

ICPAK SUBMISSIONS ON THE PUBLIC AUDIT BILL 2014

1. Background

Article 229 of the Constitution of Kenya 2010 established the Office of the Auditor General with the principal mandate to audit and report on the accounts of any entity that is funded from public funds both at the national and county levels. The Constitution envisaged that public accountability is critical and can be better realized with proper systems and structures. The Constitution further separated the budgetary control function under the Office of the Controller of Budget. The thinking is driven by the desire to enhance effectiveness of both accountability functions.

2. Key concerns in the review of the Draft Bill 2014

Efficiency & Effectiveness

In previous years, one of the major challenges the Office of the Auditor General (OAG) has had to deal with is the shortage of technical staff to undertake audits of inadequately presented accounts and financial records. This directly resulted in delayed audit reports which in effect hampered Parliament scrutiny of the government accountability reports. This has to greater extent impaired public sector accountability. The situation is compounded by the inability of the auditees in the past, to develop their own capacity to streamline financial reporting and accounting systems that compliment the efforts from the Office of the Auditor General.

Whilst the Constitution of Kenya 2010, created additional layer at the county level giving rise to more institutions with spending powers all of which must be audited, it has gone ahead to prescribe strict audit timelines. A review of the legal framework underpinning public audit must address the arising issue on capacity development.

3. Independence of the Office of the Auditor General

The Office of the Auditor General in Kenya draws its mandate from Article 229 of the Constitution. In addition, Article 248(3) a, categorizes the Office of the Auditor General as an independent office. Article 249 (2) b, is express in providing for the independence of the office that is only shall not be subject to direction and control of any person or authority. It is of critical importance to ensure that we secure both functional and to a greater extent, the financial independence of the Office of the Auditor General.

Definition of SAI Independence

The nature of the Auditor General's functions requires somewhat absolute independence. This aspect has been recognized by the International Organization of Supreme Audit Institutions (INTOSAI). In its XIX Congress meeting in Mexico, dubbed the Mexico Declaration on SAI Independence, INTOSAI recognized eight core principles as essential requirements for proper public sector auditing. These are:

The existence of an appropriate and effective constitutional/statutory/legal framework and of de facto application provisions of this framework;

The independence of SAI heads and members (of collegial institutions), including security of tenure and legal immunity in the normal discharge of their duties;

- A sufficiently broad mandate and full discretion, in the discharge of SAI functions;
- Unrestricted access to information;
- The right and obligation to report on their work;
- The freedom to decide the content and timing of audit reports and to publish and disseminate them;
- The existence of effective follow-up mechanisms on SAI recommendations;
- Financial and managerial/administrative autonomy and the availability of appropriate human, material, and monetary resources.

In Kenya, the Auditor General Office's annual budget estimates are prepared and submitted to the Cabinet Secretary responsible for Finance who then transmits to the National Assembly as part of the estimates of the revenue and expenditure of the National government. In the current set-up, Article 221(3) of the Constitution, the National Assembly considers the estimates of revenue and expenditure of the national government together with the estimates submitted by the Parliamentary Service Commission and the Chief Registrar of the Judiciary.

Article 221 (3) anticipates budget estimates for the National Government, the Judiciary and Parliament;

- Would it be right to assume the Office of the Auditor General is an institution under the National Government yet its role cuts across both levels of Government? The letter and the spirit of Article 249 (2) repudiate any assertions that the Office of the Auditor General should be sub-servient to any other institution of except the Parliament.
- Would the provisions of Article 226 (4) of the Constitution allude to the fact that the Office of the Auditor General is responsible to the National Assembly and as such would this provision then make it necessary that the Public Audit Act, provide a framework by which to secure the financial independence of the Office of the Auditor General?

We are of the opinion that to address the gaps in Law, the Public Audit Law can be used to provide the framework for financial independence of the Office of the Auditor General by empowering the Office of the Auditor General to submit its annual budget estimates to the National Assembly. This model has been implemented in other jurisdictions successfully. In this section we assess the model applied in United Kingdom.

United Kingdom

The National Audit Office prepares and submits annual budget estimates to the Public Accounts Commission. The Commission examines this estimate and lays it before the House of Commons with such modifications as it sees fit. The Commission is required to take into consideration any advice given by the Public Accounts Committee and the Treasury. The various conditions of service of the C&AG to secure independence are:

- Special procedure for appointment;
- Special procedure for removal;
- Unlimited tenure;
- Control over resources/budget;
- Immunity/protection from the actions of others in the performance of his duties; and
- Independence to frame work plans

By virtue of his office the Controller & Auditor General is an Officer of the House of Commons, and is independent of the Executive and the Judiciary; he has no relationship with investigating agencies. The independence of external audit from the Executive is a key principal of Parliamentary accountability in the UK. The National Audit Office (NAO) has financial independence. The budget of the NAO is determined by the Legislature on a recommendation from the C&AG. The Public Accounts Commission, a committee of Members of Parliament established in 1983, considers the NAO's plans and budget. The Commission then makes a recommendation to the House of Commons to accept the NAO's budget.

Canada

The Office of the Auditor General in Canada for a long time operated as a Department of the Public Service under the Public Sector Management Act (1994), thus receiving an annual appropriation from Treasury. The Public Accounts and Expenditure Review Committee in its 1992 Report recommended that the Office of the Auditor General should not be constituted as a department of the public service. Opinion from other sources went further to suggest that the Office should be established as a statutory authority to provide more autonomy and independence.

Denis Desautels the former Auditor General of Canada in the Capstone Report issued in February 2001 stated that:

'...the independence of the Office of the Auditor General needs stronger protection. At present, the Office's budget is negotiated with officials of the Treasury Board. Although this has not yet done any harm, I believe it is an uncomfortable arrangement. It could lead to unwarranted pressure on the Office and result in the withholding of necessary funds'.

Overtime, a number of models have been suggested in efforts to ensure independence of the Auditor General as illustrated below:

- (a) The first was modeled after the United Kingdom's National Audit Office mechanism. The National Audit Office presents its budget to an all-party Public Accounts Commission. The membership of the Commission includes the Chairman of the Public Accounts Committee, the Leader of the House of Commons, and seven other members of the House, appointed by it. None of the seven is a minister. The NAO prepares an estimate of its expenses annually. The Commission examines this estimate and lays it before the House of Commons with such modifications as it sees fit. The Commission is required to take into consideration any advice given by the Public Accounts Committee and the Treasury;
- (b) The second model that would also require legislative changes is that provided for in the ***Parliament of Canada Act*** for the Senate Ethics Officer and the Ethics Commissioner. Both of these officers are to prepare annual estimates of the expenses to run their respective offices.

These estimates are considered by their respective speakers and then transmitted to the President of Treasury Board who lays them before the House of Commons with the Estimates of the government for the fiscal year;

- (c) The third approach proposes a blue ribbon panel that would be appointed to review and challenge the OAG spending plans and report to the Treasury Board. The panel members would be drawn from retired high-profile public servants, accounting professionals with established credentials and experience, academics, and former speakers of the House of Commons. The report setting out the panel's recommendation with respect to the Office's estimates would be submitted to Treasury Board on behalf of the Office. While Treasury Board Secretariat would retain its challenge role with respect to the amounts requested by the OAG, it would be generally understood by all parties to the process that the OAG estimates had been "substantiated" by the panel.

Subsequently, the budget of the Office of the Auditor of Canada for each financial year is determined in consultation with the Parliamentary Committee concurrently with the annual plan.

New Zealand

Section 36 of the Public Audit Act 2001 of New Zealand provides that the Auditor General within specified timelines, prepare and submit to the Speaker of House of Representatives, a draft annual plan which is then tabled before the House of Representatives for consideration. In the case of New Zealand, the Supreme Audit Institution has financial independence and the Parliament decides on the level of funding for the Auditor-General, who submits his annual budget through the Speaker to Parliament directly.

Tanzania

Section 33 of the Public Audit Act of Tanzania provides that the Auditor General shall prepare and submit to the President, estimates for the year of administrative and development expenditures and estimates of revenues of the office of the Auditor General. The president upon receiving this, shall cause the estimates to be laid before Parliament without revision but with recommendations that the Executive may have on them.

We are of the view that the protection accorded by the Tanzanian law is critical in enshrining the independence of the Office of the Auditor General. The Tanzania approach would therefore be worth considering in light of the raging debate on how best to channel the budget for the office of the Auditor General.

4. Summary of Issues on the Public Audit Bill 2014

	Issue	Clauses of the Public Audit Bill 2014	Proposal	Justification
1	Qualification for appointment as Auditor General	Clause 5 (1) provides for the qualification for appointment to the Office of the Auditor General. Sub clause (e) provides that one must be a member of good standing of a professional body of accountants recognized by law.	Amend (e) to read.... is a practising member of good standing of a professional body of accountants recognized by law.	In its policies and procedures on registration and issuance of audit practising certificate, the professional body of accountants recognized by law in Kenya requires that applicants for practising certificates must demonstrate prior experience in external audit. We are of the view that it is a relevant criterion that should be a requirement for appointment. The same should apply to Senior Deputy Auditor General.
2	Functional independence of the Office of the Auditor General	Clause 8 (c) and (d) provides that the Office of the Auditor General shall only exercise its administrative powers in relation to disciplinary control and establishment of human capital compliment of to the extent that it is permissible by the powers of the Public Service Commission as per Art 234 of the Constitution.	Delete any limitations introduced by reference to Art. 234	Limit executive control of OAG with a view to protecting functional independence of OAG. For the OAG to protect sovereignty of the people as envisioned in Art 249(1)(b) , executive control should be limited. This will also be in line with Art. 249(2) that guarantees functional independence of commissions and holders of independent

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				<p>offices-</p> <p>(a) Are subject only to this Constitution and the law; and</p> <p>(b) Independent and not subject to direction or control by any person or authority.</p> <p>Clause 8 in its current form is in conflict with Clause 10 of the Bill.</p>
		<p>Clause 14 provides that Public Service Commission shall approve the organization structure proposed by the Auditor General</p>	<p>Delete part of the provision requiring approval by Public Service Commission. Since Office of Auditor General is accountable to Parliament, any such approval should by Parliament.</p>	<p>Safeguard the functional independence of the Office of the Auditor General</p> <p>This is guaranteed under Article 249(2) as above. Of particular importance is 249(b)-commissions and independent offices are independent and not subject to direction or control by any person or authority.</p> <p>Article 234 sets out the powers of the Public Service Commission. However 234 (3) provides that the powers of the Public Services Commission in</p>

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				relation to establishment and abolition of offices, disciplinary control shall not apply to commissions and independent offices. On this basis, the Constitution thus protects the independence of the office of Auditor General.
		<p>Clause 15 (1) on appointment of the Senior Deputy Auditor General by the Public Service Commission</p> <p>Clause 15(2) qualifications for the Senior Deputy Auditor General less stringent</p> <p>Clause 17 (1) to the extent that it requires the OAG to recruit staff in accordance with Art. 234 of the Constitution brings it into conflict with 252 (1) c and Art 249 (2) b of the Constitution.</p>	<p>Make this one of the powers of the Advisory Board hence re-word to have the Advisory Board recruit and recommend names to the Auditor General for formal appointment.</p> <p>Align the qualifications to requirements for the Office of the Auditor General as per Clause 5(5).</p> <p>Delete references to the Public Service Commission.</p>	<p>Building on independence and competence of the persons appointed to the Office of Auditor General</p> <p>Article 252(1)(c) provides that each Commission, and each holder of an independent office shall recruit its own staff, therefore the appointment of the Senior Deputy Auditor General should not be done by the Public Service Commission</p>
3	Vacancy in the Office of the Auditor General	Clause 11 (c) provides for removal of Auditor General from office under any circumstance specified in Art 251 of the Constitution or Chapter Six of the Constitution	Delete or Chapter Six of the Constitution...it an unnecessary repetition.	Article 251 (1) a of the Constitution already makes to reference to breach of the provisions of Chapter Six. Hence no need for the repetition.
4	Appointment of the Auditor General	Clause 11 (5) it is not clear whether it is the selection Committee constitute by the Public Service	Replace Public Service Commission with the Selection Panel in the second paragraph ... provided for the purpose of	Let us retain the responsibility of appointment under the independent Selection Panel. A

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		Commission or the Commission that has the ultimate responsibility to recommend names.	selection and short-listing of the said three persons, the Public Service Commission shall hold its proceedings in public and submit a report of the interview proceedings to Parliament...	contra suggestion as proposed in the second paragraph would serve to negate this. Clause 11 (12) actually designates the PSC as the Secretariat to the Selection Panel. The spirit is have this power vest in the Selection Panel.
5	Responsibilities of Senior Deputy Auditor General	Clause 16 (1) b provides that the Senior Deputy Auditor General shall be the accounting officer for the Office of the Auditor General.	Delete this from the responsibilities of the Senior Deputy Auditor General and have it vest in the Auditor General himself.	<p>By good practice, the buck stops with the senior most officer in an entity. The responsibility of accounting officers as defined under Section 66 of the PFM Act and further the reporting line defined by Section 68 (1) of the PFM Act 2012 point to the Auditor General. Section 68 of PFM Act is express in stating that the accounting officer for among others, the independent offices shall be accountable to the National Assembly.</p> <p>In light of this, let us retain the role of accounting officer under the Auditor General who can through an administrative action appoint the Senior Deputy to act as but knowing very well that the person of the Auditor General maintains the</p>

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				role as the accounting officer. report to Parliament.
6	Financial Independence of the Office of the Auditor General – Budget Estimates and plans of the Office of Auditor General	<p>How does independence of the office of the Auditor General crystallize effectively?</p> <p>Does this include financial independence and if so, are there arrangements to safeguard financial independence of the office of the Auditor General?</p> <p>Clause 20(1) provides for OAG to submit budget to Cabinet Secretary for Finance, this impedes on independence of OAG.</p>	<p>Let us think of appropriate provisions on funding of the Office of the Auditor General.</p> <p>In light of lack of proper address to the anticipated independence of the OAG and the fact that the Constitution providing that OAG reports directly to Parliament in accordance with Art 229 (7) of the Constitution and Clause 39 of this Bill, can the Bill go ahead and provide that in accordance with Art. 249 (3) of the Constitution, the Auditor General as a special independent office shall hold discussions with the appropriate Committee of Parliament on its annual budget projections and expenditure plans ahead of time.</p>	<p>We propose that independence of the Office of the Auditor General should be envisaged beyond the letter of the provision. We must think of the spirit and the intension of the provision on independence.</p> <p>Financial independence of the Office of the Auditor General is a key consideration to realize functional independence of the office and entrench the space for the holder to conduct annual examination of financial records of all government agencies without fear of reprisal at the budgeting stage.</p> <p>It is critical that the National Treasury is an office subject audit by the office of the Auditor General, it unprecedented to have the same office determine and allocate resources to the Auditor General.</p>

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				<p>We propose that independence of the Office of the Auditor General should be envisaged beyond the letter of the provision. We must think of the spirit and the intension of the provision on independence.</p> <p>Financial independence of the Office of the Auditor General is a key consideration to realize absolute independence of the Office of the Auditor General.</p> <p>Best practice:-</p> <p>United Kingdom We need to borrow from the UK, where the National Audit Office prepares and submits annual budget estimates to the Public Accounts Commission. The Commission examines this estimate and lays it before the House of Commons with such modifications as it sees fit.</p> <p>In UK, NAO has control over</p>

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				<p>resources/budget.</p> <p>In Tanzania, the Auditor General's budget is discussed with the President and the agreed budget is then forwarded to Treasury which in turn submits the agreed budget to Parliament without amendments but providing recommendations on divergent opinion to Parliament.</p> <p>In New Zealand, the Auditor General submits his expenditure estimates directly to Parliament.</p> <p>If borrowed from the above best practice, will contribute to the realization of Art. 249 of the Constitution on functional independence.</p>
7	Limitation of Scope of work of the Office of the Auditor General	Blanket exclusion of national security organs is a huge limitation of scope in the work of the Auditor General.	Let us only restrict exemptions from disclosure of financial records of security organs to cases that are objectively ascertainable as posing a threat to national security. Those criteria should be well	We appreciate the need to differentiate what would be described as administrative policies against other government policies which are

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		Under Clause 40(1), the requirement for a certificate of disclosure by the Attorney General in our view amounts to gagging the Auditor General.	defined.	subject to political debate. We are of the opinion that a blanket limitation would to a great extent negate the necessity for audit. Whilst we appreciate the sensitivity around what is deemed as political policies and hence prescribe a cautionary approach, Administrative policies should be by all means open for scrutiny by the Auditor General. The review of such policies underpin audit.
		Clause 72.... Auditor General may not question the merits of a policy of Government....	Amend to read..... the Auditor General may not question the merits of a policy objective of government or any other state organ or public entity... to the extent that in doing so, such actions will bring into jeopardy, the security of the nation.	

5. Recommendation

To assure independence of the Office of the Auditor General for efficiency and effectiveness, Public Audit law should provide for both functional and financial autonomy of the Office of the Auditor General.

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