

Money Bills and Provincial Legislatures: An Overview and Update: November 2021

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The purpose of this report is primarily to provide an update on the status of money bills amendment legislation across provincial legislatures in South Africa. It follows from an earlier, much more detailed, report: *Fiscal Oversight by Parliament and Provincial Legislatures* (2019). Readers who are interested in more background, technical detail and analysis should read the earlier report as well.

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Provinces and money bills: issues of interest for civil society

A money bill is a piece of legislation that contains proposals about the amount and distribution of government spending, or the extent and distribution of government revenue-raising measures. Only members of the Executive (government) can put forward such proposals. But the Constitution of 1996 provides a counterweight to that power by assigning to legislatures the authority to amend money bills. However, it requires that legislatures themselves pass legislation that determines how they process and amend such bills.

At the national level, Parliament passed its ‘Money Bills Act’ in 2009 and amended it in 2018. At provincial level, the first such legislation was only passed in 2018 by the Gauteng Provincial Legislature (GPL). That was followed two years later by the Eastern Cape Provincial Legislature (ECPL) in 2020.

The significance of this for civil society organisations is that there are new oversight procedures and provisions in these two legislatures (ECPL and GPL), along with an opportunity to still inform the development of such procedures in the remaining provincial legislatures. Among the specific issues of that may be of interest for civil society are:

1. Whether actual and envisaged oversight processes for money bills in PLs allocate enough time for meaningful public participation
2. How provincial money bills procedure legislation is being implemented in practice (in the ECPL and GPL)

3. Whether PLs now drafting such legislation are providing adequate opportunities for public input into the drafting and finalisation processes
4. What kinds of supporting institutions (if any) are envisaged by such legislation and whether those are likely to serve the public interest.

There is a broader question as to whether these oversight processes are fruitful avenues of engagement for civil society organisations (CSOs). On the one hand, two crucial functions – basic education and healthcare – are the responsibility of the provincial sphere of government, so expenditure decisions at that level are very relevant to the concerns of many CSOs. On the other hand, legislatures where the governing party holds a majority have shown themselves to be reluctant to make meaningful amendments to money bills. That has been true for the ANC at national and provincial level, as well as the DA at provincial level in the Western Cape.

While the current political situation in provincial legislatures means that formal amendments are unlikely, robust engagement could nevertheless lead to changes through other channels. For example, criticism or other pressure on the Executive during money bills processes may lead to changes in money bills tabled in later years. It could also lead to more information being provided by the Executive to legislatures, resulting in greater transparency.

An additional consideration is that future changes in the political system and the composition of political power – resulting for example in governing coalitions in provinces – may lead to the amendment powers of legislatures suddenly being exercised. For example, an MEC for finance from one party in a coalition might table a budget proposal that one or more other parties in the coalition do not agree with. In that case, those parties could partner with other parties inside and outside the coalition to draft and pass amendments to budget proposals. The formal legislature process of amendment should be guided by a provincial money bills Act, if that exists. Amendments could also be proposed by civil society organisations with the intention that they would be taken-up in this way. In that sense, attention to these pieces of legislation now while they are being drafted and first implemented could be very beneficial in future.

Overview of status quo as of November 2021¹

The current state of provincial money Bills legislation is outlined in Table 1. From that it is clear that provincial legislatures fall into three broad categories: those that have passed money bills amendment legislation; those that are in the process of actively drafting such legislation; and, those that have neither passed nor are drafting such legislation.

Table 1 Status of Money Bills Amendment Legislation Across Provinces

Province	Existing Provincial Money Bills Act?	Status of Legislation
Eastern Cape	Yes	Passed in 2020, not yet implemented.
Free State	No	Process to draft legislation has not yet been initiated. The legislature is reportedly aware of the need to do so.
Gauteng	Yes	Passed in 2018, not yet implemented.
KwaZulu Natal	No	Draft Bill exists – process and dates for public participation not yet published.
Limpopo	No	Process to draft legislation has not yet been initiated. The legislature is reportedly aware of the need to do so.
Mpumalanga	No	Process to draft legislation has not yet been initiated. It is unclear if the legislature is aware of the need to do so.
Northern Cape	No	A process to draft legislation was initiated some years ago but was abandoned. At present there is no indication of the process being restarted.
North West	No	Process to draft legislation has not yet been initiated. Unclear if there is awareness of the need to do so.
Western Cape	No	The drafting process is underway and the WCPL intends to hold a workshop in January 2022.

¹ The information in this section on the status of money bills amendment legislation in different provincial legislatures was primarily compiled by Sabelo Ndlovu (PMG), supplemented with additional information obtained by Zukiswa Kota (PSAM) and Seán Muller (PEERC). We are grateful to the relevant officials at all the provincial legislatures for their assistance.

Key issues and lessons from legislation in Gauteng and Eastern Cape legislatures

The GPL and ECPL were the first provincial legislatures to pass their own money bills amendment legislation as required by the Constitution. Either or both of those Acts could have provided a template for other provincial legislatures, since the issues to be dealt with are essentially the same. However, both pieces of legislation contain important flaws or limitations. It is useful to understand these both when engaging with those legislatures and when engaging with the drafting of such legislation in other legislatures.

Among the most notable limitations of the GPL and ECPL Acts pertain to: institutional arrangements for greater technical capacity; coherence with national Parliament processes; timelines for different parts of the process; and, provisions for public participation.

Institutional arrangements

The national Money Bills Act established a Parliamentary Budget Office (PBO) to provide advice and analysis on money bills-related matters. There has been a trend internationally to create such institutions for legislatures, with varying mandates. Arguably the fundamental characteristic of such institutions is that on key dimensions they are independent of both the political and bureaucratic structures in legislatures, thereby enabling greater objectivity. A quasi-independent institution of that kind is what was envisaged by the original, national Money Bills Act in 2009. After some internal contestation about this, the 2018 amendments to that Act made the PBO's independence even more explicit. Unfortunately, neither the GPL nor the ECPL incorporate the lessons learned in this regard from the national legislation.

The ECPL Money Bills Act established a 'Provincial Legislature Budget Unit', copying selected provisions from the national Money Bills Act. That makes little sense. On the one hand it chooses the option of greater capacity within the legislature bureaucracy over a quasi-independent body - this is reflected in the fact that the Unit it will have a 'general manager appointed by the Secretary', which is little different to any other unit. On the other hand, the relevant section of the Act nevertheless repeats provisions from national legislation that were intended for an independent office.

The GPL Money Bills Act, on the other hand, endorses the establishment of 'an independent structure'. But it fails to elaborate on how and in what sense its independence will be ensured. International experience indicates that clear provisions in this regard are crucial: merely stating that an office is independent is typically insufficient in practice to ensure objectivity. These issues were dealt with in some detail in the national processes leading up to the 2009 Act and the 2018 Amendment Act, but appear not to have been considered by the GPL.

Related to the above: during the ECPL and GPL processes, no serious consideration was given to the role of the existing Financial and Fiscal Commission (FFC). The FFC's mandate in the Constitution is particularly concerned with sub-national public finances, including whether provinces are required to fulfil functions that are inadequately resourced ('unfunded mandates'). Could the FFC, which is a quasi-independent institution, be better-utilised by provincial legislatures instead of establishing their own institutions? That is a question that has yet to be given proper consideration and therefore remains important for other legislatures developing money bills amendment legislation. Given that it is debatable whether the national PBO is justifying the resources allocated to it, and the ECPL has costed its proposed PLBU at almost R10million per annum, it also important to consider the resource implications of such institutions being created. If every PL creates an Office or Unit of similar size,

there will be ten such institutions at a minimum total national cost of R100million per annum for the indefinite future.

Coherence with national Parliament processes

The structure of South Africa's public finance legislation means that the amount of money allocated to a province from the National Revenue Fund is determined by the Division of Revenue Bill. That Bill is tabled, every year, in national Parliament as part of the annual Budget and determines the allocation across national, provincial and local spheres of government, as well as allocations within the provincial sphere. Consideration of that Bill occurs in the national Parliament, but in consultation with provincial legislatures through their representatives in the National Council of Provinces. It is therefore crucial that provincial money bills amendment legislation reflect that process. However, neither the GPL Money Bills Act nor the ECPL Money Bills Act does so. The potential result is incoherence between provincial legislature processes and those of the national legislature.

Timelines for different parts of the process

One set of concerns with the national Money Bills Act that were not addressed by the 2018 amendments related to timeframes for oversight. In some instances, MPs are given less than two working weeks to make decisions about major Budget proposals that the Executive has developed over many months. The type of proposals and documents tabled in provincial legislatures are somewhat different, but similar concerns arise.

The ECPL Money Bills Act is mixed when it comes to timeframes for processing particular money Bills. In some instances it states these explicitly, in other instances it does not provide them at all. In some cases the time available is quite substantial: as in the four months for adoption of the provincial appropriation Bill. While in other cases it is very short: the Act appears to allocate only 7 days to the processing of the provincial Medium Term Budget Policy Statement.

The GPL Act is similarly mixed. For some crucial decisions, such as the adoption of the 'fiscal framework', it does not provide timelines or indeed processes. On the other hand, for the Medium Term Budget Policy Statement it appears to allow 60 days for the entire oversight process, and 4 months for the Provincial Appropriation Bill which is the core of the Provincial Budget.

Provisions for public participation

Inadequate time for oversight necessarily means inadequate time for public participation. For example, in Parliament the limited time available for the 'fiscal framework' is such that civil society organisations are given only a few working days to put together their responses and indicate if they want to present these to the finance committees. But even where there is adequate time overall, that does not mean that a sufficient proportion of that time will be allocated to public participation. It is useful to remember that the power legislatures have is to amend money bills. Therefore, a legislature that takes public participation in this context seriously must consider the possibility that such participation could stimulate an amendment. For that to be so, such participation must occur early enough in the process and be allocated sufficient time should the need arise for substantial engagement before the relevant legislature committee(s) reach a decision.

The majority of the issues raised above should be addressed in legislation (i.e. in the money bills amendment Acts). However, the rules of legislatures can potentially also be used to address some of the more minor issues. Unfortunately legislatures typically do not develop their intended rules at the same time as the legislation which makes it impossible to assess whether in fact the rules will address

any of these concerns. It is nevertheless useful for CSOs to bear in mind the complementary roles of legislation and rules when engaging with these matters.

Draft legislation in progress: Western Cape and KwaZulu Natal

At the time of writing (November 2021), two legislatures were in the process of drafting money bills amendment legislation. A draft was not available from the WCPL, so we are unable to provide any preliminary comment on that. However, a draft was available from the KZNPL. In most respects, the KZNPL draft very closely resembles the ECPL Act, with the obvious downside that it presently inherits many of the flaws and limitations of the ECPL legislation.

Among the few notable differences are that the KZNPL draft:

- i. removes the responsibility of the Budget Committee for the Division of Revenue Bill
- ii. removes the provision that the head of the Budget Unit is appointed by the secretary of the legislature, but does not replace that with an alternative
- iii. adds the provision that the Budget Unit receive its own transfer of funds.

Unfortunately, such changes only add to the incoherence in the existing collection of actual and draft legislation. Whereas the ECPL needs to be supplemented with *more* detail linking the provincial processes to the Division of Revenue Bill, the KZNPL draft now removes reference to that altogether. The changes to the provisions for the envisaged PLBU seem to lean towards an independent unit in the case of KZN, except that the failure to specify how the head of the Unit and its employees are appointed is a crucial omission.

The KZNPL draft money bills amendment legislation suggests that there is fairly close alignment between ANC-majority legislatures (GPL, ECPL and KZNPL) in content. Unfortunately that means, in this case, shared flaws and limitations rather than shared strengths. It also raises the question as to whether there is some coordinating body or persons outside of individual legislatures, in which case that may limit the extent of meaningful engagement that is possible with the drafting processes. Since the WCPL has a DA majority, there is a greater chance of the draft legislation being substantively different – though whether there is any more opportunity for substantive civil society engagement remains to be seen.