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1. Introduction

Corruption Watch is a civil society organisation that was launched in January 2012¹. We encourage the public to report incidents of corruption to us and provide platforms to do so, and we use these reports as an important source of information to fight corruption in South Africa in turn holding our leaders accountable. We achieve this through research, policy advocacy, public mobilisation campaigns, strategic litigation, mass communications, and select investigations.

Since 2016, Corruption Watch has actively focused on campaigning around appointment processes of leaders to institutions that comprise our criminal justice system, the South African Reserve Bank, the board of directors for State-Owned Enterprises, as well as institutions established under Chapter 9 of the Constitution of the Republic of South Africa. The objectives of our work are largely to advocate for candidates to be appointed in a transparent manner, and to ensure that they are assessed against clear, merit-based, and objective criteria.

Corruption Watch also calls for avenues to be established that allow for public participation in the appointment proceedings. Independent and robust institutions that act in the public interest, and who operate without fear, favour or prejudice, are imperative to safeguarding South Africa's constitutional democracy. The collapse of these institutions gives rise to a state where there are no adequate checks and balances, where impunity prevails, and where the public is made vulnerable to abuse of our constitutional rights.

Along with the Institute for Security Studies (ISS), we made a previous joint submission to the Judicial Commission of Inquiry into Allegations of State Capture (the 'Judicial Commission'), chaired by Deputy Chief Justice Raymond Zondo. We highlighted how the appointments of certain compromised persons to

¹ Corruption Watch is registered as a non-profit company in terms of the Companies Act 71 of 2008.

prominent leadership positions within the criminal justice system led to the manipulation of these agencies for various nefarious purposes to ensure “that numerous politicians and politically connected individuals enjoy impunity against investigation and prosecution” during the era of state capture.

In our submission, we note the harmful effects of these politically motivated appointments and how the interference in criminal justice agencies directly impacted the public most negatively. By 2016/2017, car hijackings, residential robberies, business robberies, cash-in-transit heists, truck hijackings, and murder rates soared in the country. This was largely due to the South African Police Service (SAPS) and its Crime Intelligence branch being crippled internally by poor leadership appointments, as well as internal cases of corruption and criminality. During the same period, the performance of the National Prosecuting Authority (NPA) had substantially declined and public confidence in the country’s crime and corruption fighting institutions was at an all-time low. Our research illustrates how the political manipulation of criminal justice agencies rendered them ineffective in serving the public, and futile in protecting our constitutional democracy from criminal, and particularly corrupt, elements.

This submission is linked to Corruption Watch’s previous submission to the Judicial Commission. Its purpose is to highlight Parliament’s role in the appointment of leadership positions to key oversight institutions, and how this capacity should be strengthened to prevent compromised individuals assuming positions in organisations that are meant to protect and defend our democracy.

2. The role of Parliament in appointment proceedings

The National Assembly is tasked with appointing the heads for the following institutions:

The Office of the Public Protector

The Auditor-General

The South African Human Rights Commission

The Commission on Gender Equality

The Commission for the Promotion and Protection of Rights of Cultural, Religious and Linguistic Communities

The Independent Electoral Commission

The Inspector-General of Intelligence

The Independent Policing Investigative Directorate (through approving the Minister of Police’s appointment)

Most of these appointments are guided by clear legislation that outlines the qualification criteria for the incumbent, establishes that candidates should be deemed to have some form of personal integrity, and that candidates should be 'fit', 'proper' or 'suitable' for the positions that they wish to occupy. However, whilst the various legislative frameworks are not too prescriptive a lack of rules and uniformity in proceedings in this space gives rise to political influence over appointment processes.

3. Analysis of the 2016 appointment of the Public Protector

Concerning the appointments of heads to Chapter 9 institutions, prior to 2016 these processes were largely unstructured, and differed according to which parliamentary committee was responsible for conducting the proceedings at the time. Against this backdrop, in 2016 Corruption Watch launched its first campaign to monitor the process of appointing the new Public Protector. Advocate Thuli Madonsela's seven year, non-renewable term as the Public Protector was drawing to a close. Corruption Watch, along with many other civil society organisations, were concerned about the potential for political destabilisation of the institution, given the crucial role that it played in investigating cases of corruption which implicated former president Jacob Zuma, and those associated with the state capture project.

The purpose of our campaign was threefold: firstly, to create public awareness around the appointment process through a mass media campaign; secondly, to create avenues for public participation in the proceedings; and lastly, to ensure that the process was transparent. Corruption Watch engaged extensively with the parliamentary Ad Hoc Committee to nominate a person for Appointment as Public Protector and wrote various submissions requesting transparency and avenues for public participation in the appointment proceedings. Based on our submissions, the Ad Hoc Committee undertook the following:

- Published on Parliament's website the CVs of candidates who applied, or who were nominated, for the position of Public Protector;
- Allowed the public to comment and/or object to candidates. Public comments were taken into consideration when interviewing candidates;
- Made publicly available the questionnaires that were completed by shortlisted candidates; and
- Provided Corruption Watch with the identity numbers of candidates so that the organisation could conduct financial and security vetting – the results of which were provided to the Committee and used to scrutinise candidates in the interview process.

Corruption Watch also conducted a screening process on candidates who applied/were nominated, and the Committee utilised these profiles to shortlist applicants.

The steps taken by the Ad Hoc Committee to ensure that the process was transparent and inclusive of the public **set** a positive precedent for the future of parliamentary appointment proceedings. Since the appointment of the Public Protector, Parliament has since published the CVs of all individuals who apply/nominated for leadership positions in Chapter 9 institutions, and has ensured that there are periods set aside for public comment/objections on candidates.

The standardisation of parliamentary appointment processes is a step in the right direction and Corruption Watch is encouraged by the changes that were achieved within a short period. The Ad Hoc Committee to nominate a person for Appointment as Public Protector should be acknowledged for their willingness to create a more open and inclusive procedure. However, the lack of a robust process to scrutinise candidates based on merit and objective criteria gave rise to the incumbent Public Protector, Adv. Busisiwe Mkhwebane, whose legal ability and application of the law has been brought into question through a number of judgments². The mistakes made in respect of recruitment screening and selection processes can be costly to these institutions, the state, and our democracy at large.

The shortlisting and interviewing processes are perhaps the most crucial part of any selection proceedings. In order to conduct an effective shortlisting process, candidates should be screened to ensure that they meet the minimum criteria and established requirements for the position. Thereafter, the Committee should develop a fair set of metrics with the sole purpose of identifying a pool of the best-suited candidates for the position. However, in the appointment of the Public Protector this was not the case. MPs nominated candidates based on their political and/or ideological preferences by providing the chairperson of the Committee with names and offering no justification or motivation for their choice. In the end, the shortlist consisted of 14 individuals – half of which, based on their lack of technical experience and skillset, should not have qualified to be on the list. The interview process was particularly flawed due to questions from MPs often being inconsistent, with no objective testing for specific skills or knowledge about the institution or its processes. Thus, the absence of adequate criteria in shortlisting, as well as an unstructured probing process, led to a marathon of interviews that lasted for 20 hours, with the final candidate being interviewed at 2:00 am the following morning.

² *South African Reserve Bank v Public Protector and others* 2017 (Reserve Bank v Public Protector) (6) SA 198 (GP)
ABSA Bank Limited and others v Public Protector and others (ABSA v Public Protector) [2018] 2 ALL SA 1 (GP).
Public Protector v. South African Reserve Bank (CCT107/08) [2019] ZACC
Democratic Alliance v Public Protector; CASAC v Public Protector [2019] ZAGPPHC 132 (20 May 2019)
Minister of Water and Sanitation v Public Protector ZAGPPHC 193 (31 May 2019).

The knock-on effect of this inconsistent process became evident in the final deliberation proceedings when the Committee had to nominate a suitable candidate. Criteria relating to transformation, as well as the importance of women leadership, played a key role in the deliberation process – as it should, given South Africa’s history of oppression and inequality. However, MPs provided no further objective motivation based on the competencies of candidates that could be weighed against the requirements of the position. The nomination of Adv. Busisiwe Mkhwebane was not unanimous, with the Democratic Alliance choosing not to support the nomination. However, since her appointment in 2016, several political parties have questioned Adv. Mkhwebane’s fitness, and currently, Parliament is considering a process to remove the incumbent from office due to a slew of legal challenges and questions of competence.

4. Analysis of the 2019 process to renew the IPID executive director’s term

The failure to use objective criteria as a central tenet in decision making is not only a concern in relation to appointment processes, but also in relation to the renewal of contractual terms. In February 2020, Corruption Watch intervened in the legal matter between Robert McBride and the Minister of Police regarding McBride’s reappointment as Executive Director of the Independent Policing Investigative Directorate (IPID). The case raised the important constitutional issues regarding the separation of powers and the consequent impact that it has on the independence of bodies like IPID. This was a result of the Minister of Police Bheki Cele’s refusal to renew McBride’s contract as the Executive Director of IPID. In its court papers, and in a [submission](#) to the Portfolio Committee on Police (PCP), Corruption Watch argued that the PCP should have a significant responsibility in determining the extension or termination of such a contract, and not merely act as a mechanism to rubberstamp the Minister’s decision.

Our submission to the PCP noted that the Committee had the necessary information at its disposal to decide on the renewal of the current executive director’s contract in an objective manner. This was because over the last five years, the PCP sat to discuss IPID at least 43 times and was accordingly in a position to make such a decision. To this end, we requested that the Committee ensure that due process is followed when discharging its oversight function in the decision of possibly renewing McBride’s contract and proposed that consideration should be given to the following:

- The performance of the incumbent as the Executive Director and Accounting Officer of IPID over the last five years;
- The performance of IPID under the leadership of the incumbent over the last five years;
- If the incumbent has executed his work with independence, integrity, conscientiousness and honour, and is considered to be fit and proper;
- The advantages and disadvantages associated with the renewal of the incumbent’s contract;

- The advantages and disadvantages associated with the non-renewal of the incumbent's contract; and
- The preliminary recommendation provided by the Minister of Police to not renew the contract of the incumbent, and whether this decision can be considered as reasonable and rational.

Despite Corruption Watch's appeals, and that of other civil society organisations who requested that the PCP provide fair metrics in their decision making processes, the majority of the African National Congress members in the Committee moved to not renew McBride's contract. Whilst we accept that McBride had no automatic or legal right to an extension of his contract, the process that was undertaken to come to this conclusion exposes an inherent flaw in Parliament's structure: MPs are not required to objectively discharge their oversight mandate, they are often only guided by their party line and not the public interest, and they face limited to no accountability for not exercising their role as public representatives.

Similar to the flawed process that guided the appointment of the Public Protector, the effects of the PCP's decision has destabilized IPID as an independent institution, and hampered its ability to investigate police corruption and misconduct. Following the exit of McBride as the Executive Director, the Minister of Police appointed Victor Senna as the acting Executive Director. Section 6(5) of the IPID Act states that an acting appointment can be made for a reasonable period, which may not exceed one year. However, the Minister stalled this appointment process for over a year and in March 2020 another acting appointment was made. As it stands, the Minister has contravened the law and faces no accountability or sanction from the PCP.

Finally, it should be noted that the Office of the Public Protector and IPID are two critical oversight institutions, who in the most trying times of the state capture era, maintained their independence and pursued politicians and public servants without fear or favour. It is therefore unsettling that these organisations have been purposefully destabilised – largely through ineffective, biased, and unchecked parliamentary processes.

5. The need for selection processes to be amended

The landmark Constitutional Court ruling in the matter of *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and others*, the apex court declared that the Public Protector's remedial action is in fact binding and can only be set aside by a court of law. The effect thereof is that the Public Protector, and by extension other Chapter 9 institutions, can make legally binding findings which consequently greatly strengthens the efficacy of these oversight bodies. Given the strengthened powers of these institutions, it brings into question whether the appointment processes established to select its leadership are sufficient and fit for purpose.

It is also worthwhile noting that in three³ of the judicial commissions of inquiry established by President Cyril Ramaphosa in the last two years, the public has heard evidence of how leadership positions across the various criminal justice agencies were manipulated and influenced in order to safeguard networks of political patronage.

It is with this in mind, that in his [final report](#) of the Commission of Inquiry into Tax Administration and Governance by the South African Revenue Service (SARS), Judge Robert Nugent provides a proposal for a possible recruitment process for the SARS commissioner that would ensure that the best possible candidate is selected for the position. Judge Nugent outlines a process that should be “open and transparent” and “apolitical”, and proposes that an independent panel of experts be appointed to conduct the recruitment proceedings. He further advises that the proposed panel consist of members that are “not answerable to any constituency”. Additionally, applicants should be assessed against suitable criteria, and the panel should “make motivated and non-prescriptive recommendations on the suitability” of the candidates to the president or minister for appointment.

The process outlined by Judge Nugent is not dissimilar to the process undertaken by the Judicial Services Commission (JSC) which is tasked with interviewing candidates for judicial posts and making recommendations for appointments to the bench. The JSC comprises the following members:

- The Chief Justice of South Africa
- The President of the Supreme Court of Appeal
- A Judge President
- The Minister of Justice and Constitutional Development
- Two practicing advocates
- Two practicing attorneys
- A professor of law
- Six persons designated by the National Assembly
- Four permanent delegates to the National Council of Provinces
- Four persons designated by the President

³ Judicial Commission of Inquiry into allegations of State Capture, chaired by Deputy Chief Justice Raymond Zondo, Commission of Inquiry into Tax Administration and Governance by the SARS, chaired by Judge Robert Nugent, and the Enquiry in terms of Section 12(6) of the National Prosecuting Authority Act, chaired by Judge Yvonne Mokgoro

The JSC has been lauded for having **an** effective structure that adequately diffuses power. Various sub-committees exist to conduct screening, nominations and appointments. Civil society organisations have also been able to participate at various levels of this structure.

The processes that the JSC have undertaken, as well as the recent selection proceedings established to appoint the SARS Commissioner and the National Director of Public Prosecutions, highlight the need for independent multi-stakeholder panels who probe the fitness and properness of candidates based on clear, merit-based criteria. These interventions can, and should extend to parliamentary appointments to ensure that oversight institutions are stacked with leaders that have a high calibre of integrity and the necessary skills and experience in order to avoid the political destabilisation of these bodies.

Recommendations

With these arguments in mind, Corruption Watch proposes that the following recommendations in relation to parliamentary appointment processes.

1. **Review the necessary legislation to ensure that it provides guidance on fair and objective appointment processes.** Requirements for impartial, effective, and transparent processes that are set in law, with prescribed criteria which candidates must adhere to, can lead to fair appointments of appropriate and competent leaders. Strengthened legislation can protect institutions from political interference. Without adequate laws, such as in the case of IPID, appointments can legally happen unilaterally, with very few avenues for accountability.
2. **Develop multi-stakeholder structures to oversee the appointment proceedings.** These should be based on models established by the JSC, the selection committees established to appoint the SARS Commissioner and NDPP, as well as the recent proposal by Parliament to institute an independent panel comprised of legal experts to consider whether there is a prima facie case to remove the current Public Protector, Adv. Busisiwe Mkhwebane. A multi-stakeholder model comprised of experts does not strip away Parliament's powers in appointment or removal proceedings – it instead enhances the procedure by ensuring that independent panels provide expert recommendations that can objectively inform the decisions of MPs.
3. **Ensure that all parliamentary selection processes are transparent and open.** Transparency in parliamentary proceedings should involve widely publishing the advertisement for the available position, publishing both the longlist and shortlist of candidates as well as any supporting information that are provided by candidates, sharing the budgets and expenditure related to appointments, and ensuring that interviews and deliberation processes are open and accessible to the public.

4. **Candidates must be tested for integrity and ethics as well as their skills and expertise, using clear, merit-based, and objective criteria.** Proper screening of candidates will lead to a candidate pool that is adequately vetted based on objective metrics, of which ethical conduct is paramount. The result will deter the likelihood of appointed leaders becoming embroiled in scandals that may emerge after their appointment, thereby causing distraction and discord at a senior leadership level, as well as in the public domain for the role.
5. **Ensure that the principle of public participation is a central tenet in parliamentary appointment processes.** This allows for the public, as well as the employees in the various oversight institutions, to be apprised of the abilities and characteristics that the new appointee would bring to the job. An appropriately experienced appointee whose integrity was beyond reproach would enjoy an enhanced level of support from the public and would be effective in instituting plans aimed at improving the performance of the organisation that they are tasked with leading. Furthermore, Section 59 of the Constitution of the Republic of South Africa requires Parliament to include the public in legislative and other processes. Thus, the public should be reasonably and effectively accommodated during appointment proceedings. This interaction should be meaningful and not just a symbolic exercise or box-ticking process.

Conclusion

Corruption Watch firmly believes that in order to safeguard our constitutional pillars of democracy and prevent future attempts at state capture, those in positions of political power need to prioritise the improvement of appointment processes to key institutions. It is in the interest of the public and our constitutional democracy that there is demonstrated will to correct the steps that allowed for the destabilisation of our criminal justice agencies and oversight bodies, and to develop sufficient checks and balances that will end impunity and reinforce principles of accountability in South Africa.