



PUBLIC PROTECTOR  
SOUTH AFRICA

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**PRIVATE OFFICE**

Private Bag X677, Pretoria 0001 • 175 Lunnon Street • Hillcrest Office Park, 0083

Tel: (012) 366 7108 • Fax: (012) 362 8918 • tollfree: 0800 11 20 40

Ephraimk@pprotect.org

Public Protector South Africa @PublicProtector

**Committee Secretary: Ms Cindy Baile**

**STANDING COMMITTEE ON THE AUDITOR-GENERAL**

W/S 3/071

3rd Floor

90 Plein Street

Cape Town

8000

Email: [cbalie@parliament.gov.za](mailto:cbalie@parliament.gov.za)

Dear Madam

**PUBLIC PROTECTOR'S COMMENT ON THE DRAFT AMENDMENT OF PUBLIC AUDIT ACT.**

1. I have received an invitation to comment on the draft public audit amendment bill, 2017 and wish to submit my comment as follows:-

**1.1 Proposed new section 5(1)**

**Subsection 5(1)(aA)**

- 1.1.1 The Auditor-General is a chapter 9 constitutional state institution established to strengthen constitutional democracy in the Republic. Although the AG is authorised, in terms of section 188(2)(b) of the constitution, to audit and reports on the accounts, financial statements and financial management of any institution that is authorised in terms of

any law to receive money for a public purpose, the proposed new section 5(1)(aA) must clarify that such international association, body, institution or organisation must be registered and authorised, in terms of any law, to receive money for a public purpose.

- 1.1.2 The question which the committee may need to answer or clarify is whether the audit of an international body falls within the constitutional mandate of AG, which is to strengthen the constitutional democracy of the South Africa.
- 1.1.3 My opinion is that auditing non-organ of state or non-public entity cannot be categorised as strengthening constitutional democracy of South Africa, but may be motivated by commercial gain, which is not AG's constitutional mandate.
- 1.1.4 The usage of any "institution" that is authorised in terms of any law", refers to an institution authorised by South African law (such as NPOs) to receive public funds for public purposes. This section is intended to protect and ensure that the public funds are used for purpose it is intended for. It is my further opinion that auditing an international institution or body that did not receive any funds from the Republic will be unconstitutional, as it has nothing to do with the South African democracy.
- 1.1.5 In addition, the provision that prior approval is required from the "oversight mechanism" before the Auditor- General may undertake to provide audit and audit related services to international associations, bodies, institutions or organisations, is implying powers and authority on the part of the oversight mechanism which are not provided for or may not be consistent with its oversight role and functions as envisaged in section 55 (2) of the Constitution as well as in the Public Audit Act, 2004. It may furthermore not pass the Constitutional muster for the independence and impartiality of the Auditor General as contemplated in section 181(2) of the Constitution.

### Subsection 5(1)(d)

The "appropriate investigation" must be specified or defined to be relating to an audit. If the conducting of an "appropriate investigation" is not properly defined, this may lead to misinterpretation of the sub-section to mean conducting **any** investigation by anybody. To further ensure the legitimacy of such an investigation and compliance with the reporting requirements envisaged in this subsection, the "body" to whom a matter is to be referred, should be a public body vested with statutory investigative powers.

2. I support the new sections which deals with the recovery of the monies due to the State, as this will ensure that Auditor General become an effective institution, as prescribed in section 181(3) of the Constitution.

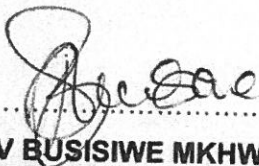
- 2.1 In the Constitutional Court judgment of *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15; CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016)*, the Chief Justice said the following, when confirming the powers of the Public Protector:-

***"We learn from the sum-total of sections 181 and 182 that the institution of the Public Protector is pivotal to the facilitation of good governance in our constitutional dispensation. In appreciation of the high sensitivity and importance of its role, regard being had to the kind of complaints, institutions and personalities likely to be investigated, as with other Chapter Nine institutions, the Constitution guarantees the independence, impartiality, dignity and effectiveness of this institution as indispensable requirements for the proper execution of its mandate".***

- 2.2 My only concern in this regard relates to the compelling nature of the obligation on the Auditor –General and its potential interaction with other public bodies mandated with the recovery of the same kind of expenditures and losses to the State involving criminal acts or possible criminal acts or omissions, including the Asset Forfeiture Unit as well as the Special Investigating Unit.

- 2.3 If the intention is to recover the expenditure and losses from the accounting officers and authorities personally, cognisance should further be taken, particularly as far as the procedure is concerned, of the relevant provisions of the Public Finance Management Act, the Municipal Finance Management Act, Treasury Regulations and other directives describing the processes and procedures to determine the "liability in law", of public servants and officials for losses and damages suffered by the State through criminal acts as well as financial mismanagement.
- 2.4 Another issue for consideration is the fact that the liability of the accounting officer or –authority is in terms of the proposed provisions based on the absence of a "satisfactory explanation", which is a very subjective test and may not necessarily correspond with the test for the liability of accounting officers, accounting authorities and officials of public entities based on financial misconduct (and therefore fault) as contemplated in sections 81 to 86 of the Public Finance Management Act and the corresponding provisions of the Municipal Finance Management Act.
3. I trust that you find the above in order and wish to confirm that my office shall be readily available to clarify any of the above comments.

Yours sincerely



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**ADV BUSISIWE MKHWEBANE**  
**PUBLIC PROTECTOR SOUTH AFRICA**  
**14/02/2018**