



national treasury

Department
National Treasury
REPUBLIC OF SOUTH AFRICA

Mr VG Smith, MP
Standing Committee on the Auditor-General
Parliament of the Republic of South Africa
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Dear Honourable Chairperson

COMMENTS ON DRAFT PUBLIC AUDIT AMENDMENT BILL

I refer to the draft Public Audit Amendment Bill published in the Government Gazette on 19 January 2018 for comment. Firstly, I wish to thank the Committee for including in the published draft Bill the amendment to section 23(6) regarding the maximum amount of audit fees that may be defrayed from the vote of National Treasury, as proposed in the letter of the Minister of Finance dated 7 November 2017.

Any legislative measures to more effectively deal with the unlawful use and loss of public resources is welcomed. The opportunity to submit comment on the published draft Bill (the draft Bill) is appreciated and is set out below.

The main comments of the National Treasury pertain to the proposed power for the Auditor-General (AG) to refer undesirable audit outcomes for investigation and the proposed obligation on the AG to recover losses resulting from unauthorised, irregular and fruitless and wasteful:

- (a) The Constitution in section 188 stipulates that the AG must audit and report on the accounts, financial statements and financial management of institutions in all spheres of government. The additional functions with respect to investigations and the mandatory recovery of losses stipulated in the draft Bill may intentionally or unintentionally result in resources being focussed on these areas rather than the constitutional mandate of the AG.
- (b) A duplication of the roles of accounting officers and accounting authorities and other functionaries in terms of the Public Finance Management Act, 1999 (PFMA), the Municipal Financial Management Act, 2003 (MFMA) and the Financial Management of Parliament and Provincial Legislatures Act, 2009, should be avoided.
- (c) The proposed power for the AG to refer undesirable audit outcomes for investigation, especially if conducted by the AG, and the proposed duty for the AG to recover any losses suffered by the State, pose a risk to the AG's independence. International Auditing Standards are clear that the provision of assurance and non-assurance services to one client can impede independence and further sets out evaluations that should be performed and safeguards that must be in place to reduce the risk to an acceptable level. Some of the most common threats are self-review and self-interest.
- (d) Specific comment on the referral of undesirable audit outcomes for investigation-clause 3(b) of the draft Bill - proposed amendment of section 5 of the Public Audit

Act, 2004 (the Act) and related amendments in clause 1 (definitions) and clause 10 (regulation-making powers).

- (i) An undesirable audit outcome is defined in clause 1 as an act or omission arising from an audit under the Act that causes, or is likely to cause, a loss of public resources or which resulted in or is likely to result in public resources not being used for its lawful purpose. The proposed section 5(1A) provides that the AG may refer an undesirable audit outcome to an appropriate body for investigation and that the body must keep the AG informed of progress and the final outcome.
 - (ii) Does an appropriate body include investigations by the AG itself? Does it only refer to another organ of state? Does it include a private entity?
 - (iii) The application of this provision could duplicate the responsibilities of accounting officers and accounting authorities and other functionaries in terms of the PFMA and the MFMA.
 - (iv) How will a duplication of investigations by an affected institution itself or an external body such as the Special Investigation Unit (SIU), the Public Protector or the Public Service Commission be avoided?
 - (v) The provision does not indicate how the outcome of the investigation, especially if it is done by a private entity, will be dealt with.
 - (vi) Possible other ways of ensuring that audit findings are implemented, should be explored.
- (e) Specific comments on the recovery by the AG of losses – clause 3(b) inserting subsection (1B) in section 5 of the Act, related amendments in clause 1 (definitions) and clause 10 (regulation-making powers):
- (i) The proposed section 5(1B) obliges (“must”) the AG to recover from an accounting officer or accounting authority any losses resulting from unauthorised, irregular or fruitless and wasteful expenditure and other losses suffered by the relevant auditee, if no satisfactory explanation for non-recovery is furnished. In subsequent provisions reference is made to the debtor and not the accounting officer or accounting authority. Will the accounting officer or accounting authority in all instances be the debtor?
 - (ii) A possible duplication of the roles of functionaries under the PFMA and MFMA and also those of the Asset Forfeiture Unit and the SIU may result.
 - (iii) The strengthening of the framework where the accounting officer or accounting authority as such is responsible for the failure to recover money may be better addressed through introducing measures in subordinate legislation such as regulations under the PFMA and the MFMA.
 - (iv) For institutions subject to the PFMA and the MFMA, the treatment of unauthorised expenditure is regulated by section 34 of the PFMA and section 32 of the MFMA. It should be clarified how the proposed duty for the AG will be applied in view of these provisions.
 - (v) The recovery of debt by the AG and payment into the relevant Revenue Fund may be construed as requiring the AG to account to the relevant Treasury on

the accuracy of the amounts collected and paid into the Revenue Fund. This may be regarded as in conflict with the AG's constitutional independence.

- (vi) The AG's role in the recovery of debt may also result in undermining the AG's primary function of being an independent auditor.
- (vii) The recovery of debt may lead to extensive legal costs and it is unclear how these costs will be funded.
- (viii) The recovery of debt from the remuneration of an employee will, in the absence of agreement, require a garnishee order (proposed section 5(1B)(f)(ii)).

Comments on other clauses of the draft Bill:

- (a) Clause 1(a) – the definition of “accounting authority”: It is proposed that-
 - “any other law” be replaced with “any other legislation”
 - “includes ... ” up to “an accounting authority” be replaced with: “includes former members of an accounting authority or a person who was formerly an accounting authority”

Note: Former Chief Executive Officers should not be mentioned as a category on its own since some may not have been accounting authorities, i.e. where the board is the accounting authority.
- (b) Clause 1(d) – the need for the definitions of “debt” and “debtor” may not be necessary if changes are made to clause 3 amending section 5 of the Act. If retained, the reference in paragraph (b) to “individual” appears unnecessary given the reference to “individually” at the end of the definition.
- (c) Clause 1(e) – it is proposed that the definition of “prescribed” reads as follows: “**‘prescribed’** means prescribed by regulation in terms of section 52;”.
- (d) Clause 1(g) – it is proposed that the definition of “this Act” reads as follows: “**‘this Act’** includes regulations made in terms of section 52;”.
- (e) Clause 1(g) - a definition of “undesirable audit outcome” may not be necessary if changes are made to clause 3 amending section 5 of the Act. If retained, it is proposed that it be amended to take into account the classification of different types of prohibited expenditure in current legislation.
- (f) Clause 2(a):
 - The insertion of section 4(3A) to allow for opting out of certain mandatory audits is supported. If the AG opts out of performing an audit, the auditee should be advised on the process of appointing a new auditor.
 - The override at the beginning of subsection (3A) may not be necessary in view of the trumping provision in subsection (4).
 - Does the phrase “that meets prescribed criteria” apply to subsection (3)(a) and (b) or only subsection (3)(b)? Either way, it is suggested that subsection (3A) be split into two paragraphs to make this clear.

- (g) Clauses 5 and 10: These amendments should be reconsidered in view of our comment on the proposed power to refer undesirable audit outcomes for investigation and the proposed obligation to recover losses.


As to the financial implications in the Memorandum on the Objects for the draft Bill, the estimated cost per annum for implementation of the additional functions is stated as R33 956 979. The determination of the estimated costs should be done by the AG. If voted funds are required, the AG's office should submit a request through the annual Medium Term Expenditure Framework (MTEF) process.

The strengthening of accountability for unauthorised, irregular and fruitless and wasteful expenditure is supported. To enhance implementation, it is essential that the functions and legislation of all the various role-players of state institutions involved in investigations and recovery are co-ordinated. The active participation of the AG in the Anti-Corruption Task Team set up by the Presidency will assist in such co-ordination and also avoid duplication of investigations and the recovery of losses.

The opportunity to present our comments and proposals on 13 March 2018 is appreciated. The National Treasury is engaging the Office of the AG on the above comments and proposals and will, on 13 March, present any revised proposals resulting from engagements.

The acting Accountant-General, Ms Zanele Mxunyelwa, will be leading the National Treasury delegation, and a full list of delegates that will be attending will be provided to your office before the hearings.

Yours sincerely



DONDO MOGAJANE
DIRECTOR-GENERAL
DATE: 23/2/2018