

**Standing Committee on Finance  
c/o Committee Secretaries**

Attention: Ms. Teboho Sepanya  
Attention: Mr. Allen Wicomb

Per Email: [tsepanya@parliament.gov.za](mailto:tsepanya@parliament.gov.za)

Per Email: [awicomb@parliament.gov.za](mailto:awicomb@parliament.gov.za)

**Rödl & Partner Legal and Tax (Pty) Ltd.  
Johannesburg  
Attorneys  
Legal Advisers  
Registered Tax Practitioners**

1 Eastgate Lane  
Bedfordview  
2007  
PO Box 346  
Bedfordview  
2008  
Tel +27 (11) 479 3000  
Fax +27 (11) 479 3033  
E-Mail [johannesburg@roedl.com](mailto:johannesburg@roedl.com)  
Internet [www.roedl.com](http://www.roedl.com)

**Contact:** Ingrid Friend  
**Direct line:** +27 (11) 479 3000  
**Fax:** +27 (11) 479 3033  
**E-Mail:** [ingrid.friend@roedl.com](mailto:ingrid.friend@roedl.com)

**Our reference**

8 February 2019

Dear Sirs

**Re: Submission on the Financial Matters Amendment Bill -  
Government Gazette No. 42160 dated 16 January 2019**

**1. GENERAL**

1.1 This submission is made by and on behalf of Rödl & Partner Legal and Tax (Pty) Ltd, a legal and tax advisory company, registration number 2009/020124/07, situated at 1 Eastgate Road, Bedfordview, Johannesburg, Gauteng (hereinafter referred to as “the Company”).

1.2 The Company does not intend to deal with each and every proposed amendment contained in the Financial Matters Amendment Bill of 16 January 2019 (hereinafter referred to as “the Bill”) and the Company’s failure to deal with each amendment of the Bill should not be construed to be an acceptance of the amendments in their current form nor the validity thereof. The Company reserves the right to deal comprehensively with each proposed amendment at the appropriate time and in the appropriate forum.

*Rödl & Partner in South Africa*

*Internationally:*

Austria, Azerbaijan, Belarus, Brazil, Bulgaria, People’s Republic of China, Croatia, Cuba, Czech Republic, Cyprus, Estonia, Ethiopia, Finland, France, Georgia, Germany, Hong Kong S.A.R., Hungary, India, Indonesia, Iran, Italy, Kazakhstan, Kenya, Latvia, Lithuania, Malaysia, Mexico, Moldavia, Myanmar, Philippines, Poland, Romania, Russian Federation, Serbia, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Thailand, Turkey, Ukraine, United Arab Emirates, United Kingdom, United States of America, Vietnam

Registration No. 2009/020124/07

Attorneys  
Legal Advisers  
Registered Tax Practitioners

Directors:  
Roger Bramwell  
Dr. Jose Campos Nave  
Prof. Dr. Christian Rödl

International Representative:  
Dr. Jose Campos Nave

- 1.3 The Company's submission on the Bill shall be confined to the proposed amendments to the Auditing Profession Act 26 of 2005 (hereinafter referred to as "the Act") contained in sections 20, 24, 27 and 28 of the Bill dealing with, *inter alia*:
- 1.3.1 Powers to enter and search premises (new section 24A of the Act);
- 1.3.2 Disciplinary hearing (current section 50 of the Act);
- 1.3.3 Offences relating to investigation and disciplinary process (current section 53 of the Act); and
- 1.3.4 Protection of personal information (new section 57A of the Act).

## **2. SUBMISSIONS ON SPECIFIC PROPOSED AMENDMENTS TO THE BILL**

### **2.1 Powers to enter and search premises**

- 2.1.1 It is submitted that the provisions of the proposed new paragraph 24A of the Bill in its current form are unconstitutional as it violates the fundamental right of privacy enshrined in section 14 of the Bill of Rights. However, we acknowledge that the provisions of section 32(b) of the Constitution permit for the obtaining of information in limited circumstances on a need-to-know basis to perform administrative functions.
- 2.1.2 Moreover, a regulatory body official (hereinafter referred to as an "IRBA Official" or "Official") is granted such powers relating to search and seizure in terms of this amendment,

but the Bill contains no provisions that ensure that the IRBA Official will not infringe on any constitutional rights. No clarity is given on how the Official will be exercising his/her powers in terms of this provision of the Bill. This uncertainty further makes this provision unconstitutional.

2.1.3 The proposed amendment also does not deal with how it will affect the Protection of Personal Information Act 4 of 2013 (hereinafter referred to as “the POPI Act”), it being clear that the amendment in its current form goes against the very object that the POPI Act is trying to protect, i.e. personal information, specifically related to personal information unrelated to the auditor or the scope of the investigation.

2.1.4 The allowance of “reasonable force” to enter premises as contained in paragraph 24A(7) of the Bill breaches the constitutional rights to human dignity and freedom and security of persons contained in sections 10 and 12 respectively of the Bill of Rights. Moreover, the proposed amendment breaches the constitutional right that everyone is entitled to administration action that is lawful, reasonable and procedurally fair as enshrined in section 33(1) of the Constitution. Furthermore, allowing the use of reasonable force confers police powers on IRBA Officials, which is unreasonable and unlawful.

2.1.5 We submit that:

2.1.5.1 in order to obtain a search warrant from a relevant judicial authority, an ex parte application supported by information and supplied under oath or solemn declaration, establishing the facts upon which the application is based, is necessary;

- 2.1.5.2 the search and seizure powers in terms of this amendment should be redrafted to conform with the search and seizure powers provided for in the Tax Administration Act 28 of 2011, specifically sections 59 and 60 thereof and to comply with the findings of the Court in *Huang and Others v The Commissioner for the South African Revenue Service* (High Court, Gauteng Division, Pretoria, Case no: SARS 1/2013). Redrafting paragraph 24A of the Bill in accordance with the Tax Administration Act would adequately address the challenges allegedly faced by the regulatory body of non-cooperation by auditing firms during investigations into improper conduct by registered auditors;
- 2.1.5.3 the provisions of paragraph 24A(1)(a) of the Bill relating to powers to enter and search premises with consent should be removed;
- 2.1.5.4 clarity be given on how the amendment will affect the POPI Act;
- 2.1.5.5 no police powers should be conferred to persons other than the police.

## **2.2 Disciplinary hearing**

- 2.2.1 Section 50(3) of the Bill provides that a hearing before the disciplinary hearing panel is open to the public, except where in the opinion of the chairperson of the panel any part of the hearing must be held in camera.

- 2.2.2 We submit that such a public hearing will not only affect one's constitutional right to dignity, but also compromises one's right to be deemed innocent unless proven guilty?.
- 2.2.3 We further submit that there are also reputational damage considerations to be had by holding a public disciplinary hearing, irrespective of the merits of the disciplinary action in question.
- 2.2.4 It is therefore submitted that all disciplinary hearings should be held privately, to protect the aforementioned constitutional and other rights.

### **2.3 Sanctions in admission of guilt process**

- 2.3.1 The provisions of proposed amendment 51(1)(b) regarding the imposition of a fine not exceeding the amount determined by the Minister of Finance (hereinafter referred to as "the Minister") from time to time does not sufficiently indicate how such a fine will be determined by the Minister.
- 2.3.2 We submit that the factors to be considered when computing such a fine are not disclosed, are vague and ought to be made known, to avoid, *inter alia*, abuse of power by the Minister and/or the regulatory body.

### **2.4 Offences relating to investigation and disciplinary process**

- 2.4.1 Section 53 of the Bill is also vague and open to abuse. It does not mention how IRBA Officials should conduct themselves with respect to lawful requests for information or the conduct of investigations.
- 2.4.2 We submit that these powers should be aligned with PAJA.

**2.5 Protection of personal information**

- 2.5.1 It is submitted that the Bill does not deal sufficiently with how the proposed amendments will not infringe on the provisions of the POPI Act.
- 2.5.2 More specifically, there is no mention of the following:
- 2.5.2.1 What happens if personal information obtained by an IRBA Official is compromised while in the Official's possession.
  - 2.5.2.2 Who is then responsible for informing the Information Regulator and the data subject in question about the breach.
  - 2.5.2.3 Sufficient indemnification provisions to deal with security compromises while the information is in the possession of Officials.
  - 2.5.2.4 Written undertakings or similar by Officials regarding the safeguarding of the information while in the Officials' possession.
- 2.5.3 We therefore submit that the Bill is in conflict with existing legislation and does not deal adequately with the hierarchy of legislative preference.

**3. GENERAL SUBMISSIONS ON THE BILL**

**3.1 Public Consultations**

3.1.1 Section 4(1) of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) provides as follows:

*“In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether –*

- (a) to hold a public enquiry in terms of subsection (2);*
- (b) to follow a notice and comment procedure in terms of subsection (3);*
- (c) to follow those procedures in both subsections (2) and (3);*
- (d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or*
- (e) to follow another appropriate procedure which gives effect to section (3).”*

3.1.2 The Bill was published in the Government Gazette on 16 January 2019 and was circulated by IRBA on 4 February 2019 to stakeholders and is yet to be made available on [www.treasury.gov.za](http://www.treasury.gov.za).

3.1.3 We submit that the Bill materially affects the rights of the public and adversely affects the rights of auditors as a body at large. In view of the fact that the date for written submissions on the Bill closes at 12h00 on 8 February 2019, the time given within which to comment on the Bill is insufficient, unreasonable and unfair.

3.1.4 In terms of section 33 of the Constitution –

- 3.1.4.1 everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- 3.1.4.2 everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- 3.1.4.3 national legislation must be enacted to give effect to these rights, and must (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in subsections 3.2.1.1 and 3.2.1.2 above; and (c) promote an efficient administration.

## **3.2 Inconsistencies of the Bill with PAJA**

- 3.2.1 In terms of section 5(2) of PAJA, an administrator to whom a request for reasons has been made, must within 90 days of receiving the request, give that person adequate reasons in writing for the administrative action where a person's rights have been materially and adversely affected by that administrative action.
- 3.2.2 No such similar provision is contained in the Bill, which we submit should be aligned with PAJA.

**3.3 Auditing Profession Act 26 of 2005**

- 3.3.1 The Act already grants the regulatory body the powers to make rules in terms of sections 9 and 10 thereof and thus there is no need for further amendments to the Act, which amendments will only serve to usurp the Court's powers.
- 3.3.2 IRBA Officials are already empowered under sections 47 and 48 of the Act to conduct inspections and investigations and the disciplinary proceedings are already adequately dealt with under sections 49 and 50 of the Act.
- 3.3.3 Sufficient sanctions are provided under sections 52, 53 and 54 of the Act.
- 3.3.4 Moreover, in terms of section 55 of the Act, the Minister may make regulations regarding the functioning of IRBA and other matters that may be necessary for the implementation and/or administration of the Act.
- 3.3.5 We therefore submit that IRBA has sufficient existing powers and there is thus no need to introduce the Bill into legislation.

**4. CONCLUSION**

- 4.1 It is evident from the foregoing that the Bill in its current form is unconstitutional, is lacking in substance, is vague, is open to abuse by regulatory body officials and the like and is not in conformity with PAJA and common administrative law.
- 4.2 It is suggested that the Bill be reviewed and amended to address the shortcomings as described herein.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Ingrid Richter Friend'. The signature is written in a cursive, flowing style with a large initial 'I'.

**Ingrid Richter Friend**

*Senior Legal Advisor*

*Senior Associate*

*LLB; LLM; ACIS*