



RAND WATER

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Reference: Public Audit Amendment Bill
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23 February 2018

ATTENTION: C BALIE

Per email: cbalie@parliament.gov.za

WS 3/701

Third Floor

90 Plein Street

Cape Town

8000

Dear Sir/Madam

RE: REPRESENTATIONS PER EXTENDED INVITATION TO COMMENT ON DRAFT PUBLIC AUDIT AMENDMENT BILL, 2017

1. The above matter has reference.
2. The submission herein is made on behalf of Rand Water as an affected party or a party that has the potential to be affected by the Draft Public Audit Amendment Bill as published on the 19 January 2018.
3. Rand Water is a State Owned Entity established in terms of the Water Services Act with the legislated mandated to provide bulk water services and carry out all other secondary activities as identified in that law.

4. As with any other state owned entity Rand Water is subject to legislation that governs and affects public entities including but not limited to the Public Finance Management Act (PFMA) and the Public Audit Act (The Act) it follows therefore that the Act and any amendment thereto will have direct application to Rand Water.

5. Rand Water wishes to make the following submissions for your consideration:

5.1 AD REFERRAL FOR CRIMINAL INVESTIGATION:

Clause 5 1(a A):

5.1.1 The proposed amendment seeks to give the Auditor General authority to go beyond reporting its findings to parliament but may at its discretion choose to refer any undesirable outcomes to the appropriate body for investigation. The text reads *may* and not *shall*.

5.1.2 It is not apparent why the drafters chose permissive language instead of a mandatory tone. Rand Water is of the view that the draft amendment in its current form fails to ensure certainty that all instances of transgression are dispensed with in a consistent manner. It is not apparent from the body of the text, when would the Auditor General refer a matter and or when he/she would not.

5.1.3 It is the view of Rand Water that in the event that the discretion is maintained, at the very least the text should indicate the standard and or conditions which must prevail for the discretion to apply. Further to the above the draft does not have inbuilt mechanisms to ensure that such power/authority would be protected from selective application and or even failure by the Auditor General to execute what is meant to be its Constitutional mandate in a fair and consistent manner.

5.2 AD PERSONAL LIABILITY

5.2.1 *Section 5(1) B and Section 5(1) (B) D-*

- 5.2.1.1 The immediate implication of the above proposed amendment is that the Auditor General would be obliged to recover from responsible parties any monies lost to the state as a consequence of unauthorised, irregular, fruitless and wasteful expenditure as well as monies that have been improperly paid and there is no satisfactory explanation as to why the monies have not been paid. In the absence of the required explanation, the AG shall be authorised to issue against responsible parties a debt certificate, the effect of which would be to hold them liable in their personal liability. Further to the above the said debt certificate shall be the basis upon which the AG would have the authority to attach personal property of the debtor inclusive of any pension benefits that the person may be entitled to.
- 5.2.1.2 Rand Water stands in full support of good governance and appreciates the importance of observing the duty of care in order to achieve good governance. In this regard the spirit of the proposed amendment is supported. We have however noted the following:
- 5.2.2 The proposed provision fails to stipulate the burden of proof required to inform the opinion of the Auditor general in determining whether the explanation received is satisfactory or not.
- 5.2.3 It is further not clear whether such determination will be drawn from the subjective observations of the Auditor-General or on application of objective standards on existing facts.
- 5.2.4 In light of the fact that in most instances the accounting authority and/ or accounting officer are not directly involved in the granular aspects of administration, it is natural that there would be instances of said wasteful and fruitless expenditure that would not be possible to identify.
- 5.2.5 A breach of the duty of care can only arise where one is aware of their duty of care and fails to execute their duty of care. The second element requires that one either actively undermines their duty by being involved in the wrongdoing themselves or failing to take the appropriate measures to ensure that duty of

care is exercised. This finds expression through putting in place appropriate and sufficient systems, controls and in addition to that monitoring the effectiveness of such systems and controls.

5.2.6 It is Rand Water's observation that the amendment as it stands has not taken into consideration that the possible unjust and unfair consequence of imputing personal liability to the responsible parties without making same subject to a requirement of awareness. This means that the Auditor General must be satisfied that at the time of his/her discovery of the transgression the accounting officer and/or accounting must have been aware or a reasonable person in the position would have been aware of the transgression and failed to Act.

5.2.7 We therefore propose that :

5.2.7.1 The amendment is explicit in what exactly will amount to a "satisfactory explanation", the standard against which such "explanation" should stand. This will assist in eliminating ambiguity and ensuring that all parties affected by the proposed amendment are aware at all material times of the standards of responses and proof that need to be kept and presented as and when required.

5.2.7.2 That the provision be qualified by a requirement for awareness, which also encompasses a "reasonable person test"

6. AD CONCURRENT COMPETENCY

6.1 The Bill proposes that the Auditor General be vested with the power and authority to initiate an investigation process with the aid of the relevant investigating authorities, It is not explicit whether the meaning of "relevant investigation authorities" for the purposes of the Act will be limited to the South African Police Service or it is inclusive of the Priority Crimes and Special Investigating Unit.

6.2 It is noted that It is the intention that the Act as would be amended shall take precedence in the event of any conflict with any other law. Rand Water would like to submit that the Bill be explicit on whether it is intended to authorise the Auditor General with the power to instruct the SIU , who currently may only act on the instruction of the

President of the Republic in terms of Section 2(1) of the Special Investigating Units And Special Tribunals Act 74 Of 1996

7. AD: RETROSPECTIVE APPLICATION

- 7.1 The proposed amendment defines an Accounting Officer as:
"a person defined as an accounting officer in the Public Finance Management Act or the Municipal Finance Management Act, or any person designated as an accounting officer in terms of any other law, as the case may be, and includes any former accounting officer. (Our emphasis)
- 7.2 The definitions are in part similar to the PMFA's definition; however the Bill has extended the definition to include *former members* of an Accounting Authority and or *former Accounting Officers*.
- 7.3 It is not clear whether the intention is for the proposed amendments to have a retrospective reach by inclusion of former members and accounting officers or whether it is to ensure that even after future vacating of an accounting position the would be responsible party/parties would not escape liability by tendering resignation on discovery of the wrongdoing and related other factors.
- 7.4 Rand Water submits that to avoid ambiguity and uncertainty, there be an express and concise expression whether the application of the Act shall have retrospective effect. This should be guided by the objectives of the Bill, is it intended to deter future losses or recover previous losses or is it intended to do both? More clarity should be sought in the wording of the Bill in this regard.



NSN Sithole

Group Governance Executive