

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.

BILL

To amend the Public Protector Act, 1994, so as to update certain obsolete provisions; to further regulate the appointment of the Public Protector and the Deputy Public Protector and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Amendment of section 1 of Act 23 of 1994, as amended by section 35 of Act 47 of 1997 and section 3 of Act 113 of 1998

1. Section 1 of the Public Protector Act, 1994 (hereinafter referred to as the principal Act), is hereby amended-

- (a) by the substitution for the definition of "committee" of the following definition:

" 'committee' means a committee **[established under]** referred to in section 2(1);"
- (b) by the substitution for the definition of "Deputy Public Protector" of the following definition:

" 'Deputy Public Protector' means any person appointed as such in terms of section **[3(2)]** 2A(1);"
- (c) by the substitution for the definition of "member of the office of the Public Protector" of the following definition:

" 'member of the office of the Public Protector' includes the Public Protector, **[a] the** Deputy Public Protector, a member of the staff of the Public Protector and any person contemplated in sections 3(12) and 7(3)(b);" and
- (d) by the substitution for the definition of "Minister" of the following definition:

" 'Minister' means the **[Minister of Justice]** Cabinet member responsible for the administration of justice;"

Amendment of section 1A of Act 23 of 1994, as inserted by section 4 of Act 113 of 1998

2. Section 1A of the principal Act is hereby amended by the substitution for subsection (3) of the following subsection:

- "(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 been so **[qualified - (i)]** admitted, practised as an advocate or an attorney; **[or (ii)]** **lectured in law at a university;**] or
- (c) 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, lectured in law at a university; or
- ~~(c)~~(d) has specialised knowledge of or experience, for a cumulative period of at least 10 years, in the administration of justice, public administration or public finance; or
- (e) has, for a cumulative period of at least 10 years, been a member of Parliament.".

Amendment of section 2 of Act 23 of 1994, as amended by section 5 of Act 113 of 1998

3. Section 2 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

- "(1) The National Assembly shall[, **in accordance with the rules and orders of the National Assembly, appoint a committee for the purpose of refer to a committee of the National Assembly** the-
- (a) nomination of a person in terms of section 193(5)(a) of the Constitution to be appointed as Public Protector;
 - (b) nomination of a person in terms of section 2A(3)(a) to be appointed as Deputy Public Protector;
 - (c) consideration in terms of section 194(1)(b) and (3)(a) of the Constitution of the removal from office of the Public Protector;
 - (d) consideration in terms of section 2A(9)(b) and (11)(a)(ii) of the removal from office of the Deputy Public Protector; and
 - (e) **[considering matters]** consideration of any other matter that can be referred to [it] such a committee in terms of the Constitution or this Act;
Provided that the composition of such committee shall be in accordance with the provisions of section 193(5)(a) of the Constitution].".

Insertion of section 2A in Act 23 of 1994

4. The following section is hereby inserted in the principal Act after section 2 :

"Appointment, remuneration and other terms and conditions of employment, vacancies in office and removal from office of Deputy Public Protector

2A. (1) The President on the recommendation of the National Assembly, shall appoint a person as Deputy Public Protector for such period as the President may determine at the time of such appointment, but not exceeding seven years.

(2) The Deputy Public Protector may at the end of his or her term of office be reappointed in terms of subsection (1) for one additional term.

(3) The National Assembly shall recommend a person -

- (a) nominated by the committee; and
- (b) approved by the National Assembly by a resolution adopted with a supporting vote of a majority of the members of the National Assembly.

(4) The Deputy Public Protector shall be a South African citizen who is a fit and proper person to hold such office, and who-

- (a) is admitted as an advocate or an attorney and has, for a cumulative period of at least 10 years after having been so admitted, practised as an advocate or an attorney: 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, lectured in law at a university; or
 - (c) has specialised knowledge of or experience, for a cumulative period of at least 10 years, in the administration of justice, public administration or public finance; or
 - (d) has, for a cumulative period of at least 10 years, been a member of Parliament.
- (5) The remuneration and other terms and conditions of employment of the Deputy Public Protector shall from time to time be determined by the National Assembly upon the advice of the committee .
- (6) The Deputy Public Protector shall have such powers as the Public Protector may delegate to him or her.
- (7) Whenever the Public Protector is, for any reason, unable to perform the functions of his or her office, or while the appointment of a person to the office of Public Protector is pending, the Deputy Public Protector shall perform such functions .
- (8) The provisions of section 2(3) and (4) shall apply with the necessary changes in respect of the vacation of office of the Deputy Public Protector .
- (9) The Deputy Public Protector may be removed from office only on-
- (a) the ground of misconduct, incapacity or incompetence;
 - (b) a finding to that effect by the committee; and
 - (c) the adoption by the National Assembly of a resolution calling for his or her removal from office.
- (10) A resolution of the National Assembly concerning the removal from office of the Deputy Public Protector must be adopted with a supporting vote of a majority of the members of the National Assembly .
- (11) (a) The President may suspend the Deputy Public Protector from office at any time after any complaint relating to the grounds referred to in subsection (9) against him or her has been received by the National Assembly, if the President deems the complaint against the Deputy Public Protector to be of such a serious nature as to make it inappropriate for him or her to perform his or her functions while the complaint is being investigated.
- (b) The President may suspend the Deputy Public Protector in terms of paragraph (a) on such terms and conditions as the President may determine, including the suspension of the payment of his or her remuneration or the suspension of any other term or condition of his or her employment.
- (12) The President shall remove the Deputy Public Protector from office upon adoption by the National Assembly of the resolution calling for his or her removal.
- (13) If a vacancy occurs in the office of the Deputy Public Protector the President shall, subject to this section, as soon as possible, appoint another person to that office."

Amendment of section 3 of Act 23 of 1994, as amended by section 35 of Act 47 of 1997 and section 6 of Act 113 of 1998

5. Section 3 of the principal Act is hereby amended –
- (a) by the substitution for the heading of the following heading:
"[Deputy Public Protector and staff] Staff of Public Protector";
 - (b) by the substitution in subsection (1) for paragraph (a) of the following paragraph:
"(a) [one or more] the Deputy Public [Protectors] Protector:";
 - (c) by the deletion of subsection (2) ;
 - (d) by the substitution for subsection (3) of the following subsection:
"(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.";
 - (e) by the deletion of subsections (4), (5) and (8);

(f) by the substitution in subsection (11) for paragraph (a) of the following paragraph:

"(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 this section, shall be tabled in the National Assembly within 14 days after such determination."; and

(g) by the substitution in subsection (13) for paragraph (b) of the following paragraph:

"(b) serve in a full-time capacity to the exclusion of any other duty or obligation arising out of any, other employment or occupation or the holding of any other office: Provided that the committee may exempt **[a] the** Deputy Public Protector and a person contemplated in section 7(3)(b) shall be exempted from the provisions of this paragraph."

Amendment of section 4 of Act 23 of 1994

6. Section 4 of the principal Act is hereby amended by the substitution in subsection (1)(a) for the words preceding subparagraph (l) of the following words:

"shall, subject to the **[Exchequer Act, 1975 (Act No. 66 of 1975)] Public Finance Management Act, 1999 (Act No. 1 of 1999)**."

Amendment of section 6 of Act 23 of 1994, as amended by section 8 of Act 113 of 1998 and section 91 of Act 2 of 2000

7. Section 6 of the principal Act is hereby amended by the substitution in subsection (5) for paragraph (a) of the following paragraph:

"(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)] Public Finance Management Act, 1999 (Act No. 1 of 1999)**;" .

Amendment of section 7 of Act 23 of 1994, as amended by section 9 of Act 113 of 1998

8. Section 7 of the principal Act is hereby amended—

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

"(2) Notwithstanding anything to the contrary contained in any law no person shall disclose to any other person the contents of any document in the possession of a member of the office of the Public Protector or the record of any evidence given before the Public Protector, **[a] the** Deputy Public Protector or a person contemplated in subsection (3)(b) during an investigation, unless the Public Protector determines otherwise."; and

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

"(ii) The provisions of section 9 and of the regulations and instructions issued by the Treasury under section **[39 of the Exchequer Act, 1975 (Act No. 66 of 1975)] 76 of the Public Finance Management Act, 1999 (Act No. 1 of 1999)**, in respect of Commissions of Inquiry, shall apply with the necessary changes in respect of that person."

Amendment of section 9 of Act 23 of 1994

9. Section 9 of the principal Act is hereby amended by the substitution in subsection (1) for paragraph (a) of the following paragraph:

"(a) insult the Public Protector or **[a] the** Deputy Public Protector;" .

Short title

10. This Act is called the Public Protector Amendment Act, 2003.

MEMORANDUM ON THE OBJECTS OF THE PUBLIC PROTECTOR AMENDMENT BILL, 2003

1. PURPOSE OF BILL

The main purpose of the Bill is to further regulate the appointment of the Deputy Public Protector.

2. OBJECTS OF BILL

2.1 The Public Protector is an institution incorporated in Chapter 9 of the Constitution, dealing with State Institutions supporting constitutional democracy. As such the Public Protector is independent and accountable to Parliament. The Public Protector Act, 1994, currently provides for the appointment of Deputy Public Protectors by the Cabinet member responsible for the administration of justice. There have been arguments that this erodes the independence of that Office as such a person may eventually assume the duties of the Public Protector. The amendments in the Bill propose that only one Deputy Public Protector be appointed, and that he or she, as is the case with the Public Protector, be appointed by the President with the involvement of Parliament. There are also amendments that regulate the remuneration and other terms and conditions of employment, vacancies in office and removal from office of the Deputy Public Protector.

2.2 The Bill also contains –

- (a) amendments relating to the office of the Public Protector; and
- (b) a few minor technical amendments, bringing the terminology in the principal Act in line with latest developments.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

The Office of the Public Protector.

4. IMPLICATIONS FOR PROVINCES

None.

5. FINANCIAL IMPLICATIONS FOR STATE

None.

6. PARLIAMENTARY PROCEDURE

The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.