



NATIONAL ANTI-CORRUPTION ADVISORY COUNCIL (NACAC)

SUBJECT: ADVISORY NOTE TO THE PRESIDENT REGARDING THE IMPLEMENTATION OF THE RECOMMENDATIONS OF THE ZONDO COMMISSION

Date: 19 October 2022

1. AIM

This document serves as the first advisory note by the National Anti-Corruption Advisory Council (NACAC) to His Excellency: President Cyril Matamela Ramaphosa. It outlines the background to the NACAC and then makes specific proposals that could be considered by the President when tabling his implementation plan in Parliament in relation to the recommendations of the 'The Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State' (hereinafter referred to as the Zondo Commission).

2. CONTEXT

- 2.1 The NACAC was announced by the President on 29 August 2022. NACAC Councillors will serve for a term of three years commencing from 01 September 2022.
- 2.2 According to the draft NACAC Terms of Reference, "the **primary purpose** of the NACAC is to be an advisory body which will monitor the implementation of the National Anti-Corruption Strategy (NACS). The Strategy contains the following **six strategic pillars**:
 - (a) Promote and encourage active citizenry, whistleblowing, integrity and transparency in all spheres of society.
 - (b) Advance the professionalisation of employees to optimise their contribution to create corruption-free workplaces.
 - (c) Enhance governance, oversight and consequence management in organisations.
 - (d) Improve the integrity and credibility of the public procurement system.
 - (e) Strengthen the resourcing, coordination, transnational cooperation, performance, accountability and independence of dedicated anti-corruption agencies.

- (f) Protect vulnerable sectors that are most prone to corruption and unethical practices with effective risk management.
- 2.3 In the Presidential appointment letters, NACAC councillors are expected to execute the following **functions**:
- (a) Advise on the effective implementation of the Strategy by government, civil society and the private sector;
 - (b) Advise key role-players on the overarching thrust of the Strategy, namely the six pillars upon which it is premised;
 - (c) Advise on strengthening of South Africa's anti-corruption architecture;
 - (d) Host the national anti-corruption summit(s), bringing together government, civil society, business, and academia, to set the country's anti-corruption agenda and evaluate progress in the implementation of the Strategy.
 - (e) Consequently, the NACAC will also advise on the implementation of the recommendations of 'The Judicial Commission of Enquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State' (The Zondo Commission) from a strategic and systemic perspective.
- 2.4 To date, NACAC has held 4 plenary meetings (2 September, 26 September, 8 October and 16 October 2022). In those meetings, Councillors familiarised themselves with the NACAC mandate. They discussed both administrative issues and substantive issues of executing the above mandates. NACAC has identified its main priority areas of work and established tentative workstreams, that have been meeting to provide in-depth analysis of work to be done. The planning process will be finalised by end of October 2022.
- 2.5 Given the urgency of advising on the implementation of the recommendations of the Zondo Commission report, NACAC has prioritised this first advisory note to the President to address that question.

3. APPROACH

- 3.1 As already indicated in 2.3(a), one of the urgent tasks for NACAC is advising the President and government on the implementation of the recommendations of the Zondo Commission report. This is due to the court directive that the President is expected to present his implementation plan within four months since the receipt of the report. The final instalment of the Zondo Commission report was received by the Presidency on 22 June 2022, which implied that the President would be expected to table his response by 22 October 2022. As such, the NACAC deemed it critical to engage with this process in **two phases**.

3.1.1 Phase 1: Before the tabling of the reports and the President's plan in Parliament

- (a) The Government Technical Task Team led by the Director-General in the Presidency, Ms Phindile Baleni, consulted NACAC by presenting two progress reports on 26 September 2022 and 08 October 2022, respectively. It was clearly stated that the information presented was based on the technical level inputs. Consultations of political structures were not yet conducted.

- (b) NACAC members appreciated the opportunity, asked questions and made comments, which were deemed as a form of advice that would inform further drafting of the implementation plan by government. Some of the ideas that emerged during that discussion are developed further in this advisory note meant for the President.

3.1.2 Phase 2: Implementation of the recommendations of the Zondo Commission by various actors

- (a) The second phase will involve further analysis of the strategic and systemic recommendations of the Zondo Commission based on the implementation plan put forward by the President. NACAC will undertake stakeholder consultations and research to inform such advisory notes.
- (b) Furthermore, NACAC is developing a system of monitoring and evaluating implementation of the NACS. This system will integrate NACAC's prioritised actions in relation to the recommendations of the Zondo Commission. On the basis of that system, NACAC will receive reports from all stakeholders in society regarding implementation of the NACS and the recommendations of the Zondo Commission. Those reports will be reviewed and advisory notes produced accordingly.

The next section discusses key points that could be considered by the President when developing and tabling his response to the recommendations of the Zondo Commission in Parliament.

4. DISCUSSION

4.1 Integrated strategic and system-wide action against corruption

The Terms of Reference of the Zondo Commission limited its scope to specific bodies and sectors such as the State-Owned Companies (SOEs), among others. Hence it could not conduct investigations in all spheres of government, various sectors of the economy and other parties. The strategic nature of the findings and recommendations of the Zondo Commission lie in the fact that the phenomenon of state capture, fraud and corruption has been well-diagnosed and published for all to know. Therefore, South Africa should not miss the opportunity to identify other areas of vulnerabilities such as municipalities and act swiftly and decisively to prevent future occurrence of state capture.

The NACS was adopted by Cabinet in 2020 while the investigations by Zondo Commission were still in progress. The six strategic pillars of the NACS cover various domains of work that should be taken forward in a whole-of-government and society fashion. Additionally, the NACS acknowledged the recommendations of the previous judicial commissions of inquiry and court rulings that must be taken into consideration in the fight against corruption. As such, the Zondo Commission is viewed as presenting significant body of evidence that points to the fact that corruption is endemic in our country and extraordinary measures must be put in place to combat and prevent the spread and recurrence of this scourge.

Among other things, NACAC will examine whether necessary additions and amendments to our constitution and our anti-corruption statutes are necessary, and devise mechanisms and policies for promoting transparency. NACAC will ensure that in its recommendations, the issues identified in the Glenister¹ judgements regarding the independence are complied with in proffering advice on the anti-corruption architecture. It is also devising an approach to monitoring and evaluating the impact of our fight against corruption using the NACS as the foundation.

Proposed actions:

- (a) *The NACAC will advise stakeholders on the thrust of the NACS. This Strategy, developed by a joint government and civil society reference group, is a comprehensive, multi-faceted approach to fighting corruption and is, itself, an important milestone in our efforts to combat corruption. At the heart of the Strategy is an ‘all of society’ approach, a conviction that a necessary condition for successfully combatting corruption is the participation of ‘all of society’ in this fight. To this end NACAC has been tasked with hosting a national anti-corruption summit by March 2023.*
- (b) *The NACS is the centrepiece guide regarding South Africa’s fight against corruption in a systemic and strategic manner across all spheres of government and sectors of society. The findings and recommendations of the Zondo Commission report are viewed from the integrated perspective of the vision, values, objectives and strategic pillars of the NACS to have implications beyond the mentioned individuals and institutions. As a form of grand corruption, state capture must be prevented and combated across the board using the NACS strategic pillars e.g. rebuilding the capacity of law-enforcement agencies to act without fear, favour or prejudice.*
- (c) *The monitoring system should incorporate timeframes and a decision register against each of the recommendations of the Zondo Commission.*

4.2 Whistle-blower protection

The first strategic pillar of the NACS urges us to: “Promote and encourage active citizenry, **whistleblowing**, integrity and transparency in all spheres of society.” Currently there is an intensive discourse in civil society, labour, academia and the legal community regarding the plight of whistle-blowers and what South Africa needs to do to improve the situation. Some of these stakeholders have put forward an advocacy document called the “Whistle Blower Act”, whose purpose is to highlight major legislative and policy reforms that could be implemented to incentivise and protect whistle-blowers and their families.

Proposed actions:

- (a) *The President could acknowledge the role of whistle-blowers, civil society activists and journalists in helping the country accept that there is a problem of state capture. President should expressed strong language in terms of supporting the whistle-blowers.*

¹ a) Glenister v President of the Republic of South Africa and Others (CCT 41/08) [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR 136 (CC) (22 October 2008);

b) Glenister v President of the Republic of South Africa and Others (Glenister I) (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC) (17 March 2011); and

c) Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others (CCT 07/14, CCT 09/14) [2014] ZACC 32; 2015 (1) BCLR 1 (CC); 2015 (2) SA 1 (CC) (27 November 2014).

- (b) *The President could speak strongly against corrupt officials in state-owned enterprises, public bodies and private sector who have proffered charges against those whistle-blowers who testified at the Zondo Commission and charged them with bringing their organisations into disrepute through their testimony. Policy and regulatory measures should be put in place to enforce this action.*
- (c) *The President could elect to establish a temporary discretionary fund to support bona fide whistle-blowers in dire need on compassionate grounds. This fund could be held in The Presidency and deployed to assist those whose lives and livelihoods are under threat. This would be until such time as the legislative framework and institutional arrangements for the fight against corruption are established.*
- (d) *The abovementioned fund may also be held by a person whom the President appoints temporarily as the Protector of Whistle-blowers and acts in their interests until such time as the appropriate infrastructure is established. That person can be a retired judge, whose office is situated in the office of the Chief Justice and deals with the most egregious violations of whistle-blower rights.*
- (e) *The reconfigured Whistle-Blower Act must squarely address the following: a) criminalisation of retaliatory action; b) extend the number of bodies that a bona fide whistle-blower can make a disclosure to; c) create stiffer penalties for violations by companies of the new whistle-blower laws; d) ensure that the new law applies further than the narrow confines of the employer-employee relations stipulated in the labour law and current Protected Disclosures Act thus making the new law an important cog in our human rights law. This will give full effect to the rights to freedom of expression, right to life, right to make a living, right to privacy – all of which whistle-blowers are often bereft. The new law must also establish a fund from which whistle-blowers can draw upon successful prosecution and following an order of court. (The Namibian law establishes such a fund). A framework for the provision of full legal immunity for whistle-blowers needs to be a key feature of the new act.*
- (f) *In concurrence with the recommendations of Zondo Commission, "ensure that any person disclosing information to reveal corruption, fraud or undue influence in public procurement activity be accorded the protections stipulated in article 32(2) of the United Nations Convention Against Corruption". Furthermore, align new legislation with Article 33 of the United Nations Convention Corruption, which states: "Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention".*
- (g) *The President could call for the proposal of a mechanism to ensure incentivised disclosures. The creation of an Independent Whistle-Blower Ombud's body with the capacity to cater for the following is recommended: a) psycho-social support; b) medical support; c) legal services; d) investigative capacity; e) case assessment capacity; f) a unit for ensuring the physical safety of whistle-blowers.*

4.3 Principles to guide appointments

The Zondo Commission found that strategic appointments and dismissals were corruptly used as an enabler for capturing targeted state institutions.

Proposed action:

The amended recommendation of the Zondo Commission regarding “appointments to the boards and executives of SOEs” should be translated into principles and procedures that would apply across the board beyond the SOEs.

4.4 Transparent public procurement

The Zondo Commission found that public procurement was the main site of state capture and corruption. It recommends extensive institutional and legislative reforms. NACAC is still applying its mind on this area and will formulate substantial advice based on further research and consultations. It is also acknowledged that National Treasury is in the process of consulting on the new Public Procurement Bill that has been on the pipeline for more than six years. This Bill is also under consideration at the NEDLAC. As a quick win, the following proposals are made.

Proposed actions:

- (a) The adoption and use of digital technology for transparency in public sector procurement.*
- (b) Inclusion of measures in the Public Procurement Bill to reduce corruption.*
- (c) Adoption of standards and practices by non-government actors to reduce inducements to corruption.*
- (d) The adoption of open principles and transparency standards in procurement in the country.*

4.5 Balancing the response to cover both private and public sectors

While state capture focuses on state bodies, in most cases of corruption both was state and non-state actors are implicated. There is a discourse in society that alleges that the fight against corruption is disproportionately targeting the public sector officials and institutions which needs to be dispelled through action.

Proposed actions:

- a) The President could highlight the pervasiveness of the corrupt practices both in the public and private sectors. Specific actions against private sector companies mentioned in the Zondo Commission report could be highlighted.*
- b) Zondo raises critical question for the government to address and also by the legal and audit professions.*
- c) Furthermore, the President could make a call for professionalisation of management consultants and consultancies in the similar manner that legal and audit professions and companies are regulated.*

4.6 Resourcing of law-enforcement agencies

The Zondo Commission does make some pointers towards malfeasance in the sector of law-enforcement agencies, but does not make any recommendations except the institutional reforms. However, it is common knowledge that these bodies have been adversely affected by state capture. NACAC has prioritised the area of conducting research and consultations on the anti-corruption architecture and will advise the President in due course.

Proposed action:

The President could make a firm commitment to progressively provide resources to the law enforcement agencies and SARS and also put measures in place to prevent future recurrence of state capture. Additional funds that have been committed to these bodies to address the findings of the Zondo Commission could be announced such as those resources provided to the Investigative Directorate of the National Prosecuting Authority.

NACAC is looking at various models to review the anti-corruption architecture based on existing benchmarking, including emerging Australian model. A range of stakeholders will be consulted on this matter.

4.7 Cultural change towards adherence to constitutional values and ethical leadership

Culture change will require strong leadership, training and education processes, communication and awareness, over a substantial period of time. Communication is one of the most important preventive measures for malpractices like corruption and fraud. South Africa has good examples of successful communication campaigns that were targeted at society-wide behaviour change such as the HIV campaign led by the South African National Aids Council (SANAC) and civil society organisations over the years. NACAC is conceptualising a communication campaign of that scale and magnitude.

Proposed actions:

- (a) The President and government to continue to address issues of poverty, unemployment and inequality as part of our struggle against corruption. Communicating the relationship between the fight against corruption and the triple challenges plus economic growth and trust-building would resonate with people's lived experiences.*
- (b) The President could formulate messages around the importance of ethical leadership in society and behaviour change at an individual level on specific anti-corruption related sub-topics like anti-bribery. A clarion call should be made for all stakeholders in society to play their part in championing behaviour change.*
- (c) There is a need to prioritise positive values of Ubuntu by focusing on soft skills as well as mainstreaming such values in the curriculum at all levels of education. This will be a proactive way of attending to social ills and perhaps exposing children at an early age to oppose all forms of destructive behaviour and corrupting tendencies.*

5. RECOMMENDATION

- 3.1 This advisory note is submitted for consideration by the President in his speech/response to the recommendations of the Zondo Commission report.