

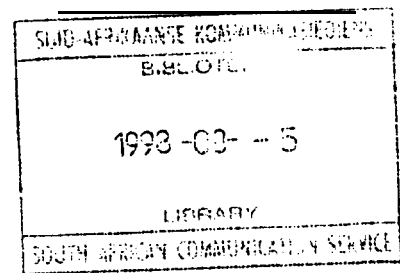
REPUBLIC OF SOUTH AFRICA

PUBLIC PROTECTOR AMENDMENT BILL

(As introduced in the National Assembly)

(MINISTER OF JUSTICE)

[B 79—98]



REPUBLIEK VAN SUID-AFRIKA

WYSIGINGSWETSONTWERP OP DIE OPENBARE BESKERMER

(Soos ingedien in die Nasionale Vergadering)

(MINISTER VAN JUSTISIE)

[W 79—98]

ISBN 0 621284114

GENERAL EXPLANATORY NOTE:

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

BE 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.”.
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Substitution of Preamble of Act 23 of 1994

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

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 to investigate [matters and to protect the public against matters 15 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 act or omission by a person performing a public function resulting in 20 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, in order to strengthen constitutional democracy in the Republic;

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— 10
- (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: 15
- “ ‘investigation’ means an investigation referred to in section 7 and any preliminary investigation related thereto;”;
- (c) by the deletion of the definition of “joint committee”;
- (d) by the deletion of the definition of “new constitution”;
- (e) by the deletion of the definition of “Provincial Public Protector”; and 20
- (f) 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 11O(2) of the Constitution] section 1A;”.

Insertion of **section 1A** in Act 23 of 1994 25

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. 30
- (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— 35
- (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. 40
- (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— 45
- (a) by the substitution for subsection (1) of the following subsection:
- “(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:
- “(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—
- (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:
- “(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 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:
- “(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.”; and
- (e) by the substitution for subsection (5) of the following subsection:
- “(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 which the National Assembly may deal with in terms of this Act.”.

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:
- “(2)(a) The President shall, subject to the provisions of paragraph (b), appoint one or more persons, qualified to be appointed as a Public Protector in terms of **[the Constitution]** section 1A(3) and on the recommendation of the National Assembly, as Deputy Public Protectors.
- (b) **[An appointment in terms of paragraph (a) shall only be made from persons—**
- (i) **nominated by the joint committee after consultation with the Public Protector; and**
- (ii) **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.]** For the purpose of paragraph (a) the National Assembly must recommend persons—
- (i) nominated by the committee; and
- (ii) approved by the Assembly by a resolution adopted by at least 60 per cent of the members of the Assembly.
- [(c) if **any nomination is not approved as contemplated in paragraph (b)(ii), the joint committee shall nominate another person in accordance with paragraph (b)(i).**
- (d) If the Public Protector has not yet been appointed or if the office of Public Protector is vacant or if, on account of his or her incapacity, the Public Protector cannot be consulted at the time

when it is necessary to nominate a person in terms of paragraph (b)(i), the joint committee may nominate persons without undertaking the consultation contemplated in the said paragraph (b)(i).]

(e) [Unless the new Constitution provides otherwise, a] Deputy Public Protector shall hold office for a period of seven years.

(f) The provisions of section 194 of the Constitution, pertaining to the removal from office of the Public Protector, and of section 2(3) and (4) shall apply [mutatis mutandis] with the necessary changes in respect of a Deputy Public Protector.”;

(b) by the substitution for subsection (3) of the following subsection: 10

“(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 deletion of subsections (6) and (7);

(d) by the substitution for subsection (8) of the following subsection: 15

“(8) The remuneration and other terms and conditions of employment of a Deputy Public Protector shall from time to time be determined by [Parliament] the National Assembly upon the advice of the committee.”;

(e) by the substitution for paragraphs (a) and (b) of subsection (11) of the following paragraphs: 20

“(a) A document setting out the remuneration, allowances and other conditions of employment determined by the Public Protector in terms of subsection (9), shall be tabled in [Parliament] the National Assembly within 14 days after such determination. 25

(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

(f) by the addition of the following subsection:

“(1 **6**) (a) Expenditure incidental to the exercise and performance of the powers and functions of the Public Protector shall be defrayed from money— 30

(i) appropriated by Parliament for that purpose;

(ii) accruing to the office of the Public Protector from any other source.

(b) (i) The office of the Public Protector may accept donations and bequests, provided that any condition which may be attached to any such donation or bequest is acceptable to the Public Protector. 35

(ii) Particulars of every donation or bequest so accepted shall be included in the next report to Parliament by the Public Protector.

(c) The Public Protector may open an account with an institution registered as a bank in terms of the Banks Act, 1990 (Act No, 94 of 1990).”.

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: 45

“(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.”. 50

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:

“(b) prejudiced by [**an act or omission**] conduct referred to in subsection (4)(d) [**or section 112(1)(a)(v) of the Constitution**] and has not taken all reasonable steps to exhaust his or her legal remedies in connection with such matter.”; 55

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

- “(4) In addition to the powers and functions assigned to the Public Protector by section [112] 182(1) of the Constitution, he or she shall be competent to investigate, on his or her own initiative or on receipt of a complaint, any [alleged] conduct in the affairs and administration of—
- (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)] any institution in which the State is the majority or controlling shareholder;**
- (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)] any public entity as defined in section 1 of the Reporting by Public Entities Act, 1992 (Act No. 93 of 1992);**
- (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] any person or institution performing a public function; and
- (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.] any person or institution performing a function on behalf of government in any sphere, that is alleged or suspected to be improper or to have resulted in any impropriety or prejudice.**”;
- (c) by the substitution for subsection (5) of the following subsection:
- “(5) 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 section [112] 182(1) of the Constitution or subsection (4).”; and
- (d) by the addition of the following subsections:
- “(6) The Public Protector shall, after obtaining a warrant from a magistrate or judge, be competent to enter, or 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 on the investigation.
- (7) 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 which in the course of his or her investigation has come to his or her knowledge.
- (8) Recourse to, or the exercise and performance of any powers and functions of the Public Protector shall not oust the jurisdiction of a court of law to hear any matter or cause whatsoever.
- (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 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 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 182(1)(a) of the Constitution or section 6(4) 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 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 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 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 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 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 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, and]**, in any manner that may be expedient under the circumstances.

(b)(i) If such implication forms part of the evidence submitted to the 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, 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:

“(11) The Public Protector may make rules in respect of any matter referred to in this section which has a bearing on an investigation or in respect of any matter incidental thereto.”.

Amendment of section 8 of Act 23 of 1994

10. 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 Parliament at least once every year.

(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:~~ 5
Provided that the Public Protector] shall, at any time, submit a report to Parliament 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, 10
Parliament;

[(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] 15
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 20
circumstances require that a report be kept confidential, the committee must be furnished with the reasons therefore and, if the committee concurs, such report shall be dealt with as a confidential paper in terms of the rules of Parliament.

(c) For the purposes of this section, ‘exceptional circumstances’ shall 25
exist if the publication of the report concerned is likely—

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

(ii) to prejudice any other investigation or pending investigation by the 30
Public Protector or a Special Investigating Unit established in terms of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996).”.

Amendment of section 11 of Act 23 of 1994

11. 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), 35
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 40
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 45
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

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

Short title

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

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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.