

Please note that most Acts are published in English and another South African official language. Currently we only have capacity to publish the English versions. This means that this document will only contain even numbered pages as the other language is printed on uneven numbered pages.



Government Gazette

REPUBLIC OF SOUTH AFRICA

Vol. 313

Cape Town

5 July 1991

No. 13351

THE PRESIDENCY

No. 1500

5 July 1991

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:—

No. 104 of 1991: Advocate-general Amendment Act, 1991.



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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with solid line indicate insertions in existing enactments.

ACT

To amend the Advocate-General Act, 1979, so as to re-define "public moneys"; to make further provision regarding the appointment and conditions of employment of the Ombudsman; to provide that the Ombudsman may refuse to investigate a matter until a prejudiced person has exhausted his legal remedies; to provide that the Ombudsman may in certain cases act in self-governing territories; to further define the duties and powers of the Ombudsman; to provide that the Ombudsman may enter upon premises in the performance of his functions; to provide that the Ombudsman and certain other persons are not competent or compellable to answer certain questions; to provide that expenses incurred by persons in connection with an inquiry by the Ombudsman may in certain circumstances be paid from State funds; to provide that the Ombudsman and certain other persons are not liable in respect of anything done by them in good faith in terms of the Act; to increase penalties; and to substitute the designation "Ombudsman" for the designation "Advocate-General"; and to provide for matters connected therewith.

*(Afrikaans text signed by the State President.)
(Assented to 27 June 1991.)*

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 118 of 1979, as amended by section 1 of Act 55 of 1983

1. Section 1 of the Advocate-General Act, 1979 (hereinafter referred to as the principal Act), is hereby amended by the substitution for the definition of "public moneys" of the following definition:

"public moneys" means—

- (a) State moneys as defined in section 1(1) of the Exchequer **[and Audit]** Act, 1975 (Act No. 66 of 1975);
- (b) revenue accruing to—
 - (i) the Railway and Harbour Fund, the Post Office Fund and **[a provincial revenue fund]** an Account for Provincial Services;
 - (ii) any institution or body contemplated in section 84 (1) (f) of the **[Republic of South Africa Constitution]** Provincial Government Act, 1961 (Act No. 32 of 1961);
 - (iii) any statutory body as defined in section 1(1) of the Exchequer **[and Audit]** Act, 1975, but, subject to section 4A, excluding any Government, body or institution referred to in section 35 of the **[National States]** Self-governing Territories Constitution Act, 1971 (Act No. 21 of 1971);

- (iv) any body, association or organization deemed in terms of section **[42 (5)] 5 (3)** of the **[Exchequer and Audit Act, 1975] Auditor-General Act, 1989 (Act No. 52 of 1989)**, to be a statutory body as defined in section 1 **[(1)]** of that Act;
- [(v) any institution or body referred to in section 16 (3) (b) or (c) of the Provincial Finance and Audit Act, 1972 (Act No. 18 of 1972)]** 5
- (c) all other moneys whatever received or held for, or on account of, a fund, institution, body, association or organization referred to in any subparagraph of paragraph (b);”.

Amendment of section 2 of Act 118 of 1979, as amended by section 2 of Act 55 of 1983 10

2. Section 2 of the principal Act is hereby amended—

- (a) by the substitution for subsection (2) of the following subsection:

“(2) The State President shall appoint to the office of **[Advocate-General] Ombudsman**, in a full-time or in a part-time capacity, a person who by virtue of his qualifications is entitled to be admitted and authorized to practise and be enrolled as an advocate in terms of the provisions of section 3 of the Admission of Advocates Act, 1964 (Act No. 74 of 1964), and who, after obtaining such qualifications, was concerned in the application of the law for a **[continuous]** period of at least 10 years or periods which together amount to at least 10 years.”; 15 20

- (b) by the substitution for the words preceding the proviso to subsection (3) of the following words:

“The salary and other conditions of employment (if any) of the Ombudsman shall from time to time be determined by the State President.”; 25

- (c) by the substitution for paragraphs (b) and (c) of subsection (6) of the following paragraphs, respectively:

“(b) A suspension of the **[Advocate-General] Ombudsman** and the reason therefor shall be communicated by message to **[the Senate and the House of Assembly] Parliament** within 14 days after such suspension, if Parliament is then in session, or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session. 30

(c) If an address is at any time during such a session of Parliament presented to the State President by the **[Senate and the House of Assembly] respective Houses** praying for the restoration to his office of the **[Advocate-General] Ombudsman** so suspended, the **[Advocate-General] Ombudsman** shall be restored to his office accordingly.”; and 35

- (d) by the substitution for subsection (7) of the following subsection:

“(7) The State President shall also remove the **[Advocate-General] Ombudsman** from office if an address from the **[Senate and the House of Assembly] respective Houses of Parliament** in the same session praying for such removal on the ground of misconduct of the **[Advocate-General] Ombudsman** or unfitness for the duties of his office or his incapacity to carry them out efficiently, is presented to the State President.”. 40

Amendment of section 4 of Act 118 of 1979, as amended by section 3 of Act 55 of 1983 45

3. Section 4 of the principal Act is hereby amended—

- (a) by the insertion after paragraph (a) of subsection (1) of the following paragraph:

“(aA) the State or the public in general is being prejudiced by maladministration in connection with the affairs of the State;”; 50

- (b) by the insertion after paragraph (c) of subsection (1) of the following paragraph:

“(d) he, or any other person, subject to the provisions of subsection (3), has been or is being or may be prejudiced, either directly or indirectly, in an unlawful or improper manner by or as a result of an act or omission as contemplated in paragraph (b) (i) or (ii).”; 55

(c) by the insertion after subsection (1) of the following subsection:

“(1A) Subsection (1) (aA) and (d) shall also apply to incidents commencing prior to the date of commencement of the Advocate-General Amendment Act, 1991, but which had not been completed on the said date.”; and

(d) by the addition of the following subsection:

“(3) If the Ombudsman is of the opinion that the person who according to the relevant affidavit or affirmed declaration is presumed to have been prejudiced, has legal remedies in respect of the matter concerned at his disposal which have been conferred upon him by or under any law and that person has not exhausted those legal remedies, the Ombudsman may refuse to inquire into the matter until those legal remedies have been exhausted: Provided that where the allegation of unlawful or improper prejudice arises from the employment relationship of an officer or employee in the service of the State, the Ombudsman shall only investigate the allegation if he is satisfied that the person concerned has exhausted the legal remedies conferred upon him by the Public Service Act, 1984 (Act No. 111 of 1984), or any other law controlling his employment relationship.”

Insertion of section 4A in Act 118 of 1979

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

“Action of Ombudsman in self-governing territories

4A. (1) If the Ombudsman has reason to suspect that a circumstance referred to in section 4(1) exists in respect of—

(a) money due to a Government, body or institution referred to in section 35 of the Self-governing Territories Constitution Act, 1971 (Act No. 21 of 1971), or which is received or being held by such a Government, body or institution; or

(b) any act or omission of a Government, body or institution referred to in paragraph (a),

he may advise the State President accordingly.

(2) Upon receipt of the information referred to in subsection (1), the State President may, after consultation with the Government of the self-governing territory concerned, by proclamation in the Gazette—

(a) request the Ombudsman to hold in such self-governing territory such inquiry as the Ombudsman may deem necessary; and

(b) declare the provisions of this Act to be applicable *mutatis mutandis* in respect of that inquiry until the Ombudsman has completed his functions in respect of the specific matter and reported thereon in terms of section 5.”

Amendment of section 5 of Act 118 of 1979

5. Section 5 of the principal Act is hereby amended—

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

“(1) The [Advocate-General] Ombudsman shall, [inquire forthwith into] in respect of a matter laid before him in terms of section 4 or which he has been requested to inquire into in terms of section 4A (2) (a), establish whether [or not] the suspicion in question is well-founded and, if so, inquire forthwith into it and hand a report on his findings and on such recommendations, if any, as he may wish to make to the [Leader of the House of Assembly] Speaker of Parliament for handing over within seven days to the Minister of Justice, who shall, within [seven] 14 days after it has been handed to him, lay the report upon the Table in [the House of Assembly] Parliament if Parliament is then in session or, if Parliament is not then in session, [hand within the said seven days, such report to the Speaker of the House of Assembly for such laying upon the Table by the Leader of the House of Assembly] within [seven] 14 days after the commencement of the next ensuing session of Parliament: Provided that for the purposes of the

publication of the contents of the said report such handing over to the **[Speaker of the House of Assembly] Minister of Justice** if Parliament is then not in session, shall, subject to the provisions of subsection (2), be deemed to constitute such laying upon the Table: Provided further that a report in respect of an inquiry held under section 4A, shall also be handed by the Ombudsman to the Government of the self-governing territory concerned.”;

(b) by the substitution for subsection (2) of the following subsection:

“(2) Notwithstanding the provisions of subsection (1) the **[Advocate-General] Ombudsman** shall, if in connection with a matter inquired into by him in terms of subsection (1) he is of the opinion that the publication of the contents of his report will not be in the interest of the security of the State, recommend in the report referred to in subsection (1) that such publication be prohibited, and a report in which such recommendation is contained shall, within **[seven] 14** days after it has been handed to **[him] the Minister of Justice**, be laid upon the Table of **[the House of Assembly] Parliament** by **[the Leader of the House of Assembly] him** as a confidential paper in terms of the Standing **[Orders] Rules** of **[the House of Assembly] Parliament** if Parliament is then in session or, if Parliament is not then in session **[be handed]**, within **[the said seven] 14** days **[by him to the Speaker of the House of Assembly]** after the commencement of the next ensuing session of Parliament, in both cases for submission to, and consideration of the said recommendation and the making of a report to **[the House of Assembly] Parliament** by a **[select] joint** committee of **[the House of Assembly] Parliament [appointed for that purpose].**”;

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

“(3) A **[select]** committee referred to in subsection (2) may, for the purposes of this Act, be authorized by resolution of **[the House of Assembly] Parliament** to continue its functions notwithstanding any prorogation of Parliament.”;

(d) by the substitution for subsection (4) of the following subsection:

“(4) The Ombudsman may, whether or not he holds an inquiry referred to in subsection (1), and, if he does in fact hold an inquiry, at any time prior to, during or after the holding of such an inquiry—

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

(b) if he deems it advisable, refer any matter which has a bearing on mismanagement to the institution, body, association or organization affected by it or make an appropriate recommendation regarding the redress of the prejudice referred to in section 4 (1) (d) or make any other recommendation which he deems expedient to the institution, body, association or organization concerned.”;

(e) by the substitution for the proviso to subsection (6) of the following proviso:

“Provided that if required to do so by the **[select] joint** committee referred to in subsection (2), the **[Advocate-General] Ombudsman** shall furnish the said **[select]** committee with the last-mentioned record.”; and

(f) by the addition of the following subsections:

“(7) The Ombudsman may, if he decides to hold an inquiry referred to in subsection (1), at any time prior to or during the holding of the inquiry—

(a) request any person in the service of the State, or of a fund, institution, body, association or organization referred to in the definition of ‘public moneys’ in section 1, or in the employment of a Government, body or institution referred to in section 4A, to assist him, under his supervision and control, in the performance of his functions;

(b) designate any person to conduct an inquiry referred to in section 7, or any part thereof, on his behalf and to report to him, and for this purpose such a person shall have the same powers as those which the Ombudsman has in terms of sections 6 and 7 and the provisions of sections 8 and 9 shall apply *mutatis mutandis* in respect of that person.

(8) The provisions of the instructions issued by the Treasury under section 39 of the Exchequer Act, 1975 (Act No. 66 of 1975), in respect of Commissions of Inquiry, shall apply *mutatis mutandis* to a person referred to in subsection (7) (b)."

Insertion of sections 7A, 7B and 7C in Act 118 of 1979

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6. The following sections are hereby inserted in the principal Act after section 7:

“Entering upon premises by Ombudsman

7A. The Ombudsman, or any person authorized thereto by him in writing, may in the performance of his functions in terms of this Act at any time and without prior notice or with such notice as he may deem sufficient or appropriate, enter any building or premises and there make such investigation and inquiry as he may deem necessary, and seize anything on those premises which in his opinion has a bearing on the purpose of the investigation, or make extracts from documents or copies thereof, and require any person whom he suspects of having the necessary information, to give an explanation of anything contained in such a document.

Ombudsman not competent or compellable to answer questions

7B. The Ombudsman or his assistant or any member of his staff or any person referred to in section 5 (7), shall not be competent or compellable to answer questions in any proceedings in a court of law or before any body or institution established by or under any law or before a commissioner referred to in the Commissions Act, 1947 (Act No. 8 of 1947), in connection with any information which in the course of his inquiry in terms of this Act has come to his knowledge.

Compensation regarding expenses

7C. The Ombudsman may, if he deems it advisable, with the concurrence of the Treasury, order that the expenses or a portion of the expenses incurred by any person in the course of or in connection with an inquiry by the Ombudsman be paid from State funds to that person.”

Amendment of section 8 of Act 118 of 1979, as amended by section 5 of Act 55 of 1983

7. Section 8 of the principal Act is hereby amended by the substitution for paragraph (c) of subsection (1) of the following paragraph:

“(c) in connection with an inquiry do anything which, if done in connection with a court of law, would have constituted contempt of court: Provided that the provisions of this paragraph shall not prohibit discussion in **[the Senate or the House of Assembly or any provincial council]** Parliament of any matter being inquired into by the **[Advocate-General]** Ombudsman.”

Insertion of section 9A in Act 118 of 1979

8. The following section is hereby inserted in the principal Act after section 9: 40

“Limitation of liability

9A. The Ombudsman, or his assistant or any member of his staff or any person referred to in section 5 (7), shall not be liable in respect of anything done in good faith under any provision of this Act by the Ombudsman, or his assistant or any member of his staff or any person referred to in section 5 (7), as the case may be.”

Amendment of section 10 of Act 118 of 1979

9. Section 10 of the principal Act is hereby amended by the substitution in subsection (2) for the expression “five hundred rand” of the expression “R2 000”.

Substitution of section 11 of Act 118 of 1979

10. The following section is hereby substituted for section 11 of the principal Act:

“Penalties

11. Any person convicted of an offence referred to in section 6 (4), 7 (7), 8 (2) or 9 (2), shall be liable to a fine not exceeding **[five hundred rand]** R4 000 or imprisonment for a period not exceeding **[six]** 12 months or to both such fine and such imprisonment.”

Substitution of expression in Act 118 of 1979

11. The principal Act is hereby amended by the substitution for the expression “Advocate-General”, wherever it occurs, of the expression “Ombudsman”. 10

Substitution of section 13 of Act 118 of 1979

12. The following section is hereby substituted for section 13 of the principal Act:

“Short title

13. This Act shall be called the **[Advocate-General]** Ombudsman Act, 1979.” 15

Substitution of long title of Act 118 of 1979

13. The following long title is hereby substituted for the long title of the principal Act:

“ACT

To establish the office of **[Advocate-General]** Ombudsman; to provide for the appointment of a person to that office; to determine the duties and powers of the **[Advocate-General]** Ombudsman; and to provide for matter connected therewith.” 20

Short title and commencement

14. This Act shall be called the Advocate-General Amendment Act, 1991, and shall come into operation on a date fixed by the State President by proclamation in the *Gazette*. 25