



Building 2 Greenstone Hill Office Park Emerald Boulevard  
 Modderfontein PO Box 8237 Greenstone 1616 Johannesburg  
 South Africa Tel 087 940 8800 Fax 087 940 8873 E-mail  
[board@irba.co.za](mailto:board@irba.co.za) Docex DX008 Edenvale Internet [www.irba.co.za](http://www.irba.co.za)

23 February 2018

*Submitted electronically to:*  
[cbalie@parliament.gov.za](mailto:cbalie@parliament.gov.za)

Hon. V Smit, MP  
 Chairperson: Standing Committee on the Auditor-General

### COMMENTS ON THE DRAFT PUBLIC AUDIT AMENDMENT BILL, 2017

The Independent Regulatory Board for Auditors (IRBA) is both the audit regulator and national auditing standard setter in South Africa. Its statutory objectives are the protection of the public by regulating audits performed by registered auditors, and the promotion of investment and employment in South Africa.

The IRBA has in collaboration with the Auditor-General (AG) developed guidance documents that support registered auditors performing audits in the public sector. Our goal is to improve governance and financial management in the public interest.

We appreciate this opportunity to comment on the Draft Public Audit Amendment Bill (the Draft Bill). The Draft Bill has an important bearing on the IRBA as:

1. Many of the professional staff of the Auditor-General of South Africa (AGSA) are registered auditors (registered with the IRBA) or audit trainees;
2. Private sector audit firms and their personnel who perform audit engagements on behalf of the AGSA are registered with the IRBA, and are therefore regulated by the IRBA in accordance with the Auditing Profession Act (Act No 26 of 2005) (the APA); and
3. The IRBA is the custodian of the *IRBA Code of Professional Conduct for Registered Auditors* (the IRBA Code), which governs the conduct of auditors in South Africa.

We respond from a unique perspective to the invitation to comment in our capacities as:

1. An auditee of the AGSA;
2. Audit regulator and national auditing standard setter; and
3. Service provider to the AGSA as we also support the internal inspections function of the AGSA.

The IRBA firmly supports the objectives of the Draft Bill. Our comments should therefore be read in the context of our commitment to the achievement of those objectives. In formulating our responses to the Draft Bill we have considered the long term effects, the relationship with existing

legislation, and any potential reputational risks that the AGSA might be exposed to in relation to the proposed amendments.

Kindly e-mail [ychoonara@irba.co.za](mailto:ychoonara@irba.co.za) or phone him directly on +27 87 940 8867, if further clarity is required on any of our comments.

Yours faithfully

A handwritten signature in cursive script that reads "Bernard Peter Agulhas".

**Bernard Peter Agulhas**  
**Chief Executive Officer**

Comment No.	Clause and Section Reference	Extract from Relevant Clause of the Draft Bill	Comments
1.	Clause 1 Definitions – Section 1(d)	<p><i>'Debtor' means the –</i></p> <p><i>(a) accounting officer, or</i></p> <p><i>(b) accounting authority or individual members of the accounting authority, identified in the certificate issued by the Auditor-General in terms of section 5(1B)(b) as liable for the debt either individually or jointly and severally, as the case may be.</i></p>	<p>1) There could be instances in which the losses incurred from unauthorised, irregular, fruitless and wasteful expenditure or monies not collected were as a result of or were due to directors or officials not performing their assigned responsibilities effectively and with due care in terms of the entities' or departments' policies and procedures. Therefore, although the accounting officer and accounting authority are accountable, other individuals should also assume appropriate responsibility.</p> <p>2) We therefore recommend that the definition be expanded to also include directors or officials who had not performed their assigned responsibilities effectively and with due care.</p> <p>3) It is unclear from the current definition that an act or omission identified from an audit related service or special audit (referred to in Section 5) would also be referred for investigation.</p> <p>4) Lastly, we recommend that parts (a) and (b) of the definition be amended to read as follows:</p> <p><i>(a) Accounting officer(s); or</i></p> <p><i>(b) Accounting authority(ies) or individual members of the accounting authority(ies)</i></p> <p>These proposed amendments should be made throughout the Draft Bill.</p>
2.	Clause 1 Definitions – Section 1(g)	<p><i>'Undesirable audit outcome' means any act or omission identified from an audit performed under this Act that causes, or is likely to cause, a loss of public</i></p>	<p>1) The term <i>'undesirable audit outcome'</i> is not a technical term. It may be used or understood to mean the outcome of an audit process or the matters included and the opinion expressed in the auditor's report. However, this term is not defined in auditing</p>

Comment No.	Clause and Section Reference	Extract from Relevant Clause of the Draft Bill	Comments
		<p><i>resources or which resulted in or is likely to result in public resources not being used for its lawful purpose.</i></p>	<p>standards, and is thus open to wide interpretation.</p> <p>2) As such, we recommend that the term “<i>undesirable audit outcome</i>” be changed to, for example, “material irregularity” or “reportable loss”, to avoid confusion. It should be noted that the APA and the Regulations to the Companies Act 71 of 2008 (the Companies Act) make use of the term “reportable irregularity”. We recommend that the term “reportable irregularity” not be used as confusion will be created between these different reporting requirements.</p> <p>3) Further, we recommend that the definition be amended to also add a level of materiality or a threshold. As currently drafted, it includes all acts or omissions identified that might have caused or are likely to cause loss or which resulted in or are likely to result in resources not being used for a lawful purpose (material and non-material). Referring to all acts or omissions identified would be onerous on various parties concerned, could render the legislation unworkable, would take enormous resources to administer, and the possibility exists that the matter might not be investigated by the relevant authority as it could be regarded as immaterial.</p> <p>4) It is unclear as to whether there is an obligation (akin to due process) that a matter being considered for referral, first be formally discussed with management or those charged with governance of the entity or department, and if they would be provided an opportunity to make representations in respect of the matter.</p> <p>5) For further guidance in this regard, please refer to the following:</p> <ul style="list-style-type: none"> <li>• The APA – Section 45;</li> </ul>

Comment No.	Clause and Section Reference	Extract from Relevant Clause of the Draft Bill	Comments
3.	Clause 3 Constitutional and legal status – Section 3(b)(1A)	The Auditor-General may refer any undesirable audit outcome to an appropriate body for investigation, and the relevant body must keep the Auditor-General informed of progress and the final outcome of the investigation.	<ul style="list-style-type: none"> <li>• The IRBA's Revised Guide for Registered Auditors: Reportable Irregularities in Terms of the Auditing Profession Act; and</li> <li>• The Regulations to the Companies Act – Section 29.</li> </ul> <ol style="list-style-type: none"> <li>1) It should be noted that the APA tasks registered auditors with acting as whistle-blowers through its Reportable Irregularity provisions, and as the administrator of Reportable Irregularities, the IRBA has significant experience with the process of managing referrals as envisaged in the Draft Bill.</li> <li>2) We are of the view that the recommendation for the AG to have a choice in determining whether or not to refer a matter to an appropriate authority might be unduly subjective and allow for the application of discretion, which might not be reasonable in the circumstances.</li> <li>3) Making it a requirement (subject to the inclusion of a level of materiality, as raised in point 2 above) would strengthen the section as that would eliminate the element of judgment and enhance the consistency in respect of matters that are referred for investigation. As such, we recommend that the phrase "the Auditor-General may" be amended to read "the Auditor-General must".</li> <li>4) Further, we are of the view that compelling the relevant body to whom a matter has been referred to keep the AG informed of the progress and final outcome of the investigation would not be enforceable unless this is also a legislated requirement of the relevant body. Confidentiality rules of other regulators may limit the extent and nature of feedback envisaged.</li> <li>5) We recommend that the option for a Memorandum of Agreement</li> </ol>

Comment No.	Clause and Section Reference	Extract from Relevant Clause of the Draft Bill	Comments
4.	Clause 3 Constitutional and legal status – Section 3(b)(1B)(a)	The Auditor-General must recover from the responsible accounting officer, accounting officers, accounting authority or accounting authorities, as the case may be, any loss resulting from unauthorised, irregular, fruitless and wasteful expenditure, as defined in any applicable legislation relevant to the auditee, and any other losses suffered by the auditee, including— (i) money due to the State, which has not been collected; or (ii) money which has been improperly paid, if, in his or her opinion, a satisfactory explanation for the failure to recover the loss is not furnished, within the prescribed period, by the relevant accounting officer or accounting authority.	between the AG and the relevant body/(ies) be considered in lieu of compelling the bodies to provide feedback.  1) Some of the Constitutional functions of the AG as an <u>independent auditor</u> are as follows, in terms of the various sections of the PAA: <u>Section 4(1)</u> To <u>audit and report</u> on the accounts, financial statements and financial management of— (a) All national and provincial state departments and administrations; (b) All constitutional institutions; (c) All municipalities; (d) Any other institution or accounting entity required by national or provincial legislation to be audited by the Auditor-General. <u>Section 4(2)</u> To <u>audit and report</u> on the consolidated financial statements of — (a) The national governments as required by Section 8 of the Public Finance Management Act; (b) All provincial governments as required by Section 19 of the Public Finance Management Act. <u>Section 4(3)</u> The AG may <u>audit and report</u> on the accounts, financial statements and financial management of — (a) Any public entity listed in the Public Finance Management Act.

Comment No.	Clause and Section Reference	Extract from Relevant Clause of the Draft Bill	Comments
			<p>2) An auditor conducts an audit engagement in terms of the International Ethics Standards Board for Accountants' (IESBA) Code of Conduct for Professional Accountants (the IESBA Code). A registered auditor performs the audit under the umbrella of the IRBA Code, which is based on the IESBA Code. A chartered accountant's work is governed by the SAICA Code of Conduct. A registered government auditor's work, who is employed by the AGSA, is governed by the IESBA Code. Both the IESBA Code and the SAICA Code have ethical requirements for professional accountants in business and professional accountants in public practice. The IRBA Code refers to registered auditors in public practice. It is not clear that the responsibilities envisaged in Section 5(1B) would fall under the umbrella of these Codes, as it does not fall under the definition of professional services envisaged by the Code. This aspect of the engagement may create challenges for the auditor in respect of the fundamental principle of objectivity and a possible self-review and/or self-interest threat.</p> <p>3) In addition, an audit is performed in terms of the International Standards on Auditing (the ISAs) and the International Standard on Quality Control for Firms that Perform Audits and Reviews of Financial Statements, and Other Assurance and Related Services Engagements. These standards support conducting an audit (or related assurance service) and the written audit opinion or report. In developing these standards, and issuing them as pronouncements in South Africa, consideration was not given for them to be used outside the typical audit role, and in particular, those envisaged in Section 5(1B). For example, the evidence rules in the auditing</p>

Comment No.	Clause and Section Reference	Extract from Relevant Clause of the Draft Bill	Comments
			<p>standards differ from the rules of evidence in a legal matter.</p> <p>4) The legal determination as to whether a particular expenditure incurred was unauthorised, irregular, fruitless and wasteful or monies were improperly paid, would ultimately need to be done by a legal expert. For purposes of the financial statements, a determination is done in terms of ISA 250 (Revised), <i>Consideration of Laws and Regulations in an Audit of Financial Statements</i>. We are of the view that the audit engagement team<sup>1</sup> would not necessarily have the necessary competence and skill to make such a determination.</p> <p>5) The responsibility to collect and hold individuals to account ultimately lies with the management or those charged with governance of the entity. The IESBA Code prohibits an independent auditor from assuming a management responsibility of an audit client. By having the responsibility for the recovery of losses or the collection of monies the proposed legislation:</p> <ul style="list-style-type: none"> <li>• May override or infringe on the legal responsibilities and duties of the management of the entity; and</li> <li>• May contravene the provisions of the IESBA Code.</li> </ul> <p>6) It is also unclear as to how this extended mandate would apply to the audits where the AGSA has opted not to perform the audit in terms of Section 4(3) of the Public Audit Act, and what the roles and responsibilities of the auditors in private firms would be in respect of</p>

<sup>1</sup> Engagement team is defined in the Glossary of Terms in the Handbook of International Quality Control, Auditing, Review, Other Assurance and Related Services Pronouncements 2016-2017 Edition Volume Part I (as updated).



Comment No.	Clause and Section Reference	Extract from Relevant Clause of the Draft Bill	Comments
			<p>this proposed amendment.</p> <p>7) Performing an assessment of losses incurred as a result of unauthorised, irregular, fruitless and wasteful expenditure could potentially cause conflicts during the performance of the audit and might delay the outcomes of the audit or the issuing of the audit opinion.</p> <p>8) We are of the view that the professional skepticism of the engagement team for the critical assessment of the evidence obtained and the work effort in gathering appropriate evidence for holding an individual/s accountable would be fundamentally different from that applied when expressing an opinion on whether the financial statements are prepared, in all material respects, in accordance with the applicable Financial Reporting Framework. It is envisaged that the audit evidence gathered by the auditor would be relevant, reliable and corroborative and not contradictory in nature.</p> <p>9) Notwithstanding that remedies have been included for the aggrieved debtor in Section 3(b)(1B)(g) of the Bill, provision has, however, not been made for a due legal process to be followed in advance of holding a specific individual/s liable, i.e. to ascertain whether the individual/s are legally obligated to make a repayment. The discretion for determining the acceptability of the explanations provided, which is likely to be judgmental, is solely in the hands of the AG rather than a court (self-review threat).</p> <p>10) It would also be impractical to recover millions of rands worth of losses or debts from an individual or body as they might not have the financial means to repay such amounts. It is not clear what</p>

Comment No.	Clause and Section Reference	Extract from Relevant Clause of the Draft Bill	Comments
			<p>would happen to such a certificate if the debt, as per the certificate issued, cannot be recovered.</p> <p>11) We recommend that it be clarified whether the AG or the auditee would be responsible for making the determination as to whether the loss resulted from unauthorised, irregular, fruitless and wasteful expenditure, as the evaluation criteria used by each of them in making that determination can often be different.</p> <p>12) We also question as to whether the "monies due to the state, which has not been collected" include uncollected consumer debt, which if it does, would appear unreasonable.</p> <p>13) We are also of the view that in respect of the proposed amendments relating to the referral of "undesirable audit outcomes" to an appropriate body, and the responsibility for the AG to recover losses that resulted from unauthorised, irregular, fruitless and wasteful expenditure or monies that were not collected or improperly paid, some of the consequence deserve more detailed consideration. For example:</p> <ul style="list-style-type: none"> <li>• The AGSA performs internal post issuance inspections of its completed audit files. Such inspections might uncover a material deficiency in the conduct of the audit or the audit outcome. In such situations, the AGSA's own determination of an undesirable outcome and related actions, could be contrary to the AGSA's own inspection result.</li> <li>• A similar scenario would arise in the case where the IRBA inspection performed on behalf of the AGSA uncovers such a deficiency that was not identified by the AGSA; or reverses an</li> </ul>

Comment No.	Clause and Section Reference	Extract from Relevant Clause of the Draft Bill	Comments
			<p>adverse finding made by the AGSA.</p> <p>14) It is unclear what the effect would be on the process to recover losses if the auditor (who may be a registered auditor) is referred to the IRBA for investigation for misconduct by an aggrieved party after the audit opinion/report has been issued but before the certificate (envisaged in Section 3(b)(1B)(a)) is issued by the AG. There are considerations around jurisdiction, due process and timing that would need to be resolved by the legislation.</p> <p>15) Further, we believe that additional consideration should be given to the impact on the proposed amendments in a situation where the audit opinion is subsequently withdrawn, or the financial statements are restated.</p> <p>16) Section 3(b)(1B)(a) does not directly address the consequences in respect of performance management findings, and as such we are of the view that this is inconsistent with the objective of the proposed amendment, and creates the situation where an auditee would trade-off a financial statement finding against a performance management finding</p> <p>17) We further recommend that the terms:</p> <ul style="list-style-type: none"> <li>• "satisfactory explanation"; and</li> <li>• "improperly paid"</li> </ul> <p>be defined as they are vague and open to interpretation.</p> <p>18) We suggest that the part of the section that reads "satisfactory explanation for the failure to recover the loss is not furnished, within the prescribed period,..." be amended to read "satisfactory explanation for the failure to recover the loss is not furnished, within</p>

Comment No.	Clause and Section Reference	Extract from Relevant Clause of the Draft Bill	Comments
			<p><i>the prescribed manner and period</i> in order to align in with Section 52(1A)(a).</p> <p>19) Lastly, as a potential "debt collector", the AG would possibly have to register as a debt collector with the National Credit Regulator. However, it is unclear whether the legislation governing debt collection has been considered.</p>
5.	<p>Clause 3 Constitutional and legal status – Section 3(b)(1B)(c)</p>	<p><i>The amount specified on the certificate referred to in paragraph (b), subject to the provisions of paragraph (g), constitutes a debt due to the State</i></p>	<p>1) It is unclear where the transaction relating to the debt would be recorded or which organ of state would account for it, and whether the payment received from the debtor/s in lieu of the debt would be set off against where the transaction was recorded or accounted for.</p>
6.	<p>Clause 3 Constitutional and legal status – Section 3(b)(1B)(d) and (e)</p>	<p><i>The debtor must pay the debt to the Auditor-General within 180 days, or in accordance with any agreed timeframe, after receipt of the certificate referred to in paragraph (b).</i></p> <p><i>Upon receipt of payment by the debtor, the Auditor-General must, as prescribed, deposit the money received into the National Revenue Fund or the Provincial Revenue Fund, as the case may be.</i></p>	<p>1) We question whether it is in fact appropriate for the losses or monies recovered/collected to be paid into the National Revenue Fund or Provincial Revenue Fund and how the relevant entity or department account will be compensated for the loss recovered or monies collected on its behalf. Also, it is not clear what these funds would be used for.</p> <p>2) It is unclear as to what criteria would be applied by the AG in determining the "agreed timeframe". Other whistle-blower legislation, such as the APA, prescribe timelines.</p> <p>3) We also question whether it is appropriate for the losses or monies recovered/collected to be paid into the National Revenue Fund or the Provincial Revenue Fund if the auditee is:</p> <ul style="list-style-type: none"> <li>• Governed by the Municipal Finance Management Act; or</li> <li>• An entity that is self-funded.</li> </ul>

Comment No.	Clause and Section Reference	Extract from Relevant Clause of the Draft Bill	Comments
7.	<p>Clause 3 Constitutional and legal status – Section 3(b)(1B)(f)(i)</p>	<p>where the debtor is entitled to a payment, other than remuneration, from an organ of state or an institution funded by public money, subject to any written agreement between the Auditor-General and the debtor, recover the debt by way of a claim against such organ of state or institution;</p>	<p>4) We recommend that "the debtor must pay" be amended to read "the debtor/s must pay". This amendment should be made throughout the Draft Bill.</p>
		<p>A debtor aggrieved by the Auditor-General's decision to recover any loss contemplated in paragraph (a), may approach the High Court for a judicial review of the decision in terms of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).</p>	<p>1) We recommend that an option that allows for the organ of state or institute to pay off the debt in instalments be included, as outlined in Section 3(f)(ii).</p>
	<p>Clause 3 Constitutional and legal status – Section 3(b)(1B)(g)</p>		<p>1) It is a concern that the only recourse that the debtor has after the certificate has been issued by the AG is to approach the High Court for a judicial review of the decision taken by the AG – with the cost of such action likely to be significant.</p> <p>2) Therefore, we recommend that a provision for an alternative dispute resolution, such as mediation, be included to address disagreements between the debtor and the AG before the High Court is approached.</p> <p>3) Further, is it unclear as to when the debtor/s would be informed of the decision by the AG to recover losses or monies from them, as envisaged in Section 1B)(a).</p>
8.	<p>Clause 3 Constitutional and legal status – Section 3(b)(1B)(i)</p>	<p>The Auditor-General may not, without the prior approval of the National Assembly, withdraw the certificate issued in terms of paragraph (b).";</p>	<p>1) We question whether the "National Assembly" would be the appropriate authority to withdraw the certificate issued in respect of entities such as municipalities.</p> <p>2) We are of the view that this proposed amendment contradicts</p>

Comment No.	Clause and Section Reference	Extract from Relevant Clause of the Draft Bill	Comments
9.	Clause 5 Accountability reports to National Assembly -- Section 10(1)(cC)	the details of the monies recovered and monies deposited into the National Revenue Fund and the Provincial Revenue Fund in terms of section 5(1B)(e); and".	Section 3(b)(1B)(g) of the Draft Bill. If a debtor that approaches the High Court for a review of the AG's decision is successful in his/her application, the debt would nevertheless remain payable as the certificate issued can only be withdrawn by the AG if the National Assembly approves the withdrawal.  3) We recommend that this amendment be reconsidered.
10.	Clause 7 Audit fees -- Section 23(6)(a)	the audit fee of an auditee, other than a department as defined in section 1 of the Public Finance Management Act, exceeds one percent of the total current and capital expenditure of such auditee for the relevant financial year [..]; and  (b) the National Treasury is of the opinion that the auditee has financial difficulty to pay such excess, such excess must be defrayed from the National Treasury's vote [..provided that the National Treasury is of the view that the auditee has financial difficulty to settle the cost. This excludes national and provincial departments] up to an	1) We recommend that "the National Revenue Fund and the Provincial Revenue Fund" be amended to read "the National Revenue Fund or the Provincial Revenue Fund" to align it with Section 5(1B)(e).  1) Some clarification is needed of the term "exceeds one percent of the total current and capital expenditure": <ul style="list-style-type: none"> <li>• Would total current expenditure include accruals?;</li> <li>• Would the amounts or values to be used be based on the audited financial statements or the budget for the relevant financial year as it would have a bearing on the calculation?; and</li> <li>• Would the value to be used for capital expenditure: <ul style="list-style-type: none"> <li>o Include the total capital expenditure incurred to date or only the expenditure that was incurred for the relevant financial year;</li> <li>o Be based on historical cost or at fair value; and</li> <li>o Take into account the depreciation or amortisation cost for the relevant financial year?</li> </ul> </li> </ul>

Comment No.	Clause and Section Reference	Extract from Relevant Clause of the Draft Bill	Comments
11.	Clause 10 Regulations – Section 52(1A)(c)	<p><i>amount not exceeding such amount or percentage as the National Treasury and the Auditor-General agree annually.</i></p> <p><i>the process and timeframes within which any payments recovered must be deposited into the National Revenue Fund, or the Provincial Revenue Fund, as the case may be.</i></p>	<p>2) It is also unclear whether the "amount not exceeding.." would be the aggregate for all auditees or per auditee.</p>
12.	Clause 11	<p><i>This Act is called the Public Audit Amendment Act, 2018, and comes into operation on 1 April 2019.</i></p>	<p>1) We recommend that this amendment be reconsidered as Section 3(e) states the AG must "upon receipt" of payment by the debtor deposit the money received into the relevant Revenue fund.</p> <p>1) We question whether the proposed effective date of 1 April 2019 is reasonable or practical considering that the AGSA would still have to develop and implement the required policies and processes.</p>

