



UNIVERSITY of the
WESTERN CAPE

**Submission by the Dullah Omar Institute at the University
of the Western Cape on
'The Contribution of SOEs to Vision 2030: case studies of
Eskom, Transnet and PRASA'.**

30 June 2020

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Introduction

1. This submission is from the Dullah Omar Institute for Constitutional Law, Governance and Human Rights (DOI) at the University of the Western Cape in response to the call for comments on the National Planning Commission's position paper '*The Contribution of SOEs to Vision 2030: case studies of Eskom, Transnet and PRASA*'. In the course of 2018-2019 DOI undertook research on the State-owned Enterprises (SOEs) with a particular emphasis on the appointment of directors to the boards of SOEs. This research resulted in five research reports upon which this submission draws:

- Wandrag, R. (2019) *The legal framework for the appointment and dismissal of SOE board members*¹
- Wandrag, R. (2019) *The legal framework governing the appointment and dismissal of board members and executives of ESKOM, PRASA and the SABC*²
- Ashagrey, H. & de Visser, J. (2019) *The Regulation of Public Enterprises in Ethiopia: Lessons for South Africa*³
- De Visser, J. and Waterhouse, S. (2020) *SOE Boards and Democracy*⁴
- Muntingh, L. (2020) *Appointing Directors to the Boards of State-Owned Enterprises*⁵

2. In addition to the five research reports, two submissions were made to the Zondo Commission and one to the Portfolio Committee on Health:

- *Submission by the Dullah Omar Institute to the Zondo Commission on the appointment of board directors to state-owned enterprises*⁶
- *Submission to the Zondo Commission of Inquiry into State Capture - Recommendations concerning the National Prosecuting Authority of South Africa*⁷
- *Submission to the Portfolio Committee on Health on the National Health Insurance Bill B11 – 2019*⁸

3. It is the aim of this submission to raise, based on the research listed above, key findings as well as to problematise particular issues that we were not able to explore fully, but regard as

¹ https://dullahomarinate.org.za/women-and-democracy/board-members-of-state-owned-enterprises-towards-transparent-appointments/reports/wandrag_legal_framework_v4-1-3-for-electronic-use-1.pdf

² https://dullahomarinate.org.za/women-and-democracy/board-members-of-state-owned-enterprises-towards-transparent-appointments/reports/wandrag_legal_framework_paper_2_revision_4_04_07_2019.pdf

³ <https://dullahomarinate.org.za/women-and-democracy/board-members-of-state-owned-enterprises-towards-transparent-appointments/reports/08082019-soes-in-ethiopia-final-word-version.pdf>

⁴ <https://dullahomarinate.org.za/women-and-democracy/board-members-of-state-owned-enterprises-towards-transparent-appointments/reports/soe-boards-and-democracy-final-pdf-version-12-feb-2020.pdf>

⁵ <https://dullahomarinate.org.za/women-and-democracy/board-members-of-state-owned-enterprises-towards-transparent-appointments/reports/appointment-of-soe-directors-assessment-pdf-version-12-feb-2020-final.pdf>

⁶ <https://dullahomarinate.org.za/women-and-democracy/board-members-of-state-owned-enterprises-towards-transparent-appointments/reports/doi-submission-to-zondo-commission.pdf>

⁷ <https://acjr.org.za/resource-centre/acjr-submission-to-zc-24-june-2019.pdf>

⁸ <https://dullahomarinate.org.za/women-and-democracy/board-members-of-state-owned-enterprises-towards-transparent-appointments/reports/nhi-bill-dullah-omar-institute-submission-with-endorsements-nov-2019.pdf>

important. The submission aims to be brief and draw attention to key issues and DOI is willing to engage further with the NPC on the issues raised.

Accountability

4. Regardless of how well or not a state institution (including SOEs) is functioning, if there is reasonable cause to suspect that there was criminal wrong-doing then the prosecution service must be able to prosecute and prosecute indeed. There is no other institution of state that holds this power and no individual or company is immune from prosecution. An independent prosecution service that has the ability to pursue criminal wrong-doing is therefore an essential component of good governance in the state. It also means that the prosecution service must be accountable and explain the reasons for not pursuing a particular matter.

What is an SOE?

5. The schedules to the Public Finance Management Act (PFMA) list in excess of 300 SOEs and these range from very large and complex entities (such as ESKOM) to regulatory authorities (e.g. liquor licencing) and entities of which the purpose is uncertain (e.g. Cowslip Investments Pty Ltd.). Having this diversity in purpose and scope under the term ‘SOE’ seems to cloud some of the issues and debate towards greater clarity. It is therefore necessary to define more precisely what an SOE is, especially when the mandate relates to a constitutional right.

Poor board appointments as root cause

6. The three case studies presented in the NPC’s position paper represent different SOEs operating in entirely different sectors. However, it is remarkable that in all three case studies, the report points at unstable executive leadership and political interference (paras 2.8.5, 3.5.4 and 4.5.2). Poor board appointments are clearly a major contributor, if not the root cause for the problems in all three SOEs.
7. The legal framework governing SOEs is confusing. In many cases, three legal frameworks, i.e. the PFMA, the Companies Act and SOE-specific legislation apply simultaneously to the same case. This has caused endless confusion, unnecessary litigation and, most critically, has been a fertile ground for capture of boards for nefarious ends. Our research findings therefore support a standardisation towards one legal framework as already recommended by the NPC and confirmed in the position paper.
8. It was equally found that non-binding instruments (such as King IV and even the Protocol on Corporate Governance in the Public Sector) have not been effective in strengthening good governance in SOEs. The report recommends that the

“appointment of management and boards must be done in line with *acceptable corporate governance norms*” (para 6.3.5.1, emphasis added). It also claims that “this should see the end of political appointments”. In our view, these statements seriously underplay the importance of addressing the root cause of SOE failures. With respect, they represent a lacklustre approach to the fundamental issue of appointing leadership. It cannot be, that “acceptable” is the standard for appointing the leadership of multibillion-rand entities, that are entrusted to deliver services that make or break this country, and that receive unfathomable amounts of state support. In our research, we show that the many soft codes containing acceptable corporate governance norms have proved irrelevant. We thus call for rules-based appointments, the framework for which must be captured in a binding overarching SOE law, and not be left to soft instruments such as a state ownership policy, a compact or a code.

The financial constitution

9. SOEs are not subject to same rules of financial controls concerning income, expenditure, debt and borrowing as ordinary government departments. This more than arm’s length relationship with the financial constitution has created significant risks and ultimately cost the taxpayer dearly. While there may be good reason to have an arm’s length relationship, cognisance must also be had for the risks it creates and remedial steps are necessary as a matter of urgency. There needs to be a revised dispensation governing the finances of especially large SOEs.

Ownership and oversight

10. It remains the case that the state, through the executive (e.g. minister), is the sole or majority shareholder in SOEs. It equally remains the case that it is the minister that appoints (and dismisses) the Board of Directors, and in some cases the CEO and CFO as well. The influence of the public and even Parliament on SOE functioning can at best be indirect through the relevant minister unless the law explicitly provides for more direct involvement (e.g. SABC board appointments). The concentration of ownership in the executive and the lack of effective external oversight has had dire consequences for South Africa’s SOEs’.
11. The research indicates that the seemingly most effective measure against manipulation and capture is to disperse discretion and decision-making, especially where it concerns appointments.

Appointments

12. There is very little guidance in law and non-binding instruments in the appointment of SOE board members and this has had a material impact on the quality of appointments and has also in no small measure contributed to the turnover in board membership. The Constitution, in section 195(1), provide some guidance on principles and values for the public service but it is required that these need to be operationalised for the appointment process. If the requirement is, for example, that there must be a high standard of professional ethics, what does this mean in practice when appointing board members to SOEs? Conversely, what is considered as evidence that a person does not have a history of a high standard of professional ethics?
13. We suggest that a framework for the appointment of SOE Board members must insist on qualifications, skills and experience relevant to that particular SOE's mandate. In addition, it must insist on personal qualities commensurate with leadership of a public entity. However, this is not sufficient. A proven commitment to the rights, values and principles underpinning the public service must be part of the requirements.
14. The current appointment process for SOE board directors is deeply flawed. Not only is it, bar a few exceptions, entirely in the hands of the relevant minister, but there is virtually no space for public involvement and public scrutiny. It is generally the rule that the public is informed of decisions already made. The criteria applied to make a selection, the integrity of candidates and the interests served or not by a particular appointment are not placed in the public domain. This raises serious questions about whether or not appointments are made based on merit. Even the Presidential State-Owned Enterprises Council (PSEC) came as news and an announcement to the public.⁹
15. Depending on the size and complexity (i.e. risk and potential consequences of a poor appointment) of the SOE concerned, it appears to be good practice to break up the appointment process into different components involving different individuals. The following is an example for illustrative purposes and can be adjusted as needed:
 - a. Clearing house to verify individuals in general to serve on the board of an SOE; this is sometime referred to a 'clearinghouse'
 - b. Subcommittee of board and management draw up criteria for filling vacancy on board with reference to strategic plan and needs of SOE
 - c. Subcommittee (different from previous) develops shortlist for interviews. Candidates must have been cleared by clearinghouse (see above).

⁹ Ramaphosa appoints members to presidential SOE council, *IOL*, 11 June 2020, <https://www.iol.co.za/news/politics/ramaphosa-appoints-members-to-presidential-soe-council-49272004>

- d. Interview panel conducts interviews and develops recommended list of one to three candidates for appointment
 - e. Minister or Board or Parliament makes the appointment.
16. Transparency also means that it is as important to know the reasons why people were appointed or shortlisted, as it is to know why they were not appointed or not shortlisted.
17. Boards must appoint the operational staff (CEO and CFO) of the SOE and not the minister.

Disqualification

18. The research recommends that due to the potential for a conflict of interests that civil servants, members of Parliament or even members of the judiciary should be disqualified from serving as members of SOE Boards. We argue that civil servants, members of national, provincial or municipal legislatures and members of the judiciary ought not to be considered for board membership as this compromises the independence of the relevant board. Furthermore, the number of boards that one individual may serve on must be limited. Lastly, there should be uniform rules pertaining to term limits.

Public involvement

19. The legitimacy of SOEs will depend on the extent to which the public trusts SOEs to behave in the broad public interest. This would require transparency to be improved on a number of fronts, such as:
- a. Clear and detailed criteria to be advertised and applied in recruitment of board members
 - b. CVs of applicants to be made available well in advance to enable public scrutiny and verification
 - c. Public submissions at any stage of the process.
 - d. Diversified composition of decision-making structures in appointment process.
20. In this respect we believe that the report takes too narrow an approach to the issue of oversight. In paragraph 6.6.3 it introduces stakeholder forums and positions the public as “consumers” and “affected communities” that may perhaps rate the quality and pricing of the SOE’s services. In our view, this disregards the basic truth that SOEs are owned by the public, through the state. The relegation of the public to a survey pool diminishes this role. The new vision for SOEs should find a way to place much greater emphasis on the public as owners of the SOE.

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