been set up under the auspices of the FIC to enable banks to share with each other and with the authorities*

⁸³ State Capture Commission Report, Part 6, Vol 1, p 264

anonymized information and to discuss general trends. However, the absence of a statutory framework providing for the controlled sharing of details anti-money laundering information by banks appears remain an obstacle to fighting financial crime.”⁸⁴

5.9.3 *“A co-ordinated and co-operative approach to targeting money laundering is required from all of the relevant enforcement agencies and at the least, Asset Forfeiture Unit (AFU) of the NPA, Hawks, FIC, Investigating Directorate of the NPA (ID), SARS, SARB, SIU.”⁸⁵*

5.9.4 *“There is a need to investigate the effectiveness of the current system of suspicious transaction and cash threshold reporting to the FIC under FIC Act. If banks are failing to make the necessary reports to the FIC, the FIC needs to take action against them, but if banks are making the necessary reports to the FIC but no action is being taken against the money laundering networks, that suggests either a flaw in the current system or its implementation by the FIC and downstream enforcement agencies. In this context, the Commission recommends that the FIC should conduct an urgent review*

- *into the compliance of the South African Banks with the FIC Act in relation to proceeds of State Capture laundered through accounts held by them identifying whether, and to what extent, the FIC was alerted to these activities by reports under the FIC Act;*
- *what action was taken by the FIC pursuant to any relevant reports received from South African Banks in this regard;*
- *what reports or recommendations were made by the FIC to other law enforcement agencies; and*
- *what steps, if any, were taken by those enforcement agencies to act on the recommendations of the FIC.”⁸⁶*

Considerations

5.9.5 Section 106 of the Financial Services Regulation Act empowers the Financial Sector Conduct Authority (FSCA) to issue conduct standards for the financial sector to treat their customers fairly. The FSCA has issued Banking Conduct Standards 3 of 2020, which requires banks to have processes and procedures in place to treat their customers fairly, including for bank account closures. This Standard took into account recent experiences related to bank account closures before 2020, and were finalised after considering public comments and tabled in Parliament before taking effect.

⁸⁴ State Capture Commission Report, Part 6, Vol 3, p 830

⁸⁵ State Capture Commission Report, Part 6, Vol 3, p 829

⁸⁶ State Capture Commission Report, Part 6, Vol 3 pp 830-831

- 5.9.6 Government is in the process of strengthening the country's anti-money laundering regime. This is in response to the findings of the Commission and adverse findings against South Africa in a mutual evaluation report completed by the Financial Action Task Force that was released in 2021. The adverse findings in the FATF report were influenced by the finding that financial intelligence and anti-money laundering systems had been ineffective in either preventing or responding to state capture.
- 5.9.7 The DPCI, NPA, SARS and the Reserve Bank have a forum through which they collaborate on key special projects to target money laundering and tax evasion. A tripartite agreement has been concluded between the NPA, FIC and the DPCI to fast-track criminal and financial investigations in money laundering matters.
- 5.9.8 The South African Anti-Money Laundering Integrated Task Force (SAMLIT) is facilitating improved information flow between the banking sector and the Fusion Centre. Established in late 2019, this public-private partnership consists of regulatory authorities, 26 banks and banking industry bodies. This body has since been joined by law enforcement agencies and other competent authorities, such as SARS. SAMLIT's tactical operations groups assists in addressing specific financial crime investigations by providing details for analysis to the FIC and the Fusion Centre. This has led to the preservation and directives to freeze accounts in the amount of R86 million in criminal assets.

Actions on Recommendations

- 5.9.9 With respect to the recommendation that banks be required to follow a fair process when considering the closure of a client's accounts, National Treasury will review whether the current standards need to be strengthened to better protect retail customers from bank closures from a financial inclusion perspective, to the extent that they comply with anti-money laundering legislation and other applicable laws.
- 5.9.10 The matter of statutory frameworks for financial information sharing partnerships has been included in the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill, which has been tabled in Parliament and is currently before the NA Finance Portfolio Committee. This Bill aims to address the deficiencies identified by the Financial Action Task Force (FATF) and IMF in their mutual evaluation of South Africa in 2021.
- 5.9.11 The FIC has appointed attorneys to conduct an urgent independent review of the effectiveness of the current regulatory reporting regime under the FIC Act. It will also undertake a review of what banks had reported in relation to possible state capture transactions, what the FIC had done with the reports, what referrals the FIC had made to law enforcement agencies and what the law enforcement agencies had done with such referrals. The FIC briefed the attorneys on 26 August 2022 and is awaiting the project plan from the attorneys, which will include the duration of

the review.

5.10 REFORMS TO THE ELECTORAL SYSTEM

Commission Recommendations

- 5.10.1 *“The proposal that consideration be given to making necessary constitutional amendments to ensure that the President of the country is elected directly by the people, aimed at ensuring that anyone who becomes President of the country does so on the basis of their own popularity with the people, not on the basis that, if voters vote for a particular party, that party will make him or her President.”*⁸⁷
- 5.10.2 *“It is recommended that Parliament should consider whether introducing a constituency-based (but still proportionally representative) electoral system would enhance the capacity of members of Parliament to hold the executive accountable. If Parliament considers that introducing a constituency-based system have this advantage, it is recommended that it should consider whether, when weighed against any possible disadvantages of, this advantage justifies amending the existing electoral system.”*⁸⁸
- 5.10.3 *“It is recommended that serious consideration be given to the majority recommendation on electoral reforms as given in the Report of the Electoral Task Team of January 2003. The Task Team included Dr F Van Zyl Slabbert who was the Chairperson.”*⁸⁹

Considerations

- 5.10.4 The commission makes recommendations for the consideration of reforms to the country’s electoral system. These include direct election of the President and the adoption of a constituency-based (but still proportionally representative) electoral system. These are made in the context of the commission’s findings of weaknesses by the country’s parliament and its elected officials to provide the requisite oversight to prevent state capture. The commission found that at critical moments party political loyalties had trumped the national interest. This was ascribed to a set of incentives in our proportional representative system in which political parties rather than electoral constituencies are the focus of accountability for elected officials.⁹⁰
- 5.10.5 The present electoral system was agreed upon in 1993 as the most appropriate one to take South Africa through the transition from apartheid to democracy. There was broad consensus among all sectors of society that the proportional representation system would support reconciliation, nation building, peace and

⁸⁷ State Capture Commission Report, Part 6, Vol 4, p 1232

⁸⁸ State Capture Commission Report, Part 6, Vol 2, p 658

⁸⁹ State Capture Commission Report, Part 6, Vol 4, p 1232

⁹⁰ State Capture Commission Report, Part 6, Vol 2, p 656

stability and social and political reforms. The Constitutional Assembly confirmed the present system in 1996 after an extensive public consultation process.

- 5.10.6 Since then, a number of panels have, at different times, been established to review the electoral system. These include the Electoral Task Team lead by Mr Frederik Van Zyl Slabbert (2003), the High Level Panel on Assessment of Key Legislation and Fundamental Change chaired by Former President Kgalema Motlanthe (2017) and the recent Ministerial Advisory Committee on Electoral System Reform chaired by Mr Valli Moosa (2021).
- 5.10.7 The report of the latter, the Ministerial Advisory Committee on Electoral System Reform, was used to inform the Electoral Amendment Bill, which is currently before the National Council of Provinces.
- 5.10.8 While there has been much attention given to the balance between constituency-based and proportional representation in electoral systems, none of these panels has undertaken a review of the process for the election of the President. The proposal for a directly elected President did not feature in the constitutional negotiations prior to the adoption of our Interim Constitution, nor in the Constitutional Assembly process. As a consequence, there is not a substantial body of work in South Africa on this matter.
- 5.10.9 Unlike the reforms proposed with respect to a constituency-based electoral model, the recommendation for the direct election of the President would require amendments to the Constitution and an extensive revision of the institutional architecture of our democracy. The direct election of the President would also have far-reaching implications for the role and status of Parliament in our constitutional system. Since Parliament would not be responsible for electing the President, its ability to hold the President and the Executive to account would be substantially diminished.
- 5.10.10 Due to the far-reaching consequences of the Commission's recommendations on electoral reform, they require an extensive process of consultation and deliberation that involves the whole of society. Among other things, this process would need to answer whether the deficiencies identified by the Commission justify revisiting previous decisions on these matters.

Actions on Recommendations

- 5.10.11 Noting that a part of the electoral reforms proposed by the Commission are currently under consideration in Parliament in relation to the Electoral Laws Amendment Bill and considering that Parliament has a court prescribed deadline to approve the Bill by 10 December 2022, it will be necessary to await the finalisation of the Bill before determining whether it satisfies the concerns raised by the Commission.
- 5.10.12 Since the recommendation for the direct election of the President would require

constitutional amendments, it is a matter that should be considered by the various political parties represented in Parliament and by the Parliament's Joint Constitutional Review Committee

5.11 CREATING A CRIMINAL OFFENCE OF ABUSE OF POWER

Commission Recommendations

- 5.11.1 *"It is therefore recommended that the Government give consideration to the creation of a statutory offence rendering it a criminal offence for any person vested with public power to abuse public power vested in that person by intentionally using that power otherwise than in good faith for a proper purpose. Such potential violations might range from the case of a president of the Republic who hands a large portion of the national wealth, or access to that wealth, to an unauthorised recipient to the junior official who suspends a colleague out of motives of envy or revenge."*⁹¹

Considerations

- 5.11.2 This is a weighty issue which requires in-depth research to consider the parameters of the offence and its implications. Such research would also need to include benchmarking with comparative jurisdictions.

Actions on Recommendations

- 5.11.3 The Department of Justice and Constitutional Development will research possible legislative provisions for the creation of a statutory offence for the abuse of public power. This work will be finalised by mid-December 2023.

5.12 CREATING A CRIMINAL OFFENCE OF CONSTITUTIONAL OR POLITICAL MALPRACTICE

Commission Recommendations

- 5.12.1 *"Given the extent to which certain public representatives failed to exercise their power, and the resultant massive losses to the fiscus and the suffering cause to vulnerable members of the public, in respect of PRASA-related matters, and the premium that the Constitution places on accountability, perhaps it is time for South Africa to ensure that its public representatives fulfil their obligations by introducing a form of sanction for what may be termed constitutional and political malpractice."*⁹²

Considerations

⁹¹ State Capture Commission Report, Part 2, Vol 2, pp 44-45

⁹² State Capture Commission Report, Part 5, Vol 2, p 847

- 5.12.2 When dealing with PRASA-related matters, the Commission recommended that, given the extent to which certain public representatives failed to exercise their power and the resultant cost, consideration should be given to introducing a sanction for ‘constitutional and political malpractice’.
- 5.12.3 The term ‘political and constitutional malpractice’ refers to instances where a political representative is negligent in exercising their duties which may result in civil action for damages against the elected representative.
- 5.12.4 The creation of such an offence requires further research.

Actions on Recommendations

- 5.12.5 The Department of Justice and Constitutional Development has been directed to undertake research of the creation of an offence of political or constitutional malpractice. It will be completed by December 2023.

5.13 RESPONSIBILITY OF PRESIDENT AND PREMIERS FOR ACTIONS OF MINISTERS AND MECS

Commission Recommendations

- 5.13.1 *“The Premier should have performed his oversight function over the MEC, Mr Zwane, and the head of department but failed dismally. ... It is necessary that there be consequences for people who fail to do their job. Otherwise, this corruption and these acts of state capture are going to continue forever to the detriment of the country and all people. ... Premiers must know that they must supervise the MECs and their departments.”⁹³*

Considerations

- 5.13.2 The State Capture Commission made certain observations with respect to the responsibility of Premiers for the actions and failures of Members of the Executive Council (MECs). The same principles would necessarily apply at a national level, to the responsibility of the President for the actions of Ministers.
- 5.13.3 According to Sections 91(2) and 93(1) of the Constitution, the President appoints the Deputy President, Ministers and Deputy Ministers, assigns their powers and functions, and may dismiss them. Section 132(2) confers similar powers on Premiers with respect to MECs.
- 5.13.4 According to Section 92(1) and (2) of the Constitution:

⁹³ State Capture Commission Report, Part 6, Vol 1, pp 200-201

- (1) *The Deputy President and Ministers are responsible for the powers and functions of the executive assigned to them by the President.*
- (2) *Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.*

Similar provisions apply with respect to MECs and Provincial Legislatures, as reflected in Section 133(1) and (2) of the Constitution.

- 5.13.5 While there are no constitutional provisions that prescribe the circumstances or manner in which a President or Premier should remove a Minister or MEC, the powers that they have of appointment and dismissal, together with the principle of collective responsibility, implies that Presidents and Premiers must ensure that Ministers or MECs are accountable for their actions. It further implies that they should apply appropriate sanctions, which may include dismissal, in instances of poor performance or wrongdoing.
- 5.13.6 The basic standard to which members of national and provincial Executives should be held are contained in the oath or solemn affirmation they take on the assumption of office, as contained in Schedule 2 of the Constitution. The President or Premier would be expected to exercise their judgment as to whether a particular member of the Executive has breached that oath or solemn affirmation, in what respect and to what degree, and hence what action would be appropriate. In making decisions of this nature the President and Premiers are enjoined to act rationally and observe the principle of legality.
- 5.13.7 Members of the Executive are also bound by the Executive Ethics Code.⁹⁴ According to the Code, Members of the Executive must, “to the satisfaction of the President or the Premier”, perform their duties and exercise their powers diligently and honestly; fulfill all the obligations imposed upon them by the Constitution and law; and act in good faith and in the best interest of good governance, and act in all respects in a manner that is consistent with the integrity of their office or the government.
- 5.13.8 It should be noted that there are instances in this administration where steps have been taken by the President against members of the Executive whose actions have fallen short of these standards.
- 5.13.9 The President has entered into Performance Agreements with all Ministers to establish agreed criteria against which their respective performances can be measured. The regular evaluation of progress in the implementation of these agreements enables closer monitoring of the work of members of the Executive.

⁹⁴ Executive Ethics Code, as promulgated on 28 July 2000 in terms of the Executive Members' Ethics Act 82 of 1998

Actions on Recommendations

- 5.13.10 The President will undertake a review of the positions of those members of his Executive implicated in wrongdoing in the report and determine, on a case-by-case basis, in line with his discretion in this regard and his obligation to observe the principle of legality and to act rationally, whether or not any action ought to be taken.

5.14 RECOMMENDATIONS SPECIFICALLY DIRECTED TO THE PRESIDENT

Commission Recommendations

- 5.14.1 While the Commission's recommendations are by definition and unless otherwise stated intended for the President's consideration, there were a few recommendations in the Commission's report that were directed specifically for action by the President. These are listed below:
- 5.14.2 *"Commission recommends that the President takes such steps as may be necessary to ensure that services of the State Security Agency are not abused in the future to serve the interests or agenda of certain individuals in relation to security vetting."*⁹⁵
- 5.14.3 *"What will now be required is a thorough reappraisal of the structure of the NPA in order to understand the causes and the nature of its institutional weaknesses so that these can be addressed presumably by way of legislative reform. The Commission is well aware that remedial action of this sort requires an in-depth analysis of the internal structure of the NPA and the legislative and constitutional context in which it operates. Such an in-depth analysis falls outside the remit of the present Commission and it must be left to the decision and the initiative of the President to order a separate detailed investigation."*⁹⁶
- 5.14.4 *"The President considers the position of Mr Kodwa as Deputy Minister of State Security having regard to the fact that Mr Kodwa appears to find himself in a position where he is beholden to Mr Jehan Mackay."*⁹⁷

Considerations

- 5.14.5 The recommendation to ensure that security vetting is not abused to serve specific interests or agendas outside of national security are being dealt with through the reform of the country's intelligence services as indicated in section 5.6.26 above.
- 5.14.6 The recommendation for a thorough reappraisal of the structure of the NPA will form part of the work of the National Anti-Corruption Advisory Council (NACAC) to

⁹⁵ State Capture Commission Report, Part 1, Vol 1, Ch 1, p 441

⁹⁶ State Capture Commission Report, Part 1, Vol 3, pp 821-822

⁹⁷ State Capture Commission Report, Part 4, Vol 1, p 202

develop a proposal for the establishment of long-term anti-corruption institutional arrangements as indicated in section 5.2.16 above.

- 5.14.7 The Commission made adverse findings with respect to four current members of the Executive and made certain observations about their suitability to hold these positions. The Commission recommended that:
- law enforcement agencies conduct investigations into possible violations of the Prevention and Combating of Corrupt Activities Act by Minister Gwede Mantashe in relation to the installation of a security system at his home;⁹⁸
 - law enforcement agencies conduct further investigations into Deputy Minister Thabang Makwetla in relation to contracts with Bosasa;⁹⁹
 - the President considers the position of Deputy Minister Zizi Kodwa in relation to alleged payment of inducements;
 - law enforcement agencies investigate Deputy Minister David Mahlobo in relation to handling of cash at the State Security Agency;¹⁰⁰
 - law enforcement agencies conduct investigations into possible contraventions of the PFMA by members of the Board of Denel in relation to the period during which Minister Khumbudzo Ntshavheni was a member of the Board of directors of Denel.¹⁰¹
- 5.14.8 According to Sections 91(2) and 93(1) of the Constitution, the President appoints the Deputy President, Ministers and Deputy Ministers, assigns their powers and functions, and may dismiss them.
- 5.14.9 Having satisfied the Constitutional requirements for eligibility for appointment to these positions (for example, being a Member of the National Assembly), the exercise of this power by the President is largely a political function. Consequently, the President must accept the political consequences of the appointment, dismissal, performance or actions of any member of the Executive that they appoint.
- 5.14.10 The President agrees with the observations by the Commission that persons who occupy such positions must be people of integrity who conduct themselves ethically and in compliance with the law. The President is obliged to act in a manner that serves the best interests of the nation, is rational and observes the principle of legality. In his or her own duty to uphold, defend and respect the Constitution as the supreme law of the Republic, he or she must ensure that those

⁹⁸ State Capture Commission Report, Part 3, Vol 4, p 747

⁹⁹ State Capture Commission Report, Part 3, Vol 4, p 859

¹⁰⁰ State Capture Commission Report, Part 5, Vol 1, p 376

¹⁰¹ State Capture Commission Report, Part 2, Vol 2, pp 133, 134, 136

he or she appoints, in his or her discretion, abide by their own oaths. Consequently, the President needs to exercise his or her judgment on whether members of the Executive meet the standards of probity and integrity expected of them.

Actions on Recommendations

- 5.14.11 In exercising his powers with respect to the appointment and dismissal of members of the Executive, the President is taking the Commission's findings, recommendations and observations about particular individuals into account and consideration, as well as the status of relevant legal processes, as such matters arise.

5.15 INTERFACE BETWEEN THE EXECUTIVE AND PARLIAMENT

- 5.15.1 The Commission found that in several instances Parliament had not been effective in holding the Executive to account.¹⁰² It made several recommendations to remedy the shortcomings it identified. Some of these recommendations refer solely to Parliament's internal arrangements while others relate to Parliament's interface with the Executive. This response deals only with the latter.

Commission Recommendations

Recommendations that refer solely to Parliament's internal arrangements:

- 5.15.2 *"It is recommended that Parliament puts in place mechanisms to ensure that such unlawful use, or abuse, of power by the Executive to silence its critics is not allowed to happen again."*¹⁰³
- 5.15.3 *"The Commission recommends that Parliament should consider whether it would be desirable to enact legislation which protects members of Parliament from losing their party membership (and therefore their seats in Parliament) merely for exercising their oversight duties reasonably and in good faith. If this is thought to be desirable, consideration would have to be given to whether such protection is feasible for longer than the duration of the Parliament to which a member has been elected."*¹⁰⁴
- 5.15.4 *"It is recommended that Parliament establish an Oversight and Advisory Section to provide advice, technical support, co-ordination, and tracking and monitoring mechanisms on issues arising from oversight and accountability activities of Members of Parliament and the committees to which they belong."*¹⁰⁵
- 5.15.5 *"It is recommended that Parliament should consider whether more representatives*

¹⁰² See State Capture Commission Report, Part 6, Vol 2, pp 639, 677, 726

¹⁰³ State Capture Commission Report, Part 5, Vol 2, p 824

¹⁰⁴ State Capture Commission Report, Part 6, Vol 2, p 659

¹⁰⁵ State Capture Commission Report, Part 6, Vol 2, p 751

of opposition parties should be appointed as chairs of portfolio committees.”¹⁰⁶

- 5.15.6 *“The evidence as a whole seems to support the view that quite many Members of Parliament lack the training and skills which are essential for Parliament to discharge its oversight responsibilities effectively. This aspect should perhaps be borne in mind when candidates are being selected for party lists and when new members are inducted and prepared for the responsibilities associated with the committees to which they are allocated.”¹⁰⁷*

Recommendations that refer to the interface between Parliament and the Executive:

- 5.15.7 *“It is recommended that Parliament should consider whether it would be desirable for it to establish a committee whose function is, or includes, oversight over acts or omissions by the President and Presidency, which are not overseen by existing portfolio committees. If it supports this in principle, it will need to determine the details as to how this is to be done. It may well be that it need not operate in the same manner as the existing portfolio committees.”¹⁰⁸*
- 5.15.8 *“One of the primary practical problems to which various witnesses drew attention was the absence of any parliamentary system to “track and monitor” implementation or non-implementation by the executive of undertakings given by the executive or of corrective action proposed in reports adopted by Parliament. ... Ms T Modise, who served as the Speaker of the National Assembly at the time that she gave evidence, agreed that this was a priority and testified that “we have actually started with that”... The Commission welcomes this and recommends that this be given the urgent priority that it requires.”¹⁰⁹*
- 5.15.9 *“It is recommended that Parliament ensures that adequate funds are allocated, particularly to portfolio committees, to enable effective parliamentary oversight.”¹¹⁰*
- 5.15.10 *“It is recommended that, subject to budgetary restraints, the scale and skills of the research and technical assistance made available to the portfolio committees be enhanced.”¹¹¹*
- 5.15.11 *“It is recommended that Parliament needs to make it clear that the practice of late submissions to portfolio committees will not be tolerated.”¹¹²*
- 5.15.12 *“It is recommended that Parliament should consider whether there is a need to legislate on the issue of reports by representatives of the executive to*

¹⁰⁶ State Capture Commission Report, Part 6, Vol 2, p 751

¹⁰⁷ State Capture Commission Report, Part 6, Vol 2, pp 728-729

¹⁰⁸ State Capture Commission Report, Part 6, Vol 2, p 749

¹⁰⁹ State Capture Commission Report, Vol 6, Part 2, p 429-432

¹¹⁰ State Capture Commission Report, Part 6, Vol 2, p 728

¹¹¹ State Capture Commission Report, Part 6, Vol 2, p 750

¹¹² State Capture Commission Report, Part 6, Vol 2, p 750

*Parliament.*¹¹³

- 5.15.13 *“It is recommended that Parliament needs to make clear that non-attendance by ministers and others scheduled to attend portfolio committee meetings will not be tolerated and to ensure that consequences are visited on those who offend without adequate cause. Parliament should consider whether there is a need to legislate on this issue.”*¹¹⁴
- 5.15.14 *“It is recommended that Parliament implement a system to “track and monitor” implementation (or non-implementation) by the executive of corrective action proposed in reports adopted by Parliament.”*¹¹⁵
- 5.15.15 *“It is recommended that Parliament should consider whether it supports the principle of “amendatory accountability” and, if it does, whether it would be desirable to give detailed substance to this principle in an Act of Parliament, along the lines suggested in the Corder report [on Parliamentary Oversight and Accountability, July 1999]. In doing so, it will be necessary for Parliament to consider the implications of the separation of powers between the legislature and executive branches of government under the Constitution. However, the Commission believes that it should not be beyond the ingenuity of Parliament to devise mechanisms which promote responsiveness and effective accountability (in themselves principles which are entrenched by the Constitution) in a manner which does not infringe the separation of powers.”*¹¹⁶
- 5.15.16 *“If Parliament should not be minded to enact legislation of the above type, the Commission is of the view that consideration should be given by Parliament to amendments to its own rules, with a view to addressing the problem of ministers who fail to report back to Parliament on what if anything has been done in respect of remedial measures proposed by Parliament or on alternative methods preferred by them to address defective performance highlighted by Parliament.”*¹¹⁷
- 5.15.17 *“The Commission supports the recommendation that, with the support of a majority of members of a portfolio committee, a portfolio committee could put a minister to terms in respect of remedial action, and could thereafter, through the Speaker intercede with the President, as head of the national executive, in the event of non-compliance. The Leader of Government Business could also play a role in such a process.”*¹¹⁸
- 5.15.18 *“It is recommended that Parliament consider whether it is desirable to amend its rules to give effect to the proposals by Corruption Watch on appointments by*

¹¹³ State Capture Commission Report, Part 6, Vol 2, p 750

¹¹⁴ State Capture Commission Report, Part 6, Vol 2, p 750

¹¹⁵ State Capture Commission Report, Part 6, Vol 2, p 750

¹¹⁶ State Capture Commission Report, Part 6, Vol 2, p 751

¹¹⁷ State Capture Commission Report, Part 6, Vol 2, p 751

¹¹⁸ State Capture Commission Report, Part 6, Vol 2, p 751

Parliament [to leadership positions in key institutions].”¹¹⁹

- 5.15.19 *“In particular, the Commission supports the recommendation made in para 4.1.9 of the OVAC model (which it will be recalled, Parliament adopted in 2009) but has not yet been implemented that: ‘... Parliament develop rules to assist it further in sanctioning Cabinet members for non-compliance after all established avenues and protocols have been exhausted, for example naming the Cabinet member by the Speaker of the National Assembly of the Chairperson of the Council based on a full explanation.’”¹²⁰*
- 5.15.20 *“Also worthy of consideration by Parliament is the suggestion made by Prof Corder in his affidavit that, with the support of a majority of members of a portfolio committee, a portfolio committee could put a minister to terms in respect of remedial action, and could thereafter, through the Speaker intercede with the President, as head of the national executive, in the event of non-compliance. The Leader of Government Business could also play a role in such a process.”¹²¹*
- 5.15.21 *“To facilitate proper oversight over the executive, the Commission is of the view that leaders of political parties should provide the political space for individual MPs to ask difficult questions without prejudice to themselves, with the assurance that their concerns will be taken seriously and properly answered.”¹²²*
- 5.15.22 *“Parliament needs to make it clear that this type of practice will not be tolerated. It needs to ensure that consequences follow to those who, without adequate cause, make proper and timely oversight impossible. If a culture has developed of documents being only being made available to portfolio committees late or on the day of the presentation, it is up to the Portfolio Committees to reject that kind of treatment from the executive and send the persons concerned back, until they submit documents and their presentations on time. If portfolio committees allow the executive to treat them with disrespect, the executives will treat them with disrespect as if they count for nothing. It is up to the portfolio committees to choose how they want to be treated.”¹²³*
- 5.15.23 *“The Commission also recommends that Parliament should consider whether there is a need to legislate on the issue of reports by representatives of the executive to Parliament. It may be that, absent such legislation, the present sometimes unsatisfactory situation will persist. An alternative might be to amend the Rules of Parliament to deal with this. However, since the objects to be achieved include placing duties on persons outside of Parliament and possibly visiting appropriate sanctions on those who are recalcitrant or unacceptably inefficient, the Commission’s prima facie view is that legislation would probably be preferable to*

¹¹⁹ State Capture Commission Report, Part 6, Vol 2, p 751

¹²⁰ State Capture Commission Report, Part 6, Vol 2, p 722

¹²¹ State Capture Commission Report, Part 6, Vol 2, p 772

¹²² State Capture Commission Report, Part 6, Vol 2, p 724, p 784

¹²³ State Capture Commission Report, Part 6, Vol 2, p 730

amending Parliament's rules."¹²⁴

5.15.24 *"Mr Mbindwane... recommends the introduction of formally regulated and open lobbying through legislation, instead of secretive lobbying which would lead to bribery and tender fraud. To this end, he recommends an appropriate amendment of the Privileges, Immunities, Independence and Protection of Members of Parliament Act of 2004 to provide for, amongst others, the registration of lobbyists, registration of their contracts with the government, declaration of gifts etc... These recommendations are worthy of consideration."*¹²⁵

Considerations

5.15.25 In giving consideration to the recommendations made with respect to Parliament, we are mindful of the separation of powers and the right of Parliament to determine its own rules and arrangements within the provisions of the Constitution.

5.15.26 The Leader of Government Business is a member of Cabinet appointed by the President in terms of section 91(4) of the Constitution to be responsible for managing the Executive's interface with Parliament. Deputy President David Mabuza is currently the Leader of Government Business.

5.15.27 According to the Joint Rules of Parliament,

The Leader of Government Business in Parliament is responsible for –

- (a) the affairs of the national executive in Parliament;*
- (b) the programming of parliamentary business initiated by the national executive, within the time allocated for that purpose;*
- (c) arranging the attendance of Cabinet members, as appropriate, in respect of parliamentary business generally;*
- (d) and performing any other function provided for by the Joint Rules or a resolution of the Assembly or the Council or resolutions adopted in both Houses.*¹²⁶

5.15.28 In terms of the Rules of the National Assembly (NA), the Leader of Government Business also plays a consultative role with respect to issues such as the times of NA sittings, changes to NA sittings venue, programming issues, monitoring replies to questions and resolutions affecting the Executive, among others.¹²⁷

5.15.29 It should be noted that Parliament has already, through the NA Rules Committee and in consultation with the Leader of Government Business, introduced a

¹²⁴ State Capture Commission Report, Part 6, Vol 2, p 731; see also p 750

¹²⁵ State Capture Commission Report, Part 5, Vol 1, p 183

¹²⁶ Joint Rules of Parliament, 6th Edition, Rule 150

¹²⁷ Rules of the National Assembly, 9th Edition, Rules 42(3), 43(1), 44(1), 136(2), 353(1)

mechanism to ensure members of the Executive are held accountable where they have not complied with their responsibilities to Parliament. Cabinet has instituted processes through which the Leader of Government Business reports to it on such failures and members of the Executive account to the Cabinet collective in this regard. In light of the findings and recommendations of the State Capture Commission, it is necessary to determine whether these measures and any sanctions that may be imposed are sufficient and appropriate.

- 5.15.30 With respect to the effective resourcing of Parliament, the institution is funded through Vote 2 of the National Budget in accordance with the Financial Management of Parliament and Provincial Legislatures Act (2009). The purpose of this vote is to provide the support services required by Parliament to fulfil its constitutional functions, assist political parties represented in Parliament to secure administrative support and service constituents, and provide members of Parliament with the necessary facilities.
- 5.15.31 Among others, the objects of Financial Management of Parliament and Provincial Legislatures Act are to ensure a consultative relationship between Parliament and the National Treasury, conducted at a high level and based on respect for the constitutional status of Parliament.¹²⁸ This places a responsibility on the Executive to ensure that, within the constraints of the fiscus, Parliament is adequately funded to execute its constitutional mandate.

Actions on Recommendations

- 5.15.32 The Leader of Government Business will interact with Parliament's Presiding Officers on the recommendations above that relate to the interface between Parliament and the Executive.
- 5.15.33 The President's Parliamentary Counsellor will, in the course of their work, interact with the relevant Parliamentary structures on these and other matters relating to the work of Parliament.
- 5.15.34 To ensure that Parliament is sufficiently resourced to hold the Executive to account, the National Treasury will engage with Parliament to determine the most appropriate way to give effect to the Commission's recommendations on the funding of Parliament.

¹²⁸ Financial Management of Parliament and Provincial Legislatures Act (2009), Section 2(b)

6 BROADER SYSTEMIC REFORMS ARISING FROM THE WORK OF THE COMMISSION

6.1 STRENGTHENING THE AUDITING SYSTEM

- 6.1.1 A fundamental challenge exposed by State Capture is that, despite the highly regulated nature of the procurement system and the considerable work done by the Auditor General of South Africa (AGSA), corruption was not meaningfully impeded.
- 6.1.2 The Commission made findings and recommendations with regard to strengthening the auditing of organs of state and state-owned entities.¹²⁹ The AGSA has developed a detailed response plan to the work of the Commission.
- 6.1.3 The response plan commits the AGSA to both immediate actions and to a series of reforms to strengthen its auditing practices and approaches to prevent state capture, as well as new types of collaboration and cooperation to strengthen the accountability ecosystem.
- 6.1.4 As an immediate response, the AGSA considered the various parts of the report in the planning and execution of the 2021-22 audit of all departments and entities covered by the work of the Commission. The Commission's findings informed the risk assessment of those audits in the past and present as well as whether appropriate procedures were performed to respond to the areas of risk. The AGSA has indicated that she will elaborate on these concerns when she tables the 2021-22 PFMA general report towards the end of this year.
- 6.1.5 The AGSA has revised its strategy to respond to vulnerabilities in key areas, in particular governance, ethics, human resource practices, and procurement of goods and services. Changes will include performing transversal assessments of suppliers who do business with all spheres of government; reconsidering the timing and frequency of the audit scoping decision process to improve agility; using computer-assisted audit techniques and data analytics to broaden its view across all spheres of government; and expanding the AGSA's database on politically exposed persons and closely related business partners.
- 6.1.6 The AGSA has now established relationships with most investigating and law-enforcement agencies, fellow constitutional institutions and several public bodies with suitable mandates to receive material irregularities for further investigation and consequences.
- 6.1.7 The national audit office is working with the South African Institute of Chartered Accountants (SAICA) and the Independent Regulatory Board of Auditors (IRBA) to dissect the findings and recommendations of the Commission. Where appropriate,

¹²⁹ State Capture Commission Report Part 1, Vol 1, p 111; p 445

these bodies should make the necessary adjustments to their processes and programmes to address the Commission's outcomes.

- 6.1.8 The National Treasury and the AGSA are working together to review the usefulness of the concept of irregular expenditure, and to focus on identifying corrupt or suspicious expenditure, or expenditure made in bad faith. This is part of an effort to address the Commission's recommendation cited in paragraph 5.3.2.3 above and return to the original intent of the PFMA to let managers manage, while holding them accountable. This is meant to attend to the problem with the current system that honest accounting officers who have acted in good faith are being criminalised, while many of the dishonest accounting officers who facilitate corruption are being overlooked. By focusing on minor rule-transgressions, we are undermining the ability of the state to deliver.

6.2 PROFESSIONALISATION OF THE PUBLIC ADMINISTRATION

- 6.2.1 A key mechanism of state capture was the strategic positioning of individuals in positions of power through the abuse of public sector appointment and dismissal processes. This was in contravention of the Constitution and applicable legislation.
- 6.2.2 An important instrument to address this issue is the National Framework towards the Implementation of Professionalisation of the Public Sector, which was adopted by Cabinet on 19 October 2022. The Framework makes specific proposals to stabilise the political-administrative interface, ensure merit-based recruitment and selection and more effective consequence management. All public sector legislation governing professionalisation will reviewed and, where necessary, amended to align with this Framework.
- 6.2.3 The Framework, for example, considers an enhanced role for the Public Service Commission (PSC), working with a new Head of Public Administration, in the appointment of top officials. The PSC and other bodies that might be constituted to enhance checks and balances would be confined to managing appointment processes to the point of recommendation, preserving the executive's prerogative as appointing authority.
- 6.2.4 The most important figure in South Africa's system of accountability for the use of public funds is the Accounting Officer, whose function is set out principally in the Public Finance Management Act of 1999 (PFMA) and Municipal Finance Management Act of 2003 (MFMA).
- 6.2.5 Accounting Officers should not be penalised for audit findings that relate to minor technical missteps or actions taken in good faith. Only decisions made in bad faith, including with corrupt intentions, should expose an accounting officer (or relevant official) to criminal investigation, personal financial sanctions or other disciplinary actions.
- 6.2.6 To address some of the deficiencies identified in the Commission's report,

government is taking steps to ensure that appointment processes ensure that the positions of Accounting Officer and those that have fiduciary responsibility for good financial and corporate governance including the CFO, head of procurement, internal audit executive as well as members of risk and audit committees are held only by individuals who are fit and proper and who are able at all times to meet the honesty and trust requirements. In this regard, we will give effect to key recommendations of Chapter 13 of the National Development Plan on 'Building a Capable State' to limit the role of Ministers in appointing and dismissing accounting officers.

- 6.2.7 A critical area for increased guidance is the interface between the executive authority and the heads of departments or agencies they oversee, within the parameters of section 85(2)(c) of the Constitution. The Public Finance Management Act (PFMA) gives the heads of department or CEO responsibility for the financial management of the institution, while the Public Service Act (PSA) gives the executive authority administrative powers. One of the consequences of this is that, in some instances, executive authorities have been involved in procurement processes that are the responsibility of the accounting officer.
- 6.2.8 To clarify the relationship between political authority and the institutions they oversee, the following measures will be undertaken:
- Revisiting the process of induction for new Ministers and reformulating the relevant sections of the Guide for Members of the Executive. This is expected to be completed by the end of this financial year;
 - legislating more clearly, through the Public Service Amendment Bill, the respective roles and functions of executive authorities and heads of department. The role of the executive authority will be more strategic while the head of department will be responsible for administrative matters pertaining to the department. It is envisaged that the Amendment Bill will be submitted to Parliament in the 2022/2023 financial year;
 - developing a code of conduct for special advisers that clarifies the role of advisers and reinforces the existing provisions that there shall be no relationship of authority between the Special Adviser and the Head of Department concerned, and that the Special Adviser shall refrain from interfering in the administration and management of the department;
 - making it an explicit requirement that executive authorities are legally obliged to record in writing all directives and advice to Heads of Department and Accounting Officers, as well as any other officials or holders of office in a public entity. This should include the outcomes of any meetings with such officials, and any verbal directive that has not been reduced to writing should be regarded by officials as having no force or effect;

- requiring that executive advice and directives need to be channelled through Accounting Officers to have force and effect. This would prevent the proliferation of conflicting instructions to officials and interference by executive authorities in the operational matters of departments and agencies and municipalities.

6.2.9 Current initiatives underway to give effect to the above include amendments to the Public Service Act, the Public Administration Management Act, the Public Finance Management Act, the Public Procurement Bill and the implementation of the National Framework for the Professionalisation of the Public Sector.

7 IMPLEMENTATION OF THE RESPONSE

- 7.1.1 If we are to successfully end state capture and turn the tide on corruption, the actions set out in this response will require dedicated coordination and effective implementation. Progress will need to be closely monitored and regularly communicated. All sections of society will need to be engaged and involved in the implementation of the actions to give effect to the recommendations of the Commission.
- 7.1.2 The execution of the response plan will be governed through existing governance structures. Cabinet will have the ultimate responsibility for overseeing the successful implementation of the response, which will include prioritising actions and making available both financial and human resources.
- 7.1.3 Cabinet will be supported by the State Capture Commission (SCC) Steering Committee, which is led by the Director-General in the Presidency and constituted by key government stakeholders. The Forum of South African Directors-General (FOSAD) Management Committee will monitor the implementation of transversal action plans across the public sector.
- 7.1.4 This work will be supported by the National Anti-Corruption Advisory Council (NACAC), which will advise on the implementation of the Commission's recommendations from a strategic and systemic perspective. In line with its terms of reference, NACAC will undertake further analysis, stakeholder consultations and research on the Commission's recommendations and the response outlined here.
- 7.1.5 The Presidency has established a centralised Programme Management Office (PMO) to coordinate the efforts of the institutions that are responsible for executing the response plan, SCC Steering Committee and Cabinet.
- 7.1.6 The institutions in both the public and private sectors responsible for the implementation of the response plan have been organised around three thematic area and allocated to workstreams. These are:
- dealing with the perpetrators and enablers of state capture and corruption;

- righting the wrongs arising from the abuse of state power and institutions;
 - reforms to prevent, detect and prosecute future occurrences of state capture and corruption.
- 7.1.7 Robust monitoring, reporting and effective communication of the progress made in the implementation of the response is key to the success of this work.
- 7.1.8 Therefore, the SCC Steering Committee will be reporting to Cabinet on the progress made in the implementation of the recommendations on a quarterly basis. This will inform regular updates to the country by the President.
- 7.1.9 In its advisory role, NACAC will provide an independent annual report to the South Africa public on the progress made by the state in implementing the responses.
- 7.1.10 Communication on the response will be part of a broader campaign to mobilise all social partners against corruption.

8 CONCLUSION

- 8.1.1 The activities that are detailed in the State Capture Commission Report and which the Commission finds constitute state capture occurred in the recent past. The very fact that the Commission was established and that it was able to do its work without hindrance is testament to the road that South Africa has travelled over the last five years.
- 8.1.2 Through their collective efforts, the South African people put an end to the abuses and crimes on which the Commission has made findings and recommendations. Even as the work of the Commission was underway, several institutions – from law enforcement agencies to SOEs, to private companies and professional bodies – had embarked on measures to ensure accountability and redress.
- 8.1.3 Although these activities may be in the past, the effects of state capture remain.
- 8.1.4 The difficulties the country is facing today have many causes, but a recurring feature is the impact of state capture. When we do not have enough locomotives to carry goods to our ports, when our power stations fail, when our national airline closes routes and cancels flights, when the employees of SOEs are not paid and when our security services are slow to respond to public unrest, we feel the hand of state capture.
- 8.1.5 We see the effects of state capture in other areas, in our weakened institutions, in our substantial public debt, and in diminished public confidence in the State.
- 8.1.6 Corruption continues in many institutions in our country, in both the public and private sector, in government departments, agencies and municipalities. Criminals

are exploiting weaknesses in procurement and other systems, public servants and businesses are colluding to extract public funds to which they have no right.

- 8.1.7 However, unlike the recent past, there is an intensified effort to fight such corruption, to prevent it from happening, to uncover it and to hold those responsible for corruption to account. The law enforcement agencies that the perpetrators of state capture had sought to destroy are being restored and rebuilt. The days of impunity for wrongdoing are over.
- 8.1.8 This means that it is vital that the measures we are putting in place to implement the recommendations of the State Capture Commission are successful in turning the tide on corruption. It means that, as a society, we need to direct all our efforts towards the far-reaching changes that are described in this document.
- 8.1.9 As a nation, we are profoundly grateful for the dedication and wisdom with which Chief Justice Raymond Zondo led this Commission. It was an extraordinary feat of public service that will contribute to changing our country for the better.
- 8.1.10 We extend our gratitude to the Secretary of the Commission, the heads of the investigation and legal teams, the evidence leaders, the researchers and the other Commission staff. We thank the many people who gave evidence before the Commission, and to the academics, investigators and journalists whose work contributed to uncovering many of the matters before the Commission.
- 8.1.11 We recognise the contribution of the former Public Protector, Adv Thuli Madonsela, whose initial investigation into allegations of state capture laid the foundation for the establishment of the State Capture Commission.
- 8.1.12 This submission of this response to Parliament gives full effect to the remedial actions contained in the Public Protector's report of November 2016.
- 8.1.13 While it marks the end of a chapter in our country's history, the hard work to restore our country, repair our institutions and rebuild our trust in each other still lies ahead.
- 8.1.14 This government is firmly committed to undertake this task, to combat corruption in all its forms, in every part of government and in every sphere of the state.
- 8.1.15 As a country, we are emerging from a difficult period. Together, we have chosen a path of rebuilding, a path of renewal, a path of transparency and accountability, a path of justice and the rule of law. I have every confidence that, no matter the challenges, we will walk this path together and we will prevail.