



SUBMISSION ON DRAFT PUBLIC AUDIT AMENDMENT BILL, 2018

23 February, 2018

Introduction

1. The Council for the Advancement of the South African Constitution (“CASAC”) is pleased to accept the invitation for public comment on the Draft Public Audit Amendment Bill, 2018.
2. CASAC is in substantial agreement with the mechanisms contained in the proposed amendments to the Public Audit Act (2004) which bolster the powers and independence of the Auditor-General. We take cognisance of the fact that the misuse of public money and poor financial management and accounting practices of entities which are subject to the powers of the Auditor-General is becoming increasingly more common and problematic. Therefore, any legislative attempt to give the Auditor-General more powers to act upon such issues should be welcomed.

Rationale for the Amendment Bill

3. During recent years, as acknowledged in the Memorandum of Objects to this Draft Amendment Bill, the Auditor-General has reported “astronomical amounts” of unlawful, irregular and wasteful expenditure and financial management. Whilst the Auditor-General has the power to uncover such practices, his or her power to implement sufficient remedial action is severely compromised by the current legislative framework.
4. Of the 19 state-owned enterprises (SOEs) audited by the Auditor-General during the 2016/2017 financial year, only five obtained “clean audits.” Irregular expenditure during this financial year alone exceeded R2.8 billion. Several SOEs failed to submit

timeous financial statements. In respect of government departments, reported unauthorised expenditure totalled R1.5 billion.¹

5. As evidenced in the 2018 budget speech by Finance Minister, Malusi Gigaba, South Africa's financial position is perilous. The wasteful and irregular expenditure of public funds is one of the primary contributors to this state of affairs. Any means to enhance the accountability of the expenditure of public funds is vital and requires urgent and thorough attention.
6. Accordingly, the current remedial powers in place are clearly insufficient, requiring the Public Audit Act to be amended to allow the Auditor-General to carry out its Constitutional functions.

Proposed extension of the powers of the Auditor-General

7. CASAC welcomes the mechanism established in the Draft Bill enabling the Auditor-General to refer undesirable audit outcomes to an appropriate investigatory body for investigation.
8. The role and powers of the independent institutions created by the Constitution, including the Auditor-General are significant in protecting and strengthening democracy. Their purpose is far more than the mere ability to report on matters related to their area of operation. They are crucial bodies in holding the various branches of government to account, and a failure to recognise their importance and powers would severely compromise their Constitutional efficacy. This is noted by recent judgments in respect of the similarly-characterised Public Protector. For example, in *Economic Freedom Fighters and others v Speaker of the National Assembly and others*,² the Constitutional Court firmly stated that the role of such institutions is far more than merely putting forward recommendations – those recommendations are binding so long as they are rational, and must be implemented. The powers of the Auditor-General must therefore ensure that the findings made are able to be implemented efficiently and effectively.
9. The current powers of the Auditor-General essentially allow for the auditing and investigation of bodies which are made subject to the jurisdiction of the Auditor-General by legislation. However, if the Auditor-General uncovers an irregularity on the part of the entity that is being audited, the power of the Auditor-General to take

¹ <https://pmg.org.za/committee-meeting/25244/>

² See for example *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016).

appropriate action is severely limited. Essentially the Auditor-General is limited to making a report to that effect to the relevant legislature or organ of state.

10. This power is wholly inadequate for several reasons, including:

- If an undesirable audit outcome is established by the Auditor-General on a certain matter and the facts give sufficient reason for the matter to be referred to an appropriate body, using a legislature or organ of state as what is essentially a “middle man” is time-wasting and unduly cumbersome;
- If, for example, the Auditor-General uncovers a situation which may have sufficient facts to be referred to the Hawks, Special Investigating Unit (SIU) or the National Prosecuting Authority, then Parliament or an organ of state should have no discretion to prevent this;
- If an audited entity yields an undesirable audit outcome, it may often be the case that the body to which the Auditor-General would, under the current Act, have to report the matter has a direct interest in the entity being audited. It would therefore be wholly inappropriate for a legislature or organ of state to bear the responsibility of deciding whether that matter should be taken further when they have a direct interest in the case. The current reporting mechanisms therefore yield clear conflicts of interest which compromise the independence and effectiveness of the Auditor-General.

11. For these reasons, CASAC supports the relevant amendments, which essentially allows the Auditor-General to “cut out the middle man” and refer undesirable audit outcomes directly to the appropriate body. It would be apt to consider which bodies would be appropriate for matters to be referred to for specific undesirable audit outcomes:

- Matters that reveal *prima facie* evidence that an offence has been committed should be referred directly to the National Prosecuting Authority;
- If the facts create a suspicion in the mind of the Auditor-General that a further specialised investigation may reveal that an offence or otherwise unlawful conduct has been committed, the matter should be referred to the Hawks or the Special Investigating Unit (SIU) for a comprehensive investigation;
- Matters which reveal maladministration, incapacity or a lack of capabilities on behalf of any audited entity, accounting officer or other personnel should be referred to the body which is constitutionally mandated to perform oversight of that body or person(s);
- Notwithstanding the above, the Auditor-General should retain the discretion to refer any matter to any body deemed appropriate by the Auditor-General on a case-by-case basis – as is the power of the Public Protector.

12. By way of example, the Public Protector (who possess a similar Constitutional status to the Auditor-General) is empowered by Section 6(4)(c) of the Public Protector Act 23

of 1994 to take the following actions which we suggest should be added to the powers of the Auditor-General:

6: Reporting matters to and additional powers of the Public Protector

“ ...

(4) *The Public Protector shall be competent to –*

...

(c) *at a time prior to, during or after an investigation –*

(i) if he or she is of the opinion that the facts disclose the commission of an offence by any person, to bring the matter to the notice of the relevant authority charged with prosecutions; or

(ii) if he or she deems it advisable, to refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of prejudice resulting therefrom or to make any other appropriate recommendation he or she deems expedient to the affected public body or authority.”

Proposed power of Auditor-General to recover debts

13. We are aware of reports arising from the Standing Committee on the Auditor-General to the effect of vast amounts being owed to the Auditor-General, especially in respect of audit fees, as well as large amounts of unlawfully spent public funds. Therefore, CASAC supports the amendments which empower the Auditor-General to recover, by way of civil claim, debts owed to the state or money that has been improperly paid.
14. In our opinion, the timeframe given to a debtor for repayment of 180 days is too long and should be changed to 90 days.
15. Consideration must, however, be given to the position of the debtor. According to the proposed amendments, the only recourse for an aggrieved “debtor” is to approach the High Court to review the decision of the Auditor-General in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Judicial review in terms of PAJA is an expensive procedure, and we are aware that several of the entities under the jurisdiction of the Auditor-General are asserting that they do not have sufficient funds even to pay audit fees.

16. Accordingly, while the judicial review option should be retained, we propose an addition mechanism of internal appeal or review to an independent panel created by the Auditor-General, including the opportunity for an aggrieved debtor to make submissions.

Remuneration Committee

17. We support the establishment of a remuneration committee within the office of the Auditor-General which determines the remuneration of the Auditor-General and employees. We believe this increases the fiscal independence of the office of the Auditor-General, as has been said of the Office of the Chief Justice which performs a similar role with respect to the judiciary.

Extension of Powers to International Entities

18. We note the proposed extension of the audit powers of the Auditor-General to international associations and entities. In 2004, the International Organisation of Supreme Audit Institutions (INTOSA) stated the following:

“As international institutions are basically funded by public contributions from different member states, SAIs [supreme audit institutions] have the same fundamental interest in these institutions’ living up to principles of good governance, accountability and transparency. Among auditors general there has for a long time been concern about the accountability for funds granted by their national governments to international institutions.”

19. Whilst we have no objection to this measure in principle, our research suggests that such a power is rare in comparable jurisdictions. Accordingly, we feel that the grounds upon which this power may be exercised needs to be specified more clearly than is done in the Draft Amendment Bill in discussion. This should include a requirement that the audit of the international entity in question is substantially linked to the powers granted to the Auditor-General in terms of Section 188 of the Constitution.

Offences and Penalties

20. We note several allegations from the Auditor-General’s office of external actors unduly attempting to influence the procedures of or threaten and intimidate the Auditor-General.³ We believe this to be a serious offence and consequentially believe that the fines and imprisonment period for such an offence should be increased in terms of Section 51(1) read with Section 54(4) of the current Act.
21. In addition, the powers vested in the Auditor-General in terms of the proposed insertion of Section 5(1A) should be extended to empower the Auditor-General to refer any

³ <https://pmg.org.za/committee-meeting/25244/>

instance of undue influence in the workings of the Auditor-General to the National Prosecuting Authority as such actions constitute an offence in terms of Section 51(1) of the current Act.

22. As a result of several reports from the Standing Committee on the Auditor General of delays in auditees producing documents, evidence and financial statements, penal provisions should be inserted for the failure to timeously provide such documentation.

Definitions

23. We believe that the definition of “*undesirable audit outcome*” should be expanded upon and clearly defined in the Regulations. This should include a non-exhaustive list of specific instances which would amount to an undesirable audit outcome. This is especially so seeing that such conduct could attract criminal liability, and it is a fundamental principle of criminal law that offences should be clearly defined. This list should include undesirable conduct performed by auditees before the audit is completed, including the failure to timeously provide documents and evidence relating to an investigation or disrupting or unduly attempting to influence an investigation.

Third party contractors

24. Concerns have been expressed by the Auditor-General of the inability to monitor funds after being paid to entities that contract with entities that are subject to the powers of the Auditor-General.
25. In this regard, the Auditor-General’s investigatory powers should be extended to investigate private audits performed on third party contractors or, if no such audit is performed, Section 4 of the current Act should be amended to allow the Auditor-General to perform audits on and investigate entities that contract with the state in specified circumstances.
26. By way of example, Section 18 of Uganda’s National Audit Act, 2008 reads as follows:

18. Audit of public monies in private organisations and bodies.

The Auditor General may inquire into, examine, investigate and report, as he or she considers necessary, on the expenditure of public monies disbursed, advanced or guaranteed to a private organisation or body in which Government has no controlling interest.

Other matters

27. In addition to our main submissions the following additional considerations require attention:

- The Auditor-General is still largely funded by audit fees. If the powers of the Auditor-General are to be increased, an additional allocation to the Auditor-General from the national fiscus may need to be considered;
- We note several complaints by auditees that they are unable to afford audit fees. Whilst Section 23 of the Act and its proposed amendments somewhat deal with this issue, we feel that entities and institutions funded by the state should not be able to complain about lack of money to pay for audits. We believe that this is more a matter of financial mismanagement on behalf of these entities than a mere lack of funds. Such bodies should be required to earmark a certain amount of funds in their budget for each financial year to comply with their auditing obligations.

Conclusion

28. CASAC is in substantial agreement with the objects of this legislative initiative, namely to enhance the investigatory, referral and debt recovery powers of the Auditor-General.

29. We feel that this is a matter which requires further discussion and we request the opportunity to make further oral submissions on this Draft Amendment Bill.