

SUBMISSION ON GAUTENG PROVINCIAL LEGISLATURE MONEY BILLS AMENDMENT PROCEDURE AND RELATED MATTERS BILL

12 March 2019

Dr Seán Muller

1. Overview

The Gauteng Provincial Legislature Money Bills Amendment Procedure and Related Matters Bill (henceforth 'the Bill') is a welcome and necessary piece of legislation. The key imperative it responds to is s120(3) of the Constitution. Although very delayed, the GPL should nevertheless be congratulated on being the first provincial legislature to reach this stage of the legislative process.

Besides the requirements and intentions of the Constitution, the Bill should also reflect the requirements of the Public Finance Management Act and the national Money Bills Amendment Procedure and Related Matters Act of 2009 (henceforth 'the Money Bills Act') where appropriate.

In this submission I attempt to address as many of the key issues pertaining to the legislation as is possible in the time available. However, given the importance of the legislation, and the need for some significant changes, I strongly recommend that at least one further round of consultation takes place with more time given to the public and experts to make inputs.

As with the Money Bills Act, the Bill has three main components: establishment of the relevant committee *structures and powers* for dealing with money Bills (including any amendments); determination and elaboration of the *processes* that must be followed in oversight of money Bills; determination and elaboration of *technical capacity* for the process, in this instance through a provincial legislature parliamentary budget office.

The comments that follow largely focus on the contents of the Bill that address process and the creation of a Budget Office.

One point to be made in relation to political structure, is that the Bill should state clearly whether ex officio members of the Budget Committee have voting rights or not. Arguably they should *not* have voting rights, since that could skew overall political representation on the committee.

2. Money Bills process and content

2.1. Components

A first reading of the Bill indicates that perhaps insufficient thought has been given to the distinction between national and provincial public finances. For example, the fiscal framework is of far less significance at the provincial level than the national level. This is because provinces raise very little of their own revenue and do not engage in any significant borrowing. Similarly, one

cannot give comparable significance at provincial level to issues of fiscal and macroeconomic policy: by the usual definition, these concepts are applied only at the national level.

Another notable omission is the linkage between provincial money Bills and national money Bills. While the Division of Revenue Bill is a national piece of legislation and can only be amended by Parliament, the provincial input to that process should somehow be linked to the provincial money bills process. In essence, the provincial voting mandates can in principle affect the allocation of resources to the province and these resources (determined by the DoRA) are the largest part of the 'provincial fiscal framework'.

Linked to this point is the question of the equitable share formula. The Bill should arguably provide for links between oversight of specific money Bills and broader contributions to the structure of the equitable share formula and division of revenue allocation.

2.2. Timing

Parts of the Bill provide clear and specific timeframes for certain processes (e.g. the time available to the Executive to respond to proposed amendments). However, other processes lack this detail. For instance, there is no timeframe for amending 'revenue proposals', which would be part of the fiscal framework.

The Money Bills Act has a very specific order in which different aspects of the Budget and medium-term Budget are dealt with. This in turn corresponds to a vision of how successive stages of public finance decision-making ought to work. The Bill refers to similar components (fiscal framework, revenue proposals, appropriation Bill) but the overarching vision that guides the oversight of these appears to be lacking. That is reflected in the absence of certain timeframes.

2.3. Public participation

The Bill contains a separate, explicit section on public participation, which is to be welcomed.

The section would be strengthened by:

- Rephrasing 'should' to 'must'
- Expanding the requirement to processing of all relevant parts of the provincial budget and money Bills, not just amendments (as the current phrasing suggests)
- Committing to a minimum time that will be provided for participation.

In considering the timing of public participation, it is important to ensure that the public has sufficient time to engage with any relevant legislation or/and related documents before participating. And that there is then sufficient time for meaningful participation to take place.

2.4. Requirements for amendments

At the national level, there has been insufficient discussion of the requirements placed on Parliament by the Money Bills Act when proposing amendments to money Bills. Some of those requirements are more onerous than what is expected of the Executive. At the same time, such

requirements are important in as much as they guide the legislature toward responsible decision-making.

For these reasons, it is important to give close attention to each stated requirement for an amendment. While the requirements in the Bill are perhaps less onerous than those in the Money Bills Act, s10(8e) could be read as being quite demanding: how would the legislature demonstrate the impact of a proposed amendment on service delivery?

Somewhat relatedly, s11 needs to reflect the limitations on provincial revenue collection in the PFMA.

2.5. BRRRs

The idea of Budget Review and Recommendation Reports is admirable. However, in practice these appear to have become a significant burden to the national legislature that is often dealt with in a rote fashion and is therefore of questionable value. Serious consideration should be given to whether the existing legislature administration can deliver on 7(1) and 7(3) as envisaged.

2.6. Conclusion and recommendations

The current Bill is a positive step towards addressing the Constitutional imperative for provincial legislation to amend money Bills. It is therefore also a meaningful step towards more substantive oversight of provincial public finances. However, greater thought and attention needs to be put into the distinction between national and provincial public finances, so that this can be better-reflected in the content of the proposed legislation.

There are also some important legal issues that need to be addressed. Notably, there is no clear/explicit recognition in the Bill of relevant requirements in the PFMA and the Money Bills Act.

3. GPL Budget Office

Section 15 of the Bill intends to establish a 'Provincial Legislature Budget Office' (PLBO). The PLBO is a form of independent fiscal institution (IFI) and attention should be given to international and local experience and principles relating to such institutions. The OECD's 'Principles for Independent Fiscal Institutions' (OECD, 2014) is an obvious starting point – selected extracts are provided in footnotes to this submission.

3.1. Purpose and mandate

The basic purpose of parliamentary budget offices the world over is to provide the legislature with independent, technically credible analysis and advice on matters pertaining to public finances. Independence has three broad components: independence from the Executive; independence from political interference or influence of any kind; ideologically non-partisan. In terms of credibility, the analysis and advice of the PBO should aim to match or exceed that of the Executive and any other relevant institutions. While this may seem unrealistic, it is feasible provided that the PBO maintains a well-defined scope of work and selects issues of greatest importance for its

analysis – rather than trying to cover every possible topic and doing so superficially and non-credibly.

3.2. Independence

There is general agreement on factors that are important for a PBO's independence. Among these are:

- i. The PBO should be established outside of, or otherwise independent from, the main legislature's administrative structure
- ii. There should be a Director or Parliamentary Budget Officer who is appointed through an open, transparent process based on their technical expertise and credibility, including robust political independence¹
- iii. The Director should be appointed for a fixed, sufficiently long term (much like the Public Protector is appointed for seven years) and be removable only through an open process on specific grounds (misconduct, incapacity, etc)²
- iv. The PBO should receive funds in the form of a transfer which is protected from manipulation and sufficient for the Office to perform its core duties
- v. The PBO should publish any advice or analysis it produces³
- vi. The PBO's reporting lines should ensure due accountability while also protecting the Office from undue influence or interference.

The only one of these criteria that is partially met in the Bill is (iv), which is referred to in s15(5). However, the experience of the national PBO shows that the vagueness of this phrasing can undermine any intended effect on independence.

The Act requires the reporting of any political interference in the PBO but the Bill makes no such provision for the PLBO.

The Act states that the Director is appointed for an initial 5 year term and the recent amendments allow for that to be renewed. The Bill makes no statement about the tenure of any Director, or any reference to the appointment process.

¹ For example, the OECD guidelines state that:

"2.2 The leadership of an IFI should be selected on the basis of merit and technical competence, without reference to political affiliation. The qualifications should be made explicit – including professional standing and relevant government or academic experience. Qualifications should include proven competence in economics and public finances and familiarity with the budget process. (OECD, 2014)

2.4. The position of head of the IFI should be a remunerated and preferably full-time position. Strict conflict-of-interest standards, particularly for institutions with council members employed on a part-time basis, should be applied equally vis-à-vis other employment in the public or private sector." (ibid)

² "2.3. Term lengths and the number of terms that the leadership of the IFI may serve should be clearly specified in legislation as should be the criteria and process for dismissal for cause. The leadership's term should optimally be independent of the electoral cycle. Independence may be enhanced by defining the term span beyond the electoral cycle." (ibid)

³ "7.2. IFI reports and analysis (including a full account of the underlying data and methodology) should be published and made freely available to all." (ibid)

The Bill does not make any reference to transparency in the work of the PLBO.

The Bill does not state the reporting lines linked to the finances and performance of the PLBO.

In short: the current Bill does not enshrine the independence of the proposed PLPBO in any way. The absence of such provisions means that *the establishment of any such Office would be wasteful and pointless*.

3.3. Structure

The structure of a PBO is also key to its efficacy and overall success.

A PBO cannot, and should not, compete with the Executive in terms of capacity, but should be a lean, agile organisation that attracts the best talent and thereby can match or exceed the quality and depth of analysis of the Executive or any comparable institution. This implies a maximally-flat structure. There is little room for ceremonial positions and therefore even the Director should be capable of, and actively involved in, research and analysis.

Conditions of service should be determined independently of the legislature administration in a manner that allows the Office to compete with the Executive for staff. However, it is critical that favourable conditions of service are matched by robust and highly credible hiring process. Initially, all posts should be filled with input from independent experts.

The Director should be a person of the highest repute. This has been reflected in a recent amendment to the Money Bills Act which states a minimum requirement that the national PBO Director be a 'fit and proper person'.

The Bill provides no information on structure at all, or any information on how and when such structure will be determined for the PLBO. This is a serious concern and could easily compromise the institution from the outset.

3.4. Powers

While PBOs can in principle achieve a great deal without specific, legislated powers, certain powers can dramatically enhance the effectiveness of such institutions.

A first issue is that a PBO or/and its Director should have clear authority to determine the priority of public finance issues for analysis.

Most notably, international and local experience suggests that a PBO's ability to independently access information from the Executive, within a reasonable period of time and at no/reasonable cost, can be critical for producing credible, accurate analysis on certain public finance issues.

Recent amendments to the Money Bills Act give the national PBO power to access information. The present Bill does not address this matter in relation to the proposed PLBO.

3.5. Conclusion and recommendations

The Bill and the accompanying Memorandum do not adequately make the case for a PBO at provincial level. The extent of analysis required at the provincial level is significantly less than at

the national legislature, so arguably some explanation needs to be provided as to why a PLBO is the appropriate choice to support the implementation of the process envisaged by the Bill.

It is my opinion that there may be a legitimate case to be made for a PLBO in the fiscally larger provinces, such as Gauteng. However, making such a case is important in guiding the drafting of the associated legislation.

In the recent review of the Money Bills Act, the national legislature accepted that the original Act of 2009 had been flawed in failing to specify various matters pertaining to the PBO. Yet in this regard the GPL Bill not only omits recognition of these recent developments but is significantly weaker than the Act originally passed by Parliament. And there are a number of other respects in which the GPL should seek to learn from the failures and successes of the national PBO, rather than risk emulating the failures.

In short: there is simply *no point* in establishing a PBO if the above matters are not clearly and credibly addressed in legislation – in the absence of properly addressing these issues, any additional resources would be better directed towards existing research structures in the legislature. If the GPL decides to maintain the intention to establish a PLBO, s15 of the Bill must be significantly redrafted.