

REPUBLIC OF SOUTH AFRICA

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# PUBLIC PROTECTOR AMENDMENT BILL

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*(As amended by the Select Committee on Security and Justice (National Council of Provinces))*

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(MINISTER OF JUSTICE)

[B 79D—98]

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REPUBLIEK VAN SUID-AFRIKA

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# WYSIGINGSWETSONTWERP OP DIE OPENBARE BESKERMER

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*(Soos gewysig deur die Gekose Komitee oor Veiligheid en Justisie (Nasionale Raad van Provinsies))*

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( MINISTER VAN JUSTISIE )

[W 79D—98]

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**GENERAL EXPLANATORY NOTE:**

- [                    ]    Words in bold type in square brackets indicate omissions from existing enactments.
- Words underlined with a solid line indicate insertions in existing enactments.
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## **BILL**

To amend the Public Protector Act, 1994, so as to bring it into line with the Constitution of the Republic of South Africa, 1996; and to provide for matters connected therewith.

**B**E IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

**Substitution of long title of Act 23 of 1994**

1. The following long title is hereby substituted for the long title of the Public Protector Act, 1994 (hereinafter referred to as the principal Act):

**“TO provide for matters incidental to the office of the Public Protector as contemplated in the Constitution of the Republic of South Africa, [1993] 1996; and to provide for matters connected therewith.”**

**Substitution of Preamble of Act 23 of 1994**

2. The following Preamble is hereby substituted for the Preamble of the principal Act: 10

**WHEREAS** sections [110 to 114] 181 to 183 of the Constitution of the Republic of South Africa, [1993 (Act 200 of 1993)] 1996 (Act No. 108 of 1996), provide for the establishment of the office of Public Protector [in order] and that the Public Protector has the power, as regulated by national 15 legislation, to investigate [matters and to protect the public against matters such as maladministration in connection with the affairs of government, improper conduct by a person performing a public function, improper acts with respect to public money, improper or unlawful enrichment of a person performing a public function and an 20 act or omission by a person performing a public function resulting in improper prejudice to another person] any conduct in state affairs, or in the public administration in any sphere of government. that is alleged or

suspected to be improper or to have resulted in any impropriety or prejudice, to report on that conduct and to take appropriate remedial action, in order to strengthen and support constitutional democracy in the Republic;

AND WHEREAS sections 193 and 194 of the Constitution provide for a mechanism for the appointment and removal of the Public Protector;

**AND WHEREAS** the Constitution envisages further legislation to provide for certain ancillary matters pertaining to the office of Public Protector [, **including the remuneration and conditions of employment, immunities and privileges, powers and functions and staff of the Public Protector**];”.

**Amendment of section 1 of Act 23 of 1994, as amended by section 35 of Act 47 of 1997**

3. Section 1 of the principal Act is hereby amended—
- (a) by the insertion of the following definition after the definition of “committee”: “ ‘Constitution’ means the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996);”;
- (b) by the substitution for the definition of “investigation” of the following definition:  
“ ‘investigation’ means an investigation referred to in section 7, including any preliminary investigation related thereto;”;
- (c) by the deletion of the definition of “joint committee”;
- (d) by the insertion of the following definition after the definition of “member of the office of the Public Protector”:  
“ ‘Minister’ means the Minister of Justice;”;
- (e) by the deletion of the definition of “new Constitution”;
- (f) by the deletion of the definition of “Provincial Public Protector”; and
- (g) by the substitution for the definition of “Public Protector” of the following definition:  
“ ‘Public Protector’ means any person appointed as such in terms of section 110(2) of the Constitution] section 1A;”.

**Insertion of section 1A in Act 23 of 1994**

4. The following section is hereby inserted in the principal Act after section 1:

**“Establishment and appointment**

- 1A. (1) There shall be a Public Protector for the Republic.
- (2) The President shall, whenever it becomes necessary, appoint a Public Protector in accordance with the provisions of section 193 of the Constitution.
- (3) The Public Protector shall be a South African citizen who *is* a fit and proper person to hold such office, and who—
- (a) is a Judge of a High Court; or
- (b) is qualified to be admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having so qualified—
- (i) practised as an advocate or an attorney; or
- (ii) lectured in law at a university; or
- (c) has specialised knowledge of or experience, for a period of at least 10 years, in the administration of justice, public administration or public finance.
- (4) The Public Protector shall not perform remunerative work outside his or her official duties.”

**Amendment of section 2 of Act 23 of 1994**

5. Section 2 of the principal Act is hereby amended—
- (a) by the substitution for subsection (1) of the following subsection: 5  
 “(1) **[Parliament]** The National Assembly shall, in accordance with the rules and orders of [Parliament] the National Assembly, appoint a committee for the purpose of considering matters referred to it in terms of this Act: Provided that the composition of such committee shall be in accordance with the provisions of section 193 (5)(a) of the Constitution.”;
- (b) by the substitution for subsection (2) of the following subsection: 10  
 “(2) The remuneration and other terms and conditions of employment of the Public Protector shall **[subject to section 110(6) of the Constitution,]** from time to time be determined by **[Parliament]** the National Assembly upon the advice of the committee: Provided that such remuneration— 15  
 (a) shall not be less than that of a judge of **[the Supreme Court of South Africa]** a High Court; and  
 (b) shall not be reduced, nor shall the terms and conditions of employment be adversely altered, during his or her term of office.”;
- (c) by the substitution for subsection (3) of the following subsection: 20  
 “(3) **[Parliament]** The National Assembly or, if Parliament is not in session, the [joint] committee may allow a Public Protector to vacate his or her office—  
 (a) on account of continued ill-health; or  
 (b) at his or her request: Provided that such request shall be addressed 25  
 to **[Parliament]** the National Assembly or the **[joint]** committee, as the case may be, at least three calendar months prior to the date on which he or she wishes to vacate such office, unless **[Parliament]** the National Assembly or the [joint] committee, as the case may be, allows a shorter period in a specific case.”;
- (d) by the substitution for subsection (4) of the following subsection: 30  
 “(4) If the **[joint]** committee allows a Public Protector to vacate his or her office in terms of subsection (3), the chairperson of the **[joint]** committee shall communicate **[the vacation of office]** that fact by message to [Parliament] the National Assembly: Provided that any decision taken by the committee in terms of this subsection must be ratified by the National Assembly.”;
- (e) by the substitution for subsection (5) of the following subsection: 35  
 “(5) The Public Protector may, at any time, approach the committee with regard to any matter **[in respect of which Parliament has functions]** pertaining to the office of the Public Protector.” 40

**Amendment of section 3 of Act 23 of 1994, as amended by section 35 of Act 47 of 1997**

6. Section 3 of the principal Act is hereby amended—
- (a) by the substitution for subsection (2) of the following subsection: 45  
 “(2) **The Minister shall, after consultation with the Public Protector, appoint one or more persons as Deputy Public Protectors.**”;
- (b) by the substitution for subsection (3) of the following subsection: 50  
 “(3) A Deputy Public Protector and a person referred to in subsection **(1)(c)** shall have such powers as the Public Protector may delegate to him or her.”;
- (c) by the substitution for subsection (5) of the following subsection: 55  
 “(5) If a vacancy occurs in the office of the Deputy Public Protector the **[President]** Minister may, subject to the provisions of this section, appoint another person to that office.”;
- (d) by the deletion of subsections (6) and (7);
- (e) by the substitution for subsection (8) of the following subsection:

- “(8) The remuneration and other terms and conditions of employment of a Deputy Public Protector shall from time to time be determined by **[Parliament upon the advice of the committee]** the Minister, after consultation with the Public Protector”;
- (f) by the substitution for subsection (10) of the following subsection: 5  
 “(10) The Minister or the Public Protector, as the case may be, shall exercise the powers referred to in subsections (1), (8) and (9), in consultation with the Minister of Finance.”;
- (g) by the substitution for paragraphs (a) and (b) of subsection (11) of the following paragraphs: 10  
 “(a) A document setting out the remuneration, allowances and other conditions of employment determined by the Minister or the Public Protector, as the case may be, in terms of [subsection (9)] this section, shall be tabled in **[Parliament]** the National Assembly within 14 days after such determination. 15  
 (b) If [Parliament] the National Assembly disapproves of any determination such determination shall cease to be of force to the extent to which it is so disapproved.”; and
- (h) by the substitution for subsection (12) of the following subsection: 20  
 “(12) The Public Protector may, in the performance of the functions contemplated in subsection (1)(b) and (c), at his or her request, be assisted by officers in the Public Service seconded to the service of the Public Protector in terms of any law regulating such secondment.”.

#### **Amendment of section 5 of Act 23 of 1994**

7. Section 5 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection: 25

“(2) The State Liability Act, 1957 (Act No. 20 of 1957), shall apply **[mutatis mutandis]** with the necessary changes in respect of the office of the Public Protector, and in such application a reference in that Act to ‘the Minister of the department concerned’ shall be construed as a reference to the Public Protector in his or her official capacity.”. 30

#### **Amendment of section 6 of Act 23 of 1994**

8. Section 6 of the principal Act is hereby amended—

- (a) by the substitution for paragraph (b) of subsection (3) of the following paragraph: 35  
 “(b) prejudiced by **[an act or omission]** conduct referred to in **[subsection (4)(d) or section 112(1)(a)(v) of the Constitution]** subsections (4) and (5) [of the Constitution] and has not taken all reasonable steps “to exhaust his or her legal remedies in connection with such matter.”; and 40
- (b) by the substitution for subsections (4) and (5) of the following subsections:  
 (4) The Public Protector shall, be competent—  
 (a) to investigate, on his or her own initiative or on receipt of a complaint, any alleged— 45  
 (i) **maladministration** in connection with the affairs of government at any level;  
 (ii) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function; 50  
 (iii) improper or dishonest act, or omission or corruption, with respect to public money;  
 (iv) improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage, by a person **as a result** of an act or omission in the public administration or in connection with the **affairs** of government at any level or of a person performing a public function; or 55  
 (v) act or omission by a person in the employ of government at any

- level, or a person performing a public function, which results in unlawful or improper prejudice to any other person;
- (b) to **endeavour**, in his or her sole discretion, to resolve any dispute or rectify any act or omission by—
- (i) mediation, conciliation or negotiation;
  - (ii) advising, where necessary, any complainant regarding appropriate remedies; or
  - (iii) any other means that may be expedient in the circumstances;
- (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 the prejudice resulting therefrom or make any other appropriate recommendation he or she deems expedient to the affected public body or authority.
- (5) In addition to the powers referred to in subsection (4), the Public Protector shall on his or her own initiative or on receipt of a complaint be competent to investigate any **alleged**—
- (a) maladministration in **connection** with the affairs of any institution in which the State is the majority or controlling shareholder or of any public entity as defined in section 1 of the Reporting by Public Entities Act, 1992 (Act No. 93 of 1992);
  - (b) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue **delay** by a person performing a function connected with his or her employment by an institution or entity contemplated in paragraph (a);
  - (c) improper or unlawful enrichment or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or **omission** in connection with the affairs of an institution or entity contemplated in paragraph (a); or
  - (d) act or omission by a person in the employ of an institution or entity contemplated in paragraph (a), which results in unlawful or improper prejudice to any other person.
- (6) Nothing in subsections (4) and (5) shall be construed as empowering the Public Protector to investigate the performance of judicial functions by any court of law.
- (7) The **Public** Protector shall be competent to investigate, on his or her own initiative or on receipt of a complaint, any alleged attempt to do anything which he or she may investigate under subsections (4) or (5).
- (8) The Public Protector or any member of his or her **staff** shall be competent but not compellable to answer questions in any proceedings in or before a court of law or any body or institution established by or under any law, in connection with any information relating to the investigation **which** in the course of his or her investigation has come to his or her knowledge.
- (9) Except where the Public Protector in special circumstances, within his or her discretion, so permits, a complaint or matter referred to the Public Protector **shall** not be entertained unless it is reported to the Public Protector within two years from **the occurrence** of the incident or matter **concerned**.”.

## Amendment of section 7 of Act 23 of 1994

## 9. Section 7 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) [The procedure to be followed in conducting an investigation shall be determined by the Public Protector **with due regard to the 5 circumstances of each case, and the Public Protector may direct that any category of persons or all persons whose presence is not desirable, shall not be present at the proceedings during the investigation or any part thereof.]**”

(a) The Public Protector shall have the power, on his or her own 10 initiative or on receipt of a complaint or an allegation or on the ground of information that has come to his or her knowledge and which points to conduct such as referred to in section 6(4) or (5) of this Act, to conduct a preliminary investigation for the purpose of determining the merits of the complaint, allegation or information and the manner in which the 15 matter concerned should be dealt with.

(b)(i) The format and the procedure to be followed in conducting any investigation shall be determined by the Public Protector with due regard to the circumstances of each case.

(ii) The Public Protector may direct that any category of persons or all 20 persons whose presence is not desirable, shall not be present at any proceedings pertaining to any investigation or part thereof.”;

(b) by the substitution for paragraph (b) of subsection (3) of the following paragraph:

“(b)(i) The Public Protector may designate any person to conduct an 25 investigation or any part thereof on his or her behalf and to report to him or her and for that purpose such a person shall have such powers as the Public Protector may [assign] delegate to him or her [and].

(ii) The Provisions of section 9 and of the instructions issued by the 30 Treasury under section 39 of the Exchequer Act, 1975 (Act No. 66 of 1975), in respect of Commissions of Inquiry, shall apply [mutatis mutandis] with the necessary changes in respect of that person.”;

(c) by the substitution for subsection (7) of the following subsection:

“(7) The Public Protector or any person authorised by him or her in 35 writing may administer an oath to or accept an affirmation from any such person.”;

(d) by the substitution for subsection (9) of the following subsection:

“(9) (a) If it appears to the Public Protector during the course of an 40 investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such person an opportunity to [be heard] respond in CONneCtiOn therewith [by way of the giving of evidence, 45 and], in any manner that may be expedient under the circumstances.

(b)(i) If such implication forms part of the evidence submitted to the 45 Public Protector during an appearance in terms of the provisions of subsection (4), such person shall be afforded an opportunity to be heard in connection therewith by way of giving evidence.

(ii) Such person or his or her legal representative shall be entitled, 50 through the Public Protector, to question other witnesses, determined by the Public Protector, who have appeared before the Public Protector in terms of this section.”; and

(e) by the addition of the following subsection:

“(1 1) The Public Protector may make rules in respect of any matter 55 referred to in this section which has a bearing on an investigation or in

respect of any matter incidental thereto, provided that such rules must be published in the *Government Gazette* and tabled in the National Assembly.”.

**Insertion of section 7A into Act 23 of 1994**

10. The following section is hereby inserted into the principal Act: 5

**“Entering upon premises by the Public Protector**

**7A. (1)** The Public Protector shall be competent to enter, 01  
 authorise another person to enter, any building or premises and there to  
 make such investigation or inquiry as he or she may deem necessary, and to  
 seize anything on those premises which in his or her opinion has a bearing 10  
 on the investigation.

(2) The pre-mises referred to in subsection (1) may only be entered by  
 virtue of a warrant issued by a magistrate or a judge of the area of  
 jurisdiction within which the premises is situated: Provided that such a  
 warrant may be issued by a judge in respect of premises situated in another 15  
 area of jurisdiction, if he or she deems it justified.

(3) A warrant contemplated in subsection (2) may only be issued if it  
 appears to the magistrate, or a judge from information on oath or  
 affirmation, stating—

- (a) the nature of the investigation or inquiry; 20
- (b) the suspicion which gave rise to the investigation or inquiry; and
- (c) the need, in regard to the investigation, for a search and seizure in  
 terms of this section,

that there are reasonable grounds for believing that anything referred to in  
 subsection (1) is on or in such premises or suspected to be on or in such 25  
 premises.

(4) A warrant issued in terms of this section may be issued on any day and  
 shall be of force until—

- (a) it has been executed;
- (b) it is cancelled by the person who issued it or, if such person is not 30  
 available, by any person with like authority; or
- (c) the expiry of three months from the day of its issue,  
 whichever may occur first.

(5) (a) Any person who acts on authority of a warrant issued in terms of  
 this section may use such force as may be reasonably necessary to 35  
 overcome any resistance against the entry and search of the premises,  
 including the breaking of any door or window of such premises: Provided  
 that such person shall first audibly demand admission to the premises and  
 state the purpose for which he or she seeks to enter such premises.

(b) The proviso to paragraph (a) shall not apply where the person 40  
 concerned is on reasonable grounds of the opinion that any object, book or  
 document which is the subject of the search may be destroyed, tampered  
 with or disposed of if the provisions of the said proviso are first complied  
 with.

(6) A warrant issued in terms of this section shall be executed by day 45  
 unless the person who issues the warrant authorises the execution thereof  
 by night at times which shall be reasonable in the circumstances,

(7) Any person executing a warrant in terms of this section shall  
 immediately before commencing with the execution—

- (a) identify himself or herself to the person in control of the premises, if 50  
 such person is present, and hand to such person a copy of the warrant  
 or, if such person is not present, affix such copy to a prominent place  
 on the premises; and

(b) supply such person at his or her request with particulars regarding his  
 or her authority to execute such a warrant. 55

(8) If during the execution of a warrant or the conducting of a search in



terms of this section, a person claims that any item found on or in the premises concerned contains privileged information and for that reason refuses the inspection or removal of such item, the person executing the warrant or conducting the search shall, if he or she is of the opinion that the item contains information which is relevant to the investigation or inquiry and that such information is necessary for the investigation or inquiry, request the registrar of the High Court which has jurisdiction or his or her delegate, to seize and remove that item for safe custody until a court of law has made a ruling on the question whether the information concerned is privileged or not.”.

#### Amendment of section 8 of Act 23 of 1994

11. Section 8 of the principal Act is hereby amended—

(a) by the substitution for subsection (2) of the following subsection.

“(2) (a) The Public Protector shall report in writing on the activities of his or her office to National Assembly at least once every year: Provided that any report shall also be tabled in the National Council of Provinces,

(b) The Public Protector [shall submit, to Parliament half-yearly reports on the findings in respect of investigations of a serious nature, which were conducted during the half-year concerned: Provided that the Public Protector] shall, at any time, submit a report to [Parliament] National Assembly on the findings of a particular investigation if—

[(a)] (i) he or she deems it necessary;

[(b)] (ii) he or she deems it in the public interest;

[(c)] (iii) it requires the urgent attention of, or an intervention by, [Parliament] National Assembly;

[(d)] (iv) he or she is requested to do so by the Speaker of the National Assembly; or

[(e)] (v) he or she is requested to do so by the [President of the Senate] Chairperson of the National Council of Provinces.”; and

(b) by the insertion after subsection (2) of the following subsection:

“(2A) (a) Any report issued by the Public Protector shall be open to the public, unless the Public Protector is of the opinion that exceptional circumstances require that the report be kept confidential.

(b) If the Public Protector is of the opinion that exceptional circumstances require that a report be kept confidential, the committee must be furnished with the reasons therefor and, if the committee concurs, such report shall be dealt with as a confidential document in terms of the rules of Parliament.

(c) For the purposes of this section, ‘exceptional circumstances’ shall exist if the publication of the report concerned is likely—

(i) to endanger the security of the citizens of the Republic;

(ii) to prejudice any other investigation or pending investigation;

(iii) disturb the public order or undermine the public peace or security of the Republic;

(iv) to be prejudicial to the interests of the Republic; or

(v) in the opinion of the Public Protector to have a bearing on the effective functioning of his or her office.”.

#### Amendment of section 11 of Act 23 of 1994

12. Section 11 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

“(1) Any person who contravenes the provisions of sections 3(14), 7(2) and 9 of this Act, or interferes with the functioning of the office of the Public Protector as contemplated in section [111(3)] 181(4) of the Constitution, shall be guilty of an offence.”; and

(b) by the substitution for subsection (3) of the following subsection:

“(3) Any person who, without just cause, refuses or fails to comply with a direction or request under [section 112(3) (a) of the Constitution or] section 7(4) [(a) of this Act] or refuses to answer any question put to him or her under [those paragraphs] that section or gives to such question an answer which to his or her knowledge is false, or refuses to 5 take the oath or to make an affirmation at the request of the Public Protector in terms of section 7(6), shall be guilty of an offence.”.

**Repeal of section 12 of Act 23 of 1994**

13. Section 12 of the principal Act is hereby repealed.

**Short title**

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14. This Act shall be called the Public Protector Amendment Act, 1998.

## MEMORANDUM ON THE OBJECTS OF THE PUBLIC PROTECTOR AMENDMENT BILL

1. The Bill aims to bring the provisions of the Public Protector Act, 1994 (Act No. 23 of 1994) (the principal Act), in line with the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) (the Constitution). The principal Act was originally drafted to give effect to the provisions of sections 110 to 114 of the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993) (the Interim Constitution). As a consequence of the repeal of the Interim Constitution, various amendments to the principal Act are required so as to harmonise it with the provisions of sections 181 and 182 of the Constitution, and to re-enact certain of the afore-mentioned provisions of the Interim Constitution in the principal Act.

2. In terms of item 20 of Schedule 6 to the Constitution, the Public Protector (as a “constitutional institution”) continues to function in terms of the legislation applicable to it. This transitional measure is, however, not wide enough to cover all matters pertaining to the Public Protector’s Office. This became apparent when the appointment of a Deputy Public Protector in terms of section 3 of the principal Act was contemplated. In terms of section 3 the Public Protector must, in the performance of his or her functions, be assisted by one or more Deputy Public Protectors appointed by the President from persons “... approved by the National Assembly and the Senate by a resolution adopted by at least 75 per cent of the members present and voting at a joint meeting”. However, the Constitution does not make provision for joint sittings of the National Assembly and the National Council of Provinces for decision-making purposes and, consequently, no procedure exists for the appointment of a Deputy Public Protector. The Bill therefore purports to make provision for such an appointment mechanism, as well as effecting the consequential amendments referred to above.

3. The Office of the Public Protector was consulted regarding the contents of the Bill.

4. In the opinion of the Department and the State Law Advisers, the Bill should be dealt with in accordance with the procedure prescribed by section 75 of the Constitution.