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12 October 2020

Mr Allan Wicomb
Secretary to the Parliamentary Standing Committee on Finance
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By e-mail: Allan Wicomb, SCoF (awicomb@parliament.gov.za)
Teboho Sepanya, SCoF (tspeanya@parliament.gov.za)

Dear Ms Sepanya and Mr Wicomb

STANDING COMMITTEE ON FINANCE PUBLIC HEARININGS ON THE APA BILL 2 OF 2020

1. The South African Institute of Chartered Accountants (SAICA), welcomes the opportunity to make submissions to the Standing Committee on Finance (SCoF) on the Audit Professions Amendment Bill 2 of 2020 (APA Bill).

2. The South African Institute of Chartered Accountants (SAICA) is the home of chartered accountants in South Africa – we currently have over **46,000 Chartered Accountant** members from various constituencies, including members in public practice (±30%), members in business (±50%), in the public sector (±5%), education (±2%) and other members (±13%). In meeting our objectives, our long-term professional interests are always in line with the public interest and responsible leadership. All auditors currently qualify through us and the majority are also SAICA members, including large and small firms.

3. For ease of reference, we set out below in **Annexure A,** our main points and detailed comments as will be presented in the oral hearings.

4. We would also appreciate the opportunity to address the committee in the oral hearings on the 14th of October 2020 via Zoom.

Yours sincerely

Freeman Nomvalo
Chief Executive Officer
The South African Institute of Chartered Accountants

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ANNEXURE A: DETAILED COMMENTS

GENERAL MATTERS
SAICA's Auditing profession consultation and advocacy

1. SAICA is currently the only professional accountancy organisation that has been accredited by the Audit Regulator in South Africa, the Independent Regulatory Board for Auditors (IRBA) in terms of the Auditing Profession Act. SAICA's training programme and qualification is thus the only route available to qualify first as a chartered accountants and then as a registered auditor. This is subject to when other professional bodies get accredited.

2. We therefore have a broad representation of the auditing profession with diverse views and needs. Equally we also have a broad representation of members in companies that are auditees and whose interest we also must serve together with the public interest.

3. The proposed amendments will have a profound impact on the auditing profession and represents significant change.

4. We have attempted to bring a collective voice to this submission.

5. In this regard SAICA's approach to informing its members of the proposed amendments, and to gather information to inform our comment letter can be summarised as follows:

    - SAICA communicated for comment the proposed Auditing Profession Amendment Bill to all its members through its social media and newsletters channels.

    - SAICA submitted it to various specialist interested forums and committees which forms part of a network of committee structures established to achieve the objective of leading, supporting and advocating for the assurance practitioner consistency of SAICA's membership including:

        i. ***Assurance Leaders Forum (ALF):***

        The Forum's is established to focus on the assurance practitioner constituency of SAICA's membership, in the context of issues that concern audit leaders within the assurance profession and in the assurance standard-setting processes.

        ii. ***Assurance Guidance Committee (AGC)***:

        The AGC was established in accordance with the SAICA By-Laws as the advisory group for audit and assurance.

        iii. ***Legal Compliance Committee (LCC)***:

The LCC was established to provide input/guidance on behalf of members and associates on legislation.

iv. ***Senior Partner's Forum (SPF)***:

The main objective of the SPF is focus on the assurance practitioner constituency of SAICA's membership, in the context of issues that concern senior partners within the assurance profession and in the assurance standard-setting processes

6. Submission: It is submitted that the impact of the proposed amendments affects the public at large, auditors and auditees, all who participate in and will benefit from a properly regulated financial market. A balance however needs to be achieved between the interest of all parties as relates to compliance and fairness.

Concerns over consultation and consideration of comments

7. After the Parliamentary Hearings on 12 February 2019, National Treasury was instructed by the Standing Committee on Finance (SCOF), the National Assembly of the 5th Parliament to engage with the relevant interested parties given the importance of the matter prior to re-tabling the Bill.

8. SAICA and other interested parties met with representatives of National Treasury on 27 February 2019 to further discuss our concerns with regards to the Bill.

9. SAICA submitted its input as was requested, although it would seem that such input has not been considered.

10. This concern was seemingly affirmed by National Treasury itself on the 26th of August 2020, when a briefing was provided by National Treasury to the Standing Committee on Finance and Select Committee on Finance. National Treasury stated that on SCOF's direction, they did start to engage stakeholders but did not conclude this, since amendments to the Auditing Profession Act were not proceeded with. They noted that following public submissions and hearings on this Bill, National Treasury will continue with these engagements should the Committee so direct.

11. Submission: The limited consultation and lack of consideration of stakeholder's proposals by National Treasury, in preparing these proposals, does not assist in resolving very important and complex problems. It is submitted that only through a proper consultative process can an outcome that is in the public interest be achieved.

12. Fortunately, both the public consultation and final drafting of proposals are still within the scope and mandate of SCOF. We therefore believe that SCOF is able to remedy the status quo as it is within its discretion to implement various interventions such as extended public consultations by SCOF, insert more appropriate drafted legislation proposals or even refer the bill back to National Treasury.

Regulatory Impact Assessment

13. It is noted that National Treasury was required in terms of a South African Cabinet decision taken and implemented from 1 October 2015 to conduct an impact assessment.

14. As per Cabinet Memoranda, seeking approval for draft policies, Bills or regulations must include an impact assessment that has been signed off by the Socio Economic Impact Assessment System Unit.

15. We note that such assessment seems to have not been conducted.

16. Submission: Understanding the impact of a proposal on various stakeholders within society is critical part of legislative interventions. We are of the view that an assessment of the socio-economic impact on policy initiatives, legislation and regulations will assist and enable SCOF and stakeholders to also better understand any such impacts on the public and auditee and not just on auditors themselves.

17. We recommend that SCOF consider the importance of the Socio Economic Impact Assessment and whether it fundamentally impacts on the proposals as currently considered.

SPECIFIC MATTERS

Reference to a policy framework

Amendment of section 4 of the APA

18. The proposed insertion of the Act stating that the Regulatory Board must, with the approval of the Minister, determine a policy framework for performing its functions.

19. The current wording may be interpreted that IRBA requires Ministerial approval to proceed with the policy framework.

20. Furthermore, no time period is prescribed for this and given its strategic importance it would be prudent to be more specific on when this should this be done.

21. Submission: We recommend the wording be changed as follows:

"(3) The Regulatory Board must [**, with the approval of the Minister**,] determine a policy framework for performing its functions in terms of subsection (1).

(4) The policy framework must be submitted to the Minister for approval within 12 months from a date determined by the Minister by public notice.

Disqualification grounds for registration as auditor

Insertion of section 37 – Addressing violent crime

22. Section 37(3(b) states that the Regulatory Board may not register a person that has been convicted whether in the Republic or elsewhere of theft, fraud, forgery, uttering a forged document, perjury, an offence under the prevention of Corrupt Activities Act, an offence involving dishonesty; other than an offence committed prior to 27 April 1994 associated with political objectives.

23. Given the state of violent crime in South Africa and based on the fact that ethics and proper conduct transcends someone's financial conduct, SAICA would like to propose that violent crimes also be included as a disqualification criterion.

24. Submission: It is suggested that the following wording be added:

"(e) has been convicted anywhere in the world of a criminal offence in which violence is an element, including but not limited to public violence; murder; rape; sexual assault; trafficking of persons; robbery; kidnapping; assault and/or torture and is sentenced in respect thereof to imprisonment without the option of a Fine. Where any such conviction has led to a sanction of imprisonment with an option of a Fine or to a Fine being imposed, the Board shall have the discretion to decide whether or not to cancel membership."

Members of the Regulatory Board

Amendment of section 11 - Composition of Board

25. The APA as currently enacted section 11(4) states that not more than 40% of the members of the Board of the Independent Regulatory Board for Auditors (IRBA) may be registered auditors.

26. Therefore, in a board size of 10 members, a maximum of 4 registered auditors may be on the Board of the IRBA. The reason for such requirement is to balance the need for independence with that of appropriate knowledge and skills of the profession to ensure proper functioning of the auditing profession.

27. The proposal is to remove both the requirement for registered auditors to serve on the board but also limit it to effectively a minimum of 1 previously registered auditor.

28. The proposed changes would mean that only 1 out of the 10 members of the Board must be a person that was a registered auditor, but is no longer a registered auditor.

29. Furthermore, we further agree that members of the board should be independent, as required in section 11(4), but do not necessarily agree that the board members may not include registered auditors. There are retired auditors who still belong to the IRBA but are registered as "non-attest". By excluding these auditors could be detrimental as they have experience and knowledge that can be useful for the Regulatory Board.

30.

31. Submission: We submit that this proposal will not assist the board in having relevant appropriate knowledge and experience to act in the best interest of the profession and society. In our view the inclusion of a minority of specialists does not undermine the Board as a collective to take decisions that are in the public interest.

32. We therefore request that the current maximum of 40% registered auditors be retained though a further requirement of non-attest may be required, with a maximum of 1 being a currently registered auditor as set out below.

33. Further to this matter, a registered practicing auditor with current knowledge would be invaluable to ensure that the Board has current knowledge and experience in a quickly changing world and environment.

34. In our view the exclusion of persons currently in practice results in a less agile and less functional regulatory authority as the mere inclusion of persons who were previously auditors does not properly cater for the current and future.

35. Submission: It is submitted that 1 of the 4 registered auditors (as proposed above) must be a currently practicing registered auditor.

36. SAICA would like to suggest that the section be amended as follows:

"11(2) The Minister must appoint competent persons**,** who must include at least 1 registered auditor, the majority of whom should be independent and the chairman must be independent

of the profession to effectively manage and guide the activities of the Regulatory Board, based on their knowledge and experience."

Amendment of section 11 - Specialist members of the Board

37. The proposed section 11(2A) states:

"The members appointed in terms of subsection (2) must include-

(a) a person who was formerly a registered auditor and has at least 10 years' experience in auditing; and

(b) an advocate or attorney who has at least 10 years 'experience in practicing law."

38. Though it seems the normal reading of the words expressly requires 2 separate persons from these 2 professions, some of our members have commented that they believe it could also be read that a single person with both such qualifications and knowledge is required.

39. Submission: To avoid any doubt, we would like to suggest the following change to the section as it might be interpreted that the member appointed must be a formerly registered auditor AND an advocate. We propose the section to be amended as follows:

"The members appointed in terms of subsection (2) must include both of the following persons -

(a) a person who was formerly a registered auditor and has at least 10 years' experience in auditing

; and

(b) an advocate or attorney who has at least 10 years 'experience in practicing law."

Amendment of section 12 - Continuing to hold office

40. There seems to be no rational for the temporary extension to hold office for a further three months.

41. The appointment of a successor member can be made during the term of a current member but with effect from the date after the incumbent person leaves the Board.

42. As no compelled timelines for appointment apply, it adds no value in adding an additional 3 months.

43. We are rather more concerned with the consequences if a board member of the IRBA is not appointed in the timeframe required and how this would impact the constitution of the Board and thus the effectiveness of the regulator.

44. Submission: We submit that the Minister needs be compelled to fill any vacancies of Board members whose terms come to an end before such expiration of term.

45. Furthermore, the Minister should be compelled to fill any vacancy arsing other than lapse of term within 6 months. In our experience where no such compulsion is required vacancies remains vacant indefinitely. It is of great importance for the IRBA board that vacancies should not remain vacant for an extended period.

Investigating Committee

Substitution of section 24 - Composition of committee

46. It is unclear whether it is intended to only have 3 members forming part of the investigating committee or a higher number. It is submitted that a maximum number of committee members should be specified.

47. No express maximum or minimum committee members are specified in the proposal.

48. This may also result in potentially the most qualified persons to conduct the investigative function, as stated in 24(1), comprising a minority.

49. Submission: We submit that the proposal expressly state the maximum number of members of the committee and that the members that have the relevant experience as envisaged in section 24(1) should constitute the majority of the investigating committee.

Substitution of section 24 - Role and administrative matters of committee

50. Unlike with section 24A, section 24 does not set out much detail of the role and administrative matters relating to the committee in the legislation.

51. These matters should in our view be contained in the text of the Act and not left to the whim of the Board or staff of IRBA to draft as policies.

52. Submission: It is submitted that the text of section 24 should be expanded to better provide for the clear role of the Investigative committee as reflected in the empowering provisions and also better define and state the administrative matters regarding the composition, management etc. of the committee.

Disciplinary committee

Insertion of section 24A - Panel and committee

53. A **"committee"** by definition is a structure which serves a purpose or specific function A **"panel"** by its definition can be merely a group of people with special knowledge or skills.

54. Section 24A seems to envisage a panel of pre-approved members from which a disciplinary committee of 3 persons can be appointed from by a Chairperson administering the panel in accordance with section 24(5). This would be similar to for example members of the Tax Board where a panel of accountants and legal members are appointed and they avail themselves for selection to a particular case for hearing.

55. However, the section as drafted, refers to the panel as the structure with a specific function and the committee as group of people from whom selection is made.

56. Submission: It is submitted that to clarify and properly identify the role and purpose of the Disciplinary committee and panel, the descriptions should in fact be swapped.

Insertion of section 24A – Independent appointment of Committee

57. Section 24A proposes that the IRBA appoint Disciplinary Committee members, which given the role of these committee members, it is in our view a conflict of interest and creates perception of bias and undue influence.

58. The role of the Disciplinary Committee is critical as they have to hear a matter brought by an IRBA structure (i.e. the Enforcement Committee) as referred by the IRBA Board but also consider the facts presented by the Auditor; and thereafter give an independent and unbiased judgement, that may have significant consequences.

59. However, such adjudicator role is undermined when there is even just perceptions of bias, for example that the adjudicator is subject to influence and control by one party to the matter.

60. In this regard it is critical that the appointment of committee members (i.e. panel members) from whom shall be selected those who conduct disciplinary hearings, is seen as independent with no perception of influence.

61. It is for this very reason that the Auditor General, Public Protector, Tax Board members, Tax Ombud etc. are all appointed by other Heads of the Executive such as a particular Minister or the President.

62. Furthermore, like with other positions of adjudication, transparency in the appointment process is key.

63. Submission: Given the importance of independence of the members of the Disciplinary Committee (i.e. panel of members from whom disciplinary hearings members will be selected from), we submit that their appointment should not be done by the IRBA as that results in real concerns of bias and undue influence.

64. We recommend that a similar process to the appointment of Tax board members, in terms of Tax Administration Act which is also constituted from a panel should be followed. In this regard it is noted that those panel members are appointed by the President. We therefore submit that the President or at the very least the Minister must appoint such members.

65. We further recommend that the appointment is done through a public request for applications and at a minimum that the appointed committee members be announced in a public notice by the President or the Minister.

Insertion of section 24A - "Committee" member qualifications and experience (i.e. Panel)

66. It is noted that no minimum qualifications and experience requirements are set for the disciplinary committee members other than the one-third set out in section 24A(2).

67. This would mean that two-thirds of the members available for appointment to the disciplinary hearing will have no minimum qualifications or experience.

68. Submission: Given the impact of the decisions of such disciplinary hearings on auditors it is submitted that all members be subject a minimum qualification and knowledge requirements set out expressly in the act.

69. This should include a minimum time experience requirement but also stated skills such as in independently adjudicating matters. As to the former there is no reason why it should be less than that required of panel members under section 24A(2) which is minimum of 10 years.

Insertion of section 24A – Term of the "Committee" (i.e. Panel)

70. The proposed section 24A(10) requires that a disciplinary committee member should have a renewable term of a further three years.

71. It is submitted that a renewable term undermines independence as it makes the relevant committee member subject to the influence and discretion of those who seek to appoint him /her. It is for this very reason the Auditor General, Public Protector, Tax Board members have fixed terms. Similarly, even judges in terms of section 176(1) of the Constitution have a fixed term of the lesser of 12 years or they reach the age of 70.

72. Submission: It is recommended that committee members have a fixed non-renewable term to ensure independence.

73. Furthermore, section 24A(9) proposes that a disciplinary committee member should only hold office for a period of 3 or less years.

74. The complexity of some matters does lead to an extended period during the case is sat, thus the limitation of the term period may undercut the effectiveness of the regulator. Matters relating to the Steinhoff case have had far reaching implications to our society and are by nature complex. It is important that once a disciplinary committee is chosen it is able execute its function fully with utmost focus. Limitation of term will most likely undermine the effectiveness of the committee.

75. We submit given the specialist nature of this industry that a longer term of continuity would ensure the requirements of consistency and efficiency as stated in section 24A(5). A similar experience has been had with the Tax Ombud hence the extension from 3 to 5 years.

76. Submission: It is therefore recommended that such disciplinary committee member holding office should be for at **least a period of 7 years**. This is rough alignment with the period of office for the Auditor–General (fixed term 5 – 10 years), the Public Protector (fixed term of 7 years) Tax Board member (5 years), with judges having a longer term of 12 years.

77. Submission: However, we also are cognisant of the fact that complex matters may run over the term of one or more committee member's terms and introducing new committee members to a disciplinary panel may not be cost efficient or in the interest of justice. In this regard we make the following proposals namely:

- A disciplinary panel member's appointment can, at the request of either party to the disciplinary and at the sole discretion of the Chairperson of the Disciplinary Committee, extend beyond the 7 year fixed term, where more time is required to finalise disciplinary cases currently being heard by such panel member. Such panel member's term shall then only lapse after finalisation of such matter; and

- New disciplinary cases shall not be allocated to panel members within 6 months of the lapse of their term of 7 years to enable them to finish off current matters and minimise the run over time periods.

Insertion of section 24A - Chairperson of the "Committee" (i.e. Panel)

78. The role of the chairperson is set out in the proposed section 24A(5) and includes:

(a) appoint from among the members of the disciplinary committee a disciplinary hearing panel for every hearing;

(b) monitor consistency in the application of disciplinary hearing rules by disciplinary hearing panels; and

(c) facilitate efficient disciplinary hearings.

79. The role of the Chairperson is not as its name implies to Chair a specific hearing but rather to ensure the whole disciplinary hearing process is effective, efficient and fair. It is therefore similar to that of a Judge President of the High Court whose role has been explained as follows:

A Judge President is the administrative head of a High Court Division in South Africa. The Judge President is expected to provide effective leadership to the division to ensure that judges in the division perform their judicial responsibilities diligently and effectively. In particular, the Judge President must ensure that matters are handled in accordance with the norms and standards regulating the performance of judicial functions in South Africa. The Judge President is also responsible for coordinating the process of allocating cases to individual judges. He or she is supposed to promote collegiality amongst judges and other staff members within the division.

80. It is submitted that such a role, similar to Judge Presidents, is fundamental to ensure that disciplinary hearing is efficient, fair, and effective

81. In this regard we submit that this role can only be performed by a person of senior stature.

82. Submission: We submit that as required in the current section 24(2) the disciplinary committee (i.e. panel of members) must be chaired by a retired judge or senior advocate.

83. It is submitted given that this role is oversight of the full disciplinary hearing function, it will not impede the efficiency or cost effectiveness of the disciplinary hearing but in fact enhance it by having a person of significant seniority and knowledge of managing the whole adjudication process.

Enforcement committee

Insertion of section 20(2) – Incomplete list of Board subcommittee

84. Section 20(2) of the Act lists all the committee created by the Regulatory Board.

85. However, the new section 24B proposes a new subcommittee of the Regulatory Board without amending section 20(2).

86. Submission: It is submitted that section 24B(1) be deleted and section 20(2) be amended to include the "Enforcement committee" as an additional Board committee.

Insertion of section 24B – Section heading

87. Section 24 (Investigation Committee), 24A (Disciplinary Committee) and 24B (Enforcement Committee) deals with different types of committees and their administrative functioning.

88. However, section 24B heading reads "Subcommittees of the Board" when in fact it is dealing with the new "Enforcement Committee"

89. Submission: To align the headings to the text and flow of the Act, we propose that the heading of section 24B should be amended to "Enforcement committee".

Insertion of section 24B – Enforcement committee roles and responsibilities

90. Section 24B introduces a new committee, namely the Enforcement Committee. Our understanding by analogy is that the Investigating committee is similar in role to the SAPS and the Enforcement Committee's role is similar to the NPA.

91. Unlike with section 24A, section 24B does not set out much detail of the role and administrative matters relating to the committee in the legislation.

92. For example, it is noted that in section 48(1A) the enforcement committee has a disciplinary referral role, and in section 48(3)(b) a discovery and charge recommendation role.

93. However, as section 24B does not set out any specific roles and processes we cannot determine how the enforcement committee relates to the function of the investigations committee.

94. These matters should in our view be contained in the text of the Act and not left to the whim of the Board or staff of IRBA to draft as policies.

95. Submission: It is submitted that the text of section 24B should be expanded to better provide for the clear role of the Investigative committee as reflected in the empowering provisions and also better define and state the administrative matters regarding the composition, management etc. of the committee.

Insertion of section 48(3) – Enforcement committee referrals

96. It is noted in section 48(3) that the Regulatory Board refers the matters for investigation to the Investigating committee, the outcome of the referral does not go back to the Board but rather the Enforcement Committee who had no input into the initial request.

97. It is unclear why a complainant process would go through the Board who consider whether (1) reasonable suspicion of misconduct exists and (2) that the complaint is justified.

98. This exact objective tests seems to be the purview of the investigations committee who must obtain evidence through investigation and make a recommendation to the Enforcement committee to proceed with the matters. It is unclear why both the Board, who conducts no investigation of fact would be based merely on the complaint be able to properly and objectively advise on the matter.

99. This in our view is demonstrates the lack of alignment of this process brought about by the lack of express statements, roles and administrative matters in section 24B.

100. Submission: It is submitted that the referral process and preliminary investigation process be reviewed to ensure no duplication and that its fairness cannot be questioned for example where the Board is making initial determinations without being objectively appraised of the facts. The interrelated workings and roles of the Investigation and Enforcement Committee should also be clarified.

Insertion of section 48(1A) – Non audit matter referrals to Professional Body

101. The proposed section 48(1A) states that the enforcement committee may refer non-audit matters to a relevant professional body.

102. The use of the word “may” should be cautioned as it is can be peremptory or indicate discretion. We understand that it was meant to indicate a discretion which we support.

103. However, the process to investigate and determine a matter, whether an audit or non-audit matter should be conducted by the investigating committee.

104. Submission: It is submitted that section 48(1A) be reworded to state, "….may in its sole discretion refer…."

105. It is further submitted that no procedure of referral by the investigating committee to the enforcement committee on non-audit matters is included in the proposed section 48 and therefore as currently drafted the process is premature.

106. We recommend that section 48(1A) be should be subject to a referral by the investigating committee as in section 48(3) and should rather be included as a subsection of 48(3). This is to ensure that the referral to Professional Body process properly aligns to the scope and process as proposed below in clauses 117-145 and ensure the overall process is clear and fair.

Reportable irregularities

Amendment of section 45 - Removal of auditor: Other legislation

107. We agree with the amendment made to Section 45 as it aligns with the IRBA Guide for Registered Auditors, Reportable Irregularities (RI Guide).

108. It is appropriate for the auditor to complete the reporting process before resigning or being removed as auditor of an entity.

109. It is proposed to add section 45(7) which will prohibit the removal of the auditor until such time as he she has complied with the reporting requirement under section 45(3).

110. However, there are various other legislation including the Companies Act, 2008 which prescribes conditions for the appointment and removal of an auditor.

111. Submission: It is submitted that the specific other legislation is amended to ensure this requirement or that section 45(7) expressly subjects all other legislation to this requirement.

Amendment of section 45(7) - Person prohibited to remove of auditor

112. The proposed section 45(7)(a) prohibits an individual registered auditor to be removed and section 45(7)(b) prohibits the removal of the auditor by an entity.

113. Given that all auditors will conduct audits for an entity, it is unclear what circumstances are envisaged in section (a).

114. Submission: It should be clarified what are envisaged circumstances where (a) applies and where an individual removes and auditor.

Amendment of section 45(7) - Resignation of auditor

115. The section does not seem to deal with the resignation by the auditor in circumstance where the auditor cannot continue the engagement due to ethical reservations / concerns and where a RI may be applicable.

116.	Submission: Should the section have intended to cover resignation as well, it is recommended that a mechanism is inserted into section45 (7) to address the legal and other risks (including brand loss due to association and mass action) that an auditor may incur if he should be prohibited from resigning due ethical reasons and provide legal protections for the auditor.

Investigations – Referring matters to a professional body

Amendment of section 48 – Dual membership

117. In terms of the amendment in section 48(1A), the enforcement committee may, if it deems it appropriate, refer a non-audit matter brought against a registered auditor to a professional body accredited in terms of section 32(2) for investigation and disciplinary proceedings.

118. SAICA is currently the only accredited professional body but this will equally impact future accredited professional bodies.

119. We would like to raise the issue of dual membership bodies.

120. It is envisaged that in future there might be more than one accredited professional body and we are questioning how this will be dealt with if a registered auditor is also a member of another accredited professional body, how would this referral then be decided.

121. This is also currently a challenge in the tax profession.

122.	Submission: Clarity is sought how referrals for non-audit matters will work where an auditor has membership with two or more accredited bodies and if the expectation is that both would instigate disciplinary proceedings and sanctions.

Amendment of section 48 – Limiting scope of referred non-audit matters

123. Currently the concept of “audit” is defined in the APA and is very narrow as it excludes certain assurance functions such as independent review and matters such as “forensic audits”.

124. Therefore, the concept of “non-audit” matters is quite wide and can include various services provided by said registered auditor.

125. Professional bodies as member’s bodies are limited in law to matters which are within the scope and objectives of its founding documents such as the SAICA Constitution. Most of these bodies will also be tax exempt under section 30B of the Income Tax Act which specifically requires it to only operate within its objectives and prescribes it to apply its funds and activities to 90% of its principle or main object.

126. As such, it is important to note that SAICA can only discipline members within the SAICA mandate which includes the requirements set out in the SAICA Constitution, by-laws and Code of Professional Conduct (revised 2018).

127. The current referral mechanism and proposal does not consider this limitation or deal with it procedurally, which could result in the body entertaining a matter outside its scope in contravention of its founding document and other laws.

128. Submission: It is submitted section 48 be amended to introduce a referral scope limitation that equates to the limitation set in the professional body's prescripts (e.g. the relevant bodies founding documents, bylaws and codes of conduct).

129. Furthermore, a process should be added where a matter referred to the Professional Body is not identified as in scope, the Professional Body will then refer the matter back to the Regulatory Board.

Amendment of section 48 – Additional statutory powers for Professional Bodies

130. The current amendments were introduced to enhance the effectives of the regulation of auditors conduct especially as relations to investigation, discipline and sanction.

131. It proposes splitting this function between audit matters reserved for IRBA and non-audit matters for professional bodies.

132. However, it does not detract that what is sought is the regulation of auditors as people and not just audits as process and that both process should be seen as effective.

133. We have concerns that a statutory body such as the IRBA which will now have significant powers to investigate and enforce sanction, will not have a balanced outcome on the conduct of auditors if the voluntary membership body such as SAICA, does not have the similar statutory powers of investigation and enforcement as the IRBA does.

134. For example, SAICA is only able to obtain information on a voluntarily basis from a complainant and from members and associates. Furthermore, should we impose sanction other than termination of membership, that sanction is at most one vested in the law of contract with limited enforcement rights.

135. Submission: It is submitted that additional statutory powers be provided either to the professional body directly or through a mechanism via IRBA, whereby information can be compelled. Furthermore, sanctions should similarly be enforceable by law or deemed as if it was a sanction imposed by IRBA and enforceable via IRBA by the professional body.

Amendment of section 48 - Binding nature of non-audit disciplinary outcome

136. Though we welcome the proposal for the referral of non-audit disciplinary matters we however are concerned that the law is silent as to whether IRBA would have to abide by the professional body disciplinary outcomes and the procedures followed.

137. Given that IRBA accredits the professional body and the effectiveness of its disciplinary process and therefore has a direct input therein, it would be counterproductive and

undermine the whole reason for referrals if IRBA could reject or override the process, its outcome or its sanction.

138.	Submission: Section 48 should be amended to include that the IRBA does not have the power to review or reject the disciplinary investigations and proceedings for non-audit matters conducted by the accredited body nor the sanctions imposed, should they have been done in accordance with the relevant professional bodies prescripts (e.g. founding documents, bylaws and code of conduct).

Amendment of section 48 - Impact of suspensions of membership

139. One of the sanctions, in addition or fines and termination of membership, is suspensions.

140. It is however unclear if a sanction of suspension is imposed whether that would mean that the auditor does not comply with the membership body requirements for registration as an auditor and whether such suspension would then also just be temporary.

141. A similar problem has been experienced in the tax profession and we would rather want to avoid such uncertainty given the gravity of the matter.

142.	Submission: It is submitted that the law needs to be clarified as to consequences of a sanction of membership suspension as imposed by a professional body on a non-audit matter would have on the registration of the auditor with IRBA.

Insertion of section 57A - Disclosure of information for referred matters

143. With reference to section 48(1A), where matters can be referred to a registered professional body, section 57A does not expressly permit disclosure of information to a professional body though it could be inferred as part of the disciplinary process in section 57A(1)(a).

144. A similar exclusion on confidential information by SARS for disclosure to a Recognised Controlling Body is made in the Tax Administration Act in section 70(1)(e) as to the regulation of the Tax Profession.

145.	Submission: It is submitted that section 57A be expanded to expressly allow disclosure to a registered professional body for the purposes of the regulation of the auditing profession or for non-audit matters refer.

Protections, Appeal and Sanctions

146. The APA does is silent on an appeal or objections process except for the Promotion of Administrative Justice Act which allows the registered auditor to object against the administrative process used but not against decision of the IRBA.

147. Section 51 of the APA only allows the registered auditor to address the disciplinary committee as part of mitigation

148. This does not seem to fore balanced approach.

149. Submission: It is submitted that an internal objections process for certain decisions be introduced similar to tax to avoid the auditor having to take all matters on review of for relief to the High Court when senior management or an independent committee could have resolved the matter.

150. The scope of such decisions could be explored in further consultation sessions with National Treasury to be included in the bill.

Sanctions in admission of guilt process

151. It is submitted that although the admission of guilt by the registered auditor can be taken into account as a mitigating factor; this still needs to be appropriately weighed up against the gravity of the punishable conduct when determining sanction to ensure the sanction applied is still appropriate in line with the improper conduct of the auditor.

152. It also remains unclear how the admission of guilt will impact the normal process.

153. Submission: We request clarity on how the admission of guilt process will be different from the normal process.

Powers to enter and search premises

Insertion of section 48A - Clarity of reasons and evidence for extended powers

154. The proposed power for search and seizure for the purposes of an investigation has been included in the Bill for disciplinary matters as confirmed in the Memorandum on the Objects of the Draft Bill which states:

> *2.3 To address the challenges faced by the IRBA due to non-cooperation by auditing firms during investigations into improper conduct by registered auditors, the proposed amendment empowers the investigating committee to authorise an official of the IRBA to enter and search premises or subpoena any person with information required to complete an investigation.*

155. Currently section 53(1)(c) of the APA makes it a criminal offence if an auditor does not, as requested at a disciplinary hearing, make available or refuses to make available, information under his or her control or possession. This right of enforcement is quite broad and extensive extending to "*any information, including working papers, statements, correspondence, books or other documents*".

156. We are however unaware of any criminal matters and prosecutions pending or instigated by IRBA against auditors to enforce this cooperation and disclosure notwithstanding that such lack of cooperation to produce information serves as the basis for the IRBA's request for search and seizure rights.

157. Section 48(5) of the APA already includes a substantial requirement that a registered auditor must produce any information to the investigating committee as and when requested:

> ***"S48(5)*** *(a) In investigating a charge of improper conduct the investigating committee may*
>
> *(i) require the registered auditor to whom the charge relates or any other person to produce to the committee any information, including but not limited to any working papers, statements, correspondence, books or other documents, which is in the possession or under the control of that registered auditor or other person and which relates to the subject matter of the charge, including specifically, but without limitation, any working papers of the registered auditor;*
>
> *(ii) inspect and, if the investigating committee considers it appropriate, retain any such information for the purposes of its investigations; and*
>
> *(iii) make copies of and take extracts from such information.*
>
> *(b) The provisions of this subsection apply regardless of whether the registered auditor is of the opinion that such information contains confidential information about a client."*

158. Failure to produce such information during a disciplinary also constitutes a criminal offence liable on conviction to 5 years in prison.

159. Submission: It remains unclear to us why IRBA is of the view that is materially and regularly hindered to conduct investigations and disciplinary hearings in the absence of evidence support such conduct as a norm or demonstrating that it has been compelled to apply criminal sanctions for such failure by auditors.

Insertion of section 48A - Role of IRBA should be aligned to invasive powers

160. Search and seizure powers are intrusions and limitations of the fundamental Constitutional rights and the sanctity of the right to privacy and the existence of safeguards to regulate the way in which state officials may enter the private domain of ordinary citizens is one of the features that distinguishes a constitutional democracy from a police state1.

161. The IRBA's objects in terms of the APA includes disciplining registered auditors for improper conduct (i.e. non-compliance with the Act).

162. It is not the role of IRBA to investigate and prosecute criminal matters, but civil matters. The legislation empowering search and seizure powers to civil authorities has become quite common in our constitutional society, though the legislature has not addressed fundamental questions regarding its constitutionality.

163. The provision of such powers to civil authority to exercise in relation to unlawful but not criminal conduct has been problematic in many areas.

[1] Misty v Interim National Medical and Dental Council of South Africa and Others [1998] SACC 10: 1998 (4) SA 1127 (CC); 1998 (7) BCLR (CC) at para 25.

164. Firstly, the unlawful conduct does not necessarily equate to the same "public interest" threshold as criminal matters in applying a limitation on a constitutional right.

165. Furthermore, the constituent rights such as the right of an accused person in section 35 of the Constitution is in most instances excluded in civil matters including the right to be informed and the right not to be compelled.

166. This creation by the legislator of quasi criminal investigative powers for civil authorities means that in criminal matters, civil authorities end up playing on both sides of the fence with "Chinese walls" the only protection, if at all in protecting a fundamental constitutional right.

167. Submission: The policy of assigning search and seizure powers to civil authorities therefore remains questionable at best. We have not seen significant increases in criminal convictions by these authorities, including organs of state like SARS and CPIC, despite these powers as the criminal investigations and prosecutions are still reliant on the SAPS and NPA as the appropriate constitutional authority.

Scope of search & seizure powers too broad

168. The limitation this power places on section 14 of the Constitution and whether it in fact complies with all the requirements set out, requires a more detailed analysis.

169. Secondly, it creates a conflicts between the obligations and powers of the Police and National Prosecuting Authority.

170. Section 205 places the constitutional obligation on the police to investigate crime and section 179 of the Constitution provides exclusive powers to the National Prosecuting Authority to institute criminal proceedings on behalf of the state.

171. The Constitution holds the right to privacy so sacrosanct that it specifically addresses it in section 14, specifically prohibiting search or a person and his premises and having his property seized.

172. The limitation of this right is therefore only possible in the application of section 36 of the Constitution.

173. In *Minister of Police and Others v Kunjana* (CCT253/15) [2016] ZACC 21; 2016 (9) BCLR 1237 (CC); 2016 (2) SACR 473 (CC) (27 July 2016) the Constitutional Court sets out the nature of the balance sought in limiting what is a fundamental right:

[16] Section 14 of the Constitution guarantees everyone the right to privacy, including the right not to have their person or home searched, their property searched, their possessions seized, or the privacy of their communications infringed. This Court has held that an individual's right to privacy is bolstered by his or her right to dignity in section 10 of the Constitution.[13]

[17] Privacy, like all rights, is not absolute. In Bernstein this Court held:

*"The truism that no right is to be considered absolute implies that from the outset of interpretation each right is always already limited by every other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community."**[14]***

*[18] In Mistry, this Court emphasised the sanctity of the right to privacy and said that the existence of safeguards to regulate the way in which state officials may enter the private domains of ordinary citizens is one of the features that distinguishes a constitutional democracy from a police state.**[15]** In Gartner, this Court held that "the right to privacy embraces the right to be free from intrusions and interference by the state and others in one's personal life".**[16]** How closely one infringes on the "inner sanctum" of the home is a consideration that must be borne in mind when considering the extent to which a limitation of the right to privacy may be justified.*

174. Like all constitutional rights there is a limitation imposed in section 36 but it should be clear what the scope of the limitation is.

175. Firstly, there must be substantial state interest in requiring the limitation. One would assume that criminal matters attract a much higher state interest than civil matters[2].

[19] In Magajane, Van der Westhuizen J stated:

*"[T]he importance of the purpose of the limitation, is crucial to the analysis, as it is clear that the Constitution does not regard the limitation of a constitutional right as justified unless there is a substantial state interest requiring the limitation."**[17]***

176. Importantly the court in Mistry goes further to explain the scope of the limitation:

[21] The impugned provisions are broad. Section 11(1)(a) and (g) of the Drugs Act does not circumscribe the time, place nor manner in which the searches and seizures can be conducted. Again, the words of Van der Westhuizen J in Magajane bear reference:

*"**[The warrant]** governs the time, place and scope of the search, limiting the privacy intrusion, guiding the State in the conduct of the inspection and informing the subject of the legality and limits of the search. Our history provides much evidence for the need to adhere strictly to the warrant requirement."**[18]***

[22] Further, section 11(1)(a) grants police officers the power to search warrantless at "any time" "any premises, vehicle, vessel or aircraft" and "any container" in which substances or drugs are suspected to be found. Hence, as contended by the applicants, the premises which may be searched include private homes where the expectation of privacy is greater, being regarded as the "inner sanctum" of a person. Section 11(1)(g)

[2] *In Magajane, Van der Westhuizen J stated: "[T]he importance of the purpose of the limitation, is crucial to the analysis, as it is clear that the Constitution does not regard the limitation of a constitutional right as justified unless there is a substantial state interest requiring the limitation."[17]*

allows police officers to seize "anything" connected with a contravention of a provision of the Drugs Act. This power to seize without a warrant derives from the power of police officials to engage in a warrantless search.

*[27] It should not be forgotten that exceptions to the warrant requirement should not become the rule. In 2013, this Court found provisions in the Customs and Excise Act**[21]** that provided for a warrantless search procedure to unjustifiably conflict with the constitutionally guaranteed right to privacy. Madlanga J stated:*

*"A warrant is not a mere formality. It is a mechanism employed to balance an individual's right to privacy with the public interest in compliance with and enforcement of regulatory provisions. A warrant guarantees that the State must be able, prior to an intrusion, to justify and support intrusions upon individuals' privacy under oath before a judicial officer. Further, it governs the time, place and scope of the search. This softens the intrusion on the right to privacy, guides the conduct of the inspection, and informs the individual of the legality and limits of the search. Our **history provides evidence of the need to adhere strictly to the warrant requirement** unless there are clear and justifiable reasons for deviation."**[22]***

177. The court affirms that what, where, when and how are integral criteria of search and seizure rights even where exercised through the use of warrants. Furthermore, intrusions into a person's inner sanctum of his private home should be subjected to a higher threshold of state interest.

178. In determining the appropriateness of the search and seizure rights, the relation between the limitation and its purpose must be tested. The court states:

*[24] A rational connection must exist between the purpose of a law and the limitation it imposes.**[19]***

179. SAICA would like to state that we are not objecting against the power of enter and search by the IRBA but we would request that the powers should be balanced by equal protection.

180. Submission: Such caution for limitation and over eagerness of powers by executive is in our view well founded. The Constitutional Court declared section 32A of the Estate Agencies Affairs Act and section 45B of the Financial Intelligence Centre Act unconstitutional and invalid. Similarly, this same court declared invalid the board search and seizure powers of the Customs and Excise Act.

181. We would like to request that the amendment to the APA align with the requirements as set out by the Constitutional Court.

182. In this regard we have in Annexure B set out for ease of reference a comparison of rights in this regards for various authorities under various Act as comparison. It is striking that the powers IRBA is seeking exceed those authorities and seem to suffer the same critical oversight of being too broad as those struck down by the Constitutional court for the Estate Agency Affairs Board, Financial Intelligence Authority and SARS for Customs and Excise.

Including constitutionally prescribed procedures for search and seizure

183. On analysis of the proposed search and seizure provisions there are various matters that have not been dealt with. Again our **Annexure B** comparison can be used to identify such oversights as well as the relevant case law cited.

- Submission: Should the search and seizure proposed sections be included in the APA we are of the view that further amendments should be made that the following should be considered:

- Where an instruction is issued by the by the IRBA for a search and seizure, the constitutional requirement of connecting rationale, purpose within defined scope and what relevant material could be found should be inserted. For example, the IRBA may instruct where a disciplinary investigation has been instituted and the RA has not provided the requested documents that support the compliant and such documents are reasonable thought to be held by the registered auditors.

- Application requirements are not set out in the law and neither are the warrant conditions as determined by *Thint and Mistry* cases. The APA should specify minimum content of a warrant with a purpose statement. Documents should also be limited to those that possibly will be used in investigation.

- Exercising warrant: The proposed amendments has not made provision for a Damage payment for damage caused through entry and search and specifically where the registered auditor did not obstruct (e.g. searches at night at closed premises).

- The amendments should include a procedure or grounds to have a warrant revoked.

- The constitutional protection for accused i.e. Evidence may not be used to incriminate yourself in terms of section 35 of the Constitution should be included.

- The amendments should take note of the separation between civil and criminal rights and also include information regarding the sharing of information between civil and criminal cases.

- The amendments should include a procedure for return of documents found not to be relevant or for return of copies, for example records required to do tax returns.

ANNEXURE B – ANALYSIS AND COMPARISON OF SEARCH AND SEIZURE POWERS

Annexure Par.	Regulatory References in prevalent legislation: search and entry /seizure	Proposed changes in Audit Profession Act 26 of 2005 in Auditing Profession Amendment Bill 2020	Estate Agency Affairs Board Act 112 of 1976 (to be repealed by Property Practitioners Bill passed 2019) PPB	Property Practitioners Act 22 of 2019	Legal Practice Act 28 of 2014	Tax Administration Act 28 of 2011	Financial Intelligence Centre Act 38 of 2001	Financial Sector Regulation Act 9 of 2017
1.	**Prior procedures to ensure that search and entry/seizure is remedy of last resort**	Not reflected	Not reflected **Rectified in PPB**	S 26 Compliance notices	N/a No search and entry/seizure requirement	S 99 (3)	S 43A (3)	S 149 S 131(1) (*a*)
2.	**Inspector criteria**	Not reflected	Not reflected **Rectified in PPB**	S 24 qualified inspectors, detail such as identification	N/a No search and entry/seizure requirement	S 61(1)	S 45 Identification of inspectors	S 134 Identification of inspectors
3.	**Power of inspector**	S 48A(2)	S 32A (repealed by Concourt) **Rectified in PPB**	S 25 powers of the inspectors to enter, inspect, search and seize	N/a No search and entry/seizure requirement	S 61	S 45B	S 137
4.	**Trigger for search and entry**	S 48A (1) (a) For purposes of investigation	S 32A (repealed by Concourt) Non-compliance **S 25 of PPB**	S 25 to ensure compliance with the Act	N/a No search and entry/seizure requirement	S 60(1) Non-compliance	S 45B(1A) Non-compliance	S 136 For purposes of investigation

5.	**Warrant**	S 48B	S 32A repealed, Concourt require warrant	S 25(3)	N/a No search and entry/seizure requirement	S 59 and 60	S 45(1B)	S 138
	Regulatory References in prevalent legislation: search and entry /seizure	**Proposed Audit Profession Act 26 of 2005 amendments in Auditing Profession Amendment Bill, 2020**	**Estate Agency Affairs Board Act 112 of 1976**	**Property Practitioners Act 22 of 2019**	**Legal Practice Act 28 of 2014**	**Tax Administration Act 28 of 2011**	**Financial Intelligence Centre Act 38 of 2001**	**Financial Sector Regulation Act 9 of 2017**
6.	**Without warrant**	S 48A (1)	S 32A (repealed) **Rectified in PPB No requirement in PPB**	S 25(1) Enter without a warrant, inspector powers set out specifically	N/a No search and entry/seizure requirement	S 63 (1)	S 45B (1C)	S 137
7.	**Protection clauses**	S 57 Just administrative action	S 8C Right of Appeal against committees S 31 Right of Appeal against decisions of board **Included in PPB**	S29 Mediation S30 Adjudication S 31 Adjudication Appeal Committee	S 41 Right of Appeal to Appeal Tribunal S 42 Legal Services Ombud S 44 High Court may be approached	S 57, S 72, S 103 Various mechanisms Dispute resolution procedures	S 45 D 11 Right of Appeal to Court	Various mechanisms S 140 Ombud Scheme Tribunal Administrative sanctions Structure of law

8.	**Appeal**	Not reflected	S 8C Right of Appeal against committees S 31 Appeal against decisions of board **Included in PPB**	S 31 Adjudication Appeal Committee	S 41 Right of Appeal to Appeal Tribunal S 44 High Court may be approached	S 104 & S107 Various procedures Objection against assessment or decision.	S 45D Right of Appeal	S 299 Right of appeal of Financial Services Board decisions Appeals Board Tribunal
9.	**Sanctions Regime**	S 51 and S 51B	Not reflected **Rectified in PPB**	S 26 Compliance notices S 27 Fine as compensation	S 40 fines, suspension, compensation	Chapter 15	S 45C	S 120 S 154 S 171-174