

Western Cape
Government

BETTER TOGETHER

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The Committee Secretary

The Standing Committee on the Auditor-General

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Email: cbalie@parliament.gov.za**For the attention of: Ms C Balie****INVITATION TO COMMENT ON THE DRAFT PUBLIC AUDIT AMENDMENT BILL, 2017**

1. The Western Cape Government conveys its gratitude to the Standing Committee on the Auditor-General ('SCOAG') for the opportunity to submit comments on the Draft Public Audit Amendment Bill, 2017 ('the Draft Bill').
2. Your attention in this regard is drawn to the attached schedule of comments.
3. The Western Cape Government would welcome the opportunity to engage further with SCOAG on this Draft Bill and looks forward to receiving a notification from SCOAG in this regard.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Dr IH Meyer', written over a horizontal line.

DR IH MEYER**MEC OF FINANCE: WESTERN CAPE GOVERNMENT****DATE: 19 FEBRUARY 2018**

COMMENTS: DRAFT PUBLIC AUDIT AMENDMENT BILL, 2017

Clause <i>(Indicate clause/ regulation Number)</i>	Comment <i>(State why the clause/regulation or proposed amendment is not supported or what the problem is with the provision)</i>	Suggestion <i>(Suggested deletion/amendment/ addition)</i>
<p>General</p>	<p>The Western Cape Government submits its comments on the Draft Public Audit Amendment Bill, 2017 ('the Draft Bill'). Subject to the serious concerns and comments contained in this document, the Draft Bill is supported in light of the aims and objectives it seeks to achieve.</p>	
<p>General</p>	<p>The Draft Bill gives wide-ranging powers to the Auditor-General ('A-G') which expand significantly upon its pure auditing functions as such. Added to this is that the language employed in the Draft Bill is wide and open-ended. This combination could create problems of interpretation in future and should be addressed in the finalisation of the Draft Bill..</p>	<p>It is recommended that the text be reviewed by and in conjunction with a legislative drafter who is familiar with generally accepted Commonwealth legislative drafting practices for purposes of ensuring that there is clarity in the language of the Draft Bill and that the definitions used and the powers of the A-G referred to are carefully drafted to prevent loose interpretations.</p>
<p>Draft Clause 1(g)</p>	<p>The Draft Bill proposes the insertion of the definition of 'undesirable audit outcome' to section 1 of the Public Audit Act, 2004 ('the Act'). The Draft Bill also contemplates an extension of the <i>ad hoc</i> functions of the 'A-G' listed in section 5 of the Act by providing for the A-G to refer an undesirable audit outcome arising from an audit under the Act to an appropriate body for investigation. According to its proposed definition, '<i>undesirable audit outcome</i>' means <i>any act or omission identified from an audit performed under this Act that causes, or is likely</i></p>	<p>It is proposed that for purposes of preventing a situation where inappropriate meanings are allowed to slip into the definition of 'undesirable audit outcome', it should be re-worded to include a reference to a loss of public resources as a result of criminal conduct or unauthorised, irregular and fruitless or wasteful expenditure. Importantly, this definition must</p>

	<p><u>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.</u> (underlining supplied for emphasis).</p> <p>This definition is overly broad, not definitive and leaves too much room for loose interpretation. It will grant the A-G the unfettered discretion to make determinations and refer matters for investigation.</p> <p>There may be situations where 'a loss of public resources' does not amount to criminal conduct or where 'a loss of public resources' does not necessarily amount to unauthorised, irregular or fruitless and wasteful expenditure as defined in the Public Finance Management Act, 1999, for example.</p> <p>An indirect consequence of a determination or audit opinion under such a broad definition is that it could result in an undue burden being placed on the investigating institution referred to in the proposed section 5(1A). The investigating institution would rely on an existing <i>prima facie</i> case or a <i>prima facie</i> case capable of being made out on the facts to the effect that there has been criminal conduct or irregular, unauthorised or wasteful and fruitless expenditure amounting to criminal conduct before proceeding to take a matter to its full conclusion under the law. If that is non-existent, the investigatory institution's capacity would be compromised.</p>	<p>be linked to internationally recognised standards in the sphere of financial audits which is the primary business of the office of the A-G.</p>
Draft Clause 2(a)	The word 'the' is missing before 'prescribed criteria' in the proposed section 4(3A). Link the reference to 'prescribed criteria' to that referred to in subsection (3)(b).	Insert 'the' as follows: ' <u>the</u> prescribed criteria'.

Draft Clause 3(a)	<p>The Western Cape Government supports the proposed insertion of section 5(1)(aB) which is to the effect that the A-G may provide audit and audit related services commonly performed by an independent audit institution to an international association, body, institution or organisation on the conditions referred to in the proposal provided that it does not impact on the A-G carrying out its core functions under section 4(1) and (3) of the Act . It is noteworthy in this regard that the A-G is unable to service its clients within its current mandate.</p> <p>The fees generated from this activity can be used to offset overheads which will be the interests of the country as a whole.</p>	<p>It is proposed that this draft section be re-worded to the effect that provided the A-G's role as an independent auditor is not compromised and that its ability to perform its core functions in section 4(1) and (3) are not compromised, it may, at a fee, provide the contemplated audit related services.</p>
Draft Clause 3(b)	<p>Draft section 5(1A) contemplates the <u>referral</u> by the A-G of any undesirable audit outcome to an appropriate body for investigation, and for the relevant body to keep the A-G informed of progress and the final outcome of the investigation. The appropriate body referred to would be the Special Investigative Unit ('SIU'), the Public Protector ('PP') and the Hawks, amongst others.</p> <p>The following concerns arise: The present proposal raises the possibility of duplication in the investigation of fraud and theft matters under the Public Finance Management Act, 1999 ('PFMA') and the Municipal Finance Management Act, 2003 ('MFMA') and the body to which the A-G will refer the matter.</p> <p>The process of referring any undesirable audit outcome to an appropriate body for investigation should factor in and take</p>	<p>Re-consider the proposal and align it with the procedures contemplated under the PFMA and the MFMA.</p>

cognisance of the relevant processes contemplated by the PFMA and the MFMA and the accountability procedures in relation to accounting officers under that legislation.

Draft section 5(1A) and (1B) must be read in conjunction with each other. A serious concern is that draft section 5(1A), which deals with the proposed power of the A-G to refer any undesirable audit outcome for investigation is linked to the contemplated 'recovery' procedures under draft section 5(1B).

Draft section 5(1B) contemplates the A-G being empowered to 'recover' any losses resulting from unauthorised, irregular and wasteful expenditure from accounting officers and accounting authorities if the explanation for the failure to recover the loss is not satisfactory. There is no indication of when the recovery procedures will be initiated – whether upon conclusion of the investigation, possible court proceedings or during the investigation. The A-G may refer a matter for investigation. If it does not refer a matter for investigation, the question that arises is whether the A-G will be empowered to recover losses consequent upon its own conclusion that no satisfactory explanation has been given.

If the explanation provided to the investigatory body is not satisfactory, it would be the responsibility of that body to initiate further steps in the prosecution of the matter to its full conclusion. The draft proposal is unsound because there is no clear separation of the contemplated powers of the A-G in relation to the investigation by another independent body such as the SIU, the PP or the Hawks. The A-G will be seen to be making a determination as to

	<p>whether the explanation provided to the investigatory body is satisfactory or not and then taking steps to recover losses on that basis. This is contrary to due process of law. We refer to the comment on draft section 5(1B) below.</p>	
<p>Draft Clause 3(b)</p>	<p>The insertion of draft section 5(1B) contemplates an additional function to the <i>ad hoc</i> functions of the A-G, namely the recovery from the responsible accounting officer, accounting officers, accounting authority or accounting authorities, as the case may be, of any loss resulting from unauthorised, irregular, fruitless and wasteful expenditure, as defined in any applicable legislation relevant to the auditee, and any other losses suffered by the auditee, including—</p> <ul style="list-style-type: none"> (i) money due to the State, which has not been collected; or (ii) money which has been improperly paid, <p>if, in his or her opinion, a satisfactory explanation for the failure to recover the loss is not furnished, within the prescribed period, by the relevant accounting officer or accounting authority.</p> <p>Draft section 5(1B) (b) to (j) contains a number of procedures which include the recovery of the aforementioned monies from the 'debtor', the steps that may be taken by the debtor to repay the amount and the process by which the debtor may challenge the decision by the A-G to recover the monies.</p> <p>The Western Cape Government does not support these proposals for the following reasons:</p> <ul style="list-style-type: none"> (a) Section 2(a) of the Act assigns supreme <u>auditing</u> functions to the A-G. Given their application to the comments on this draft section, the provisions of section 188(1) and 	<p>It is proposed that this draft section be deleted.</p>

(2) of the Constitution and sections 4(1) and (3) of the Act are applicable. These provisions do not confer debt collecting powers on the A-G. Where the A-G has conducted an audit of the entity in question, a debt collecting activity arising from an audit could compromise the essential nature of the office of the A-G as an impartial institution with the function of conducting audits and preparing reports for submission to the relevant legislature with a direct interest in the report.

- (b) The procedure contemplated in draft section 5(1B)(a) is flawed because, as explained above, if a matter has been referred by the A-G to an appropriate body, the procedures envisaged here could encroach upon the independent investigation by that body. The explanation must be provided within a 'prescribed period'. It would appear that this period will be determined by the A-G. This will interfere with the investigation by the body to which the matter has been referred.
- (c) The procedure does not state how a 'satisfactory explanation' for the failure of the accounting officer or accounting authority to recover the loss is to be furnished. For example, would the explanation need to be furnished by way of written representations, a hearing, or a disciplinary enquiry? The procedure does not give effect to the principle of *audi alteram partem* in that the accounting officer or accounting authority is not seen to be given a proper opportunity to present evidence of a satisfactory explanation or the

reasons for his or her inability to do so. There is no mention of a body of persons tasked with conducting any hearing and their requisite capacity to do so. This proposal must be carefully considered as it might be unconstitutional.

(d) An added complication is that in the absence of a 'satisfactory explanation', the A-G will issue a certificate in which the relevant accounting officer or accounting authority will be named (draft section 5(1B)(b)) and this certificate will constitute a debt due to the state, which must be paid within a period of 180 days of the date of its receipt. There is no opportunity afforded to the alleged debtor (the accounting officer or accounting authority who received the prescribed certificate) to appeal an adverse decision of the A-G internally. A debtor aggrieved at the A-G's decision to recover the contemplated loss may under draft section 5(1B)(g) approach the High Court to review the decision of the A-G. High Court litigation to review the decisions of public functionaries is expensive. The process is unfair, when viewed against the flawed procedure referred to above and is not supported.

(e) To the extent that the procedures envisaged in this draft section are aimed at holding accounting officers and accounting authorities accountable for alleged financial misconduct, they are a duplication of the financial misconduct proceedings provided for under the Municipal Regulations on Financial Misconduct Procedures and Criminal Proceedings, 2014 under the MFMA

	<p>and the relevant Treasury Regulations issued under the PFMA.</p> <p>The Western Cape Government is furthermore concerned about the potential costs to the office of the A-G of undertaking this kind of activity. There will also be consequential costs if mistakes are made and the A-G is sued for damages.</p> <p>For the sake of completeness, your attention is drawn to the matter of <u>Minister of Local Government and Land Tenure & Another v Sizwe Development & Others: In re Sizwe Development Flagstaff Municipality 1991 (1) SA 677 (Tk)</u> in which the then Auditor-General of the Transkei was granted leave to intervene in an application to rescind a contract that manifested fraud. This matter, however, predated the Constitution and pertained to the Exchequer and Audit Act, 1975. Your attention is drawn to it for the sake of completeness.</p>	
<p>Draft Clause 6.</p>	<p>The proposed amendment to section 20(2) is not supported. In terms of international standards on auditing, it is an expectation of an auditee that the A-G provides an opinion. A 'conclusion' or finding' is not consistent with the terms of an audit engagement</p>	<p>Delete the proposed amendment to section 20(2) and also the reference to 'conclusion' under the current provision.</p>
<p>Draft Clause 7.</p>	<p>The proposal to amend this section is not supported because there are budgetary implications for National Treasury. The amount to be defrayed from the vote should be within the domain of National Treasury and the A-G should not be party to this kind of decision. A major unintended consequence of this proposal is that there could be a negative impact on</p>	<p>Delete the proposed amendment.</p>

	municipalities that are currently struggling to cover audit costs.	
Draft Clause 10.	The words 'including but not limited to' are redundant. Delete 'but not limited to'. The drafting of this section is also poorly worded. Insert 'the' and 'of' in draft subsection (a) as follows: ' <u>the setting out</u> of criteria...' Delete 'regarding' in draft subsection (b). Delete 'on' in draft subsection (c).	Amend as explained in column 2.
Draft Clause 10(b)	The proposals in this draft section must be carefully reviewed in light of the comments on draft section 5(1B) above.	Delete these proposals in light of the comments on draft section 5(1B), above.