

A COLLECTIVE CIVIL SOCIETY RESPONSE  
TO THE ZONDO COMMISSION AND THE  
STATE CAPTURE REPORT

CIVIL SOCIETY  
WORKING GROUP ON  
STATE CAPTURE

MARCH 2024



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## ABOUT THE CIVIL SOCIETY WORKING GROUP ON STATE CAPTURE

The Civil Society Working Group on State Capture (CSWG) was established in November 2018 and is a coalition of more than 20 civil society organisations united in their stance against the looting of public funds and committed to promoting the interests of the public.

Over the years, the CSWG has been actively engaged in making submissions to the Judicial Commission of Inquiry into Allegations of State Capture (known as the Zondo Commission) in order to assist the Commission in its fact-finding mission and to ensure accountability for economic crimes committed by individuals, members of the political elite, and private sector actors linked to state capture and corruption. The work of the CSWG has been both evidence-based and concerned with that which is needed to protect and promote the interests of the public.

The CSWG recognises that functioning democratic institutions play an important role in achieving lasting social justice. Further, there is the recognition that the work of the Zondo Commission, both during the life of the Commission and now that the Commission has concluded its work, requires active engagement by civil society that is both supportive of the Commission's work and critical of its shortcomings, while drawing important lessons that can be taken forward.

The work of the CSWG acknowledges and honours the whistle-blowers, activists, journalists, civil society actors, and researchers who have shown their courage in exposing state capture and corruption, despite the continued risks faced in standing up for truth and justice.

### PARTICIPATING ORGANISATIONS:

Ahmed Kathrada Foundation (AKF); Alternative information and Development Centre (AIDC); Black Sash; Budget Justice Coalition (BJC); Centre for Applied Legal Studies (CALS); Corruption Watch (CW); Council for the Advancement of the South African Constitution (CASAC); Defend Our Democracy (DOD); Dullah Omar Institute (DOI); Equal Education (EE); Freedom Under Law (FUL); Helen Suzman Foundation (HSF); Judges Matter (JM); Legal Resources Centre (LRC); My Vote Counts (MVC); Open Secrets; Organisation for Undoing Tax Abuse (OUTA); Platform to Protect Whistle-blowers in Africa (PPLAAF); Public Affairs Research Institute (PARI); Section27 (S27); South African Faith Communities Environment Institute (SAFCEI); Treatment Action Campaign (TAC) and #Unitebehind

**The struggle against state capture and corruption in South Africa is a struggle for human rights. This is why continued commitment to the implementation of the Zondo Commission's recommendations and the vigilance of civil society remain important.**

**As the CSWG, we recognise that this is a critical moment for South Africa. There is an opportunity to ensure accountability and justice for years of corruption and maladministration, and to institute key reforms to build a capable state to ensure that it works for the benefit of all.**

# 1 | INTRODUCTION

The work of the Zondo Commission, which spanned over four years, laid bare the various networks of looters in the public and private sectors who have criminally enriched themselves at the expense of the people of South Africa. This is a reflection, by numerous civil society organisations within the Civil Society Working Group on State Capture (CSWG), on the Zondo Commission and the State Capture report. Although there have been some developments, urgent action needs to be taken to tackle state capture and corruption.

The Judicial Commission of Inquiry into Allegations of State Capture (known as the Zondo Commission) was established, in 2018, as a legal process in terms of the Commissions Act 8 of 1947. The Act makes it clear that the foremost reason for establishing a commission of inquiry is for such a body to use the powers conferred upon it to investigate matters of great public concern.<sup>1</sup>

The human cost of state capture and its contribution to deepening poverty and inequality provide the necessary urgency for the reforms and recommendations put forward by the Zondo Commission to be implemented. As the people in South Africa experience rolling blackouts, rising costs of living, high unemployment and face the challenges presented by austerity, it is clear that the consequences of the looting facilitated by state capture and corruption have been dire and extend beyond financial loss. State capacity has been severely eroded while a weakened economy is exasperated by revenue shortfall, coupled with the continued bailout of dysfunctional state-owned entities or enterprises (SOEs) that are bleeding the fiscus dry. It is unconscionable that constitutionally enshrined human rights, such as healthcare, social security, housing, and basic education to name but a few, have been compromised because of the actions of corrupt individuals.

The struggle against state capture and corruption in South Africa is a struggle for human rights. This is why continued commitment to the implementation of the Zondo Commission's recommendations and the vigilance of civil society remain important.

As the CSWG, a broad coalition of over 20 civil society organisations, we recognise that this is a critical moment for South Africa. There is an opportunity to ensure accountability and justice for years of corruption and maladministration and to institute key reforms to build a capable state and ensure that it works for the benefit of all.

As the Zondo Commission's findings and the phenomenon of state capture itself continue to be debated in the public domain, it is important to note that the Commission's findings have been widely and broadly endorsed, and they have been formally accepted by the state. We welcome the state's acceptance of the Commission's findings in respect of the existence, nature, and extent of state capture. The President's response to the Zondo Commission's report marks an important step for the country as it demonstrates the political will to accept, take forward, and implement the key recommendations of the Commission.<sup>2</sup>

As the work against corruption and state capture continues, it is further important to note that state capture is not a thing of the past and has not effectively come to an end. It is clear that serious corruption remains pervasive throughout government institutions and that key mechanisms of state capture identified by the Commission remain largely unchanged.

The Commission's findings on the mechanisms and causes of state capture, in particular institutional weaknesses in the state, provide a strong foundation for implementing critical reforms. It is disappointing that the President has not yet outlined concrete action with regard to members of the national executive implicated in state capture in the Commission's report. The President's failure to act decisively undermines his assertion that it "constitutes an ethical, moral and institutional departure from the abuses revealed by the State Capture Commission".<sup>3</sup> Those implicated parties still holding positions of power continue to undermine efforts to reduce the threat of state capture in the future. The failure to hold them accountable continues to demonstrate to the public that there are no consequences for corruption.

We are indebted to the whistle-blowers who came forward and exposed corruption and state capture. However, being indebted is not enough; we need to see action in an environment that has become increasingly dangerous for whistle-blowers. We call for urgent additional policy and action for the greater protection of whistle-blowers in South Africa, as they remain key to the fight against state capture and corruption.

We call on Parliament to reflect on the findings of the Zondo Commission, particularly those pertaining to Parliament's ineffectiveness in holding the executive accountable, and to be proactive in its response to the Commission's findings and recommendations. It should release its own implementation plan to address how it intends not only to deal with the recommendations directed at Parliament itself but also to ensure proper oversight of the executive's response to state capture, and to tackle the fundamental challenges created by the existing political culture and deficient appointment processes across the state. Parliament must take the necessary steps with regard to the findings of the Commission, with

due consideration to transparency, accountability and, where possible, meaningful public participation.

This moment provides the opportunity for a fundamental resetting of our system of governance that should not be squandered.

The struggle against corruption and the rebuilding of our institutions cannot only be left to law enforcement agencies and the justice system. The people of South Africa can also play a part in holding those in power to account. This collective response has been compiled from several civil society organisations' perspectives and stands as a part of ongoing collective work by the CSWG and broader civil society, alongside the important work being done by journalists in the country. These reflections come at a significant time in South Africa, ahead of the 2024 national election, in which, for the first time, independent candidates are eligible for election and there are talks of coalition government at a national level.

This is a response that discusses the role of commissions of inquiry in our society; the successes of the Zondo Commission; the gaps or challenges experienced by the Commission; and some of the lessons learnt from the Commission. It also highlights civil society's reflections on some of the key recommendations of the Zondo Commission.

Furthermore, with the Commission having ended its work, this collective civil society response stands as a continued effort to hold perpetrators of state capture and corruption to account, while forming part of the CSWG's efforts and commitment to keeping a watching brief on holding the state accountable to its professed intentions to fight corruption and hold those who have squandered state resources and acted with impunity accountable.



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**Eternal vigilance is the price of our freedom.**



## 2 | REFLECTIONS ON THE ZONDO COMMISSION



### COMMISSIONS OF INQUIRY AND THE ROLE OF CIVIL SOCIETY

A commission of inquiry can make findings based on evidence presented before it and then make non-binding recommendations to the President. A commission has no power to issue binding instructions or to act on any of its findings. Yet, if a commission is rigorous, thorough, and transparent, it can be a powerful contributor to accountability.<sup>4</sup>

Commissions have wide inquisitorial powers and have discretion to admit information that would not be admissible before a traditional court of law. Furthermore, unlike courts and other legal instruments, commissions' investigations can look beyond narrow questions of legal liability. In its investigation of state capture, for example, the Zondo Commission was able to highlight weaknesses in policy, legislation, and institutional design that facilitated systemic corruption. These characteristics enable commissions to uncover a great deal of information and assist in revealing the wide range of different actors that need to be held to account. This is the case particularly when a commission operates in good faith and uses its powers and scope to the fullest extent.

There are a number of important roles that can be played by commissions, chief amongst which are outlined below.

First, they can empower state institutions with an evidential basis to pursue prosecutions and/or disciplinary action against alleged corrupt actors. This is so, even if, as in the case of the Zondo Commission, none of the evidence that comes to light as a result of question and answering at the commission's proceedings is admissible in subsequent criminal proceedings. The evidence that comes to light can be used as a basis for

further investigation and trial preparation for future legal proceedings, both civil and criminal.

Second, commissions can identify causes of systemic corruption and state capture and make recommendations for institutional, legislative, and policy reform. For this to be ultimately successful and worthwhile, political will and prompt implementation of recommendations are required. These recommendations can provide a strong basis for those within the state and outside of it to push for key reforms.

Third, commissions can play an important role by providing civil society and the media with facts to use as a basis to track and monitor the state's progress in holding alleged corrupt actors accountable. Commissions of inquiry expose wrongdoing and the complicity of multiple players in those acts of wrongdoing while bringing them into the national consciousness.

There are significant limitations on commissions' potential to ensure accountability. The nature of a commission of inquiry is that its subject matter is highly contested (often necessitating its establishment in the first place), and its recommendations often become the object of political scrutiny. If political elites are not in favour of the recommendations, they may use their political power to move to effectively nullify a report and/or its recommendations. South Africa, in particular, has a complicated history when it comes to commissions of inquiry, with many having been used to cover up evidence of crimes to protect powerful elites. A good example of this is the Seriti Commission into the Arms Deal, whose findings were set aside by South Africa's courts on the basis that the judges chairing it failed to fulfil their role and ignored much of the evidence of corruption in that instance.<sup>5</sup> In the case of the Zondo Commission, the concern is whether the recommendations will be implemented by political elites implicated in state capture and corruption themselves, and when there are vested interests working against reform and justice.

As civil society, it is important that we are cognisant of, and take lessons from, the nature of commissions of inquiry and think deeply about our role, given the understanding that commissions cannot be a panacea for accountability. Civil society can strengthen its vigilance and support on behalf of the public by following proceedings closely, while also managing and tempering the expectations of the public about the possible outcomes for accountability and the limitations that are born out of the nature of a commission of inquiry. Civil society can play a vital role in tracking the implementation of recommendations, applying pressure, and keeping the work of the Zondo Commission alive in the public domain.

Ultimately, the implementation of the Commission's recommendations—and any response to the Commission's findings—is dependent on the will and capacity of those in power and on organised civil society's ability to mobilise for change and seek accountability.



## THE ZONDO COMMISSION AND WHAT IT DID WELL

The Zondo Commission made a number of robust findings and recommendations. These findings and recommendations implicated a number of prominent politicians, politically connected people, private companies, and state-owned entities that enabled and benefitted from state capture crimes. Many of the recommendations call directly for criminal investigation with a view to possible prosecution. In this way, the Commission has been an important step towards proper accountability for state capture.<sup>6</sup>

The exhaustive and far-reaching focus of the Commission means that its report provides a fairly comprehensive account of state capture and the patterns of corrupt activity that took place at various state-owned enterprises and state institutions. It lays bare the ways in which corrupt networks looted SOEs for the benefit of a select few at the cost of the people of South Africa. The Commission made a serious effort to track and explain the social and political context of the state capture phenomenon. Throughout its report, it traced a host of social and political relationships. Notably, it showed that these patterns of corruption were not limited to relationships within the state but extended to include relationships between the state and the private sector as well. It also confirmed the tireless work done by civil society and investigative journalists to uncover state capture and show that many in government and the private sector failed to act in the public interest while pursuing profit and personal gain.

This is reflected in the treasure trove of documentation that the Zondo Commission has bequeathed the country: 75,099 pages of transcribed oral evidence, hearings from 300 witnesses, 1,438 implicated companies and individuals, and 1,731,106 pages of documentary evidence including affidavits and exhibits. The report is an invaluable tool in efforts to hold perpetrators of state capture and corruption accountable.<sup>7</sup>

The Zondo Commission must be commended for the exhaustive way in which it sought out and considered evidence of state capture. It did not shy away from gathering and publicly exploring evidence that implicated very senior and powerful politicians and private sector actors. What is more, it did this despite the pressure it faced over the course of its proceedings. The chairperson of the Commission and evidence leaders undertook the work of the Commission with commitment and integrity. Additionally, the Commission cast the net wide in terms of implicated and associated parties and stood its ground, for the most part, when witnesses were obstructionist or contravened its terms of reference and the rule of law.<sup>8</sup>

The Commission also played an important role in ensuring that its proceedings were accessible to the media and open to contributions from civil society. Although the initial venue of the hearings may have made it difficult for members of the public to attend, the public was brought along from the outset, with television news outlets permitted to broadcast proceedings live at every sitting.<sup>9</sup> For four years, the public listened to evidence of corrupt activities, which has made an important contribution to the public understanding and discourse on issues of corruption and state capture in South Africa.



## WHERE THE ZONDO COMMISSION MISSED THE MARK

Although we commend the work of the Zondo Commission, there are no doubt a number of areas of concern.

The main weakness of the Commission was its unevenness: The attention paid to different facets of state capture was uneven and certain areas were under-served. This was exacerbated by a lack of public communication. The underlying logic for what the Commission chose to investigate or chose to exclude was never clarified. There was a disproportionate allocation of time for some witnesses and evidence streams, at the expense of others. While the Commission summoned and grilled numerous politicians and public officials in this way, it did not do the same for the numerous chief executive officers of large private companies implicated in state capture.

The Commission could have used its powers in terms of the applicable legislation more effectively and should have summoned more witnesses who were unwilling to appear before the Commission. The Commission, for example, missed a vital opportunity to question members of the Gupta family. The Guptas offered to appear *virtually*, but their application was denied by the chairperson. Later, however, with the institution of partial lockdown, following the outbreak of Covid-19, several witnesses testified virtually. The fact that the Guptas and one of their chief associates, Salim Essa—all of whom were implicated in many instances of state capture crimes—did not testify and could not be cross-examined was a huge loss.

The Zondo Commission took a lengthy period of time to conclude the inquiry. The Commission experienced multiple delays, some of which were due to external factors, but others were the result of inefficient internal processes. While several applications were made to extend the Commission's timelines, there were instances where some witnesses testified for days and other witnesses were not called at all, and public interest was lost on more pressing issues. The justifications for these decisions were not provided.

In certain instances, the Commission did well in showing how private sector actors, such as global consulting firm Bain and Company, enabled state capture at South Africa's tax agency.<sup>10</sup> However, more could have been done to catalogue the full extent to which the private sector provided the necessary infrastructure for state capture.<sup>11</sup> In particular, the Commission failed to properly investigate the private sector's role in money laundering activities. This was a missed opportunity in two ways. First, it failed to deliver an initial factual basis for law enforcement that could inform investigations and/or prosecutions against financial institutions and those who run them. Second, it left the state, as a whole, uninformed as to the effectiveness of South Africa's anti-money laundering legislative and institutional framework. In the end, it took the threat of a grey listing by the Financial Action Task Force for legislators in South Africa to scramble, ultimately unsuccessfully, to introduce the required reforms.

Another important area of work that did not receive sufficient focus during the work of the Commission was political manipulation of criminal justice agencies and the significant impact of state capture on those institutions.<sup>12</sup> A separate commission addressing challenges pertaining to the work of the criminal justice sector broadly may be required.

The Commission could also have done much more to communicate the cost of state capture. A section in its report dedicated to outlining the financial and social costs would have been powerful. Instead, the report fails to consider and detail the ways in which state capture affected the people of South Africa, with the most severe impacts felt by the most vulnerable in our society. It failed to show that state capture crimes have resulted in increased economic instability and austerity measures that affect everyone in South Africa. The widespread looting of state capture has affected every sector of the country, but the fallout from load-shedding, the increase in government debt, and the proliferation of austerity measures have had a particularly damaging impact on the poor. The Commission failed to reflect on this in its findings, which means that the true impact and cost of state capture for South Africa is not reflected in the report.

The Commission failed to adequately engage with and learn from affected communities and thus did not consistently link the issues of criminality and state capture with their associated social costs. Robust public engagements such as the Civil Society Working Group People’s Hearing on State Capture are an important way in which the Commission could have taken opportunities to draw on the views of the public. The Commission may have missed the opportunity to directly engage with the public itself, especially given its time constraints. What is more, it also missed the opportunity to sufficiently draw on the submissions made by civil society, in this regard, such as that made by the CSWG detailing the proceedings and findings of the People’s Hearing on State Capture.<sup>13</sup>

Measuring corruption’s social cost is an important and key aspect of addressing state capture and corruption. It enables the state and civil society to formulate and implement strategies of redress that aim not only to hold corrupt actors to account but also to address the individual and structural harms they have caused. It may well be that South Africa should empower—and even require—future commissions of inquiry to urgently consider and measure the social cost of such wrongdoing.



## LESSONS LEARNED FROM THE WORK OF THE ZONDO COMMISSION

The Zondo Commission’s work was a strong reminder of the great power and value of a well-run commission of inquiry. The Commission not only had a powerful truth-seeking value but was sufficiently open to the public to allow public engagement and debate on the evidence that was brought before it. The impact of the Commission could also be seen in the vociferous fightback that it was subject to from a number of the parties implicated in state capture. This is a reminder that the work of the CSWG, as well as civil society more broadly, in taking a supportive but critical stance towards the Commission was important.

Another important lesson is that a commission, with a scope as broad as that faced by the Zondo Commission, must be adequately resourced from the very start. Failure to do so risks slowing down the work of the commission, and the lack of adequate resources raises serious questions about the state’s support for the work of such a commission of inquiry.

The Commission’s lifespan was in tension with its broad Terms of Reference.<sup>14</sup> This was aggravated by reluctant and non-cooperative witnesses. As a result, the Commission had to seek court-ordered extensions on several occasions to properly complete its work. It

is possible that a more realistic assessment of the task before the Commission could have avoided the Commission spending so much of its life working on borrowed time. Some of the delay, however, was caused by the Commission's witness management, as noted earlier.

Chief Justice, Raymond Zondo, drafted rules for the work of the Commission in an effort to ensure fair processes as far as possible.<sup>15</sup> This is an important lesson, as not all commissions have been run in this way, which has had some serious negative consequences. It should be mandatory for commissions to have fair processes and to allow for legal representations to be made.

Another key lesson is that the mountain of evidence assembled by the teams of lawyers and investigators at the Zondo Commission must urgently find its way to law enforcement agencies, which must be given ready and searchable access to all documentation to allow them to pursue charges, as the Commission does not have prosecutorial powers. It is, however, important to note that President Cyril Ramaphosa amended the relevant regulations during the Commission's hearings to this effect.<sup>16</sup>

The scope of the Commission's work was extremely broad and in future such work should be more streamlined to enable the full scrutiny of one aspect of the inquiry, with attendant resolutions presented. It was a unique process in that it was meant to investigate a wide subject matter and to try and find ways to be strategic in how it approached and tackled that expanse; all while working, as noted earlier, within the afforded time frames. For all the ways in which the Commission was successful and less so, it would seem that there are lessons for future commissions when the scope of inquiry is so wide-ranging. The best approach may be to tackle one stream of evidence at a time and to conclude that stream of work and timeously provide interim reports, where possible and applicable, particularly in instances where more time is required and the lifespan of the commission is continuously extended.



## INFORMATION ARCHIVE AND PUBLIC ACCESS

While the life and work of the Commission has come to an end, there is no doubt that the information it gathered is extremely valuable to a host of different institutions in our country, including state institutions, criminal justice institutions, civil society, academic institutions, and the media. This information will no doubt be useful in efforts to hold those implicated in state capture and corruption to account. And it can be used to study and determine the trends that lead to corrupt transactions and the capture of state departments and state-owned entities.

The Commission considered 1.7 million pages of evidence. The information gathered throughout the lifespan of the Commission reportedly amounted to 1 million gigabytes, and it was estimated that only around 10 per cent of the information gathered was publicly presented. Taking into account the time frame and the amount of information gathered, it is understandable that there is a considerable amount of information that did not make its way into the public domain.

The work of the Commission, which included the gathering of the information, was funded by South African citizens, who should have free and easy access to it.

It has been recently reported that the Department of Justice and Constitutional Development has begun work on a digital library

to preserve, catalogue, and index all the information received by the Commission.<sup>17</sup> This is a laudable step in the right direction of improving public access to the Commission's voluminous records. The information should be archived and safely stored, and access thereto should be made as simple as possible. Civil society should be included in the process where relevant and possible. While that library is being set up, the Department of Justice must facilitate access to the information for those who seek it out.

The archive of the Zondo Commission is a vital resource, and it is in the public interest that this information should be preserved and made accessible. Making the fully digitised archive searchable will be key to ensuring equitable access. Whichever website this archive is available on should be made secure and be zero-rated, so that data costs are not a barrier to access. Every document that was served before and was produced by the Commission, including all affidavits, annexures, transcripts, and submissions, should be included in this publicly available archive.



**The Commission's investigations identified patterns of corruption that have been repeated across various state institutions and will likely also be present in institutions that were not addressed by the Commission. This indicates systemic and structural problems, which need to be addressed.**

**The CSWG will continue to closely monitor the implementation of the Zondo Commission's recommendations as part of its commitment to providing access and information to members of the public.**



# 3 | TRACKING THE IMPLEMENTATION OF AND RESPONSE TO THE ZONDO COMMISSION'S RECOMMENDATIONS

## | ON THE ZONDO COMMISSION'S RECOMMENDATIONS AND THE EXECUTIVE'S RESPONSE

The recommendations have been carefully and critically considered by the Civil Society Working Group on State Capture. Here, we set out the recommendations that we believe should be prioritised for implementation. We also highlight key areas of concern arising from the findings of the Zondo Commission, note gaps in the recommendations made by the Commission, and propose some ways of addressing these gaps.

In October 2022, the President tabled the Cabinet's response to Parliament.<sup>18</sup> In November 2023, the Presidency published its report on the progress made on the implementation of the recommendations of the Commission.<sup>19</sup>

The President's response to the State Capture report and implementation of its recommendations are vital, as they demonstrate the political will to take forward the work of the Zondo Commission and tackle state capture and corruption.

We welcome the President's acceptance of the Commission's findings with respect to the existence, nature, and extent of state capture. The Commission's findings on the mechanisms and causes of state capture, in particular institutional weaknesses in the state, provide a strong foundation for implementing critical reforms. However, we strongly disagree with the President's conclusion that state capture is "in the past" and has effectively come to an end. It is clear that serious corruption remains pervasive throughout government institutions and that key mechanisms of state capture identified by the Commission remain largely unchanged. It is also concerning that the Presidency's response and progress report have not sufficiently addressed the enabling political factors identified by the Commission. The task of the executive is not only to mop up the effects of state capture but to address, seriously and comprehensively, the complex failures of the state and political system that have enabled and continue to enable corruption and state capture.

## RECOMMENDATIONS SUPPORTED BY THE CSWG AND FURTHER OPPORTUNITIES FOR REFORM



### FURTHER INVESTIGATIONS AND PROSECUTIONS

The Zondo Commission presented strong opportunities for law enforcement agencies to hold perpetrators of state capture crimes to account. Its strongest recommendations were to law enforcement agencies and included recommending that they investigate and prosecute those implicated in state capture crimes for possible violations of criminal law, including the Public Finance Management Act 1 of 1999, Prevention of Organised Crime Act 121 of 1998, and Prevention and Combatting of Corrupt Activities Act 12 of 2004.

The Commission conducted relatively advanced investigations into several workstreams that did not receive hearing time. It should be made clear what has happened to those investigations. According to its progress report, the Presidency has referred "202 recommendations from the commission for criminal and other investigations, and possible prosecution to law enforcement agencies and other regulatory bodies, such as, the SA Institute for Chartered Accountants and Legal Practices Council".<sup>20</sup>

The onus is now on the attendant state institutions, namely the National Prosecuting Authority (NPA), the Hawks, the Special Investigating Unit (SIU), and the regulators, to carry these recommendations forward. Unfortunately, while progress has been made by institutions like the SIU, there has yet to be a successful prosecution of a state capture case by the NPA.

With regard to the NPA, there are worthwhile concerns around insufficient resourcing that might explain why a large number of cases have not been moving to trial. But this does not explain, in the instances where cases have proceeded to court, why we are seeing rudimentary and serious failures, such as not properly bringing evidence before the

court, by the NPA. Cases like the Nulane case bring the institutional weakening of law enforcement agencies into sharp focus. It is essential to address in order to help ensure that the perpetrators of state capture and corruption are held to account.

We therefore call for urgent, deliberate, and targeted reform in critical law enforcement agencies, where in which there should be a prioritisation of state capture cases. This along with the provision of additional resources through increased budgeting and human resources.

The NPA Amendment Bill (B29–2023) provides a step in the right direction through the proposed creation of a new, permanent independent investigating body within the NPA. Swift and effective implementation of this key piece of legislation and adequate resourcing will go a long way towards rebuilding public trust and assuring the public that law enforcement agencies are willing and able to effectively tackle corruption and state capture and to act on the findings of the Zondo Commission. The opposite is also true, however—failure to act will result in those implicated remaining unaccountable and further loss of public trust. We note, with concern, issues relating to the delayed prosecution of state capture cases.

With regard to private prosecutions, introduction of legislation to amend the Criminal Procedure Act 51 of 1977 to permit private prosecutions of criminal conduct in SOEs by civil society in cases where the NPA produces a certificate of *nolle prosequi*. Alternatively, to litigate in the Constitutional Court on the constitutionality of the current case law interpretations of the Criminal Procedure Act limiting private prosecutions to natural persons in cases affecting private interests.



## ADMINISTRATIVE ACTION AGAINST DIRECTORS AND COMPANIES

The Zondo Commission's recommendations to make amendments to the Companies Act 71 of 2008, namely, to extend the time period to file a delinquent director application, is supported by the CSWG. We welcome the tabling of this amendment before Parliament.

In addition, the CSWG welcomes the Presidency's progress report noting that cases for delinquency proceedings against 73 former directors of SOEs implicated in the evidence presented to the Commission have been compiled by the Department of Public Enterprises.<sup>21</sup> We will be monitoring these proceedings.

We support the Commission's recommendation that Bain and Company should be debarred for its role in the destruction of the South African Revenue Service (SARS) and welcome National Treasury's prompt action in this regard. This recommendation is a steppingstone for National Treasury and state institutions to effectively hold other private sector actors who are implicated in corrupt activities to account. It is a chance for companies like KPMG, McKinsey, and PwC, along with a host of other private sector actors, including banks, named in the Commission's reports, to face accountability and to break the cycles of impunity that have allowed corruption to thrive at the expense of the public in South Africa. Most major companies fatten their bottom lines through government contracts, particularly in the consulting industry. Debarment is an opportunity to hold corporations that enable state capture and corruption and place profits above people accountable.



## WHISTLE-BLOWER PROTECTION

We support the Commission's call for greater protection and incentivisation of whistleblowing. If whistle-blowers are better protected in South Africa, it will encourage and help individuals to come forward with information on corrupt activities.

The Department of Justice and Constitutional Development published a comprehensive review of the current legislative framework and recommendations for reforms in June 2023. The review makes significant recommendations for reforms to the Protected Disclosures Act 26 of 2000 and Witness Protection Act 112 of 1998 based on the Commission's recommendations on whistle-blower protection.<sup>22</sup> However, the proposals do not go far enough. In particular, reform efforts should be aimed at sanctioning employers who retaliate against whistle-blowers and/or use non-disclosure agreements to silence them; and at providing for an independent reporting channel for corruption whistle-blowers that is not beholden to employers and, importantly, that allows whistle-blowers to remain anonymous.

The CSWG calls for the urgent reform of key pieces of legislation, such as the Protected Disclosures Act, along with the implementation of incentivised whistleblowing by the state. The CSWG cautions against further delays in providing a conducive and protected environment for people who expose corrupt practices.



## PARLIAMENTARY OVERSIGHT

The Commission's recommendations on parliamentary oversight are strong. By June 2023, Parliament was yet to implement the proposed reforms. Certain key recommendations can be termed as low-hanging fruit that would make a significant improvement to parliamentary oversight. Improving monitoring and evaluation, in particular implementing a tracking system for resolutions and recommendations made by committees, should be actioned without delay; so too should improving resourcing for oversight functions. Most important are the recommendations on improving Parliament's accountability legislation and reforming the committee system. Parliamentary committees are the primary oversight mechanism that Parliament has at its disposal, and they can be very effective in holding the executive to account.

The creation of a portfolio committee dedicated to overseeing the Presidency would be an important institutional change for three reasons. First, because a president has unique power to orchestrate and cover up corruption. Second, because the Presidency now houses the State Security Agency, which played a crucial enabling role in state capture. Third, because the work of the recently appointed Minister in the Presidency Responsible for Electricity, whose mandate is to address our electricity crisis, deserves close oversight in light of the history of energy-related procurement and corruption detailed by the Commission.

The CSWG calls on Parliament to take urgent steps to reform its oversight systems, which should include improving resourcing for oversight functions, implementing a tracking system, and establishing a portfolio committee to oversee the Presidency.



## PUBLIC PROCUREMENT

The Commission found that the public procurement system was the primary site for the “redirection” of state resources and made numerous recommendations for enhancing the integrity of the public procurement system in South Africa. Importantly, it recognised that fragmentation of South Africa’s procurement legislation has aided in abuse and poor oversight of the system and called on government to address this.

The President’s response to the Commission’s report indicates that many of the Commission’s recommendations on procurement are addressed by the Public Procurement Bill currently before Parliament (B18–2023).<sup>23</sup> However, the Bill does *not* adequately address the concerns raised by the Zondo Commission.

Greater transparency in public procurement is vital. The government, spearheaded by National Treasury, must develop a framework and supporting infrastructures for enhanced public scrutiny of the public procurement system. This should ensure standards and systems for the publishing of procurement data along the value chain, from bidding and awards through contract management and project closure, supported by fit-for-purpose, integrated information technology systems. Further, transparency in and oversight of the public procurement system would be greatly supported by a high-standard beneficial ownership register and by this register being open to the public.

The Commission’s recommendation on the introduction of incentives for whistle-blowing on public procurement fraud is a specific, targeted intervention that should be conceived of as part of procurement reform—and it should be included in the Public Procurement Bill and in related sector-specific legislation (such as that regulating the tax system).

The CSWG calls for a procurement system that is open, transparent, and subject to scrutiny; incorporates appropriate integrity provisions; and establishes independent oversight bodies, in order to avoid a repetition or continuation of state capture and high levels of corruption within the public procurement sector. Members of the CSWG wish to strongly caution against the reliance on regulations to establish key amendments to procurement legislation; instead, key principles should ideally be set out in the primary legislation.



## PUBLIC ADMINISTRATION REFORMS

The Commission’s report correctly argued that the ability to place political associates in key posts within the public administration was the “essential mechanism” of state capture. Executives (and senior officials) were improperly involved in operational matters that they were supposed to oversee. Corrupt politicians and officials also used disciplinary processes, suspensions, and dismissals to remove “non-compliant” employees and replace them with complicit individuals. The report further found that one of the key features of the state that “allowed State Capture to take hold” was the failure to implement, effectively and fully, section 195 of the Constitution. Section 195 envisages a public administration that is professional, effective, impartial, and developmentally directed. The report contains a substantial analysis of the ruling African National Congress’s policy of cadre deployment, declaring its efforts to influence appointment and removal decisions as unlawful and invalid.

The Commission has provided a strong set of recommendations for reform of public administration. It is important that strong underlying principles should be used to support reforms.

Appointments and dismissals of public officials should be governed by criteria of merit, performance, and representativity *only*. Politicians must still have a say in appointments such that there is adequate room for them to direct the administration in support of policy and programmatic mandates; however, there must be stronger checks and balances to guard against the introduction of unlawful criteria into appointment and removal processes: Independent bodies should assume the role of providing checks and balances within these processes. Independence entails that these bodies should be established as statutory independent bodies and constituted through channels other than the executive by, for instance, giving constitutional institutions and persons possessing key areas of expertise a role in the selection of members.

The Public Service Amendment Bill (B13–2023) and the Public Administration and Management Amendment Bill (B10–2023) were tabled in Parliament in 2023. A draft Public Service Commission Bill (B30–2023) was also published for public comment. These Bills contain important, positive steps forward but do not go far enough to fully address the weaknesses exposed by the Zondo Commission, or to realise the vision of the National Development Plan and the Professionalisation Framework with regard to stabilising the political-administrative interface and better insulating public administration from patronage politics.

The CSWG calls for an overhaul of appointment processes to ensure that inappropriate political interference in appointment processes ceases and that senior officials are chosen based on experience, expertise, and commitment to public service.



## SOE GOVERNANCE

Having identified improper appointments and dismissals as a key mechanism of state capture in state-owned enterprises, the Commission's report provides a substantial and detailed proposal for a Standing Appointment and Oversight Committee. It envisages a role for, inter alia, the Chief Justice, the Legal Practice Council, and the Independent Regulatory Board of Auditors, in constituting a committee to govern recommendations for appointments to the boards and senior posts of SOEs.

It is clear that the executive has decided against implementing this particular recommendation. They have chosen to address the problems in SOE appointments highlighted by the Commission in the draft National State Enterprises Bill, which the President has previously stated will “codify the appointment process so that the principles and process become legally binding and that sanctions for noncompliance are put in place”<sup>24</sup>

However, the draft Bill published by the Cabinet does not do this and does not meaningfully address the governance challenges facing SOEs in any way. The Bill does not specify how the boards and executives of subsidiary SOEs will be appointed. Instead, the board of the holding company will be appointed by the President with no clear appointment processes, criteria, or adequate checks and balances.

While the Zondo Commission's specific recommendation for a standing oversight committee need not be implemented exactly as proposed, there is a clear and urgent need for substantial reforms to

the way in which SOE boards and senior executives are appointed. The CSWG calls for transparent mechanisms to ensure that SOE board appointment processes are designed in a way to select for appropriate expertise and experience and that they are open to public scrutiny, including the incorporation of voices from civil society. Reform of state-owned entities is a substantial step towards addressing longstanding challenges across SOEs. Particular emphasis should be placed on learning from past experiences within these entities, as highlighted by the Commission.



## THE CRIMINAL JUSTICE SYSTEM

The Commission made virtually no recommendations on the criminal justice system, despite its own finding that state capture was facilitated by “a deliberate effort to subvert and weaken law enforcement and intelligence agencies at the commanding levels so as to shield and sustain illicit activities, avoid accountability and to disempower opponents”.<sup>25</sup> Nevertheless, the evidence contained in the State Capture report and in the Commission’s body of evidence more generally—clearly show that these institutions are not, and have not been, fit for purpose and need substantial reforms.

The most alarming revelations about the justice system at the Commission were about its (lack of) independence. The evidence presented at the Commission showed that law enforcement agencies were highly politicised and compromised at the highest levels. The weakening and hollowing out of these institutions, through undue influence over appointment and removal processes within them, has further helped to de-professionalise them while enabling patronage. There is a need to re-establish the legitimacy, impartiality, and independence of key criminal justice system institutions.<sup>26</sup>

The government must provide, develop, and implement robust mechanisms for ensuring the independence of law enforcement institutions and their heads, and the transparency and rigour of appointment processes must be enhanced.

Beyond appointments and removals, other questions of independence remain. Academics and civil society have been calling for greater structural independence, including financial independence, for the NPA. The Presidency’s response plan has not engaged adequately with these questions. There appears to be no strategy for ensuring that these institutions are properly capacitated, for ensuring proper oversight, or for addressing internal corruption.

The National Anti-Corruption Advisory Council, established in 2022, has been given a mandate to rethink the anti-corruption institutional architecture. Civil society will be watching to see whether this remodelling will have the requisite muscle, independence, resourcing, and capacity to address systemic and structural corruption. For now, the current system remains extremely vulnerable.



## ACCOUNTABILITY MECHANISMS OUTSIDE OF THE CRIMINAL JUSTICE SYSTEM

Agencies and organisations like, the South African Institute of Chartered Accountants, the Independent Regulatory Board of Auditors, and other local and/or international oversight authorities should be consulted in efforts to hold individuals and companies implicated in corruption accountable. Orange overalls are not the only way to hold people to account.

Chapter 9 institutions like the Auditor-General and Public Protector should be more regularly informed and consulted on suspicious and criminal actions by public servants. National Treasury's Restricted Suppliers Database should be revisited. A process that will streamline the noting and reporting of corrupt service providers should be implemented as a matter of urgency. Professional bodies and commercial banks should play a bigger and better role in fighting corruption. The Financial Intelligence Centre and SARS could also play a more effective role in curbing and punishing suspicious financial transactions.

The Commission's Terms of Reference mandated it to ascertain the "nature and extent" of corruption and state capture in public entities.<sup>27</sup> As discussed earlier, the Commission's investigations were necessarily limited, and its findings and recommendations were not exhaustive. Therefore, while the recommendations of the Commission remain vital, it is important to bear in mind that they should not stand alone when it comes to the response to state capture and systemic corruption in South Africa, to the exclusion of other important interventions that were not considered by the Commission.

The Commission's investigations identified patterns of corruption that have been repeated across various state institutions and will likely also be present in institutions that were not addressed by the Commission. This indicates systemic and structural problems, which need to be addressed. Many reforms proposed by the Commission in specific cases are, arguably, broadly applicable across various state institutions.

The CSWG will continue to closely monitor the implementation of the Zondo Commission's recommendations as part of its commitment to providing access and information to members of the public. This moment provides the opportunity for a fundamental resetting of our system of governance that should not be squandered.



## 4 | FINAL REFLECTIONS AND CONCLUSIONS



### THE PUBLIC AND CIVIL SOCIETY TAKE THE WORK OF THE COMMISSION FORWARD

The public and civil society must undertake to keep the work of the Commission alive and to give it longevity in the public imagination. The massive amount of information made available by the Commission is itself a rich resource. Civil society can track the archiving of Commission records and advocate for public access (see the earlier discussion on a publicly accessible information archive). Furthermore, we can and should endeavour to make full use of the archive—to fully plumb its depths and use all of the information available in our research and advocacy work.

As discussed, a key strength of the Zondo Commission was its extensive and detailed findings and recommendations, including those related to recommended investigations and prosecutions, as well as institutional reform. A vital way for civil society to take this work forward is to track and monitor the implementation of the recommendations, particularly at key law enforcement institutions and in Parliament. Civil society is well-placed to conduct an in-depth study of the Commission's report and recommendations, to formulate workable solutions for institutional and legislative reforms, and to advocate for those solutions, in addition to taking forward and implementing key recommendations made by the Commission.

Civil society organisations should maintain networks and partnerships to monitor the recommendations and should continue to put forward submissions to regulatory bodies, law enforcement agencies, and Parliament with regard to the recommendations we support.

There are many opportunities for collaboration within civil society to augment the sector's capacity to monitor and scrutinise implementation of not only the Zondo Commission's recommendations but also the implementation of the National Anti-Corruption Strategy. Civil Society has been engaged in efforts to do so, a key example of this is illustrated by a conference held in October, 2023, by civil society organisations part of the CSWG, the Public Affairs Research Institute (PARI) and Council for the Advancement of the South African Constitution (CASAC).<sup>28</sup>

Crucially, civil society must retain a critical and keen eye on the progress of the criminal prosecutions of the numerous individuals and corporations that the Commission recommended for investigation and prosecution. Where these are not forthcoming, the failures must be challenged. Civil society organisations can pressure law enforcement agencies for greater accountability.

Equally important is our capacity to reflect the voices and will of those who have been left to deal with the consequences of state capture, which includes taking the messages, lessons learned, and recommendations of the Zondo Commission's findings directly to the people. This is also the time to consider establishing partnerships that bring all sectors together to create space for public inclusion and intervention in processes that affect people's lives. Civil society organizations, activist movements and communities should stay connected in co-created knowledge sharing networks that stay engaged in efforts to amplify and give voice to the impact of state capture and corruption, and priorities youth participation.

The use of data analytics and data tools can play a vital role in understanding how resources are allocated and in tracking expenditure over time. It can assist communities and civil society to hold their elected officials to account and provide information on how resources will be used to develop communities and improve services. In addition, the continued use of long-term advocacy work, sustained by using infographics, billboards, and community radio platforms, will be crucial.

The CSWG will be engaged in targeted campaigns that use multiple channels and easily accessible formats. Throughout this we will maintain efforts to highlight why this work matters to the country and continue to do important work to overturn patterns of corruption and poor governance.

# BEYOND INSTITUTIONAL REFORM AND LEGAL REFORM—CREATIVE WAYS TO ADDRESS THE IMPACT OF STATE CAPTURE AND TO SEEK ACCOUNTABILITY?



## ART AND STORYTELLING

As important as legal and institutional reform are in addressing state capture and seeking accountability, these measures have limitations when it comes to the various ways in which people express their experiences of injustice. Art, in its various forms, is an innovative and critical mechanism to address the impact of state capture and to reimagine ways of addressing these forms of crimes. One of the most critical aspects of art as a form of storytelling is its accessibility. This allows different people, not only to engage with art, but to create it in a way that best speaks to them. The use of art further requires civil society and the public to deconstruct normative understandings of accountability and justice, thus paving the way for more holistic pathways to accountability.

Art, whether it be visual, performative, or in other forms, has long had a place in South African history as a mechanism of protest. It functions as a tool of storytelling, raising awareness, and critical examination through the incorporation of various methods. As such, it should be considered a powerful tool to address the impact of state capture. Activists made use of visual art, poetry, music, and theatre as forms of protest during apartheid to draw attention to the violence and injustice inflicted by the regime. The creation and sharing of this art further served as a powerful tool to disrupt hegemonic power. In contemporary South Africa, after the Marikana massacre and the Marikana Commission of Inquiry, art was used by community members and activists to remember the grave injustice that was the massacre, as well as the sense of disappointment, despair, and lack of justice in its aftermath.

These images and artworks are a way for society to continue the conversation around Marikana. The Institute for Justice and Reconciliation's Gender Justice Project partnered with filmmakers of varying gender and sexual identities to tell their stories through film, exploring different issues around gender discrimination and injustice. Using these approaches to continue conversations around the impacts of state capture would also be an important and powerful way of continuing these critical conversations and more purposefully telling the human stories.



## CIVIL ACTION

In cases of unreasonable delay by the NPA in actioning the Zondo Commission's recommendations on prosecutions, civil society should consider taking action by asking the NPA for a *nolle prosequi* certificate and instituting private prosecutions.

On the basis of section 38 of the Constitution, civil society actors might consider bringing applications to have company directors declared delinquent in terms of section 162 of the Companies Act.

On the basis of section 38, civil society actors might also consider bringing civil actions against individual directors and executive officers

for recovery of monies illegally expended and the return of such monies to the institution concerned or to the fiscus (if the institution does not itself act to recover those monies).

A variation on this would be to consider bringing applications in terms of High Court Rule 53, seeking orders to review and to set aside administrative decisions to spend particular public monies and, on that basis, to get orders for restoration of such monies by responsible individuals in their personal capacities. The advantage of the latter option may be that it permits early discovery through production of the record of the decision under review (and thus access to all relevant information), based on which the founding papers in the application may be amended and supplemented.



## WORKSHOPS AND PEOPLE'S HEARINGS

Workshops have often been used to address varying forms of injustice and as a mechanism to engage with affected communities on these injustices. Workshops are a powerful way for the public to voice their personal and communal experiences of injustice, as well as a tool to come up with ideas around how to address existing formal institutions and structures with their proposals.

Open Secrets held a People's Hearing on State Capture, in 2019, to explore how state capture has impacted the lives of millions of people in South Africa. Dozens of people gave testimonies during the hearing, sharing their personal stories around how state capture had affected them and their communities. These included commuters who were reliant on trains speaking about how the capture of the Passenger Rail Agency of South Africa (Prasa) affected their daily lives, as well as miners who had lost their jobs at Optimum Coal Mine because of state capture. The engagement with communities was imperative in understanding the social cost of state capture, and similar hearings should be used to broaden and deepen conversations about the costs of state capture and what justice and accountability should look like.

It is clear from the discourse playing out on many platforms that there is still a disconnect between the implications of state capture and its effects on the ground. There is space for a much better and coordinated communication effort to truly unpack the significance of this era in our country's trajectory, to demonstrate the links, and to empower and engage all sectors of the public in ensuring that we are not again subjected to the abuses we have endured during these past decades.

We have pointed out that measuring state capture's social cost enables the state, civil society, and the private sector to formulate and implement holistic strategies of redress. Civil society need not remain still in this regard. We could identify sites of concrete damage that are clearly traceable to discrete acts of corruption within the state capture architecture, tell the story of that damage, and devise and implement strategies to uplift individuals and communities who have suffered.





# THE PEOPLE'S HEARING ON

# STATE CAPTURE

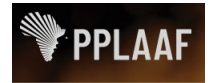
WOMEN'S JAIL  
CONSTITUTION HILL  
JOHANNESBURG  
12 OCTOBER 2019

# #DearJudgeZondo



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