PUBLIC SUBMISSIONS THAT RAISE BOTH LEGAL AND POLICY ISSUES FOR THE PUBLIC AUDIT AMENDMENT BILL, 2018

General

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| Clause | Comment | Response from AGSA | Legal and Policy Issues |
| **Clause 1(a)- amending section 1** | The inclusion of the **“former”** in the definition of Accounting Authority and Accounting Officer will have a retrospective effect. The Bill should therefore stipulate the retrospective date. Therefore, the commentators suggested the deletion of the word **“former”.**  | The Bill will have a prospective effect. However, it will also have some retrospective implications due to the inclusion of former officials under whose reign material irregularities occurred. | Please refer to legal advice in this regard |
| **Clause 1(d)- amending section 1** | The definition of **“debtor”** is unnecessary and confusing. A debtor is only referred to in the context of the debt recovery process and the depositing of recovered funds.  | The deletion of the definition | Please refer to legal advice in this regard |
| **Clause 1(g)-amending section 1** | The term could create confusion, as it is a broad term referring to any type of audit outcome- *anything less than clean audit is “undesirable.”* Therefore; the commentators proposed that it should be substituted with “**Reportable Irregularities”** which is the term currently used by registered private auditors to report on it as per the IRBA.In line with the above, it was further proposed by the definition should be aligned to that of **“Reportable Irregularities”**.  | Concurs with the views of the commentators and as such, AGSA proposes that the definition for **“undesirable audit outcomes”** be substituted by a definition for **“Material irregularity”** | The replacement of **“desirable audit outcome”** with **“material irregularity”** should be supported on the following grounds:Firstly, this is a technical term used in the field of auditing, which registered auditors (registered to IRBA) are currently familiar with. Therefore, it will eliminate the confusion, which the public comments highlighted.Secondly, this term will be consistent with Audit Profession Act, which governs registered auditors.Thirdly, the use of “material irregularity” rather than “reportable irregularities” as proposed, gives more meaning that is significant because the reportable irregularity forms part of a material irregularity description. |
| **Clause 3(1)(a) amending section 51(aB)****Clause 3(10(b) amending section 5(b)(1A)****Clause 3(1)(b) amending section 5(1B)(a)****Clause 3(1)(b)-amending 5(1B)(a)(ii)****Clause 3(1)(b)-amending section 5(1B)(b)****Clause 3(1)(b)-amending section 5(1B)(d)****Clause 5(1B)(e)****Clause 3(1)(b)- amending section 5(1B)(f)****Clause 3(1)(b) amending section 5(1B)(g)****Clause 3(1)(b)- amending section 5(1B)(h)(i)****Clause 3(1)(C) amending section 5 (1B)(c)(bA)****Clause 5 amending Section 10** | Concern was raised about whether the auditing of international associations or bodies falls within the constitutional mandate of the AG, which is to strengthen the constitutional democracy of South Africa. It was further commented that the requirement for the AGSA to get SCOAG’s approval prior to rendering such services might not pass the test for constitutionalityCommentators raised several concerns with regard to the referral of undesirable audit outcomes for investigation to an appropriate body.Firstly, they were concerned that what the **“appropriate body”** was, was unclear. As such, they proposed that the **“appropriate body”** be substituted with **“relevant law enforcement agency”**. Secondly, they argued that it will be a futile exercise for AGSA to refer matters to these law enforcement agencies, considering the latter’s current competency and capacity.Lastly, the Bill stipulates that the AG **“may”** refer any undesirable audit outcome, thus creating an opportunity for AGSA to be subjective in how it refers matters. The additional function given to AGSA to recover debt could potentially compromise the constitutional independence of this institution. Further, it will be unconstitutional to provide such function to AGSA because it is not provided in section 188 of the Constitution.As such, the commentators proposed that this responsibility should be assigned to the National Treasury, while others proposed that it should be assigned to the Executive Authority or State Attorney. Further, with regard to debt collection, some commentators proposed that the responsibility to collect the outstanding debt should be given to the National Treasury or State Attorney. Others suggested that this responsibility should be given to private legal firms on a pro bono basis. Importantly, the capacity of the State Attorney to conduct this function was questioned. The Bill requires that if in the AGSA’s opinion, a “satisfactory explanation” for the failure to recover the loss is not furnished…” The commentators were perturbed with the reference to “satisfactory explanation”. They argued that this is subjective. As such, they proposed that “satisfactory explanation” be defined.This clause requires the AGSA to issue a certificate. Commentators raised concerns with the issuance of such certificate. They argue that the manner in which this section is phrased suggests that the certificate is a final demand for the debtor to comply with the payment of debt due to him/her. However, clause 5(1B)(I) of the Bill states that the certificate is only “Prima facie” proof of the facts, the identity of the debtor and the debt. Therefore, they suggested that this confusion be clarified by referring to the certificate as the “prima facie” proof of the facts.The clause requires the debtor to pay the AGSA within 180 days. The commentators complained that 180 days were too long, and suggested it be reduced to 90 daysThis Clause requires the AGSA to deposit money received from the debtor into the National Revenue Fund or the Provincial Revenue Fund, as the case may be. The commentators argued that this would compromise the constitutional independence of AGSA because it would have to account to the relevant treasury for the accuracy of the monies collected and deposited in the national revenue fund or provincial revenue fund as the case may be.Needs to be revised to align it with the new proposal, whereby the AGSA will no longer recover and collect debtThis Clause states that a debtor aggrieved by the AGSA’s decision to recover any loss contemplated in clause 5(1B)(a), may approach the High Court for a judicial review. Several commentators were concerned with the fact that the only recourse for the debtor after he/she has been issued with a certificate is to approach a High Court for a judicial review, which is a costly exercise. They further argued that approaching a high court is time consuming and could potentially hinder the realisation of the objects of this Bill. Consequently, they propose a dispute resolution mechanism to deal with the disagreement between the aggrieved debtor and the AGSA.This clause states that the AGSA may not, without the prior approval of the National Assembly, withdraw the certificate issued in terms of…” Several commentators argued that this clause is confusing because by implication, the certificate may only be withdrawn as per the High Court instructions; therefore, there should be no need for the National Assembly to ratify the decision.This clause requires that the AGSA to establish a remuneration committee, which amongst others, will be required to make recommendations to the Independent Commission on the salary, allowance and benefits of the AG. Several commentators were concerned by the fact that the AG is empowered to establish and appoint the committee, which will in turn make recommendations about his/her salary, allowance and benefits. They, therefore, proposed that the SCOAG should establish such committee.No comment was made. | The AGSA has sought the legal advice from a Senior Legal Counsel about the constitutionality of it auditing the financial records of international associations or bodies. Subsequently, the Counsel opined that auditing services rendered by the AGSA to international associations or bodies did not interfere with the ASGA’s constitutional mandate.Concurs with the commentators and consequently, suggests to refine this clause but without deviating from the initial intention to assign consequences for wrongdoing in the management of public resources. Thus, **”appropriate body”** will be substituted with “relevant law enforcement agency”. Therefore, clause 5(b)(1A) will be rephrased as follows: *“ The Auditor-General must, subject to sub-paragraph a to c, refer any known, alleged or suspected material irregularity identified during an audit performed under this Act to the relevant law enforcement agency for investigation, and the relevant body must keep the Auditor-General informed of the progress and the final outcome of the investigation”*The AGSA supports the proposal that either the National Treasury or private firms on a pro bono basis should collect debt owed to the State. Further, the AGSA proposes that the Committee should consult with the Standing Committee on Finance and the Portfolio Committee on Justice and Constitutional Development with regard to the aforesaid proposal. In addition, with regard to the recovery of debt, the AGSA proposes to issue a certificate in terms of section 51(1A) to the responsible Executive Authority to recover the amount specified in the certificate from the responsible Accounting Officer or Accounting Authority.Disagrees, and supports the use of “satisfactory explanation”. Further suggests a review of this clause since it was clear that the AGSA would no longer execute the debt recovery function. **NB For referral, recovery and certificate** as explained in the previous paragraphs, the AGSA proposes a3-tier approach to address the concerns. , Firstly, the AGSA will issue his recommendations on the best way to address the known, alleged or suspected material irregularity.Secondly, after six months of the audit report being released, the AGSA follows up on the implementation of his recommendations made in respect of the alleged or suspected material irregularity. If the recommendations have not been implemented or not implemented satisfactorily, the AGSA issues a ‘yellow card’ in the form of remedial action.Lastly, if the remedial action is not implemented within 12 months of the date of the audit report, the AGSA will refer alleged or suspected material irregularity to an appropriate body (“**relevant law enforcement agency”)** for investigation. The outcome of such investigation may be a certificate of debt, issued in the name of the responsible accounting officer or accounting authority.No comment.No comment because it was tentatively agreed that the debt collection and recovery functions will no longer reside in the Office of the AG.Concurs with commentators and supports the creation of such dispute resolution mechanism or appeal mechanism. Subsequently, the AGSA proposes the creation of an internal review or appeal mechanism. They argue that although the appointment of an internal review or appeal structure poses a conflict of interest, such conflict would be mitigated by the retained option to take the matter on review to the High Court.No comment made.Disagrees with the commentators and supports the inclusion of the provisions related to the remuneration committee.The AGSA supports this clause to ensure open and transparent reporting on the extended powers included in the Bill. However, they propose that it be redrafted in accordance with the final decision of the Committee regarding the powers to issue remedial action, certificates of debt and to refer material irregularities for further investigation. | Please refer to legal advice in this regardPlease refer to legal advice in this regardPlease refer to legal advice in this regardPlease refer to legal advice in this regardPlease refer to legal advice in this regardPlease refer to legal advice in this regardPlease refer to legal advice in this regardPlease refer to legal advice in this regardIn light of the proposed 3 tier approach, the internal review mechanism may no longer be necessary. The certificate will be informed by the outcomes of the investigation by the relevant law enforcement agency. Therefore, if a debtor is aggrieved, the only recourse they have would be to challenge the outcomes in a court of law.Please refer to legal advice in this regardSince the proposed remuneration committee is, amongst others, expected to make recommendations to the Independent Commission on the salary, allowance and benefits of the AG, its establishment should be done in consultation with the SCOAG.Please refer to legal advice in this regard |
| **Clause 7 amending section 23(6)(b)****Clause 9(1)(a) and (b)- amending Section 40****Clause 10 amending section 52** | This clause states that if the audit fees of an auditee, other than a department as defined in section 1 of the PFMA, exceeds one percent of the total current and capital expenditure for the relevant financial year, such excess must be defrayed from the National Treasury’s vote up to an amount not exceeding such amount or percentage as the National Treasury and the Auditor-General agree annually. Importantly, this clause was included as per the request of the National Treasury to the Committee.This clause requires the Deputy Auditor- General (DAG) to establish the Audit Committee and to appoint the members of the Audit Committee in consultation with the AG. Several commentators have raised concern about the possible conflict of interest. The primary role of the Audit Committee is to oversee the system of internal financial control, the financial statements and reporting process. Since the DAG is the Accounting Officer in the Office of the AG, therefore by implication the AC oversees her/his roles. This clause empowers the AGSA to make regulations pertaining to any matter to facilitate the application of this Bill. Commentators were concerned that this arrangement “smacks of the player/referee-syndrome”, which in effect refers to a conflict of interest. | The AGSA does not support the proposed amendment because they view this as posing risks to the financial independence of the AGSA.No Comment made The AGSA disagrees with the commentators and supports the proposed amendment. The AGSA is best placed to prepare the regulations as the owner and the subject matter expert in relation to the PAA, Furthermore, the regulations would still be subjected to the applicable legislative processes. | The collection of outstanding audit fees from debtors remains a challenge for AGSA. For the 2016/17 financial year, the AGSA recorded an amount of R806 million in outstanding audit fees. This amount increased by 19 percent compared to R609 recorded in the 2015/16 financial year. The main contributor to this increase remains the local government sphere, which is responsible for\ 49 percent of the total debt for 2016/17 financial year, and 51 percent in the 2015/16 financial year.The challenge of outstanding debt, in particular to the local government sphere can be ascribed to factors such as lack of funds in low capacity municipalities, ***lack of capacity to generate revenue since they are located in economically distressed regions***, and local government (municipalities) management tends to prioritise payments for salaries and service delivery related costs above the audit fees.Flowing from above, section 23(6) of the PAA requires that if the local government audit fees exceed one per cent of the total current and capital budget, such excess must be defrayed from National Treasury’s Vote. The AGSA reported that the number of financially distressed municipalities grew from 71 in 2014 to 86 in 2016. For the 2016/17 financial year, National Treasury paid R79 million and R42 million in the 2015/16 financial year. Thus, the outstanding balance of R321 million for financially distressed municipalities and 1 percent debtors remains a significant strain on AGSA’s cash flows.In spite of the above, the AGSA leadership has had several engagements and made a number of submissions to SCOAG, Minister of Finance, National Treasury, SALGA and CoGTA to address the collection challenges from local government, especially, 1 percent debtors and financially distress municipality.Therefore, it is proposed that the response from AGSA be supported. This would be in line with SCOAG’s legislative mandate, which is to assist and protect the AGSA in order to ensure its independence, impartiality, dignity and effectiveness. (derived in section 2(c)(i) of the PAA). It is proposed that the amendment be supported in its current form. The responsibility given to DAG to appoint the members of the Audit Committee in consultation with the Auditor-General is not different to the current practice in other organs of the state and as outlined in the PFMA. Treasury Regulations 3.1.2, which give rise to section 77 of the PFMA, empowers the Accounting Officer of the institution to appoint the Audit Committee members in consultation with the relevant Executive Authority. It is proposed that the Committee should support the proposed amendment, which empowers the AGSA to make regulations pertaining to any matter related to facilitating the application of the Bill. The current practice is that public institutions (departments), which are in the main responsible for the implementation of certain legislation, are also responsible for the regulations. For example, the National Treasury, to give effect to the PFMA, drafted Treasury Regulations. |