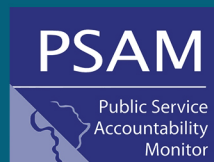


FISCAL OVERSIGHT BY PARLIAMENT AND PROVINCIAL LEGISLATURES

SEÁN MULLER



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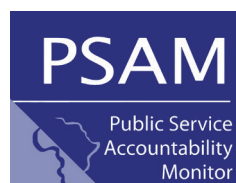
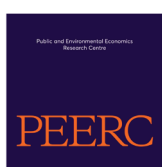
Seán M. Muller

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The project works to increase the direct political participation of CSOs in order to increase legislatures' capacity to fulfil their constitutional mandates to oversee executive performance, develop law and respond to the public. Part of this project includes increasing public knowledge on the role of legislatures and mechanisms through which to engage with them on crucial oversight functions, including budget oversight.

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HEINRICH BÖLL STIFTUNG
SOUTHERN AFRICA

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1. INTRODUCTION

The raising of revenue, allocation of expenditure and borrowing of money (issuing of debt), are at the core of the functioning of government. That, in turn, means that oversight of budgets and related legislation or decision-making is a critical responsibility of legislatures. The actual authority that legislatures have varies from country to country, but in South Africa the Constitution grants both national and provincial legislatures significant powers to amend proposed budgets and other bills ('money Bills') that raise revenue or allocate expenditure. In practice, South African legislatures appear to have never formally used these powers to make a significant amendment. One reason is that legislatures have always been controlled by the same political party that controls the relevant sphere of government, within a top-down political system. As a result, members of parliament (MPs) or members of provincial legislatures (MPLs) have been disinclined to reject budget proposals tabled by their own (national or provincial) government. The lack of interest in legislature powers has manifested, at both national and provincial level, in failures to pass legislation required by the Constitution to guide the amendment of money Bills.

There is some contention as to whether this matters or not. For instance, the National Treasury is generally opposed to 'in year' amendments as these could cause significant disruption to standard budgeting processes within government departments and entities. And in the political environment that has dominated at the national level since 1994, there is a view from both politicians and government officials that any legitimate concerns about budget allocations or revenue raising could be resolved through behind-the-scenes political channels rather than through formal exercising of Parliament's authority.

It could also be argued that there has been very limited public engagement with budget oversight processes (Waterhouse, 2015) and that therefore there were rarely specific demands for amendments to budgets or other money bills. However, the lack of public engagement could equally, and perhaps more likely, be due to the impression that legislatures are effectively rubber-stamping institutions (Parliament of South Africa, 2009; Van Der Westhuizen, 2014). Indeed, in the post-1994 era the media has traditionally reported on the national Budget when it is presented by the Minister of Finance as something that has been decided ('announced'), not as a set of proposals that could be accepted, rejected or amended.

As will become clear below, the national legislature is where citizens first, formally have the right to respond to the expenditure and revenue proposals in the national budget; failure to facilitate involvement in the legislature's budget oversight process, or to rule-out the possibility of amendments *ex ante*, fundamentally undermines the accountability of the government.

In that context, the purpose of this research is to analyse and explain the provisions that exist for legislature oversight of budgets and money Bills. The primary intention is to demystify the relevant powers and processes so that civil society organisations are better able to make submissions and, where appropriate, advocate for changes to budgets and money bills to serve the public interest. In pursuit of this, the research also identifies areas in which the national and provincial legislatures can improve. At the provincial level, we focus on three legislatures: Eastern Cape, Gauteng and Western Cape.

2. Legislative overview

At present, there are three key pieces of legislation in relation to oversight of public finances within the national and provincial spheres of government: the Constitution (1996), the Public Finance Management Act ('PFMA') first passed into law in 1999 and the Money Bills Amendment Procedure and Related Matters Act ('Money Bills Act') passed in 2009.¹

2.1. Constitutional provisions

Chapter 13 of the Constitution sets out the broad parameters for the management of public finances, including the legislation that needs to be passed to effect the national budget. It establishes the authority of the National Treasury (s216) and requires (s216(1)) legislation that prescribes how public finances should be managed – that is the role played by the PFMA. The powers accorded to legislatures are contained in Chapter 4 (National Parliament) and Chapter 6 (Provincial Legislatures). The Constitution also established (s220-222) an independent body, in the form of the Financial and Fiscal Commission (FFC), that should make recommendations on public finance matters to Parliament and the provincial legislatures.

A 'money bill' is defined by s77 of Chapter 4 defines as follows:

- (1) A Bill is a money Bill if it –
- (a) appropriates money;
 - (b) imposes national taxes, levies, duties or surcharges;
 - (c) abolishes or reduces, or grants exemptions from, any national taxes, levies, duties or surcharges; or
 - (d) authorises direct charges against the

National Revenue Fund, except a Bill envisaged in section 214 authorising direct charges.

An analogous definition is provided for provinces by s120. The Constitution strictly limits the power to table money Bills at the national level to "the Cabinet member responsible for national financial matters" (s73(2a)) and at the provincial level to "the member of the Executive Council who is responsible for financial matters in the province" (s119).

This is counterbalanced by the power of legislatures to reject or amend money bills. However, the Constitution requires (s77(3)) that a piece of legislation be passed that determines the procedure for amending national money bills. In other words: it requires an Act which states how Parliament can go about changing the budget and other public finance proposals of the government. For various, mostly political, reasons such legislation was only passed in 2009 in the form of the Money Bills Act.² The Constitution has identical, corresponding requirements for provinces (s120); at the time of the first version of this report, no province had passed such legislation. However, at the very end of the tenure of the 5th legislature, the GPL passed a Gauteng Money Bills Act. Unfortunately, as we discuss below, that process was rushed and the resultant legislation is deeply unsatisfactory.

It is an open question as to what the failure to pass the legislation prescribed in s77(3) and s120(3) implies for legislatures' powers to amend money bills. The view taken by some is that until, and unless, such legislation exists the legislatures can-

¹ There are many other pieces of public finance legislation, that are not related to the core focus of this paper, including: the Municipal Finance Management Act ('MFMA') originally passed in 2003; the Financial Management of Parliament and Provincial Legislatures Act ('FMPPLA') (2009); the recently amended Public Audit Act (2004); etc. Some other legislation relating to taxation is discussed in subsequent sections.

² The detailed background to the Money Bills Act and related matters – such as the establishment of a Parliamentary Budget Office – will be discussed in a separate paper.

not amend money bills. And that is consistent with the view that the intention of the Constitution was for such legislation to be passed shortly after the promulgation of the Constitution itself. On the other hand, it seems an extreme interpretation of the law to argue that legislatures entirely forfeit a critical oversight power entirely on the basis that the same legislatures had not yet enacted a procedure in legislation. As we will see in section 5, this ambiguity was addressed explicitly in the Standing Rules of one of the PLs we examine, but not the other two.

2.2. Implications of the absence of amendment powers

The implications of legislatures not having amendment powers are often not fully appreciated. The absence of amendment powers means, firstly, that a legislature can only accept or reject a money Bill – including the Budget documents. If a legislature rejects the money Bill that determines Budget expenditure (appropriations) and the Minister or MEC does not table a revised Bill, there are provisions in the PFMA to guide public expenditure in the scenario where no Budget is passed.

In terms of revenue, any revenue instruments and rates set in previous years will remain in place, except in the unusual situation where there was an explicit time period for a particular tax/rate that now lapses. The implications for revenue collection may, therefore, be minimal. An exception is income taxes. Tax brackets are normally adjusted for inflation to reduce what is known as 'fiscal drag', where individuals are pushed into higher tax brackets due to inflation and end-up paying a higher tax rate despite their real (as opposed to nominal) income being the same. Most national Budgets since 1994 have contained an

adjustment for fiscal drag, so it follows that under normal circumstances the failure to pass a Budget would mean higher income tax collection than would have been the case otherwise. The extent of that 'over-collection' increases with the rate of inflation.

On the expenditure side, there are explicit provisions in s29 of the PFMA regarding government expenditure in the absence of an approved Budget for the relevant fiscal year. National or provincial government may spend:

- up to 45% of the previous year's expenditure in the first four months
- up to 10% of the previous year's expenditure per month in the subsequent months
- up to the previous year's total expenditure for the entire year.

Such spending is limited to "services for which funds were appropriated in the previous annual budget or adjustments budget". These provisions apply to provinces provided there is corresponding provincial legislation (s29(4)).

The above expenditure provisions equate, in the event that no Budget is passed, to a real reduction in government expenditure in proportion to inflation. The combination of the revenue and expenditure effects therefore translate into a likely, substantial reduction in any annual budget deficit or substantial increase in any budget surplus. The failure of the Executive and Legislature to agree on a budget leads to fiscal austerity that increases in extent with the rate of inflation. Although this has not happened in South Africa to date, it may become more likely under coalition governments where coalition partners hold strongly divergent views on fiscal issues.

At a higher level of abstraction, what the

absence of amendment powers prevents, in effect, is legislature-led increases in expenditure, or decreases in revenue, beyond what is proposed by the relevant Treasury. In that sense, the absence of amendment powers for legislatures implicitly favours fiscal conservatism over expansionary fiscal policy.

2.3. Parliament: Money Bills Amendment Procedure and Related Matters Act (2009)

At the national level such concerns no longer apply, because the Money Bills Act of 2009 finally set out a process by which Parliament could make amendments. There are five main dimensions to the provisions of that Act:

- i. Timelines (for the Executive and Parliament)
- ii. Factors that must be considered when making an amendment
- iii. Requirements that an amendment must satisfy
- iv. Public hearings
- v. Opportunity for the Executive to respond.

These are explained in more detail in section 3 below.

The Act also creates a Parliamentary Budget Office (PBO) to provide the legislature with technical capacity to analyse money Bills and associated proposals. While the performance of the PBO to date is mixed, it has the potential to be an important institution both for the legislature

and the broader public – including civil society organisations.³ In other countries, independent fiscal institutions like PBOs often have a significant impact on public debate around fiscal proposals. This is largely due to the credible analysis they produce that is independent of the government and political parties – and may differ from assertions made by the Executive.⁴ There is, therefore, a strong argument for civil society to pay greater attention to the capacity and independence of the existing PBO, as well as contribute to consultation that may take place regarding the creation of PBOs at the provincial level.⁵

Some important amendments to the original Money Bills Act were finalised in 2018 and were signed into law by the President at the beginning of 2019.⁶ The positive changes include: additional flexibility in the time limits for amendments; greater elaboration of the institutional independence of the PBO; assignment of powers to the PBO to independently obtain information; introduction of a requirement that its Director be 'fit and proper'; and, recognition of the relative autonomy of provinces in determining their money bills amendment procedures. Negative changes include: reduced time for oversight of part of the Medium Term Budget Policy Statement (MTBPS); and, reduced transparency in the reporting of the PBO through the creation of an advisory board composed of the chairpersons of the finance and appropriations committees and two house chairpersons – positions all traditionally held by the majority party.

³ For accessible discussions of the role, and some failures, of the South African PBO, see Muller (The important role of the Parliamentary Budget Office, 2016; Why South Africa's public finance watchdog failed its mandate on nuclear, 2016).

⁴ See for instance Kopits (2011) and Currstine, Harris and Seiwald (2013).

⁵ A detailed history of the current South African PBO is the subject of separate work.

⁶ The formal process followed by the legislature in drafting and approving the amendments is documented by the Parliamentary Monitoring Group at <https://pmg.org.za/bill/828/>.

2.4. Provincial legislatures

As noted above, at the provincial level, no legislation currently exists in eight of the nine provinces that satisfies the requirements of s120(3).⁷ And the legislation recently passed in Gauteng, while perhaps well-intentioned, is unsatisfactory. As is discussed in detail in section 5, for the three legislatures we examined, a procedure for dealing with money bills was instead laid out in the legislatures' 'Standing Rules'. However, that is likely to change – partly prompted by recent amendments to the schedule of the Money Bills Act dealing with provinces and seemingly greater awareness of s120(3). The Gauteng Provincial Legislature (GPL) provides an indication of what may happen in other provinces. In 2018, the GPL established an ad hoc committee to draft such legislation and consider the creation of a provincial PBO. This committee produced a draft Bill that was circulated for consultation at the end of February 2019 (GPL, 2019), passed by the committee at the end of March, approved by the House in April and signed into law by the Premier in May (Gauteng Provincial Government, 2019). The Eastern Cape Provincial Legislature (ECPL) has drafted a white paper that will shortly be published.⁸ And both the Western Cape and KwaZulu Natal legislatures have shown an interest in developing money bills amendment legislation.

2.5. Taxation

A more complicated area of legislation concerns taxation. As shown above, the Constitution covers revenue-raising legislation under its definition of money bills – specifically, s77(1)(b) and s77(1)(c) at the national level. The Money Bills Act of 2009, however, distinguished between 'revenue proposals' in tabled budget documents and the actual tax legislation which it referred to as 'revenue bills'. This created problematic inconsistencies that were raised as a concern during the public consultation process on amending the Act. In addition, there exist various pieces of legislation that apply to particular tax instruments, notably: the Valued-Added Tax Act (1991), the Income Tax Act (1962), the Customs and Excise Duties Act (1964), and the Tax Administration Act (2011). The interaction between these pieces of legislation and the Money Bills Act is a relatively unexplored subject, but when the 2018 Budget proposed to increase VAT to 15%, Parliament was advised by both the Treasury and Parliament's own legal advisor that provisions in the VAT Act meant the proposal would come into effect despite the absence of parliamentary approval. On the face of it, however, this seems to contradict the intentions of the Constitution and is likely to be the subject of further scrutiny.

⁷ This was confirmed by searching the Juta Law Provincial Legislation database.

⁸ Workshop of the Ad Hoc Committee on Money Bills and Related Matters Bill of the Gauteng Provincial Legislature, 7 November 2018.

3. The national legislature, the budget and money bills

As noted above, the Money Bills Act sets out the procedure that the national legislature follows in dealing with money bills. Although the focus of the present paper is on provincial legislatures, it is useful to understand what happens at the national level for at least three reasons:

- The share of total government revenue allocated to provinces is determined in the national legislature through the Division of Revenue Bill, with inputs and voting representatives from the provincial legislatures
- The time periods for oversight at the national level affect those at the provincial level
- The procedure and considerations prescribed are partially replicated in the schedule concerning provinces and reflected to various degrees in provincial legislature standing rules.

Within the national legislature there are two important distinctions in terms of responsibilities. First, between the National Assembly and the National Council of Provinces. Second, between the finance committees and the appropriations committees.

3.1. Budget

The national Budget, traditionally tabled in the last week of February, has three main components that must be approved or amended by Parliament in the following order: the fiscal framework, the Division of Revenue Bill (DoRB) and the Appropriations

Bill.⁹ The finance committees are responsible for the fiscal framework, while the appropriations committees are responsible for the DoRB and Appropriations Bill.

The fiscal framework determines the total expenditure, revenue and borrowing of national government. So what economists normally refer to as 'fiscal policy' – the role government plays in the economy through taxation and spending – is determined by, and reflected in, the fiscal framework. The finance committees of the NA and NCOP are responsible for considering this aspect of the Budget and the Money Bills Act, s8(7), requires it to be approved or amended within 16 days of the Budget being tabled. The Money Bills Act also states that the committees must hold public hearings and outlines a lengthy set of factors that must be considered when making any amendment.

The Division of Revenue Bill (DoRB) is the key piece of national budget legislation for provinces, as it determines – in accordance with s214 of the Constitution – the distribution of total government expenditure across the three spheres (national, provincial and local).

The Money Bills Act (s9) states that the DoRB cannot be considered before the fiscal framework has been passed and that Parliament must pass it within 35 days of the fiscal framework being adopted. Although it had been proposed that the Act be amended to allow concurrent consideration of the DoRB and the fiscal framework, this is not reflected in the final

⁹ The PFMA (s27(1)) requires that the national Budget be tabled on a date determined by the Minister of Finance before the start of the financial year or, "in exceptional circumstances", as soon as possible thereafter.

proposed amendments. The significance of this is that the DoRB approval process is relatively complex, since – as described in section 4.2 – it requires mandates from provincial legislatures, and there are no legislative provisions to address the situation where the DoRB is not passed. The time limitations in the national legislation (the Money Bills Act) therefore places significant constraints on the time available for provincial legislatures to engage with the DoRB.

Finally, the Appropriations Bill determines the allocation of the national share of government expenditure across national departments. Parliament has 4 months (s10(7)) in order to approve or amend this Bill.

For each of the above, the proposed amendments to the Money Bills Act add the proviso, “or as soon as reasonably possible thereafter” to the timelines for approval. In principle this introduces some flexibility in situations where material amendments are made, or there is substantial disagreement within the legislature. However, as things stand, this provision is unlikely to change standard practice.

The way the Money Bills Act is structured is such that the fiscal framework must be adopted first, then the Division of Revenue Bill and, finally, the Appropriations Bill: decisions at each stage place constraints on decisions at the next stage. This is a deliberate intention of the legislation, partly aimed at enforcing fiscal responsibility. Notably, having approved the total level of government expenditure and borrowing through the fiscal framework, if Parliament (through the appropriations committees) wishes to increase the allocation to a particular national department it must find those resources within what it has already

determined (by the finance committees) is a responsible level of total expenditure.

The main reason for the much longer time allocated to the Appropriations Bill, is that oversight requires each portfolio committee to consider the proposed ‘Vote’ in detail.¹⁰ For example, the Portfolio Committee on Health will consider the detailed, proposed allocations to health at the national level. In the event that any committee proposes changes, those will need to be coordinated with another committee or committees: with both the fiscal framework and division of revenue already approved, the total amount of national government expenditure is then fixed and any increase in allocation to one Vote requires a decrease in an allocation to another.

In principle, what this means is that for up to four months of the year national government departments are operating without a finally-approved Budget. This situation is catered for under s29 of the PFMA, which allows spending of up to 45% of the previous year’s Budget in the first four months. These provisions carry over to provinces provided appropriate provincial legislation, in the form of a ‘Direct Charges Act’ or equivalent, has been passed.

In fact, the provisions of s29 of the PFMA are crucial in the context of legislative authority: if the legislature simply rejects the proposed Budget, s29 nevertheless allows government to continue functioning. The caveat is that the government cannot spend more in total than the previous year, which would mean a real reduction in government expenditure proportional to the level of inflation in that year.

¹⁰ A ‘Vote’ is defined in the PFMA as:

“vote” means one of the main segments into which an appropriation Act is divided and which—

(a) specifies the total amount which is usually appropriated per department in an appropriation Act; and
(b) is separately approved by Parliament or a provincial legislature, as may be appropriate, before it approves the relevant draft appropriation Act as such.

3.2. Legislature inputs to the Budget

In principle, there are a number of ways in which Parliament can influence the Budget prior to its tabling.

In the year prior to tabling, the Money Bills Act requires that portfolio committees of the National Assembly compile 'budget review and recommendation reports' (BRRRs) that "assess the performance of each national department" (s5(1)). These are submitted to the relevant Cabinet member and the Minister of Finance and the next year's Budget must respond to any recommendations (s7(4)). The idea, in essence, is that Parliament can influence resource allocation in the Budget through assessments of departmental performance. In practice, the compilation of BRRRs consumes significant committee oversight resources, but it remains an open question as to whether there is sufficient research and analytical capacity in Parliament to have a meaningful, constructive influence on the Budget.

An additional opportunity for influence arises through the Medium-Term Budget Policy Statement – the details of which are given in section 3.5. The MTBPS outlines the proposed fiscal frameworks, division of revenue and national allocation of expenditure across functions, for the subsequent three fiscal years. This provides a preliminary signal of the Executive's intended Budget for the coming year and hence committee responses can, in principle, cause the Executive to alter some of those proposals prior to the Budget being tabled.

3.3. Revenue Bills

The revenue projections in the fiscal framework are affected by any new tax proposals in the Budget, which can include changes in tax rates or excise duties (on things like alcohol or cigarettes) or the introduction of new taxes, duties or levies.

The original Money Bills Act required Parliament's finance committees to state whether they approve or reject these proposals at the same time as they reported on the fiscal framework. Such proposals need to be enacted into law by an actual money bill – or, in the terminology of the Money Bills Act, a 'revenue bill' – and those have traditionally been considered later in the year.¹¹ One such bill that is often tabled in draft form with the Budget documents is the Rates and Monetary Amounts Amendment Bill. Another relevant bill, that is usually tabled later in the year, is the Taxation Laws Amendment Bill.

Asking Parliament to take a position on proposals, while only considering the actual legislation later, arguably creates an incoherence in the oversight process. Proposed amendments to the Act remove the requirement to state a position on revenue proposals when the fiscal framework is considered. However, it is unclear at this stage what implications this will have for oversight of new revenue measures and whether the National Treasury will now table the relevant legislation earlier in the fiscal year.

A further complicating factor for oversight is that if economic actors (individuals and

¹¹ The Act defines revenue Bills as: "Bills that impose or abolish national taxes, levies, duties or surcharges or which abolish reduce or grant exemption from any national taxes, levies, duties or surcharges".

firms) become aware of changes to tax rates or measures in advance, that could undesirably affect their behaviour. On this basis, the National Treasury often only announces an intention to make such changes in the actual Budget and various pieces of tax legislation allow such announcements to take effect immediately – prior to any consideration or decision by the legislature.

The resultant tension has been highlighted recently by the announcement in the 2018 Budget that the VAT rate would increase to 15%. The VAT Act – s7(4) – allows that decision to come into effect regardless of the legislature's approval.¹² This is reflected in s8 of the Draft Rates and Monetary Amounts and Amendment of Revenue Laws Bill that was tabled with the 2018 Budget:

8. (1) Section 7 of the Value-Added Tax Act, 1991, is hereby amended by the substitution in subsection (1) for the words following paragraph (c) of the following words:

"calculated at the rate of [14] 15 per cent on the value of the supply concerned or the importation, as the case may be."

(2) Subsection (1) is deemed to have come into operation on 1 April 2018.

For matters relating to income tax, for both individuals and firms, this is somewhat less of an issue because the power of Parliament to subsequently reverse the change means that the revenue authority would then have to return, or collect, the difference that results to the relevant taxpayers. In the case of VAT, however, this is not possible since VAT is paid on consumer goods

and no systems exist to return or increase VAT collections after the fact.

While it is not unusual internationally for the Executive to be able to implement tax changes in this way, there remain questions about its constitutionality in South Africa and the extent to which it could undermine the oversight authority of Parliament. This should be the subject of further research and, possibly, clarification by the courts.

Since most state revenue is raised at the national level, and provinces in particular have more limited revenue-raising powers, oversight of revenue Bills is of much more importance at the national than provincial level. However, it is worth noting – as other authors have (Croome & Olivier, 2010, pp. 7-8) – that provinces have also chosen not to exercise the full extent of their revenue-raising authority.

3.4. Adjustments Budget

If the executive want to make changes to any aspect of the national Budget, the Minister must table an 'adjustments budget' with the proposed changes (PFMA s30 and Money Bills Act s12). Typically, this means an adjusted fiscal framework, Division of Revenue Amendment Bill and Adjustments Appropriation Bill.

The Adjustments Budget and MTBPS are traditionally tabled together, but there is no inherent reason for doing this. Indeed, there is some evidence from the national legislature that the tabling of these together has created some confusion among MPs and led to inadequate oversight. For example, in a number of years the finance

¹² "(4) If the Minister makes an announcement in the national annual budget contemplated in section 27 (1) of the Public Finance Management, 1999 (Act No. 1 of 1999), that the VAT rate specified in this section is to be altered, that alteration will be effective from a date determined by the Minister in that announcement, and continues to apply for a period of 12 months from that date subject to Parliament passing legislation giving effect to that announcement within that period of 12 months." (s7(4), Value-Added Tax Act).

committees have tabled one report on the adjusted fiscal framework (Adjustments Budget) and proposed fiscal frameworks (MTBPS) within the much shorter time allocated for the former. That, furthermore, will be entrenched practice under the amendments to the Act.

3.5. MTBPS

The Medium-Term Budget Policy Statement (MTBPS) provides an overview, of national government's intended fiscal policy and expenditure priorities, along with its economic forecasts, for the next three fiscal years. This is as required by s28 of the PFMA and s6 of the Money Bills Act, both of which require the tabling of such a document at least three months prior to the national Budget.

Although a medium-term budget is therefore required by legislation, it is not enacted in legislation. As a result, it does not require approval, amendment or rejection. The current Money Bills Act requires the relevant committees to report on the MTBPS and recommend amendments to the subsequent year's Budget if that is unchanged in response to committee reports. The pending amendments to the Money Bills Act rephrase this to state that committees may include recommendations to amend the respective MTBPS proposals (fiscal framework, division of revenue and expenditure priorities).

The significance of the MTBPS in the oversight process is perhaps underappreciated. National Treasury officials have stated in various fora that substantial in-year

amendments to the Budget (i.e. after it is tabled) are likely to be undesirably disruptive to the functioning of government. This in turn may contribute to the reluctance of (majority party) MPs to consider such amendments. In contrast, the MTBPS provides an opportunity to influence fiscal decisions before they are reflected in draft legislation. Regardless of whether one agrees with the Treasury's aversion to in-year amendments, there is clearly merit to greater engagement with the MTBPS – where possible – prior to engaging with corresponding issues in the Budget.

In saying this, it is important to note that in some instances key fiscal decisions are not reflected in the MTBPS and that necessitates a focus on in-year amendments. Two pertinent, recent examples are the dramatic increase in higher education funding and the introduction of a one percentage point increase in value-added tax (VAT). Neither decision was reflected in the 2017 MTBPS but both had material impacts on the 2018 Budget.

3.6. Legislature capacity for oversight and amendment

A common concern internationally is that legislatures typically have fewer resources than the Executive, which makes any oversight challenging but especially so on matters – such as public finance – that may require substantial technical expertise. South Africa is no exception and, combined with a mostly subservient role of the legislature in the democratic era, this has meant very limited substantive oversight of public finances. For instance, prior

even to the promulgation of the Money Bills Act, Krafchik and Wehner (1998, p. 531) argued that:

Even if Parliament were to gain amendment powers immediately, however, committees do not currently have the capacity to utilise them effectively. Consequently, the ability of Parliament to change the Budget would be low.

That prediction has arguably been confirmed by subsequent developments.

The current committee structure of Parliament means that each of the four primary fiscal oversight committees (of finance and appropriations in the two Houses) should have at least one 'content advisor' and one 'researcher'. Given the responsibilities of these committees, that is very limited capacity even just for the processes outlined in the Money Bills Act. In addition, the finance committees are also responsible for considering extremely complex proposed legislation relating to financial sector regulation and oversight of a large number of entities such as development finance institutions.

In this context, the challenges to oversight are often compounded by other institutional factors. In certain instances, some committees – such as the Standing Committee on Finance – have been without either a researcher or a content advisor for a prolonged period of time. Each term of Parliament brings new MPs, and often chairpersons, to the relevant committees who may have no knowledge of public finance oversight. Similarly, many committee staff are on five year contracts, the renewal of which does not appear to have

any clear association with qualifications or performance. The result is that each term of Parliament involves a certain degree of 'starting from scratch', with limited institutional memory.

An increasingly popular approach internationally to improving the fiscal oversight capacity of legislatures is the creation of 'independent fiscal institutions', that are independent from the Executive and have staff with relevant technical expertise. There are a variety of models for such institutions, but the most common is the 'parliamentary budget office' which, in one way or another, directly advises the legislature. As already noted, such an office was created in law by the Money Bills Act (2009) although the process to establish it in practice only began in 2012. The mandate of the PBO is broadly to "support the implementation of [the Money Bills Act] by undertaking research and analysis for the [finance and appropriations committees]".

The detailed mandate (s15(2)) is broad and includes: "providing reviews and analysis" of tabled Budget documents, "providing advice and analysis on proposed amendments", "monitoring and synthesising matters and reports tabled and adopted in a House with budgetary implications", "monitoring and reporting on potential unfunded mandates" and "undertaking any other work deemed necessary by the Director".

The PBO therefore has the potential to materially improve the extent and quality of fiscal oversight by Parliament. However, there are two main practical challenges. The first is that the institution itself needs to be competently staffed and properly managed in a way that ensures robust po-

litical independence. The Money Bills Act (s15(9)) contains a provision that:

the Director shall be obliged to report to Parliament any inappropriate political or executive interference to prevent the office from providing independent, objective and professional advice on matters related to the budget and other money Bills.

While in principle this provides some protection for the Office, in practice it suffers from significant limitations. The nature of the reporting lines envisaged are unclear and – in the case of interference by Members of Parliament or their political associates – it may well require that the Director report interference to the same individuals responsible for the interference. Furthermore, it does not address the possibility that the Director and/or other staff of the Office may act of their own volition in a manner that is not truly independent. Hence, the notion of 'robust political independence' used above refers to a broader, more substantive conception of the role of the Office than merely a lack of demonstrable interference in its functioning.

The second is that for the Office to fulfil its potential, its role needs to be properly understood and integrated into the workings of the Parliament administration and the relevant committees. As things stand, there is evidence to suggest that neither of these challenges has been adequately addressed. With proposed amendments to the Act providing much greater detail on the institutional independence of the Office and the position of PBO Director vacant, there is a renewed opportunity to establish the Office in a manner that improves oversight.

From a civil society perspective, a properly operating PBO is also a valuable resource. Provided it is technically credible and substantively independent (in mindset as well as operations), its analysis and research provides a valuable counterweight to, or corroboration of, assertions by the Executive. For instance, the Executive could produce a costing of a nuclear power programme of R500billion and the PBO could then either critically analysis the Executive's costing, or produce an entirely independent costing that could be used by Parliament to inform its own position on the merits of the Executive's proposal. Good practice typically dictates that PBOs seek to obtain data from the Executive and make their analyses publicly available, thereby serving as a resource for civil society.

3.7. Political dynamics and legislative oversight

Much of what happens in the oversight process is first-and-foremost a function of political dynamics rather than necessarily than the formal oversight mandate, technical considerations or indeed the broader public interest. In the South African political system based on proportional representation, MPs are deployed to Parliament by their respective parties rather than elected directly – thereby reducing their independence and possible inclination to voting against proposals from 'their party's' government. The concern that has been raised by many analysts is that this substantially reduces the value of legislative oversight and that is arguably reflected in most decision taken in the legislature.

These dynamics and their consequences carry-over, correspondingly, to fiscal oversight. However, even in the absence of a change in political system – as has been mooted most notably by the Van Zyl Slabbert Commission on Electoral Reform (2003) – there are conceivable scenarios in which the legislature might make meaningful amendments to, or even reject, proposals by the Executive. Amongst these are:

1. Where the Executive tables proposals, albeit with the approval of representatives of the majority party in Cabinet, that contradict the policies or views of the majority party itself
2. Where there are divisions within the majority party, such that the bulk of its representatives in the legislature differ from those in the Executive
3. Where no single party holds a majority, coalition members may take different positions on specific proposals thereby increasing the likelihood of Executive proposals being amended or rejected.

These considerations apply, correspondingly, to fiscal decisions. In such scenarios, but perhaps especially in the third scenario, the role of civil society and a credible, independent institution such as the PBO could be extremely important in contributing to decisions in the public interest.

4. Provinces and the national legislature: the NCoP

Before considering how provincial matters are dealt with by provincial legislatures, it is important to note that the Constitution makes provision for some such matters to be considered in the national legislature through the National Council of Provinces (NCoP).

The NCoP is composed of permanent and special delegates from the legislatures, along with the relevant provincial premiers or appropriate replacement. At least five provinces need to vote in favour of a question for it to be decided (Constitution, s65(1b)).

A key distinction for the purposes of most legislation is between Bills affecting provinces (s76) and those deemed not to affect provinces (s75). In both instances the NCoP has the opportunity to make a decision regarding the Bill, but for s75 Bills the NA can ultimately override any amendments or objections of the NCoP, whereas for s76 Bills if the NCoP and NA cannot agree a mediation process is initiated; if there is no agreement after mediation the Bill then it either lapses or must be passed by at least two-thirds of the NA.

The manner in which provincial legislatures submit their mandates to the NCoP is formalised in the Mandating Procedures of Provinces Act (52 of 2008).

4.1. NCoP finance: the fiscal framework and revenue proposals

The Money Bills Act requires both finance committees to consider and report on the fiscal framework and revenue

proposals/revenue Bills. The manner in which these are treated does not require the Select Committee on Finance to obtain formal mandates from the provincial legislatures. Nevertheless, in principle the members of the Select Committee should represent the interests of provinces in relation to the fiscal framework and any revenue proposals.

For instance, if the fiscal framework proposes drastic cuts to total state expenditure ('austerity') then this is likely to lead to significant reductions in provincial expenditure, regardless of the division of revenue. It would then be appropriate to raise such concerns in the joint meetings of the two committees and when reporting on the fiscal framework to the NCoP. Given the deliberate order of matters, it would be largely redundant for provincial legislatures to object to cuts in their allocations only when considering the Division of Revenue since by that time the overall fiscal constraints have been decided.

Similarly, one can conceive of situations in which particular revenue proposals may affect some provinces disproportionately. For example, the national government may seek to impose an excise duty on an important input to the citrus-growing industry which could then affect the provincial economies of the Western Cape, Mpumalanga and Limpopo. The permanent delegates of those legislatures could then raise concerns in the relevant committee meetings in the national legislature.

Anecdotally, the extent to which such linkages are made appears to depend to a significant degree on the initiative of individual representatives.

4.2. NCoP appropriations: the division of revenue

In relation to public finance matters, the key process that links provincial and national public finances and associated legislative oversight pertains to the Division of Revenue Bill. Because the DoRB proposes how state revenue is split across the three spheres – national, provincial and local – it cannot simply be left to the national government and legislature to determine. Although s77(3) of the Constitution states that all money Bills should be treated in terms of s75, s77(1d) excludes the Division of Revenue Bill which is therefore 'tagged' as an s76 Bill.

The division of revenue across the spheres of government must satisfy a number of criteria, outlined in s214(2) of the Constitution. The standardised approach to meeting those requirements has been through the development and use of an 'equitable share formula', which in turn relies on official estimates of relevant variables – such as population and school enrolment – at the provincial level. In determining this formula, National Treasury must consult provincial governments, the Financial and Fiscal Commission (FFC) and organised local government which now takes the form of the South African Local Government Association (SALGA).

The initial legislative process for the Division of Revenue is as follows. First, the national Executive tables the Division of Revenue Bill in Parliament as part of the national Budget. As per the Money Bills Act, this Bill is considered by the commit-

tee on appropriations in the National Assembly (the Standing Committee on Appropriations). Once the committee reports to the NA and the House adopts the report and approves the Bill, it is referred to the National Council of Provinces (NCoP) and its appropriations committee (the Select Committee on Appropriations).

As per the Mandating Procedures of Provinces Act (52 of 2008), the Select Committee on Appropriations must in its deliberations on the Bill consider the negotiating mandates submitted by provincial legislatures. This, then, is the opportunity for provincial legislatures to raise concerns about the total allocation, or structure of the allocation, to provinces for the current fiscal year as proposed in the DoRB. The National Treasury then responds to those concerns.

After that, the provincial delegates report back to their respective provincial legislatures, which must then decide voting mandates. Those voting mandates inform the votes in favour of, or against, the DoRB in the meeting of the Selection Committee on Appropriations – after which the committee adopts an appropriate report.

In practice, with the same political party holding the majority in the national legislature and across the majority of provincial legislatures (eight of nine), similar political dynamics come into play as described earlier in relation to other aspects of national money Bills. Specifically, it has never been the case that the majority of provincial legislatures have voted against a DoRB – indeed, we are unaware of any case where even one provincial legislature with the same majority party as the national one has voted against a DoRB.

4.3. Role of the Financial and Fiscal Commission (FFC)

In section 3.6 we noted the role of independent fiscal institutions in supporting fiscal oversight, with a focus on the national level and the Parliamentary Budget Office. However, prior to the PBO there already existed an independent fiscal institution in the form of the Financial and Fiscal Commission (FFC), established by s220-222 of the Constitution.

Although in principle the FFC could have been assigned a mandate that included the role now assigned to the PBO, the Constitution (s220(3)) and subsequent legislation such as the Financial and Fiscal Commission Act (1997) have focused the FFC's mandate on 'intergovernmental fiscal relations'. Specifically, the FFC Act (s3(2A)) requires that, "An organ of state in one sphere of government which seeks to assign a power or function to an organ of state in another sphere", must inform the FFC, which in turn must report and make recommendations on such a proposal. In essence, the concern of the Constitution that underlies the envisaged role of the FFC is that responsibilities should not be assigned to a sphere of government without the corresponding fiscal implications being addressed.

In legislation, the FFC is also required to make recommendations to Parliament and provincial legislatures, and the legislatures must consider the FFC's recommendations. Furthermore, in other instances besides the one cited above, the FFC must be consulted – as in the case of the DoRB, where

Parliament's appropriations committees must consult with the FFC (s9(7a), Money Bills Act).

In practice, the role and influence of the FFC has been, at best, mixed. The National Treasury or Ministry of Finance have in some instances appeared to resent the role of the FFC and not consider the recommendations it makes to have merit. And while the FFC presents annually to the national and provincial legislatures, in many instances the process is perfunctory. At times that has led MPs to question the usefulness of the institution itself.

As with the PBO, the contribution of the FFC to oversight depends on its credibility, independence and interaction with legislative structures. Although it has been in existence since 1997, its role in fiscal oversight has arguably not yet been entrenched and its public impact in particular has been quite limited. Nevertheless, as with any other independent fiscal institution it has the potential to play an important role in fiscal oversight through independent, credible assessments and associated recommendations.

A full assessment of the FFC's role since 1997 is beyond the scope of this research. However, a number of factors appear to have been responsible for the inability of the FFC to entrench its role in oversight. In no particular order, these are: technocratic resistance from the National Treasury and provincial treasuries; political opposition from ministers and MECs of finance, and the legislatures themselves, to robust oversight of the Executive (as per earlier comments regarding the effect of a system of proportional representation); variable

technical credibility of the FFC; blurring of the FFC's role both by the organisation itself and other stakeholders; lack of clarity on the weight to be afforded to, and the appropriateness of, the FFC's recommendations.

Regarding the final point, an additional issue worth noting is that most fiscal issues are not entirely technical in nature: they often have some normative component. A concern, then, is on what basis the FFC formulates recommendations on such issues given that many of these would have materially different impacts on social welfare to the alternatives. This is especially problematic because of the historical blurring of the FFC's mandate. In relation to the transferring of responsibilities across spheres of government – as per s3(2A) of the FFC Act – the role of the FFC is fairly clear in as much as it primarily requires an assessment of the likely fiscal implications of such a transfer and recommendations as to how fiscal allocations can be altered accordingly. In many instances, that is a largely technical exercise. In contrast, the FFC's actual recommendations are rarely on such matters and span a gamut of issues on which the institution has questionable expertise and mandate.¹³

By comparison, the Money Bills Act does not require the PBO to make recommendations and it is debatable whether that is necessary to perform its function. MPs have, at times, expressed frustration at the PBOs failure to take positions or make recommendations on certain issues, but this may reflect both a misunderstanding of the institution's mandate and a desire to escape responsibility for politically difficult or unpopular decisions.

Given the creation of a PBO, it should be easier to clearly delineate the FFC's mandate and ensure that its expertise and recommendations are aligned to that. In that event, it will still be necessary for the Executive and legislatures to understand, recognise and respect the mandate – something that civil society can also play a role in ensuring.

¹³ At the time of writing, a list of the FFC's recommendations was available on its website: <http://www.ffc.co.za/submissions/commission-submissions/list-of-recommendations>.

5. Provincial legislatures

Having provided an overview of national legislation and the national legislature (Parliament) we now turn to a subject that has received even less attention: *provincial legislature oversight of the Budget*.

5.1. Overview of research approach

The broader project within which this research is located engages primarily with the provincial legislatures in the Western Cape and Eastern Cape. In this research, we also sought to engage with the legislature in Gauteng.

The research was largely desktop in nature, which meant a heavy reliance on the availability of documentation from the provincial legislatures. The WCPL was the only legislature to have sufficient documents on its website to enable a mostly complete mapping of the fiscal oversight process for a given, recent year (2017). The ECPL had some documents on its website, but these had clearly been uploaded erratically – within and across years. Since committee staff did not respond to requests for documentation and assistance, this meant that we were largely limited to examining the Standing Rules. The GPL had the least documentation on its website, but committee staff and the relevant committee chairperson were forthcoming with in-year information for 2018 and compiled information for 2017, as well as discussions in person; this enabled a more detailed understanding of the oversight process.

5.2. Implications of existing legislative provisions

The Constitution requires (s120(3)) that provincial legislatures pass an Act that outlines a procedure to amend money Bills. Remarkably, 22 years after the Constitution was promulgated no provincial legislature has passed such an Act and the legislatures cited here appear to have only recently become aware of the obligation to do so.

A contributor to this may have been the delay in passing such legislation at the national level and, subsequently, that the Money Bills Act (2009) mistakenly sought to prescribe – through a schedule to the Act of 'norms and standards' – to provinces how they should process money Bills. It has subsequently been recognised that this is unconstitutional and the proposed amendments limit prescriptions in the revised schedule to consistency between provincial money Bills and already-passed national money Bills.

The change in emphasis can be seen from the proposed change in the key clause in the Act. The original Act stated:

Provincial legislatures must adhere to the norms and standards for amending money Bills set out in the Schedule (s16, Money Bills Act 2009)

The amendments replaced the phrase "adhere to" with "take into account".

As was the case in the national legislature prior to the Money Bills Act, to date provincial legislatures have followed process-

es outlined – in widely varying degrees of detail – in their Standing Rules. It is to the details of these provincial processes that we now turn.

5.3. Existing rules and procedures

Legislatures have Standing Rules, subject to amendment, which set out principles and processes governing the operation of the legislature. These must, necessarily, be informed by any and all relevant legislation – most notably, the Constitution and the PFMA. The result is that while there are many commonalities across the Rules of different legislatures, there are also notable – and possibly important – differences. For example, although public participation in provincial legislatures is a requirement (s118) of the Constitution, the manner in which this is facilitated is largely at the discretion of the legislatures. Here we focus on matters pertaining to money Bills and public finance more broadly. It is worth noting that in some respects, the Minister of Finance and National Treasury may prescribe to Provincial Treasuries. For instance, s27(2) of the PFMA requires that provincial budgets be tabled within two weeks of the national budget unless the Minister approves an extension.

5.3.1. Gauteng

5.3.1.1. Standing Rules

The GPL recently passed its own Money Bills Act, which was gazetted on the 22nd of May 2019. That ought to determine the oversight procedures for the 6th provincial legislature. Nevertheless, for the purposes of understanding historical prac-

tice – and comparison with other provincial legislatures – it is informative to briefly consider the Standing Rules which were in force until the end of the 5th legislature. We then provide detailed discussion of the contents of the proposed Bill and subsequent Gauteng Money Bills Act, since the issues that arise will be important for other provincial legislatures in future.

In the Standing Rules of the GPL (March, 2017), Chapter 11 Part 5 (s216 – s224) deals with money bills. There is no explicit mention of procedures concerning the provincial budget and therefore the procedure is generic for all money Bills. It is notable that the Rules explicitly state that the relevant committee may recommend amendments to a money Bill: “The committee... may not amend a Money Bill... [but] may make recommendations for amendments to a Money Bill” (s221(2)).¹⁴

Although s167-s187 establish various key committees in the legislature, they do not establish any particular committee for budget oversight.

The procedure outlined must be followed (s217(3)) for any money Bill “appropriating money for the ordinary services of the government or imposing taxes, levies or duties for this purpose”. It assigns the relevant committee a period to consider the money Bill that “may not exceed seven consecutive working days of the Legislature, excluding Wednesdays, unless the Speaker after consulting the Leader of Government Business decides otherwise”. Furthermore, the committee report must be presented “on or before the first working day of the Legislature” after the end of the seven days.

¹⁴ The GPL Rules write ‘Money Bill’ whereas the Money Bills Act (2009) writes ‘money Bill’: we follow the national legislation unless using direct quotes.

No specific mention is made of public participation in the money Bills process, but public participation is established as a 'power' of committees in s148(9-11) of the Standing Rules. Furthermore, as per the Constitutional provision mentioned above, s140 requires the Legislature to facilitate public involvement in committee matters and s51(2) requires the Speaker to publish details of the time and place of committee meetings and House sittings, along with the subject of those meetings. In addition, s54(1) empowers members of the public or organisations to make written submissions and request to appear before a committee on a particular matter.

5.3.1.2. The Gauteng Money Bills Act¹⁵

At the end of February 2019 the GPL's Ad Hoc Committee on Money Bills and Related Matters Bill circulated a draft Gauteng Money Bills Amendment Procedure and Related Matters Bill. The Bill was subject to very limited consultation before it was passed by the committee, and then the legislature, within six weeks. Such haste, after twenty-two years had passed since the relevant provision of the Constitution came into effect, may have been driven by the prospect of the governing ANC losing control of Gauteng Province in the country's 6th elections in May 2019.¹⁶

In terms of procedure, the Act largely seeks to imitate, in both structure and content, the national Money Bills Act. The original Bill proposed the creation of a Provincial Legislature Budget Office (PLBO) analogous to the national Parliamentary Budget Office. That section of the pro-

posed legislation was deeply flawed: not only did it fail to learn from problems with the national legislation relating to the PBO, it fell well short of even the provisions of the original Money Bills Act of 2009. This can be seen when measuring the appropriateness of the proposed legislative provisions for the Gauteng PLBO against principles for such independent fiscal institutions (OECD, 2014). In response to such criticisms, the final version of the Act does not refer explicitly to a PLBO but rather "an independent structure to support the implementation of the Act". However, this amounts to largely the same thing – since PBOs are a form of independent fiscal institution usually associated with legislatures.

Provincial Legislature Budget Office (PLBO)

In terms of the legislative provisions in the originally-proposed Bill, the envisaged PLBO only superficially satisfied the requirements pertaining to an institutional mandate and resourcing. The former was outlined in s 15(2) and 15(3) of the Bill, while the latter was addressed in 15(5). However, it is fairly evidently that the mandate sections were largely copied from the national Money Bills Act and therefore fail to reflect the very distinct public finance oversight responsibilities of a provincial legislature as opposed to the national one. The phrasing of the section pertaining to resourcing imitates phrasing at the national level, which has previously been cited as generating sufficient ambiguity that it undermined the substantive independence of the national PBO. The remedies introduced via recent amendments to the national Act were not reflected in the GPL Bill.

¹⁵ A lengthier discussion of some of the limitations of the Act can be found in the comments submitted to the GPL Muller (Submission on Gauteng Provincial Legislature Money Bills Amendment Procedure and Related Matters Bill, 2019). A summary of those is provided in Muller (Gauteng legislature's draft money bills act is riddled with flaws, 2019). Some amendments were in fact made in response to these submissions; however, as noted in the main text, these were inadequate to address all substantive concerns.

¹⁶ As it transpired, the ANC won a one seat majority in the GPL in the May 2019 provincial elections.

The four most striking omissions from the GPL Bill were:

- no clear provisions for institutional independence, including how any leadership of the institutional will be appointed and under what terms
- no structure for the Office
- no commitments to transparency either in how the Office's leadership are appointed, how the institution operates or the publication of its research
- no powers for access to information from the Executive or its entities.

Given that many of the above matters had been raised and addressed in recent amendments to the national Act, the concern arises that such omissions may not reflect ignorance but a deliberate intent to ensure that the PLBO is kept on a political leash. In that case, the institution will arguably not warrant any resources ultimately allocated to it.

The final Act (Gauteng Provincial Government, 2019) only sought to address the majority of these concerns by removing what little detail on the PLBO existed in the original Bill and replacing those with a single clause:

14. (1) The Legislature must establish an independent structure to support the implementation of the Act, whose main objective is to provide non-partisan, high-quality and independent technical analysis, objective and professional advice to the Legislature on matters related to the budget and other money Bills.

But this evidently suffers from all the same problems.

The only positive change between the Bill and the Act was the introduction of a clause assigning information access powers:

(2) This structure may obtain information it requires for the performance of its functions from any organ of state or person it considers appropriate.

As a final point, it is important to note that it is unclear whether the creation of an independent fiscal institution is appropriate at legislature level in South Africa. While the case may be stronger for provincial legislatures that have larger budgets, an alternative would be to bolster the capacity of existing research structures within the legislature and make more use of external institutions like the Financial and Fiscal Commission.

Proposed oversight mandate, structures and procedures

On the surface of it, the Act contains a number of provisions that are positive in that they address shortcomings of the Standing Rules. Amongst these are: explicit allocation of oversight responsibilities to the Budget Committee; the introduction of a particular process for the annual provincial Budget and adjustments budget; the requirement for a medium-term budget and associated processes; and, an explicit provision for public participation in the budget process.

However, on closer inspection the substance of most of these provisions is arguably unsatisfactory. Much of this may be due to the text being a first draft from a rushed process, but it nevertheless has significant implications. Unlike the national Act, the Gauteng Act does not reflect clarity of thought in relation to the structure of the oversight process. For example, s10(5) refers to the 'adopted fiscal framework' but nowhere is the process or timing of the adoption of the fiscal framework explained.

One clear positive is that the Act does not contain the very stringent seven day requirement in the Standing Rules (albeit that this did not appear to be observed by the GPL in practice). Instead, the primary restrictions, s10(11) and s12(8) respectively, are that the legislature pass the provincial appropriation bill within four months of it being tabled and the adjustment appropriations bill within 30 days. Furthermore, the Provincial Executive must be given at least ten days or four days, s10(7) and s12(8) respectively, to respond to any proposed amendments to these bills.

Various aspects of the Gauteng Act reflect inadequate engagement with the nature of provincial money bills. For example, the clauses in s11 pertaining to revenue bills and proposals largely reflect broad criteria that are applicable at national level and therefore also fail to explicitly consider compatibility with revenue raising at national and local level. Another example, is the excessive emphasis on a provincial fiscal framework without corresponding recognition that this is heavily dependent on the national Division of Revenue Bill. In that regard, perhaps the major omission from the Gauteng Act is an explicit link to the process by which provinces make submissions to the national legislature on the Division of Revenue (as described in section 4.2 above).

The Gauteng Act also follows the national one in introducing budgetary review and recommendation reports (BRRRs) that must be submitted to the relevant MECs, s7, before the adoption of the legislature's report(s) on the medium-term budget policy statement. In principle, the rationale is sound: that portfolio committees consider

performance of departments relative to their budget allocations prior to decision about medium-term allocations. However, in practice there is little evidence at the national level that BRRRs have substantively informed overall budget oversight. Whereas making the production of such reports a formal requirement may have created a generic burden for committees that is unrelated to actual oversight priorities. An ostensibly positive aspect of the Act is an explicit set of provisions in s15 regarding public participation. However, on closer inspection the phrasing of these is unsatisfactory. S15(1) says that the Budget Committee should seek representations from the public "when considering amendments" – when arguably public involvement should be solicited at all stages of the oversight process.

5.3.2. Eastern Cape

The ECPL Standing Rules (First Edition for the Fifth Term), s154-170, make detailed provisions for oversight of money Bills.

As regards amendment of money Bills, the Rules expressly prohibit this in the absence of provincial legislation:

A money bill may only be amended by the Legislature in terms of the procedure provided for in an Act of the Legislature. (s154(3))

After the appropriate process, report and debate, the legislature must therefore accept or reject a money Bill (s169(2)) – although the MEC may (169(1b)) return such a Bill to the relevant committee(s) if further amendments are proposed (presumably by the Executive).

No default period is stated for processing money Bills; instead, full discretion (s156(3)) is given to the Speaker in consultation with the Chairperson of the Programming Committee. Similar discretion is given in relation to the process for annual budget of the Province.

The Rules do not establish (s51) a specific committee for budget oversight. However, there are a number of specific references to a Portfolio Committee on Finance and Provincial Expenditure. Any money Bill must be referred to this committee (s(156(1))), as must the budget documents (s161(1)) and the chairperson of this committee must “report on the budget as a whole” (s162(5)).

The Rules have explicit provisions for taxation proposals in s170, with the only notable aspect of this being that it ensures the MEC for Finance’s recommendation must be obtained for tax proposals that are “incidentally involved in a bill” (s170(2)).

There are no specific provisions in relation to public participation during any of the above processes. Mention of public participation within the Rules is largely limited to the establishment, powers and functions of the Public Participation, Petitions and Education Committee.

5.3.3. Western Cape

In the Standing Rules (February 2014) of the WCPL, s182 – s191 deal with money bills. One section within this – s183 – appears to disallow certain forms of amendment unless they are proposed by the relevant minister (MEC for Finance) or approved by the Premier. Specifically, the legislature cannot make amendments that increase expenditure or “alter the destination of expenditure”, increase revenue or “extend the incidence of a tax”.

S183(1)(b) says that in relation to actual money Bills (as opposed to other Bills covered under s183(3)) this is subject to provisions of the legislation the province is required to have to amend money Bills. The necessity of such legislation is noted in s30(2) of the Western Cape Constitution, following directly from s120(3) of The Constitution cited previously. In effect, then, the Rules of the WCPL require that committees and the House must either accept or reject a money Bill.

The period allowed for oversight is stated in s187, which says that this period commences on a day determined by the Speaker but may not be longer than “5 consecutive working days of the House” and that the relevant committee(s) must present their report(s) “on or before the third sitting day after the end of the period allowed for deliberations”.

The Rules do – in s107-109 – establish a Budget Committee as the main committee responsible for Budget oversight and associated Bills. Its mandate is as follows:

109. The Budget Committee must –

(1) consider and make recommendations to the House on Budget allocations in the annual MTBPS as well as the main budget, the Budget Review and the relevant bills with a view to improving spending effectiveness and efficiency;

(2) review and assess overall provincial expenditure and non-financial reports on a quarterly basis for spending efficiency and effectiveness;

(3) engage the provincial government on spending patterns;

(4) performs such other tasks assigned to it by resolution of the House; and

(5) ensure public involvement in all budgetary processes

5.3.4. Observations

The notional processes for money Bills across the three provincial legislatures raise a number of issues.

In terms of the time available for oversight, the seven days allocated by the GPL and five days allocated by the WCPL appear very limiting and inadequate. While the ECPL Rules do not contain such limitations, it is unclear whether the discretion assigned to the Speaker manifests in more time for oversight than the other two PLs.

There are interesting contrasts in relation to the prospects of amending money Bills. The now-defunct GPL rules referred explicitly to the possibility of amendment whereas the ECPL rules explicitly proscribe amendments in the absence of legislated amendment processes. The WCPL provisions are selective in their proscriptions: amendments that decrease expenditure or decrease taxation can be made without Executive approval. The ECPL Rules and the WCPL provisions are arguably consistent with the fiscal conservatism implicitly promoted by the default (PFMA) measures that come into effect when a budget is not passed. From the various legislature Rules, it is therefore evident that there are material differences in interpretation of money Bill amendment powers of provincial legislatures in the absence of legislation for this purpose.

In terms of the committee(s) responsible for money Bills and the provincial budget, the WCPL Rules establish a Budget Committee, whereas the ECPL allocates responsibility – but does not establish – a Portfolio Committee on Finance and Provincial Expenditure. The GPL Rules neither established nor made reference to a specific committee, though the Gauteng Act now does.

On the question of public participation, the WCPL requires that the Budget Committee “ensure public involvement in all budget processes”. The GPL Rules had no explicit provisions relating to money Bills or the Budget, but other aspects of the Rules clearly stated the necessity of, and opportunities for, public participation; this is marginally better addressed in the Gauteng Act. The ECPL Rules appear to have the weakest provisions, with no mention of public participation in the otherwise detailed chapter on money Bills and even the broader Rules make limited reference to the issue.

While the ECPL and WCPL Rules make explicit reference to the provincial budget process, the GPL Rules only stated generic processes for all money Bills. The GPL Act has now substantially remedied that omission in the Gauteng case. The ECPL is the only one of the three with explicit provisions for taxation proposals, but these are limited to ensuring coverage of taxation proposals not in money Bills – rather than addressing the oversight process per se. None of the Rules make mention of the medium-term Budget required by s28 of the PFMA.

Overall, then, even at the level of the Rules of provincial legislatures there is significant variation in how money Bills and budget oversight processes are conceived.

5.4. Fiscal oversight processes in practice

While legislation and the relevant Standing Rules may prescribe how fiscal oversight ought to work at a high level, how that plays out in practice – and whether all prescriptions are adhered to – is another matter.

Given the mostly desktop nature of this research, we sought to rely on committee and House documents for a given, recent year (2017) to map how actual oversight takes place. Such information was not available for the ECPL. In the case of the WCPL it was obtained from the legislature website, whereas for the GPL the information was collated and provided by committee staff. The information is shown in Table 1 in the appendix.

As part of the broader project of which this research is a part, starting in 2018, the Parliamentary Monitoring Group (PMG) is attempting to broaden its coverage of committee meetings – including an emphasis on fiscal matters – from Parliament to the provincial legislatures. Where this is successful, it is likely to significantly increase the extent and depth of information available on provincial legislature oversight processes. At the time of writing, content from the WCPL was already available on the PMG website for 2018.

For the purposes of understanding the actual legislature process and involvement of external stakeholders, discussions were also held with officials from the National Treasury and FFC. Future work could involve more systematic and detailed quali-

tative interviews with MPLs, provincial legislature staff, provincial treasury officials and staff of other relevant institutions. One caution in that regard, is that we observed anecdotal examples where engagement for the purposes of this research may have (positively) influenced conduct and representation on some of the matters being studied. Although it may have been for the better, it does mean that the accuracy of findings and observations derived from such research may be somewhat time-contingent. This is most notable in the case of the GPL, where the GPL Act may necessitate some changes in the procedures followed.

5.4.1. Gauteng

The primary GPL committee responsible for budget oversight to date was the Finance Committee.

Legislature rules, internationally, often distinguish between the 'principle' and the 'detail(s)' of a Bill. According to the information provided by committee staff, the Finance Committee dealt with the principles of the provincial appropriation Bill – which is at the core of the annual budget – in the seven consecutive working days of the legislature (s221(1)) specified. The detail was then dealt with over subsequent months. In 2017, this meant that there were ten calendar days between the tabling of the appropriation Bill and the approval of its principle.

A puzzle here is that s222(3) and s223 of the GPL Rules appeared to require that the principle and details of a money Bill be dealt with concurrently. Furthermore, s223 explicitly outlines a process starting with

consideration of the principle but including consideration of the votes (detail) in the money Bill. However, as shown in Table 1, the GPL House considered votes from the 2017 provincial budget approximately five weeks after approving the principle of the appropriations Bill and that Bill was finalised a further month later.

It is unclear what the legal implications of this are, but the resultant process is somewhat similar to the national legislature's process of approving the fiscal framework and then dealing with the Appropriations Bill. While this would appear to be well-within the powers of the provincial legislature, and beneficial in as much as it provides more time for oversight, it does appear to be inconsistent with the process described in the GPL Rules.

Between the approval of the principle of the appropriation Bill and consideration of specific votes, the Finance Committee considered the Division of Revenue Bill. The standard procedure, according to committee staff, was that the GPL permanent representative provided a short introduction of the Bill to the committee followed by a more detailed presentation by National Treasury – including a question and answer session.

There are public hearings on the Bill, after which the committee finalises the report that then informs the negotiating mandate of the permanent representative. It would appear that this report also determines the voting and final mandates, since no subsequent meeting of the committee is recorded prior to the DoRB being passed by the NCoP.¹⁷ In practice, then, the GPL Finance Committee oversight process

¹⁷ In 2018, the committee reportedly adopted a negotiating mandate on the 20th of April and separately adopted a final mandate on the 26th of April.

for DoRB – which commenced three weeks after the referral of the Bill to the NCoP – was two calendar weeks in 2017.

Towards the end of the year, the Finance Committee receives briefings on the Division of Revenue Amendment Bill, which is part of the national adjustments budget. In 2017, requests for public submissions were published two calendar weeks prior. The Committee approved the DoRAB the day after its briefing and hearings.

On the subsequent day, the MEC for Finance tabled the provincial adjustments budget and the medium-term budget policy statement for the province. (As with the national legislature, the custom appears to be tabling these conceptually distinct documents on the same day). On the same day, the Committee is briefed by the provincial treasury and stakeholders are reportedly invited to this meeting. The Committee deliberates on and adopts the report a week later.

The committee rarely, if ever, deals with revenue-related money bills and to date there has been limited or no reporting on the medium-term budget projections and proposals.¹⁸

As regards public participation, committee staff indicated that the Finance Committee has had difficulty soliciting inputs and presentations and, furthermore, when submissions are solicited these are often not directly related to the matters the Committee is considering.¹⁹ This is despite the GPL being more proactive than some other legislatures and having public outreach officers briefing some participants in advance of their presentations.

5.4.2. Eastern Cape

There was very little information available on the ECPL website, particularly for recent years, and direct requests to the relevant committee staff were not responded to. As a result, we are unable to assess how the fiscal oversight process works in practice in the ECPL. The inability to obtain such information does perhaps suggest that the legislature is less open than it ought to be.

5.4.3. Western Cape

As per its Standing Rules, the Budget Committee (BC) is the primary committee processing expenditure-related money bills like the provincial appropriation bill. However, the legislature has also established a Finance Committee which – like its namesake in Parliament – considers revenue-related matters (such as gambling revenue and associated matters) and oversees the Provincial Treasury itself.

In 2017, the Budget Committee had two meetings on the provincial appropriation Bill: one on the day it was tabled and another slightly more than two weeks later in which it adopted the report on the Bill. On the day prior to the finalisation of the Budget Committee's report, other portfolio committees reported to the House on the specific votes. A week later, over two days, the House considered the relevant votes and passed the Bill three weeks after it was tabled.

On the same day that the Budget Committee finalises its report on the appropriation

¹⁸ Meeting with GPL Finance Committee staff, 28 August 2018.

¹⁹ Ibid.

Bill, it is briefed on the Division of Revenue Bill. In two subsequent meetings it adopts first a negotiating mandate and then a final mandate. The available documents suggest an incongruity: that the House considered the Committee's report on the 15th of June, although the Division of Revenue Bill was passed by the NCoP on the 11th of May.

The time periods are even shorter in relation to the adjustment budgets (national and provincial). In November, the DoRAB is processed (from briefing to final mandate) within six calendar days. According to committee records, the initial briefing was only ninety minutes and the meeting adopting the final mandate was thirty minutes. No mention is made of public participation. The adjustments appropriation Bill for the province is tabled after the final DoRAB mandate is adopted. In 2017 it was adopted by the legislature within eight calendar days of being tabled and the Budget Committee met twice: once for the initial briefing and once to consider and adopt the report.

What seems clear from the 2017 process is that oversight in the actual committee meetings is quite perfunctory and there is little, or no, public participation. That also appears evident from the committee reports, which contain no detail other than stating support for the Western Cape Appropriation Bill 2017 and the Division of Revenue Bill 2017. It is not clear how the period of the 7th to 24th March used to process the provincial appropriation Bill satisfies the requirement in s187 – this may reflect a particular interpretation of 'consecutive working days of the House'.

More recent information for 2018 reflects that there were 'public hearings', or at least opportunities for this, but the PMG minutes do not reflect any participation. The Chairperson of the Budget Committee is quoted as saying: "although the meeting had been advertised in the newspapers, public participation needed to be improved".²⁰

5.4.4. Observations

While the above analysis is limited in its detail, there are nevertheless some factors that appear quite evident. First, and as per the relevant Standing Rules, the time allocated to fiscal oversight is very limited. In many instances, too, the total time taken to process the legislation exaggerates the extent of oversight, which may be limited to between one or three meetings. And these meetings themselves may be short.

From the information available, there appears to be very limited – if any – public participation across all fiscal oversight processes. The 'lock ups' prior to budget documents being tabled are reportedly limited to MPLs – unlike at the national legislature where journalists, economists and members of civil society can also view the documents in advance.²¹ Where public participation does happen, the quality and focus of inputs is at best highly variable.²²

There appears to be a heavy reliance on the Provincial Treasury (in relation to the provincial budget and adjustments budget) and the National Treasury (in relation to the Division of Revenue) for interpretation and expertise when considering relevant legislation – though it would require

²⁰ Meeting of the Budget Committee of the Western Cape Provincial Legislature, 14 November 2018, Parliamentary Monitoring Group: <https://pmg.org.za/committee-meeting/27528/>.

²¹ Personal correspondence, meeting with National Treasury officials, Pretoria, 6 September 2018.

detailed analysis of meeting content to establish the nature of reliance with greater certainty. In some instances, such as with the ECPL, the provincial treasury and National Treasury may present giving differing/conflicting perspectives.²³ This can be constructive if highlighting legitimate areas of persistent disagreement relating to the province's interests, or disingenuous if a provincial treasury has agreed to the relevant aspects of the Division of Revenue in Executive processes while then dissenting in the legislature.²⁴

There is notable variation across the GPL and WCPL in the period of time over which Votes from the provincial appropriations Bill are considered and adopted. The GPL allocates this more time in practice – analogous to the national legislature approach to the Appropriation Bill – albeit that this appears to have been inconsistent with its own Rules (now superseded by the GPL Act). The WCPL on the other hand processes the full appropriation Bill more quickly, but that raises questions about the possible superficiality of oversight by portfolio committees.²⁵ Interestingly, the World Bank's Public Expenditure and Financial Accountability assessment penalises countries where provincial budgets are adopted over a period longer than two months.²⁶

There is an apparent inconsistency in the provincial processes documented: the two PLs on which we have detailed information adopt at least the principle of their provincial appropriation Bills, and sometimes the full Bill including the votes and schedule, before they have submitted a final mandate on the Division of Revenue Bill. Since the Provincial Appropriation Bill mostly appropriates funds transferred under the

Division of Revenue Bill, this sequencing of decisions appears discordant.

While we noted in section 3.5 that Parliament's engagement with the MTBPS could be improved, at the provincial level – consistent with its omission from the respective Standing Rules – there does not appear to be any substantive engagement with medium-term projections and proposals.²⁷ This is clearly an area of concern and warrants further attention.

5.5. Recent developments: provincial money bills amendment Acts

The absence of provincial legislation to amend money Bills is of evident concern, given that this is a requirement of s120(3) of the Constitution. At best, this casts doubt on amendment powers of provincial legislatures; at worst, it means that provincial legislatures cannot lawfully make amendments. As noted in section 2.2, the absence of amendment powers does not just affect the powers of legislatures and the public, but it also has particular implications for fiscal policy.

It appears that a number of provincial legislatures have recently become aware of the Constitutional imperative to draft and adopt such legislation. In the report of the WCPL Finance Committee on the Provincial Treasury's Budget Vote for 2017, the Committee requested a report from the Provincial Treasury "that details the processes and procedures to amend

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ For the purposes of this research we did not seek to collect information on committees besides those directly concerned with fiscal matters. In principle, however, portfolio committees can play a key role in informing amendments that alter expenditure priorities.

²⁶ Ibid.

²⁷ This was also confirmed by National Treasury officials (ibid).

Money Bills before Parliament".²⁸ However, as was subsequently noted by the MEC for Finance, it was inappropriate to request that the Treasury take the lead on such legislation as the legislature had to draft such an Act itself.²⁹ The MEC suggested, as per consultation with the National Treasury and Parliament, that the WCPL wait until amendments to the Money Bills Act were completed since these could have implications for provincial legislatures. Subsequently, the Budget Committee has met to receive advice from the legislature's Legal Unit on the matter.³⁰ However, no minutes are available on the website and therefore the current status of the WCPL process is unclear.

More recently, the GPL established its Ad-Hoc Committee on Money Bills and Related Matters Bill. A workshop organised by this committee took place in November 2018 and was attended by a political and administrative delegation from the ECPL, as well as administrative representatives from the KZNPL. As already noted above, the GPL draft and passed its money bills legislation before the end of its 5th term. The ECPL is reportedly drafting a white paper for consultation.³¹

The prospect of provincial money Bills legislation has also raised the prospect of provincial PBOs. In mid-2018 the GPL indicated an intention to establish a PBO and went on oversight trips to Uganda and South Korea to inform this process. The ECPL is weighing-up the possibility of establishing a PBO against bolstering the research and analytical capacity within existing structures.

With a caveat similar to that already cited from Krafchik and Wehner (1998) that limitations to current fiscal oversight are not going to be dramatically altered by new legislation or even institutions – and associated concerns of the National Treasury³² – the process of developing legislation and interrogating the capacity available provides an important opportunity for improvement in provincial fiscal oversight in the short- and long-term.

²⁸ Report of the Standing Committee on Finance on Vote 3 Provincial Treasury, 22 March 2017.

²⁹ Speech by the MEC of Finance, Dr Ivan Meyer, to the Western Cape Provincial Legislature, 22 June 2017.

³⁰ Meeting agenda for the Budget Committee of the Western Cape Provincial Legislature, 14 September 2017.

³¹ Statements and personal communication, Workshop of the Ad Hoc Committee on Money Bills and Related Matters Bill Gauteng Provincial Legislature, 7 November 2018.

³² Personal correspondence, meeting with National Treasury officials, Pretoria, 6 September 2018.

6. Areas identified for monitoring and engagement

The above analysis, while preliminary and empirically largely limited to 2017, suggests a number of broad areas for civil society engagement:³³

- Interpretation and implementation of the amended Money Bills Act in the national legislature
- Timely availability of information from provincial legislatures (prior to and after meetings of committees and sittings of the relevant Houses)
- Implementation of substantive public participation processes in provincial legislatures
- Drafting of money Bill amendment procedure legislation for provincial legislatures and associated decisions about timing, content, public participation and supporting institutions.

In addition to these, the issue of 'capacity' is critical at all levels, in both national and provincial legislatures, across politicians and officials. There are two dimensions to this in relation to officials: extent of support available for legislatures in terms of the number of staff, and the actual technical capacity and competence of the staff employed for this purpose (whether in legislature administrations or independent fiscal institutions). Since the kind of analysis and research required rarely takes place outside of national and provincial treasuries, and sometimes not even in those institutions, this kind of analytical capacity needs to be developed in a deliberate, structured manner – something

that has arguably happened to a limited degree since 1996.

The challenges in relation to MPs and MPLs are somewhat different: there is no requirement for elective representatives to have expertise or experience related to the legislature committees on which they are appointed to serve. This means that it may take years for representatives to fully appraise themselves of the fiscal oversight process, including their own role and that of other stakeholders. With relatively high churn in political representatives, the result can be limited practical capacity to exercise oversight powers and engagement that may be unrelated to the core mandate of the relevant committees. Lack of capacity amongst officials can compound the problems caused by lack of capacity among political representatives, and vice versa. Civil society can potentially play some role, through its engagements with representatives and officials, in building capacity but ultimately these matters need more systematic resolution within the relevant institutions.

In terms of further research, it would be valuable to have greater availability of documents and information pertaining to oversight in past years – though with the prospect of the above-mentioned changes coming into effect, the associated insights may be of less value for future engagement than historical appraisal. From the perspective of this report, it would be particularly valuable to complete Table 1 for the Eastern Cape and all remaining provinces. Beyond that, detailed inter-

³³ One area that has not been touched on in this research but does appear to be both complex and problematic is the process by which legislature budgets themselves are determined and how oversight occurs in the presence of potential institutional conflict of interest.

views with the relevant role players – MPLs, committee staff, provincial treasury staff, national treasury staff working on intergovernmental fiscal relations, the FFC, SALGA and civil society groups – could usefully deepen understanding of the provincial fiscal oversight process, its limitations and opportunities.

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Annexure A: Illustrative provincial fiscal oversight processes (2017)

Table 1 below provides a detailed illustration of the timing of provincial budget oversight processes and their connection to the national legislature through the Division of Revenue Bill. Information for the Western Cape Provincial Legislature (WCPL) was collected from the legislature's website³⁴, whereas the information for the Gauteng Provincial Legislature (GPL) was provided by a committee coordinator for the Finance Portfolio Committee in the GPL.³⁵ Comparable information was not available on the Eastern Cape Provincial Legislature website and was not forthcoming from the relevant committee staff.³⁶

Table 1 Detailed provincial budget oversight processes (2017)

Month	Parliament	GPL	WCPL
January			
February	22 February: Division of Revenue Bill (DoRB) [B4-2017] tabled in Parliament		
March	10 March: Standing Committee on Appropriations (SCoA) receives National Treasury & Financial and Fiscal Commission briefing 13 March: Division of Revenue Bill: public hearings 14 March: Select Committee on Appropriations (SeCoA) receives SALGA submission on DoRB SCoA finalises report on DoRB 15 March: National Assembly (NA) passes Bill and refers to National Council on Provinces (NCoP)	7 March: First reading of Gauteng Provincial Appropriation Bill [B1 - 2017] in the House Finance Portfolio Committee (FPC) sits to get briefing from Provincial Treasury on the PAB 2017. Thereafter the FPC receives presentation from all Gauteng Portfolio Departments on the Principle of the Bill. 10 March: Stakeholder engagement, to solicit submissions from stakeholders 14 March: The FPC deliberates on the PAB 17 March: The House considers and adopts the principle of the PAB	7 March: First reading of WC Appropriation Bill [B1 - 2017] in the House Budget Committee (BC) sits to get briefing from PT on the WC Appropriation Bill 2017 23 March: Relevant committees report on Votes 24 March: BC briefed by NT on the Division of Revenue Bill 2017; committee considers and adopts draft report on the WC Appropriation Bill (announcement 'circulated' on 16 March) 28 March: BC considers and adopts report on the negotiating mandate on the DoRB 29 March: House debates 5 votes 31 March: House debates a further 4 votes, considers votes and schedules, finalises the B1-2017.
April		7 April: Finance Portfolio Committee (henceforth PC) receives briefing from NCOP Permanent Delegate supported by National Treasury on the DoRB, PC Researcher presents the socio-economic analysis, the Legal Advisor tables the Legal Opinion on the Bill, and the PC receives the Provincial Executive Council's view on the Bill. 8 April: Subsequent to the PC	

³⁴ Websites of the WCPL: <http://www.wcpp.gov.za/papers-of-the-house> and <http://www.wcpp.gov.za/committee-document>.

³⁵ Personal correspondence: John Ntsane, 30 November 2018.

³⁶ Letter sent to two committee staff per email on 28 August 2018 received no reply.

		meeting, public hearings on the Bill conducted 18 April: Public hearings on the Bill continued 21 April: The PC considers its report on the DoRB, which informs the voting of the Permanent Delegate at the NCOP Select Committee on Appropriations	
May	2 May: NCOP holds public hearings on DoRB 3 May: NCOP considers negotiating mandates 9 May 2017: NCOP considers final mandates and adopts report 11 May 2017: DoRB passed by NCOP 26 May: President signs Act 3 of 2017	22 – 26 May: Consideration of Budget Votes	4 May: BC considers and adopts report on the final mandate
June		April-June: Respective PCs consider the detail of the PAB for their respective portfolios 29 June: House considers detail of the Bill, considers votes and schedules, finalises the Bill	15 June: House considers report of BC (of 4th May) on the DoRB
July			
August	1 August: FFC makes submission to SCoA on 2018/19 Division of Revenue		17 August: First reading of Adjustment Appropriations [Emergency Funds] Bill [B5-2017] in the House 18th August: all but one committee reports back that they support the Bill 24th August: BC reports that it supports the Bill (the last committee submitted its report on the 23rd) 31 August: House considers principle, considers votes and schedules, finalises Bill
September			
October	25 October: DORAB tabled in Parliament with other adjustment documents and MTBPS		

November	<p>9 November: SCoA briefed by NT on DoRAB</p> <p>10 November: SCoA public hearings</p> <p>13 November: SCoA report on the Bill</p> <p>14 November: NA adopts DoRAB and sends to NCOP for concurrence</p> <p>17 November: SeCoA meets on negotiating mandates</p> <p>22 November: Bill adopted by NCoP</p>	<p>Notices of public hearing and request for submissions on DoRAB [B24-2017] were published in newspapers (The Star, 01 November 2017, City Press 05 November 2017 and Sowetan, 13 November 2017).</p> <p>15 November: FPC receives briefing from NCOP Permanent Delegate supported by National Treasury on the DoRAB, FPC Researcher presents the socio-economic analysis, the Legal Advisor tables the Legal Opinion on the Bill, and the FPC receives the Provincial Executive Council's view on the Bill.</p> <p>16 November: FPC deliberates and adopts the Bill.</p> <p>16 November: Introduction of the Provincial Adjustment Appropriation Bill [G003-2017], Mid Term Budget Policy Statement, Provincial Economic Outlook Review</p> <p>16 November: Provincial Treasury presents the detail of the Bill to the FPC (stakeholders invited to the PC Meeting)</p> <p>23 November: FPC deliberates and adopts the Committee oversight report on the PAAB</p>	<p>15 November: BC meets on DoRAB [B24-2017], briefing by Permanent Delegate and 'public hearing' (total length of meeting is 90min!)</p> <p>16 November: BC adoption of negotiating mandate</p> <p>21 November: BC adoption of final mandate (30min meeting)</p> <p>23 November: Tabling of WC Adjustments Appropriation Bill [B6-2017], including 'WC MTBPS', etc</p> <p>23 November: BC briefing from PT on the Bill, WC MTBPS</p> <p>28 November: BC consideration and adoption of report on the Bill</p> <p>29 November: House considers the principle of B6-2017 and report (from 21 November) of the BC on the DoRAB [B24-2017]</p> <p>31 November: House considers votes from B6-2017</p>
December			<p>1 December: House considers remaining votes, schedules and finalises B6-2017</p>

Annexure B: The Division of Revenue Process and the Provincial Equitable Share

Jugal Mahabir

Introduction

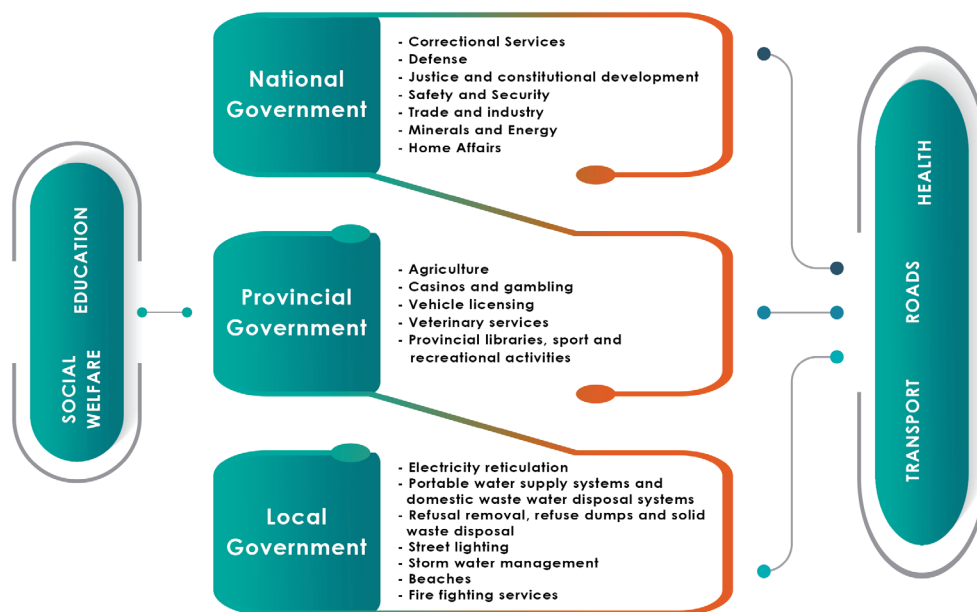
This Annexure accompanies the research paper entitled Fiscal Oversight by Parliament and Provincial Legislatures and provides the necessary details on the division of revenue (DOR) process and the provincial equitable share (PES). The PES is provincial government's primary source of revenue in delivering their key social mandates. Understanding the mechanics of the formula in the greater context of the DOR process is important for improved fiscal oversight by parliamentarians and members of the provincial legislatures.

Division of Powers and Functions Across National, Provincial and Local Government

South Africa is a unitary state with three spheres of government. Each sphere is mandated with powers and functions in terms of their social and economic roles and service delivery responsibilities by the Constitution of the country. The rationale for this arrangement is that it improves the efficiency and effectiveness in delivering services, as certain services are best delivered at local and regional levels. As an example, defence is best delivered at a national government level, since all citizens of South Africa get the same type of defence service i.e. the service does not differ in different regions of the country. On the other hand, citizens' tastes and preferences for certain other services may differ by region; meaning that such services are best delivered by provincial and local governments. Public finances then need to be allocated according to the mandates of the different spheres. Each sphere, including provinces, executes its service delivery mandates through corresponding expenditure decisions.

Figure B-1 below gives an indication of the division of expenditure powers and functions across the three spheres of government in South Africa. While many services are exclusive to each sphere, there are other services that are provided concurrently i.e. the delivery of the service is shared amongst the different levels of government. For example, education is a function shared between national and provincial government, where tertiary education is provided by the former and basic education by the latter. As indicated, key provincial services include the delivery of concurrent services in the form of education, health, social welfare and transport and exclusive services such as agriculture and veterinary services. As is the case in a unitary state, national government is also responsible for developing supporting laws and policies that regulate and inform the services delivered by sub-national governments.

Figure B-1: Responsibilities of Each Level of Government



Source: Author

Limited Provincial Authority to Raise Revenue

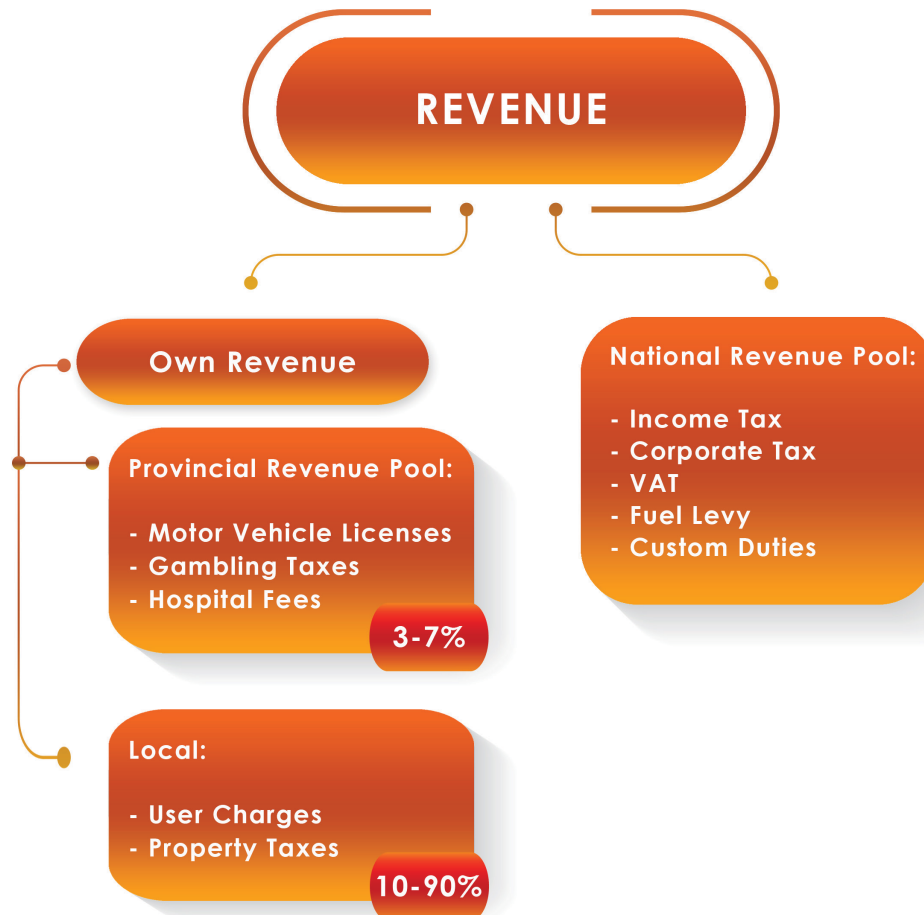
In order to fund their expenditure responsibilities, the Constitution also assigns taxation and revenue powers to all three spheres of government. The assignment of revenue powers and functions is usually linked each sphere's ability and capacity to impose and enforce taxes, and to a lesser extent to the expenditure assignment framework described above. With regard to provinces section 228 of the Constitution states that:

A provincial legislature may impose-

- (a) taxes, levies and duties other than income tax, value-added tax, general sales tax, rates on property or customs duties; and
- (b) flat-rate surcharges on any tax, levy or duty that is imposed by national legislation, other than on corporate income tax, value-added tax, rates on property or customs duties.

In general, provinces are restricted in the ability to impose taxes. As per Section 228 above, provinces cannot levy taxes on income (both individual and corporate), sales and property. Provinces are allowed to levy user charges on the services they provide, such as hospital fees, and they are also allowed to apply a surcharge on national taxes, such as personal income tax. However, provinces are yet to apply the latter, meaning that provincial own revenues are rather restrictive, with major tax powers staying with national government. Figure B-2 below shows the division of revenue powers across all three spheres of government and the respective contribution of own tax revenues to each sphere's overall budget.

Figure B-2: Own revenue sources across the three spheres of government



Source: Khumalo et al (2016)³⁷

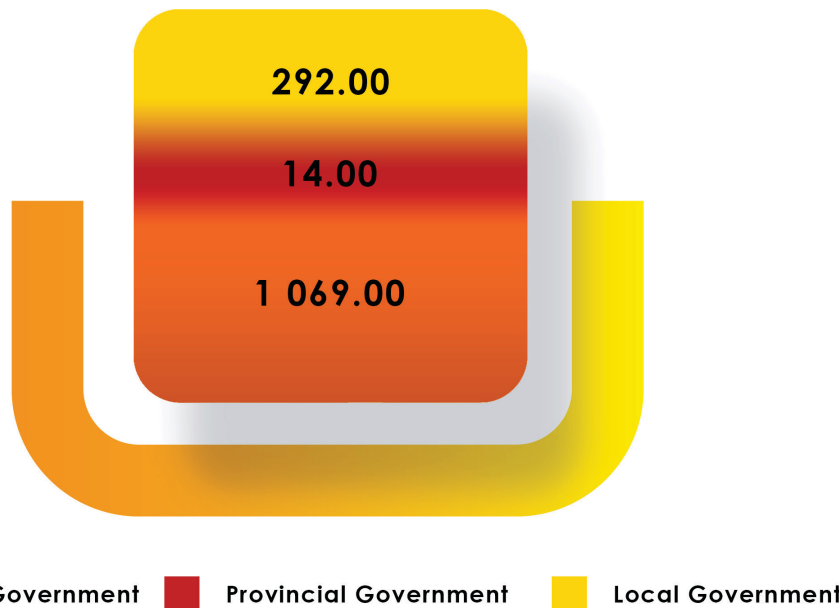
Provincial government's main revenue sources are gambling taxes (casino taxes and horse racing taxes), alcohol licences and motor vehicle licences. However, these revenue sources only contribute between 3% and 7% of the overall revenues of respective provinces. Given this limited revenue generation capacity, intergovernmental transfers or grants play a key role in the financing of provincial governments in the country. The provincial fiscal framework, therefore, is the combination of provincial own revenues and grants to provinces required to fund provincial service delivery and developmental mandates.³⁸

As pointed out above, most of the taxation powers lie with national government. Consequently, most revenues are collected at a national level relative to provincial and local government. Figure B-3 below shows the total revenues collected by all three levels of government in the 2015/16 financial year from their respective revenue sources. National, provincial and local government, combined, collected a total of R1.4 trillion. However, most of these revenues were collected by national government (R1 trillion or 78%). Provincial taxes only constituted 1% of the total revenues collected.

³⁷ Khumalo, B., Dawood, G. and Mahabir, J. (2016). South Africa's Intergovernmental Fiscal System. Chapter 10 in Kenyan-South African Dialogue on Devolution. Steytler, N. and Ghai, Y. (eds)

³⁸ Khumalo et al. (2016). South Africa's Intergovernmental Fiscal System. Chapter 10 in Kenyan-South African Dialogue on Devolution. Steytler, N. and Ghai, Y. (eds)

Figure B-3: Total Revenues Collected by Level of Government (2015/16) (R' billion)



Source: National Treasury 2017 Budget Review, 2015 Provincial Budget and Expenditure Review, MFMA S71 Reports³⁹

Fiscal Transfers Between Spheres of Government and the Division of Revenue

When comparing the revenues generated by each sphere (Figure B-3) to the actual service delivery responsibilities (Figure B-1), it is clear that there is a mismatch between revenues generated and expenditure responsibilities. This is known as a fiscal gap and such fiscal gap can be vertical i.e. exist for all provinces, or horizontal i.e. exist across provinces. The DOR process remedies fiscal gaps and plays a role in supporting national government policies and priorities at a provincial level. The DOR is a constitutional mandate that entitles each sphere to an 'equitable' share of nationally raised revenues. In other words, the revenues that national government gets from personal income tax, corporate tax, VAT and other taxes are shared between national, provincial and local government. Provinces get these funds in the form of the equitable share grant from national government.

Sections 214 and 227 of the Constitution give effect to the DOR process. Section 214(1) states that "an Act of parliament must provide for:

- the equitable division of revenue raised nationally among the national, provincial and local spheres of government;
- the determination of each province's equitable share of the provincial share of that revenue; and
- any other allocations to provinces and local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations may be made."

³⁹ The data for provinces is an estimate extracted from the 2015 Provincial Budgets and Expenditure Review. This was the last of these publications that provided an aggregate analysis of provincial expenditure in the country. Provincial budget information, which is provided annually on the National Treasury website, is reported by province, making aggregate analysis difficult.

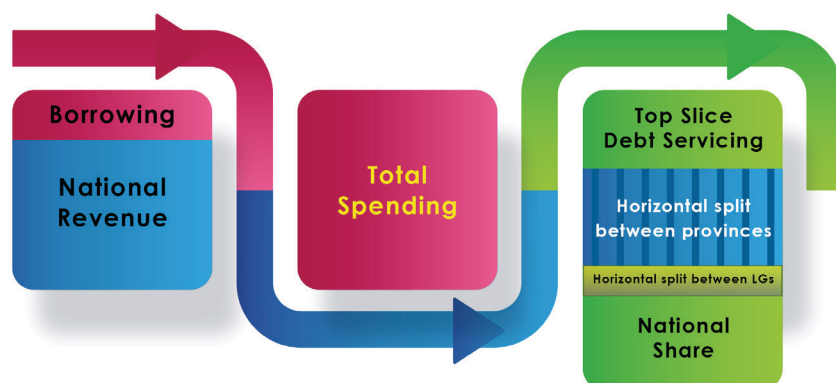
In addition, Section 214(2) provides the principles that inform the DOR and respective equitable shares to each sphere. These are:

- the national interest;
- any provision that must be made in respect to the national debt and other national obligations;
- the needs and interests of the national government determined by objective criteria;
- the need to ensure that the provinces and municipalities are able to provide basic service and perform the functions allocated to them;
- the fiscal capacity and efficiency of the provinces and municipalities;
- the developmental and other needs of provinces, local government and municipalities;
- economic disparities within and among provinces;
- obligations of the provinces and municipalities in terms of national legislation;
- the desirability of stable and predictable allocations of revenue shares; and
- the need for flexibility in responding to emergencies or other temporary needs, and other factors based on similar objective criteria.

The “act of parliament” referred to in the constitutional prescripts is the DOR Bill (Act) that is tabled annually in Parliament as described in the main report. The equitable share is an unconditional grant meant to close the fiscal gap and ensure that provinces are sufficiently financed to deliver on their service delivery mandates. There is also provision in the Constitution for additional allocations to provinces. These usually take the form of conditional grants and are spent by provinces on behalf of national government in achieving nationally set goals and priorities.

The DOR process is explained in Figure B-4 below. In the first part of the Figure, all revenues collected by national government are supplemented by national government’s borrowing requirements for the year.⁴⁰ The sum of national government tax revenues, other national government revenues and national government borrowing constitutes total government spending for a given financial year. This is shown in the second part of Figure B-4. From the total pot of funds available for the financial year, the Constitution requires that debt costs (a maturing debt and interest costs) are paid first and then the remainder is shared between national, provincial and local government through the DOR process.

Figure B-4: The Division of Revenue Process



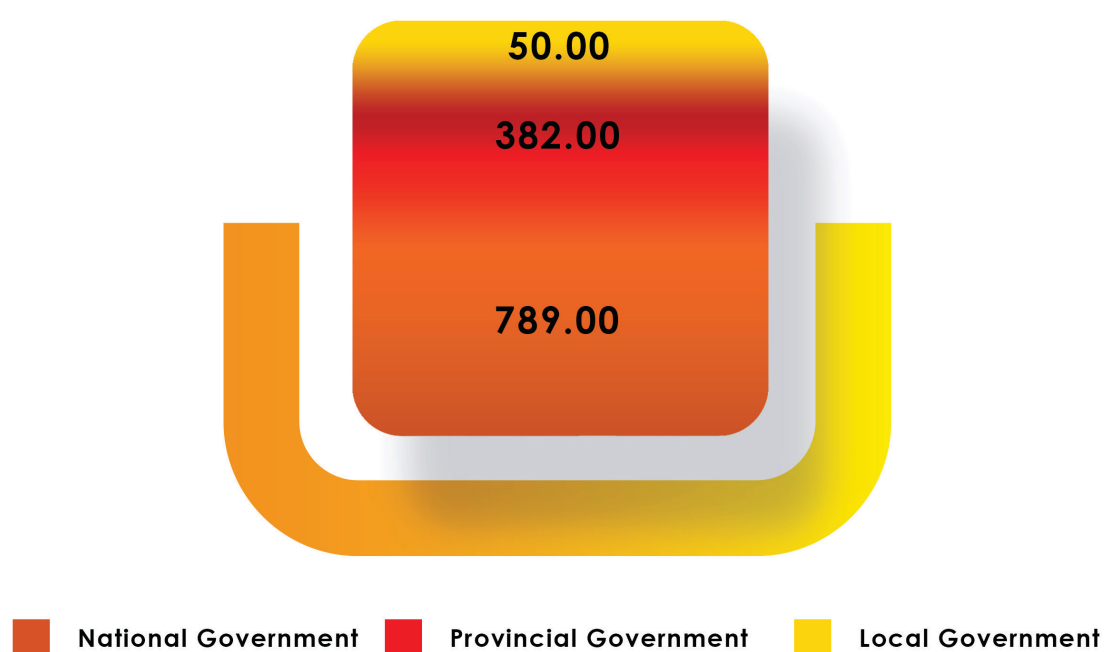
Source: Financial and Fiscal Commission

⁴⁰ The fiscal framework is determined before the DOR. The expenditure needs and revenue estimates of government in general are largely based on previous years and thus the difference between expenditure and forecasted revenue collection determines the borrowing requirements for the year. Therefore, in the usual intra-governmental process the borrowing requirement is determined prior to the DOR process.

The Vertical Division of Revenue Across Spheres of Government

The sharing of nationally raised revenue amongst national, provincial and local government is known as the vertical division. The term vertical is used since the funds move downwards from national to provincial and local government. Figure B-5 shows the current share of the vertical division of revenues for the 2015/16 financial year. In general, national government gets the largest share of nationally raised revenues to fund national government mandates. Local government gets the smallest share, partly because it is assumed that municipalities have substantial own revenue raising capacity to fund its expenditures. The shares presented in Figure B-5 essentially accounts for each sphere's "equitable share" and do not include other transfers to province and municipalities. In this regard, national government's share also includes conditional grants that accrue to provinces and municipalities. Therefore, Figure B-5 essentially underestimates the actual funds that accrue to provinces through other channels in addition to each sphere's equitable share.

Figure B-5: The Division of Revenue 2015/16 (R' billion)



Source: 2015 Division of Revenue Bill

The Horizontal Division of Revenue Across Provinces

The vertical DOR process described above is important to ensure that all spheres of government have enough funds to provide the services that they are responsible for. However, it is important for each province to also be able to appropriately fund their service delivery responsibilities within their jurisdictions. The process of sharing the provincial share of the vertical division of revenue between the nine provinces is called the horizontal division of revenue, since that is spread across provinces.

The vertical and horizontal DOR processes aims at remedying vertical and horizontal fiscal gaps respectively i.e. ensuring that provincial government, in general, and each province, in particular, have sufficient funds to deliver on their service delivery mandates. As a consequence, the equitable shares to provincial government and individual provinces largely reflect the level and type of services they provide. With that said, both processes are determined differently, with the vertical DOR being determined politically through the budget process via the deliberations and considerations of the Minister's Committee on the Budget (MinComBud) and final approval by Cabinet while the horizontal DOR is determined by a formula. The vertical DOR process trends to reflect the strategic goals of the government of the day and is thus directly influenced by the political authorities to offer the policy flexibility required to achieve such goals. In general, the constitutional precepts in Section 214 essentially inform the vertical DOR process, with annual changes to the vertical DOR reflecting the policy priorities and funding availability of that year as approved by Cabinet before being tabled in parliament. The horizontal DOR is formula based and aims to ensure objectivity and transparency in sharing revenues across provinces and is, simultaneously free from any form of manipulation.

There are a number of intergovernmental institutions and forums, established by the Intergovernmental Fiscal Relations Act 97 of 1997, which play a key role in the vertical and horizontal DOR process. The DOR process essentially commences with the FFC's annual submission to parliament with recommendations to guide and improve the following year's vertical and horizontal DOR. Parliament then debates these recommendations and uses them to scrutinise the executive's policy and fiscal decisions for the following DOR process. The executive considers these recommendations through various intergovernmental forums and thereafter by the Budget Council and the Budget Forum. The Budget Council consists of the Minister of Finance and the nine provincial MECs responsible for the finance portfolio, while Budget Forum includes the Budget Council members and the South African Local Government Association (SALGA). These platforms are used to consult on the DOR with provinces and local government (via SALGA) prior to tabling the DOR Bill in Parliament. As part of tabling the DOR Bill, the Minister of Finance is obligated to respond to the FFC's recommendations.

The Equitable Share Formula: Determining the Provincial Share of National Revenue

As with the vertical DOR process, the constitutional precepts also guide the structure of the PES formula used to determine each province's equitable share. This includes the need to ensure provinces have the ability to provide services to their citizens, the developmental need of provinces, the fiscal capacity of provinces and to recognise the economic disparities across and within provinces. As such, the PES formula comprises of six components that attempts to capture these directives. Each component is afforded a weight that sums up to 100%, with such weights being determined by previous provincial spending trends. For the 2019 budget, the components of the PES and the subsequent distribution of weights are as follows:

An education component (48%) based on estimated size of school age population (5 – 17 years) and the number of learners (Grade R to 12) enrolled in public ordinary schools;

An education component (48%) based on estimated size of school age population (5 – 17 years) and the number of learners (Grade R to 12) enrolled in public ordinary schools;

A health component (27%) based on each province's risk profile and health system caseloads;

A basic component (16%) derived from each province's estimated share of the national population;

An institutional component (5%) divided equally between the provinces;

A poverty component (3%) based on income data that reinforces the redistributive nature of the formula; and

An economic output component (1 percent) based on estimated regional economic output (GDP-R).

The PES formula calculates the expenditure need of each province, as related to its two largest service responsibilities in the form of the education and health services. These two components account for 75% of the total allocations received from the PES, with the other four components accounting for the remaining 25%. As the PES is an unconditional grant, provinces are not obligated to spend according to these weights and can use the PES for other provincial services not explicitly mentioned in the formula. For example, if a province is allocated 40% of its equitable share for education it could nevertheless allocate only 35% of its expenditure to education. In addition to education and health, other provincial services are technically funded by the Basic component, although the funds from the PES are fungible. The Poverty component attempts to recognise the economic disparities across provinces and provide further support for provinces that are fiscally constrained due to a relatively poorer population.

Section 227 (2) of the Constitution states that "additional revenues raised by provinces or municipalities may not be deducted from their share of revenue raised nationally, or from other allocations made to them out of the national revenue fund. Equally, there is no obligation on the national government to compensate provinces or municipalities that do not raise revenue commensurate with their fiscal effort". Therefore, the equitable share allocations to provinces should not take into account a province's ability (or inability) to collect revenues owed to them from their own revenue sources. The PES allocations should not reward poor performance in collecting own revenues or punish provinces that perform well in collecting revenues owed to them. While this is the case, the PES formula is still required to consider the fiscal capacity of provinces when determining allocations.

As mentioned above, the DOR process intends to close fiscal gaps i.e. the difference between expenditure needs and the revenues a province can generate from their taxation powers. It is for this reason that the Constitution explicitly states that the vertical and horizontal DOR should recognise the fiscal capacity of provinces i.e. the potential revenue that can be collected by a province, given the nature and characteristics of the provincial tax base, regardless of performance or ability in collecting such revenues. While provinces are theoretically afforded a range of revenue sources in Section 228 of the Constitution, in practice they impose very few of these and, thus, have a negligible own revenue contribution to their budgets. As a result, the PES formula does not explicitly account for fiscal capacity when determining allocations.

Limited and Largely Unutilised Borrowing Powers of Provinces

Like national government, provincial governments are also allowed to access credit to fund certain types of expenditures. The Constitution authorises provincial borrowing through Section 230, while the Borrowing Powers of Provincial Governments Act 48 of 1996 further regulates this power. Both the Constitution and the said Act allow for provincial borrowing to fund capital expenditure and to also bridge finance for operating expenditure (cash-flow management), although the latter needs to be paid by the end of the financial year.

While there is a legislative framework that allows provinces to borrow, the prescripts of such legislation are quite restrictive, with provinces having very little discretion around their borrowing decision. As an example, provinces are restricted to borrow within an overall permitted debt percentage limit, as determined by the Minister of Finance. The Borrowing Powers of Provincial Governments Act also limits provinces in terms of borrowing sources, with national government or an institution of national government being the first choice of lender, with the private sector being the lender of last resort. As per the Act, all provincial borrowing decisions are coordinated by a Loans Coordination Committee, which consists of the Minister of Finance and the executive member of each provincial finance portfolio.

The restrictions placed on provincial borrowing capabilities described above and the consequent control national government exhibits on such borrowing powers is due to various reasons. This includes concerns over a province's ability to pay back loans and the national government having to guarantee such a loan in the face of such a default. Provinces also offer very little security for such loans, apart from the funding they receive from national government. Uncontrolled provincial borrowing, in general and under such circumstances, can threaten the macroeconomic stability of the country. Given these general concerns and the restrictive nature of the provincial borrowing legal framework, provinces are yet to exercise their borrowing powers to date. This follows a decision taken at a Budget Council meeting in 1997.⁴¹

⁴¹ www.treasury.gov.za/publications/igfr/2001/Annex.pdf

