



COUNCIL
FOR THE ADVANCEMENT OF THE
SOUTH AFRICAN
CONSTITUTION

WHY THE NATIONAL ASSEMBLY FAILED TO EXERCISE EFFECTIVE OVERSIGHT IN RESPECT OF STATE CAPTURE

"I am ...concerned if a situation where .. a structure of Parliament which has very important constitutional responsibilities of oversight over the executive raises issues and they are just ignored and nothing happens to anybody", Deputy Chief Justice Zondo¹

SUBMISSION BY THE COUNCIL FOR THE ADVANCEMENT OF THE SOUTH AFRICAN CONSTITUTION TO THE JUDICIAL COMMISSION OF INQUIRY INTO STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR, INCLUDING ORGANS OF STATE

¹ Chairperson of the Commission on State Capture, during testimony by Mr Dennis Bloem, former Chairperson of the National Assembly Portfolio Committee on Correctional Services, 2 February 2019.

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INTRODUCTION

1. Notwithstanding that widespread allegations of State Capture dominated media headlines for years, only in June 2017 did the National Assembly task four Portfolio Committees (Home Affairs, Mineral Resources, Public Enterprises and Transport) to engage with the concerned Ministers and to hold enquiries regarding allegations of State Capture within these national Departments.²
2. In light of the above statement by Deputy Chief Justice Zondo, Chairperson of the Judicial Commission of Inquiry into Allegations on State Capture (*“the State Capture Commission”*), the Council for the Advancement of the South African Constitution (*“CASAC”*) has considered whether structural impediments in our constitutional architecture resulted in the National Assembly not fulfilling its oversight function with regard to State Capture.
3. It is widely acknowledged internationally that Parliaments have an important role to play in preventing corruption in general and state capture specifically. In 2002 the Global Organization of Parliamentarians Against Corruption (GOPAC) which was formed by parliamentarians across the globe identified corruption as *“the greatest threat to the democratic ideal of self-government, endangering representative institutions selected in free elections by a broadly enfranchised people.”*³

² <https://www.parliament.gov.za/press-releases/parliamentary-investigation-alleged-state-capture-emails>

³ Staphenurst, Ulrich, and Strohal “Introduction: Parliamentarians Fighting Corruption” in *The Role of Parliament in Curbing Corruption* (World Bank, 2006) at p 1.

4. Parliaments across the world play a pre-eminent role in fighting corruption at two levels - by enacting appropriate legislation and performing effective oversight which *“can be achieved through effective participation in the budgetary process, the exercise of parliamentary oversight through anticorruption commissions, cooperation with supreme audit institutions, and promoting a media-friendly environment.”*⁴
5. The next segment which sets out the legislative and constitutional landscape demonstrates that there were no structural constraints which impeded Parliament and specifically the National Assembly (“the NA”) from exercising oversight and accountability with regard to State Capture.
6. While Parliament consists of both the NA and the National Council of Provinces (“the NCOP”), given the mandate of the State Capture Commission and the mandate of the NA to hold the President, the National Executive and organs of state at national level accountable, this submission exclusively examines the role of the NA.⁵

CONSTITUTIONAL AND LEGISLATIVE PROVISIONS ON OVERSIGHT BY THE NATIONAL ASSEMBLY

7. Section 1(d), a founding provision of the Constitution provides that the Republic of South Africa is founded on, inter alia, *“a multi-party system of democratic government, to ensure accountability, responsiveness and openness”*.

⁴ Ibid.

⁵ In contrast to the NA, the NCOP represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. In this regard the NCOP's role is to exercise oversight over national aspects of provincial and local government. The NCOP may require a Cabinet member, an official of the national government or a provincial government MEC to attend a meeting of the Council or a committee.

8. In terms of section 42(3) of the Constitution, *“The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.”* (emphasis added).

9. Significantly, section 55(2) of the Constitution provides that the NA must provide for mechanisms—

- “(a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and
- (b) to maintain oversight of—
 - (i) the exercise of national executive authority, including the implementation of legislation; and
 - (ii) any organ of state.”

10. Section 92(2) of the Constitution concomitantly provides that *“Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions”*. In terms of section 92(3) Members of Cabinet *“must act in accordance with the Constitution”* and must *“provide Parliament with full and regular reports concerning matters under their control”*.

11. In addition to oversight over the Executive, section 239 of the Constitution defines organs of state very broadly to include -

- “(a) any department of state or administration in the national, provincial or local sphere of government; or

- (b) any other functionary or institution—
- (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.”
(emphasis added)

12. In order to facilitate the oversight functions of the NA, section 56 of the Constitution empowers the NA by providing that -

“The National Assembly or any of its committees may—

- (a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents;*
- (b) require any person or institution to report to it;*
- (c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and*
- (d) receive petitions, representations or submissions from any interested persons or institutions.”*

13. Sections 14 and 15 of the Powers, Privileges and Immunities of Parliament and the Provincial Legislatures Act 4 of 2004 (*“the Powers Act”*) is the enabling legislation which gives effect to section 56 of the Constitution and provides for the summoning and examination of witnesses.

14. In terms of section 17(1) of the Powers Act, it is an offence which is punishable by a fine or to imprisonment for a period not exceeding 12 months or to both the fine and the imprisonment for a person who –

- 14.1. has been duly summoned and who fails, without sufficient cause to attend a hearing, to remain in attendance until excused; or
- 14.2. refuses to be sworn in or to make an affirmation as a witness; or

14.3. fails without sufficient cause to answer fully and satisfactorily all questions lawfully put to him; or

14.4. fails to produce any document.

15. Similarly, in terms of section 17(2) of the Powers Act, it is also an offence if any person -

15.1. threatens or obstructs another person in respect of evidence to be given before a House or committee; or

15.2. induces another person to refrain from giving evidence or producing a document or to give false evidence before a House or committee; or

15.3. assaults, penalises or threatens another person or with intent to deceive a House or committee; or

15.4. produces to the House or committee any false, untrue, fabricated or falsified document.

16. The Constitution itself explicitly creates two mechanisms for oversight over the Executive in sections 89 and 102 of the Constitution.

17. Section 89(1) provides that the NA, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of -

“(a) a serious violation of the Constitution or the law;

(b) serious misconduct; or

(c) inability to perform the functions of office.”

18. In terms of section 102 of the Constitution –

“(1) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the Cabinet excluding the President, the President must reconstitute the Cabinet.

(2) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign.”

19. There are several further provisions in the Constitution which bolsters effective oversight and accountability, and these include –

19.1. section 58(1) which provides that Cabinet members, Deputy Ministers and members of the NA have freedom of speech in the Assembly and in its committees and are not liable to civil or criminal proceedings, arrest, imprisonment or damages for anything said or revealed or submitted to the Assembly or any of its committees;

19.2. section 59(1) which provides that the NA must facilitate public involvement in the legislative and other processes of the Assembly and its committees and conduct its business in an open manner, and hold its sittings, and those of its committees, in public but that reasonable measures may be taken to regulate public access, including access of the media, to the Assembly; and

19.3. section 59(2) provides that NA may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.

THE NATIONAL ASSEMBLY RULES WHICH GIVE EFFECT TO OVERSIGHT

20. While section 57(1) provides that the NA may determine and control its internal arrangements, proceedings and procedures and make rules and orders concerning its business this must be done “*with due regard to representative and participatory democracy, accountability, transparency and public involvement.*”

21. In terms of section 57(2)(b), the NA rules must also provide for the participation in the proceedings of the Assembly and its committees of minority parties represented in the Assembly, in a manner consistent with democracy. The Constitutional Court has held that section 57 must be interpreted “*as empowering the Assembly to make rules that do not constitute an inadvertent deployment of invincible giants in a member’s path” to exercising their rights*”.⁶

22. At both the Assembly and Committee level, the Constitution requires that the NA and its committees must conduct its business in an open manner and may not exclude the public, including the media, unless it is reasonable and justifiable to do so in an open and democratic society.

Rules relating to proceedings in the National Assembly

23. At the Assembly level, debates are televised in a contested field which allows political parties represented in the NA to debate various issues.

⁶ *Oriani-Ambrosini, MP v Sisulu, MP, Speaker of the National Assembly* 2013 (1) BCLR 14 (CC) at para 64.

24. The NA Rules provides for several mechanisms to ensure accountability and oversight of the Executive which includes -

24.1. Rule 129, which caters for motions of no confidence in the President and Cabinet in terms of section 102 of the Constitution;

24.2. Chapter 8 of the NA Rules, which provides for the discussion of urgent matters of national public importance;

24.3. Rule 132, which allows for statements by members and provides for members to make statements on any matter;

24.4. Chapter 10 of the NA Rules, which provides for questions to the executive. Rule 140 specifically provides that members of the NA can put questions to the President on matters of national and international importance; and

24.5. Rule 141, in terms of which a member may request the Speaker in writing to allow an urgent question for oral reply to be put to the President on the next applicable day. In this regard an approved urgent question takes precedence over all other questions on the relevant question day.

25. There are also other mechanisms such as debates on budget votes, members' statements, plenary debates and reports from state institutions supporting constitutional democracy.

26. Rule 85(1) of the NA Rules provides for a restriction on the rights of members in the Assembly as *"[n]o member may impute improper motives to any other member,*

or cast personal reflections upon a member's integrity or dignity, or verbally abuse a member in any other way".

27. Rule 85(2) provides further that “[a] member who wishes to bring any improper or unethical conduct on the part of another member to the attention of the House, may do so only by way of a separate substantive motion, comprising a clearly formulated and properly substantiated charge that in the opinion of the Speaker *prima facie* warrants consideration by the House.”

28. Rule 85(3) specifically states that rule 85 applies to the President, Ministers and Deputy Ministers, who are not members of the NA.

29. Rule 85 is also similar in substance to Rule 88 of the current rules which also does not permit members to reflect upon judges and certain other holders of public office, whose removal from such office is dependent upon a decision of the NA, except upon a separate substantive motion in the NA and which is clearly formulated and properly substantiated.

30. Should a member of the NA table a substantive motion calling for the removal of the President, and the Speaker is of the view that the allegations warrant the attention of the NA, she must refer it to the NA for consideration.

31. Since a motion in terms of section 89(1) would likely bring wrong-doing on the part of the President to the attention of the NA, it would need to comply with Rule 85(2).

32. A resolution in terms of section 89 may be initiated by way of a notice of motion and takes the form of a draft resolution. In this regard, Rule 119 provides that a

member may propose a subject for discussion, or a draft resolution for approval, as a resolution of the NA, with or without a debate.

33. Rule 123 provides that every motion (draft resolution) requires notice, except those specially excluded by the NA Rules.

34. Rule 124 deals with notices of motion and provides in sub-rule (6) for ways in which notice of a motion may be given, namely:

34.1. In the NA, when the presiding officer calls for notices of motion, by reading it aloud and immediately thereafter delivering, at the Table, a signed copy of the notice, which may not differ from the notice as read aloud; or

34.2. by delivering a signed copy of the notice on any parliamentary working day to the Secretary to Parliament for placing on the Order Paper.

35. In terms of Rule 124(7), written notices of motion delivered to the Secretary in terms of sub-rule 6(b) after 12:00 on any parliamentary working day may be placed on the Order Paper only after the expiry of 24 hours, unless the Speaker directs otherwise.

36. Once a notice of a motion is given in terms of Rule 124(6) and it complies with the Rules and Orders of the NA or directives and guidelines approved by the Rules Committee, the full text is printed on the Order Paper under "Further Business", once. Thereafter, it is listed as a page reference under "Further Business", until it is programmed for debate when it will once again be published in full.

37. In terms of Rule 126, the Speaker may disallow a notice of motion that offends or contravenes the Rules and Orders of the NA or directives and guidelines approved by the Rules Committee. In this case the Speaker informs the member that his or her notice of a motion is procedurally out of order and it will not be appearing on the Order Paper.

38. According to the ***National Assembly Guide to Procedure 2004***,⁷ the effect of a notice of a motion is merely to indicate an intention on the part of a member to move a motion in the NA if and when it is programmed for consideration by the NA. Thus, the consideration of such a motion would need to be programmed by the National Assembly Programme Committee.

39. If a member's notice of motion is published on the Order Paper, as indicated above, it will appear under "Further Business". It would then be the responsibility of the whip of the member's party to propose both through the Chief Whips' Forum and at the Programme Committee that the member's motion be programmed for consideration by the NA. This is not the case with a notice of motion in terms of section 89, since the Speaker is obliged to give such notice of motion due priority in terms of Rule 26.

40. Rule 26(1) provides that when: *"exercising the authority of the Speaker, as provided for in the Constitution and legislation and the rules of Parliament, the Speaker must —*

- (a) *ensure that the National Assembly provides a national forum for public consideration of issues, passes legislation and scrutinises and oversees executive action in accordance with section 42(3) of the Constitution;*

⁷ *National Assembly Guide to Procedure 2004*, at page 117.

- (b) *ensure that parties represented in the National Assembly participate fully in the proceedings of the Assembly and its committees and forums, and facilitate public involvement in the processes of the Assembly in accordance with Sections 57 and 59 of the Constitution; and*
- (c) *whenever possible, consult with relevant office-bearers and structures within Parliament to achieve the efficient and effective functioning of Parliament in a transparent and accountable manner.”*

Rules relating to committees of the National Assembly

41. Committees are regarded as the ‘engine room’ of the NA and thus play a key role in effecting oversight, not only over members of the Executive, but also organs of state, which include state owned enterprises.

42. Rule 154(1) provides that “[p]arties are entitled to be represented in committees in substantially the same proportion as the proportion in which they are represented in the Assembly, except where the Rules prescribe the composition of the committee or the number of members in the committee does not allow for all parties to be represented”.

43. In terms of Rule 154(2), subject to the NA Rules, the Joint Rules and decisions of the Rules Committee, and where practicably possible, each party is entitled to at least one representative in a committee.

44. NA Rule 167(a) gives effect to section 56 of the Constitution and provides that any committee, including *ad hoc* committees, has the power to summon any person to appear before it to give evidence on oath or affirmation, or to produce documents.
45. Rule 253(1) provides that an ad hoc committee may be established by resolution of the NA; or if it is during an adjournment of the NA for a period of more than 14 days, by the Speaker after consulting the Chief Whip and the most senior whip of each of the other parties.
46. In terms of Rule 253(4), the resolution of the NA or decision of the Speaker establishing an ad hoc committee must specify the task assigned to the committee, which may include conducting an inquiry or investigation and reporting or recommending to the NA on steps to be taken pursuant to its findings; and set time frames for the completion of any steps in performing the task; and the completion of the task.

PARLIAMENT'S POLICY ON OVERSIGHT AND ACCOUNTABILITY

47. In 2004 Parliament via resolutions in both the NA and NCOP adopted an Oversight and Accountability Model which recognises that unlike the Westminster system, in South Africa oversight is a constitutionally mandated function of legislative organs of state to scrutinise and oversee executive action as well as over any organ of state. In this regard it is recognised that -

“oversight entails the informal and formal, watchful, strategic and structured scrutiny exercised by legislatures in respect of the implementation of laws, the application of the budget, and the strict observance of statutes and the

Constitution. In addition, and most importantly, it entails overseeing the effective management of government departments by individual members of Cabinet in pursuit of improved service delivery for the achievement of a better quality of life for all citizens.”⁸

48. The Oversight and Accountability Model therefore defines oversight broadly –

- “• To detect and prevent abuse, arbitrary behaviour or illegal and unconstitutional conduct on the part of the government and public agencies. At the core of this function is the protection of the rights and liberties of citizens.*
- To hold the government to account in respect of how the taxpayers’ money is used. It detects waste within the machinery of government and public agencies. Thus it can improve the efficiency, economy and effectiveness of government operations.*
- To ensure that policies announced by government and authorised by Parliament are actually delivered. This function includes monitoring the achievement of goals set by legislation and the government's own programmes.*
- To improve the transparency of government operations and enhance public trust in the government, which is itself a condition of effective policy delivery.”⁹*

49. The Oversight and Accountability model recognises that the appropriate mechanism for Parliament to conduct oversight of these organs of state would be through parliamentary committees. *“In conducting oversight, the committee would either request a briefing from the organ of state or visit the organ of state for fact-finding, depending on the purpose of the oversight. The committees would have to consider the appropriate means for conducting oversight to cover all organs of state.”¹⁰*

⁸ Oversight and Accountability Model, para 2.1.

⁹ Ibid, para 2.1.1.

¹⁰ Ibid, para 2.1.1.

50. The Oversight and Accountability Model also notes that accountability -

“is the hallmark of modern democratic governance. Democracy remains clichéd if those in power cannot be held accountable in public for their acts or omissions, for their decisions, their expenditure or policies. Historically, the concept of accountability was closely linked to accounting in the financial sense. It has however moved far beyond its origins and has become a symbol of good governance both in the public and private sectors. Accountability refers to institutionalised practices of giving account of how assigned responsibilities are carried out.”¹¹

51. In terms of the Oversight and Accountability Model, the functions of accountability include:

- *“To enhance the integrity of public governance in order to safeguard government against corruption, nepotism, abuse of power and other forms of inappropriate behaviour.*
- *As an institutional arrangement, to effect democratic control.*
- *To improve performance, which will foster institutional learning and service delivery.*
- *In regard to transparency, responsiveness and answerability, to assure public confidence in government and bridge the gap between the governed and the government and ensure public confidence in government.*
- *To enable the public to judge the performance of the government by the government giving account in public.”*

¹¹ Ibid, para 2.2.

JURISPRUDENCE OF THE CONSTITUTIONAL COURT ON CORRUPTION AND THE ASSEMBLY'S OVERSIGHT ROLE IN THIS RESPECT

52. In 2001 the Constitutional Court pointed out that -

“Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state...”¹²

53. In **United Democratic Movement v Speaker of the National Assembly and others (Council for the Advancement of the South African Constitution and others as *amici curiae*)** the Constitutional Court held that -

“Public office, in any of the three arms, comes with a lot of power. That power comes with responsibilities whose magnitude ordinarily determines the allocation of resources for the performance of public functions. The powers and resources assigned to each of these arms do not belong to the public office bearers who occupy positions of high authority therein. They are therefore not to be used for the advancement of personal or sectarian interests. These servants are supposed to exercise the power and control these enormous resources at the beck and call of the people. Since State power and resources are for our common good, checks and balances to ensure accountability enjoy pre-eminence in our governance system.”¹³

¹² *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) at para 4.

¹³ *United Democratic Movement v Speaker of the National Assembly and others (Council for the Advancement of the South African Constitution and others as amici curiae)* 2017 (8) BCLR 1061 (CC), at para 7.

54. It is trite that section 42(3) and 55(2) which requires the NA to facilitate oversight over the Executive and organs of State must be interpreted purposively. In **Democratic Alliance v Speaker of the National Assembly and others**, the Constitutional Court stated that -

“Parliament is ... entrusted with the onerous task of overseeing the Executive. Tyrannical rule is usually at the hands of the Executive, not least because it exercises control over the police and army, two instruments often used to prop up the tyrant through means like arrest, detention, torture and even execution. Even in a democracy, one cannot discount the temptation of the improper use of State organs to further the interests of some within the Executive. Needless to say, for Parliament properly to exercise its oversight function over the Executive, it must operate in an environment that guarantees members freedom from arrest, detention, prosecution or harassment of whatever nature...”¹⁴

55. With reference to the obligation of the NA contained in section 44(2) of the Constitution to scrutinise and oversee executive action, the Constitutional Court in **Economic Freedom Fighters v Speaker of the National Assembly and others; Democratic Alliance v Speaker of the National Assembly and others (Corruption Watch (RF) NPC as amicus curiae)** (**EFF1**) held that “‘scrutinise’ means subject to scrutiny. And ‘scrutiny’ implies a careful and thorough examination or a penetrating or searching reflection.”¹⁵

56. With regard to section 55(2) and the duty of the NA to exercise oversight, in **EFF1**, the Constitutional Court furthermore stated that -

“the National Assembly, and by extension Parliament, is the embodiment of the centuries old dreams and legitimate aspirations of all our people. It is the voice of all South Africans, especially the poor, the voiceless and the least remembered. It is the watchdog of State resources, the enforcer of fiscal discipline and cost effectiveness for the common good of all our people. It also

¹⁴ *Democratic Alliance v Speaker of the National Assembly and others* 2016 (5) BCLR 577 (CC) at para 17.

¹⁵ *Economic Freedom Fighters v Speaker of the National Assembly and others; Democratic Alliance v Speaker of the National Assembly and others (Corruption Watch (RF) NPC as amicus curiae)* 2016 (5) BCLR 618 (CC) at para 85.

bears the responsibility to play an oversight role over the Executive and State organs and ensure that constitutional and statutory obligations are properly executed. For this reason, it fulfils a pre-eminently unique role of holding the Executive accountable for the fulfilment of the promises made to the populace through the State of the Nation Address, budget speeches, policies, legislation and the Constitution, duly undergirded by the affirmation or oath of office constitutionally administered to the Executive before assumption of office. In sum, Parliament is the mouthpiece, the eyes and the service delivery ensuring machinery of the people. No doubt, it is an irreplaceable feature of good governance in South Africa.”¹⁶ (footnotes omitted).

57. In ***Mazibuko v Speaker of the National Assembly*** the Constitutional Court held that a motion of no confidence in terms of section 102(1) of the Constitution “*is perhaps the most important mechanism that may be employed by parliament to hold the executive to account, and to interrogate executive performance.*”¹⁷

58. In the *UDM (secret ballot)* case, the Constitutional Court affirmed the importance of a motion of no confidence as a mechanism to hold the President to account, as per *Mazibuko*.¹⁸ The Court went further to say that:

“A motion of no confidence is, in some respects, potentially more devastating than impeachment. It does not necessarily require any serious wrongdoing, though this is implied. It may be passed by an ordinary, as opposed to a two-thirds majority of Members of the National Assembly. Unlike an impeachment that targets only the President, a motion of no confidence does not spare the Deputy President, Ministers and Deputy Ministers of adverse consequences. And the Constitution

¹⁶ *EFF1* at para 22.

¹⁷ *Mazibuko NO v Sisulu NNO* 2013 (6) SA 249 (CC) at para 43.

¹⁸ At para 44.

does not say when or on what grounds it would be fitting to seek refuge in a motion of no confidence."

59. In UDM it was further held that:

"The frustration or disappointment of the losing presidential hopeful and his or her supporters could conceivably have a wide range of prejudicial consequences for Members who are known to have contributed to the loss. To allow Members of the National Assembly to vote with their conscience and choose who they truly believe to be the best presidential material for our country, without any fear of reprisals, a secret ballot has been identified as the best voting mechanism. Conversely, a Member of Parliament could be exposed to a range of reasonably foreseeable prejudicial consequences when called upon to pronounce through a vote on the President's accountability or continued suitability for the highest office."

60. In ***Economic Freedom Fighters and others (Democratic Alliance as Intervening Party) v Speaker of the National Assembly and another***¹⁹ the Constitutional Court found that the NA had failed to adopt rules to give effect to section 89 impeachment proceedings and that consequently the Assembly had failed to hold the President to account following the handing down of the *Nkandla* judgment. The Constitutional Court held the NA failed to determine properly whether the President had breached section 89(1) of the Constitution and that it had violated its constitutional duty in terms of section 42(3) of the Constitution to scrutinise and oversee the actions of the executive.

¹⁹ *Economic Freedom Fighters and others (Democratic Alliance as Intervening Party) v Speaker of the National Assembly and another* 2018 (3) BCLR 259 (CC)

61. The majority per Jafta J held that It is apparent “*that members of the Assembly wield enormous power. They may remove the President and Cabinet from office for only the reason that they have lost confidence in them. Ordinarily, the loss of confidence may stem from the manner in which the President or Cabinet performs functions or exercises power*”²⁰

62. Jafta J held further that

“The fact that members of the Assembly assume office through nomination by political parties ought to have a limited influence on how they exercise the institutional power of the Assembly. Where the interests of the political parties are inconsistent with the Assembly's objectives, members must exercise the Assembly's power for the achievement of the Assembly's objectives. For example, members may not frustrate the realisation of ensuring a government by the people if its attainment would harm their political party. If they were to do so, they would be using the institutional power of the Assembly for a purpose other than the one for which the power was conferred. This would be inconsistent with the Constitution...

*Political parties themselves derive their existence and power from the Constitution first and foremost. ... But all these rights must be exercised in a manner that is consistent with other provisions of the Constitution. They cannot be invoked to undermine the powers and functions of the Assembly.”*²¹

²⁰ Ibid at para 137.

²¹ Ibid at para 144-145.

ANALYSIS OF LACK OF OVERSIGHT - 2014 UNTIL JUNE 2017

63. The Fifth Parliament sat from June 2014 to May 2019. The first half was largely characterised by a lack of, or inadequate oversight.²² Former President Jacob Zuma was re-elected as President by the National Assembly, despite the Public Protector's report, *Secure in Comfort*, being released in March 2014. In addition, Ms Baleka Mbete, who also held the position of Chairperson of the governing party, was elected as Speaker of the National Assembly. In many ways, these two appointments came to define the Fifth Parliament.

64. The Constitution envisages the NA to be a space imbued with the principles of multiparty democracy, which is representative, participatory, responsive, accountable and open.

The Role of Speaker of the National Assembly

65. The Office of the Speaker is established in terms of section 52(4) of the Constitution without elaborating on the role and function of the Speaker. The Rules of the NA as well as various court judgments provide guidance on understanding the role of the Speaker. Essentially, the role requires impartiality and neutrality in line with the Westminster tradition.²³ The Speaker is tasked with

²² Gary Pienaar: https://pmg.org.za/parliament-review/article/gary_pienaar. More rigorous oversight began to emerge following a series of court decisions, combined with Member's no confidence motions. In addition, the Public Protector released the State of Capture report which led to the creation of four committees tasked with investigating aspects of state capture. Two of these committees were particularly energetic and worked effectively in a largely non-partisan manner – the Portfolio Committee on Public Enterprises, which inquired into management, operational and contractual issues at Eskom, and the Portfolio Committee on Home Affairs, which investigated the naturalisation of the Gupta family were said to be particularly effective.

²³ *United Democratic Movement v Speaker of the National Assembly and Others* 2017 (5) SA 300 (CC) at para 87.

maintaining order and discipline in the House, while presiding over House meetings and debates. Furthermore, the Speaker has the final authority on the interpretation and application of the rules of the NA.²⁴

66. Yet on numerous occasions, the Speaker appeared to be biased and partisan. In *Tlouamma and Others v Mbete, Speaker of the National Assembly of the Parliament of the Republic of South Africa and Another*²⁵ the applicants being minority parties represented in the NA charged that on 21 August 2014, during a presidential question and answer session, the Speaker protected the President from responding to questions in the House, did not permit follow-up questions and ignored points of order, while allowing members of the governing party to address the House. In response, 20 members of Parliament of the EFF objected and this led to a decision of the NA to suspend them without pay for periods ranging from 14 to 30 days.

- a. On 16 September 2014 during a debate on a motion of no confidence in the Speaker, the Speaker remained in the House seated next to the then Deputy President, observing the proceedings. She had previously addressed ANC supporters outside Parliament, before the debate convened, using police loud hailer equipment.²⁶
- b. On 13 November 2014 during a debate on the *Ad Hoc* committee report on Nkandla the Speaker of her own accord and without consulting any

²⁴ National Assembly Guide to Procedure

<https://www.parliament.gov.za/storage/app/media/GUIDE.pdf> at pages 17 -23.

²⁵ *Tlouamma and Others v Mbete, Speaker of the National Assembly of the Parliament of the Republic of South Africa and Another* 2016 (1) SA 534 (WCC) paras 33 – 35.

²⁶ <https://www.dailymaverick.co.za/article/2014-09-17-the-great-baleka-mbete-debate-how-the-anc-won-the-battle-and-lost-the-pr-war/>.

other Member, changed the programme, supposedly, due to time constraints. Chaos ensued yet again, when the Speaker did not pay heed to the objections to her decision.²⁷

- c. There were other incidents too where the Speaker was clearly partisan, such as in January 2015 when the Speaker in her capacity as the party's chairperson, attending the ANC's 103rd birthday celebration and on other occasions publicly criticising opposition parties while espousing support for the ANC.
- d. The Speaker was again said to be complicit in the violent removal of members of opposition parties from the House and was said to have approved of the manner in which they were removed.²⁸
- e. In another incident on 12 February 2015, a signal jamming device was used to prevent media broadcasting of the State of the Nation Address. The Speaker was seemingly unaware as to who authorised the signal jamming as well as the reasons behind the use of the signal jammer. At the same event, the Speaker permitted the violent removal of members of the National Assembly from the House.²⁹
- f. The National Assembly, through the Speaker, shielded the President from oversight and accountability. As a consequence, some decisions

²⁷ <https://www.politicsweb.co.za/replies/rowdiness-of-da-and-eff-mps-deplorable--office-of->

²⁸ <https://mg.co.za/article/2016-05-04-parliament-protection-services-forcibly-remove-eff>.

²⁹ *Primedia Broadcasting (Pty) Ltd and Others v Speaker of the National Assembly and Others* 2017 (1) SA 572 (SCA).

and conduct taken by the Speaker and Parliament, were taken on review to the Constitutional Court, and are discussed below.

ANALYSIS OF COURT JUDGMENTS ON THE NARROWING OF SPACE IN THE ASSEMBLY

67. Constitutional Principle XIV³⁰ requires that provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy. To this end, section 57(2)(d) of the Constitution provides for the recognition of the leader of the largest opposition party in the National Assembly as the Leader of the Opposition. This therefore creates a constitutional imperative that the rules and orders of the NA provide for the participation in the proceedings of the NA and its committees of minority parties represented in the NA in a manner consistent with democracy. There is an additional imperative for the financial and administrative assistance to each party represented in the NA in proportion to its representation, as created by section 57(2)(c) of the Constitution. In *Democratic Alliance and Another v Masondo NO and Another*³¹ the Constitutional Court held that the purpose of these provisions is to ensure that minority parties can participate meaningfully in the deliberative processes of Parliament.

68. In *S v Lawrence; S v Negal; S v Solberg*³² Sachs J opined that;

³⁰ <https://www.sahistory.org.za/archive/document-35-constitutional-principles-schedule-4-interim-constitution>.

³¹ *Democratic Alliance and Another v Masondo NO and Another* 2003 (2) SA 413 (CC) at para 18.

³² *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC) at para 160.

“[T]he Constitution does not envisage a mathematical form of democracy, where the winner takes all until the next vote-counting exercise occurs. Rather, it contemplates a pluralistic democracy where continuous respect is given to the rights of all to be heard and have their views considered...

The open and deliberative nature of the process goes further than providing a dignified and meaningful role for all participants. It is calculated to produce better outcomes through subjecting laws and governmental action to the test of critical debate, rather than basing them on unilateral decision-making. It should be underlined that the responsibility for serious and meaningful deliberation and decision-making rests not only on the majority, but on minority groups as well. In the end, the endeavours of both majority and minority parties should be directed not towards exercising (or blocking the exercise) of power for its own sake, but at achieving a just society where, in the words of the Preamble, ‘South Africa belongs to all who live in it ...’.

69. That a vibrant opposition in the NA is essential for accountable government is axiomatic, but this accountability function is self evidently not the sole preserve of the opposition within the NA. Section 47 of the Constitution prescribes eligibility for membership of the NA and determines how a person loses his or membership of the NA. Pertinently, section 47(3)(c) makes party political membership a condition for being a member of the NA. Security of tenure and a parliamentary career are conditional upon members maintaining membership of the nominating political party. As a consequence, section 47(3)(c) limits the freedom of individual members to follow the dictates of personal conscience and moral conviction. Members run the risk of facing disciplinary action and consequent dismissal by

their party leadership in the event that they express positions which differ from the party line.³³

70. Section 1 of the Constitution establishes South Africa as a “multi-party system of democratic government” to ensure “accountability, responsiveness, and openness”. Yet despite this injunction, the NA is characterised by majoritarianism which has resulted in the narrowing of space for debate in the NA. A series of cases decided by the Constitutional Court attest to this premise.

*Mazibuko NO v Sisulu NNO*³⁴

71. Lindiwe Mazibuko, the then Leader of the Opposition in the NA challenged the constitutionality of the Rules of the NA in so far as they failed to vindicate the right of a Member of the Assembly to have a motion of no confidence in the President debated and voted on as a matter of urgency. This was after she had given notice in the NA of a motion of no confidence in the President in accordance with section 102 (2) of the Constitution. The Chief Whip’s Forum and the Programme Committee failed to agree on if and when the motion should be debated and voted in the NA.

72. The Constitutional Court held that to the extent that the Rules regulating the Assembly do not vindicate the rights of members of the Assembly, they are inconsistent with section 102(2) of the Constitution and invalid.

³³ See for example where former Dr Makosi Khoza was removed as chairperson of the parliamentary portfolio committee on public service and administration and attempts were made for her to appear before an ANC disciplinary panel after she publicly supported the call for the removal of President Jacob Zuma. <https://www.enca.com/south-africa/makhosi-khoza-disciplinary-hearing-begins>

³⁴ *Mazibuko NO v Sisulu NNO* 2013 (6) SA 249 (CC).

73. Importantly, the Court held that;

“...a vital constitutional entitlement to move a motion of no confidence in the President cannot be left to the whim of the majority or minority in the Programme Committee or any other committee of the Assembly. It would be inimical to the vital purpose of section 102(2) to accept that a motion of no confidence in the President may never reach the Assembly except with the generosity and concurrence of the majority in that Committee.”³⁵

74. The attempts to throttle constitutionally embedded accountability mechanisms in turn affect the checks and balances element necessary for the proper functioning of the separation of powers doctrine. In turn, the available space for dissent within the NA narrows, with the result that the oversight function of the NA becomes less effective.

*Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly*³⁶

75. The Public Protector, Thuli Madonsela released a report in March 2014 detailing findings of investigations into R246 million of taxpayers’ money spent on upgrades to President Jacob Zuma’s private residence. The investigation found that the President breached the executive members’ code of ethics, which in turn resulted in the infringement of constitutional principles, laws and procedures. In the initial

³⁵ *Mazibuko NO v Sisulu NNO* 2013 (6) SA 249 (CC) at para 57.

³⁶ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC).

14-day period granted by the Public Protector, the President provided an unsatisfactory response to Parliament regarding the findings of the report.

76. For its part, the NA set up two *Ad Hoc* Committees, comprising its members, to examine the Public Protector's report as well as other reports including the one compiled, also at its instance, by the Minister of Police. Members of opposition parties withdrew from the Ad Hoc Committee, on the basis that they could not legitimise a process designed to shield the President from accountability. The ANC had a majority and hence a quorum on the Committee and was thus able to function without the opposition parties. After endorsing the report by the Minister of Police exonerating the President from liability and a report to the same effect by its last *Ad Hoc* Committee, the NA resolved to absolve the President of all liability. Consequently, the President did not comply with the remedial action taken by the Public Protector.

77. The NA chose not to challenge the Public Protector's report on the basis of the findings made by the Minister of Police and the *Ad Hoc* Committee, despite the fact that the NA had a constitutionally enshrined duty to hold the President accountable by facilitating and ensuring compliance with the remedial action of the Public Protector.

78. The NA created a parallel process whose only purpose was to circumvent the findings of the Public Protector. This constituted a failure by the NA to properly exercise its oversight function over the former President. This served to invalidate and render useless the Public Protector's remedial action.

79. The majority party used its numerical advantage to shield the President from accountability.

Economic Freedom Fighters and Others v Speaker of the National Assembly and Another ³⁷

80. In 2017, the Economic Freedom Fighters (EFF), United Democratic Movement (UDM) and the Congress of the People (COPE) approached the Constitutional Court for an order declaring that the Speaker of the NA had failed to put all appropriate mechanisms and processes in place to hold President Jacob Zuma to account for violating the Constitution through his failure to implement the report of the Public Protector regarding non-security upgrades at his Nkandla residence. The opposition parties further asked for a declaration to compel the NA to investigate Jacob Zuma's conduct in the *Nkandla*³⁸ matter, with a view to determining whether his conduct warranted an impeachment.

81. The Court held that the Assembly would, absent certain exceptional circumstances, prior to impeachment proceedings being launched, be required to determine, as a preliminary enquiry, whether one of the listed grounds for impeachment existed. Without such rules, it would not be possible to implement a section 89 process.

³⁷ *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC).

³⁸ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC).

82. The Court then examined whether the NA had failed to hold the President to account following the release of the Nkandla Report and the judgment of the Court in the same matter (EFF1). On this the Court rejected the argument that the Question and Answer sessions and the motion of no confidence held in terms of section 102(2) of the Constitution, were measures taken in terms of section 89(1). The Court then clarified that the section 89(1) procedure had its own specific and unique requirements for which the Assembly was mandated to create rules. The Court noted that without the preliminary enquiry to assess whether one of the listed grounds for impeachment were present, it would be unconstitutional to remove the President.

83. The Court further held the fact that the NA had failed to properly determine whether the President had breached section 89(1) of the Constitution was a violation of the NA's constitutional duty. Such duty was in accordance with section 42(3) of the Constitution, which mandates the NA with scrutinising and overseeing the actions of the executive.

84. In rejecting the *Ad Hoc* Committee system as the means to determine impeachment proceedings, the Court held that;

"A decision by members of the majority party in the ad hoc Committee may prevent an impeachment process from proceeding beyond the committee, to shield a President who is their party leader."

85. The decision recognises that the numerical dominance of political parties in Parliament can result in the loss of accountability, and hence seeks to ensure that

the ability of minority parties to exercise accountability and oversight are not stymied.

*United Democratic Movement v Speaker of the National Assembly and Others*³⁹

86. The United Democratic Movement (UDM) joined by all the opposition political parties represented in Parliament, lodged an application before the Constitutional Court. The crisp issue was whether the Constitution requires, permits, or prohibits votes by secret ballot in motions of no confidence in the President of the Republic.

87. The Speaker had averred that that neither the Constitution nor the Rules of the National Assembly allow her to authorise a vote by secret ballot, an argument with the Court rejected. Instead, the Court held that the Speaker has the power to authorise a vote by a secret ballot in motion of no confidence proceedings against the President, in appropriate circumstances.

88. In finding that the Speaker has the power to authorise a vote by secret ballot, the Court took cognisance of the fact that “*Due regard must always be had to real possibilities of corruption as well as the prevailing circumstances and whether they allow Members to exercise their vote in a manner that does not expose them to illegitimate hardships.*”⁴⁰

89. In this regard, the decision sought to counter the narrowing space for dissent in the NA through safeguarding the responsibility of Members of Parliament to vote

³⁹ 2017 (5) SA 300 (CC).

⁴⁰ *United Democratic Movement v Speaker of the National Assembly and Others* 2017 (5) SA 300 (CC) at para 88.

according to their conscience to enforce accountability without undermining the need to let them toe the party line when it is inappropriate to do so.

ELECTORAL REFORM

90. Section 55(2) of the Constitution which requires Parliament to establish mechanisms to hold the national executive and organs of state to account is dependent upon the electoral system in which it operates in order to achieve its full intended purpose. The closed-list system of proportional representation means that there are no direct lines of political accountability between voters and parliamentarians. Linked to this are sections 47(3)(c) and 106(3)(c) which make party political membership a prerequisite for one to be and remain as a member of Parliament. Loss of membership of a party on whose list a member was elected, will result in the loss of the seat. The net effect is that Members of Parliament are accountable and beholden to their party bosses primarily, rather than to the electorate. The seat belongs to the party, not the member assigned to it.

91. The NA has been largely deferential to the executive in a number of notable instances including the allowing of the South African Defence Force (SANDF) to deploy armed personnel on the precincts of Parliament as well as the Department of State Security's use of signal jamming devices during the 2015 State of the Nation Address. The electoral dominance of the governing party has led to the blurring of the line between the party and the state hence the NA's deference to the executive.

92. In turn, the courts have become the site of political contestation, perpetuating the perception that courts are interfering in the politics of the day through judgments which weaken the government's authority and power. A further perception as result of the cases that have come before the courts is that the judiciary is counter-majoritarian and partial, which may threaten the public perception of judicial legitimacy. It must be said that these perceptions arose over cases that were could and should have been resolved by the NA.
93. The Fifth Parliament saw the entrenchment of majoritarianism, to the exclusion of opposition parties. This contributed to poor oversight over the executive and organs of state, in turn allowing State Capture to flourish, seemingly unabated. Ultimately, the NA's inability to effectively discharge its oversight mandate resulted in the weakening of Parliament as a pillar of South Africa's constitutional democracy.

THE CORDER REPORT

94. Parliament's Oversight and Accountability Model mentioned earlier draws from a Report on Parliamentary Oversight and Accountability prepared by Hugh Corder, Saras Jagwanth and Fred Soltau for the Speaker of the National Assembly in July 1999 (the Corder Report) – a copy of this Report is attached to this submission (**Annexure 1**). However, Parliament's Model does not reference the Corder Report and it is not known whether this Report was ever formally considered or adopted by the National Assembly or its Rules Committee.
95. The terms of reference for Corder included the following:

- Outline and explain the nature of the obligation that s 55(2) places on the National Assembly. Incorporated in this task is the list of bodies that should under section 55(2) of the Constitution account to Parliament, including ‘organ of state’ and ‘national executive authority’.
- Establish the nature, frequency, contents and purposes of reports currently submitted to Parliament, and provide an overview of existing Parliamentary procedures for dealing with reports that are submitted. In the light of this what processes in addition to reports are necessary to ensure effective oversight.
- How does Parliament ensure the accountability of State Institutions Supporting Constitutional Democracy without infringing their independence?
- What mechanisms and procedures could be put in place to achieve the fulfilment of the constitutional obligation of Parliamentary oversight of the executive?

96. While we do not intend to summarise the whole Corder Report we believe there are some recommendations which remain relevant and should be considered afresh. They can be summarised as follows:

- An Accountability Standards Act
- An Accountability and Independence of Constitutional Institutions Act
- The establishment of a Standing Committee on Constitutional Institutions

97. It is trite that the oversight framework in Parliament has failed to expose and hold those responsible for state capture and corruption to account. The tools at Parliament’s disposal therefore need to be strengthened.

98. An Accountability Standards Act would serve the following purposes:

- (i) partially to fulfill the NA's constitutional obligations for establishing accountability mechanisms;
- (ii) to set the broad framework and minimum requirements for accountability; and
- (iii) to provide an authoritative and mandatory framework within which committee members can perform their oversight task.

99. Its primary advantage would be to provide a legislative basis for holding members of the executive accountable, given the reluctance by MPs from the majority party to stand up to their political seniors. This is compounded by the present electoral system in which MPs are beholden to their party hierarchies. Whilst the electoral system is likely to be changed following the judgment of the Constitutional Court in *New Nation Movement* case⁴¹, the influence of political parties on MPs is unlikely to be fundamentally altered, at least in the short term.

100. The Corder Report referring to what it calls 'Amendatory Accountability' states that the "Act should oblige (the) executive and organs of state to answer and submit to scrutiny, as well as imposing on them an obligation to redress grievances. This means that remedial action should be authorised for exposed errors, defects of policy or maladministration. This form of amendatory accountability is essential to an effective system of reporting."

101. It goes on to say "where those in political office have made themselves guilty of corruption or financial misconduct responsibility should be legislated, just as it is in the case of civil servants. In terms of the Public Finance Management Act

⁴¹ Supra, note 41

offences by accounting officers (Heads of Departments or CEOs of institutions) are punishable either by a fine or imprisonment.”

102. Corder also highlights the need to clarify the accountability lines between senior civil servants and Ministers, so that there exists a continuum of accountability to Parliament. This would eliminate things falling between the cracks as responsibility is shifted between directors-general and Ministers, with neither being held accountable.

103. Corder also moots the idea of establishing a specialised agency (Comptroller or National Audit Office) to conduct programme evaluation audits to determine whether a project has delivered the outcomes and objectives that were set. Such an agency would make available its assessments to Parliament to capacitate its oversight role. Parliament does not at present have the capacity to process complex reports itself.

104. The Corder Report also considered the financial and administrative independence of state institutions supporting constitutional democracy (the so-called Chapter Nine Institutions), and how Parliament can ensure the accountability of these institutions without undermining their independence. This was an exercise repeated by the National Assembly's Ad Hoc Committee on the Review of Chapter Nine and Associated Institutions, which resulted in the 'Asmal Report' in 2007.

105. Corder emphasises the dual role of Chapter Nine institutions in relation to Parliament:

“Firstly they should be seen as complementary to Parliament's oversight function: *together* with Parliament they act as watch-dog bodies over the

government and organs of state. Secondly, they support and aid Parliament in its oversight function by providing it with information that is not derived from the executive... This function is most obvious in relation to the office of the Auditor-General which performs the primary part of oversight of financial matters, but this is clear also in relation to the other institutions in chapter 9. The Public Protector for example has as its main function the investigation of improper conduct in state or government affairs and in the public administration which also forms a crucial part of Parliament's oversight role. Similarly, the Human Rights Commission not only ensures the protection and development of human rights but is also the main vehicle through which the implementation of socio-economic rights in government departments is monitored."

106. The latter role has regrettably been neglected, especially by Parliament.

Parliament has failed to use the reports submitted by these institutions to hold the executive accountable, with the exception of reports from the Auditor General.

107. Corder again proposes new legislation to deal with Chapter Nine bodies, an Accountability and Independence of Constitutional Institutions Act, which would also include the Public Service Commission, Judicial Service Commission, Independent Communications Authority (ICASA) and the Finance and Fiscal Commission. The Act would inter alia deal with the following matters:

- the full financial independence of constitutional institutions. To give effect to this it should be provided that the budget of these institutions should not be

linked to the budget of a government ministry, ensuring that they will not be vulnerable to political pressure by way of financial penalties.

- the full administrative independence of constitutional institutions. Provision should be made for Parliament, through its relevant committees, to exercise both a supportive and monitoring role for constitutional institutions.
- the establishment of a Standing Committee on Constitutional Institutions. The establishment of this Committee appears to be required by s 193(5)(a) of the Constitution, which provides for nominations for membership of constitutional institutions by a Committee of the National Assembly.

108. This Standing Committee on Constitutional Institutions would-

- nominate and make recommendations for appointment of members to constitutional institutions;
- receive and consider all reports of constitutional institutions;
- hold hearings and call recalcitrant respondents to account before it where such respondents resist the recommendations of the constitutional institution concerned.

109. Whilst these proposals to strengthen Parliament's oversight of the executive and organs of state are necessary, the electoral dominance of the majority party, and its shameless exploitation of majoritarianism within the Rules of Parliament will temper their impact on fighting corruption and ensuring clean governance. Political parties will use whatever mechanisms at their disposal to protect their own. Electoral reform is unlikely to change this template significantly.

RECOMMENDATIONS

Electoral Reform

110. In 2002, Cabinet appointed an Electoral Task Team (ETT) chaired by Dr Frederick Van Zyl Slabbert. The ETT was tasked with formulating new electoral laws for the 2004 elections and beyond. The majority report of the ETT proposed a system in which an open list proportional representation system would ensure the correct balance between individual and party accountability. Voters would select a party and thereafter rank candidates in the order in which they think they should be elected to Parliament, depending on the proportion of votes the party received. The hybrid electoral system not only meets constitutional muster in so far as the proportional representation aspect is concerned but would also increase the responsibility of individual representatives towards their constituents. This would lead to members of the NA being more accountable to the electorate – as opposed to their parties and party bosses. In view of the New Nation Movement case it is opportune that the recommendations of the ETT are reconsidered.

111. The 2017 High Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change also recommends that Parliament should amend the *Electoral Act* to provide for an electoral system that makes Members of Parliament accountable to defined constituencies on a proportional representation and constituency system for national elections.

112. The recent judgment of the Constitutional Court in the *New Nation Movement* matter⁴² will now compel Parliament to amend the electoral system within 24 months. Whether a new electoral model will enhance the accountability of MPs however remains uncertain.

Sections 47(3)(c) and 106(3)(c) of the Constitution

113. Having discussed the provisions of sections 47(3)(c) and 106(3)(c) of the Constitution above, it is recommended that the provision be amended to allow for a free mandate for members of the NA. This would give effect to the constitutional imperative for accountability, responsiveness and openness, underpinning a system of multiparty democratic governance. However, it is noted that the judgment of Justice Madlanga in the *New Nation Movement* case emphasised that the constraints of section 47(3)(c) whilst applying to members of political parties, would have no effect on independent members in a new electoral dispensation. An amendment of these sections would be especially appropriate should a new system incorporate an open list proportional representation system within a multi-member constituency.

Appointments to Key Institutions

114. Since much of the State Capture within state organs and the national executive, was enabled by key personnel, it is recommended that Parliament creates effective public participation and Parliamentary oversight mechanisms for specified classes of appointments to public office. The involvement of Parliament

⁴² *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* [2020] ZACC 11

would increase both the independence and accountability of such players while narrowing the scope for untoward external influence, especially where appointments are made by members of the executive.

115. We support the proposals made to the Commission by Corruption Watch and the Institute for Security Studies regarding the processes for the appointments of the heads of such institutions.

116. We propose that the heads of the SAPS, Hawks, Independent Police Investigating Directorate (IPID), and Financial Intelligence Centre (FIC) be appointed through an open, competitive and transparent process conducted by Parliament – this should include the publication of detailed job specification and eligibility criteria, a public call for applications and nominations, public interviews of shortlisted candidates and a resolution of the National Assembly recommending a candidate for appointment. The suspension and removal mechanisms for these office bearers should also be subject to transparent parliamentary oversight.

117. We commend the open, transparent and participatory process followed in appointing the National Director of Public Prosecutions (NDPP) in late 2018, and recommend that it be formalised for future appointments, with the legislative changes that may be necessary. Alternatively it is proposed that the NDPP be appointed on the recommendation of the Judicial Service Commission (JSC) in a process consistent with the appointment of judges.

Impartiality of the Speaker of the National Assembly

118. It is recommended that to ensure political impartiality at all times, the Rules of the NA be amended to specify that the person elected as Speaker should not hold office within any political party.

Appointment of Chairpersons of Parliamentary Committees

119. Chairpersons of parliamentary committees undoubtedly play a key role in how the committees discharge their oversight mandates. While traditionally, only the Standing Committee on Public Accounts (SCOPA) has a chairperson drawn from outside the ranks of the governing party, it is recommended that chairpersons should be appointed from among parties represented in the NA, according to a proportional formula. This may assist in countering the majoritarian domination by the governing party. In addition all presiding officers in both Houses are also currently drawn from the majority party, a practice that has deviated from that adopted in earlier post-1994 parliaments.

Performance Contracts for Cabinet Ministers

120. The President has announced a system of 'performance contracts' for Ministers in the Cabinet to enhance the efficiency and responsiveness of government. However, these contracts have apparently not been finalised and made public, which the President has committed to do, including during his State of the Nation Address in February 2020. The President should also be encouraged to provide these contracts, their performance indicators and bi-annual assessments to

Parliament to facilitate effective oversight. Where shortcomings are identified, there must be consequences, including, where appropriate, effective remedial action. It is of great concern that it is now reported⁴³ that these contracts have not been finalised, and its implementation has been suspended.

Oversight and Accountability

121. As mentioned earlier it is opportune to consider the recommendations contained in the Corder Report. Parliament should be advised to consider formulating and developing legislation (an Accountability Standards Act) to provide a mandatory, legal basis for committees to hold the executive to account.
122. Parliament should also consider legislating an Accountability and Independence of Constitutional Institutions Act to strengthen the framework for Chapter Nine institutions to function effectively.
123. This should include provisions to establish a Standing Committee on Constitutional Institutions to oversee the Chapter Nine bodies, deal with appointment processes for these bodies, and process all reports received from them to ensure that recommendations and remedial action are implemented.

Dedicated Anti-Corruption Agency

124. It is also recommended that a dedicated, independent and multi-function anti-corruption agency be established as a means of both deterring and combating

⁴³ <https://www.businesslive.co.za/bd/national/2020-07-12-ramaphosa-deletes-cabinet-performance-plan-despite-promise/>

corruption which has flourished in the face of weak accountability mechanisms. We have seen how the various law enforcement agencies were themselves captured in recent years, extinguishing their capacity to investigate and prosecute perpetrators of state capture and corruption.

125. The institutional capacity of the Directorate for Priority Crimes Investigation (the Hawks) and the National Prosecuting Authority (NPA) was hollowed out via the appointment of pliable heads of those institutions.

126. CASAC has long advocated the establishment of an independent anti-corruption agency. A report entitled “Corruption – Towards a Comprehensive Societal Response” was first published by us in March 2011 – an updated abbreviated version of this report is annexed to this submission (**Annexure 2**). This report outlines the existing multi-agency approach towards fighting corruption, their challenges and shortcomings.

127. CASAC proposes the adoption of a “*single-agency*” model – to create a dedicated independent anti-corruption agency, mandated to combat corruption by following a three-pronged strategy of (1) enforcement (including investigation and referral for prosecution); (2) prevention; and (3) education. Such an institution, if properly funded and well-staffed, would enable decisive and effective action to be taken.

128. The report notes that:

“South Africa finds itself, at this moment in history, attempting to move into a “post-state capture society” – to rebuild public trust in law enforcement and the public service, and to combat corruption effectively. CASAC takes the view that, in order to ensure public confidence in anti-corruption mechanisms in this post-

state capture society, it will be necessary to make a decisive break from our existing institutions, and to establish a new, clearly independent entity, which can take on the task of anti-corruption functions in a holistic and targeted manner.

The crisis of state capture demands that we are innovative in crafting solutions.”

129. The report considers the basic elements of such an agency, including its institutional design and its mode of operation. Its design must incorporate the following factors:

- independence
- its legal basis
- institutional location
- appointment of its head and other personnel
- accountability
- resourcing

130. The agency must be mandated to perform three key tasks:

- Enforcement of anti-corruption law, by investigating all complaints and referring matters to the NPA for prosecution.
- Prevention of corruption, by providing advice on how to prevent corruption. This function could include a wide range of activities, such as developing anti-corruption strategies and plans; monitoring and evaluating current measures; research on corruption; and reviewing existing policies and legislation.
- Public education on corruption.

CONCLUSION

131. The current system of checks and balances enshrined in the Constitution has proven to be inadequate in preventing the abuse of power by public representatives and officials.

132. We hope that the Commission of Inquiry will engage with the recommendations and proposals in this submission. They seek to advance the effectiveness of the functioning of Parliament, and in particular its oversight of the executive arm of the state, including organs of state.

133. Finally the proposal for a new institutional arrangement to combat and prevent corruption and state capture is deserving of attention. We cannot expect the same institutional architecture to be significantly more effective in the future than it was in the past, just because there have been a few changes in personnel.

Cape Town

14 July 2020