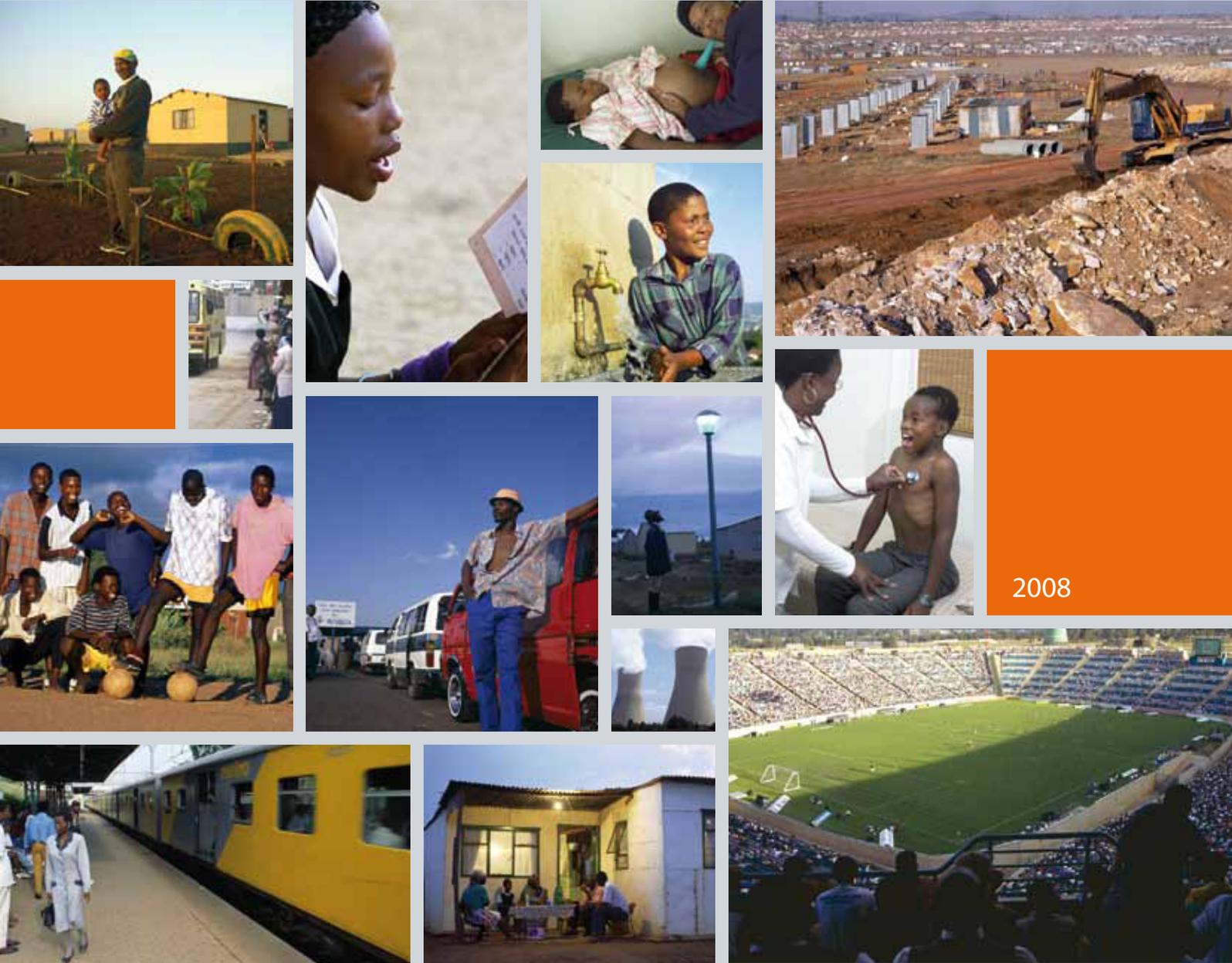


Submission on the Public Finance Management Bill 2008



2008

Financial and Fiscal Commission

Preliminary Comments on the Public Finance Management Bill

Introduction

This submission is made in terms of the Financial and Fiscal Commission Act (2003) which among other things mandates the Commission to act as a consultative body for, and make recommendations and give advice to organs of state in the national, provincial and local spheres of government of financial and fiscal matters.

General observations

The Bill introduces new amendments to the existing Public Finance Management Act (1) of 1999. While not intended to compromise or as it were change materially the principles that are in the existing act in respect of strengthening fiscal prudence and good financial management principles, the amendments are quite wide-ranging and may to a certain extent result in unintended consequences. Generally legislation should be aimed towards creating an enabling environment for regulations to be put in place to ensure that the law is followed. Such an approach ensures that there is a significant level of flexibility with which fiscally sound management practices and decisions can be made. The fact that the Bill brings in to the legislation a number of regulations that were applicable to the current Act may mean that the decision making space for managers is being tightened as such there may be a need for caution to ensure that the flexibility of management in decision making is not unduly compromised.

The Bill also brings on board a number of principles that have become entrenched in the Division of Revenue Act into the proposed legislation. While this might appear to be a positive step to take given the fact that such principles are already entrenched, where changes to the IGFR system occur that may require changes to the DoRA, it may be difficult to change this particular piece of legislation as it does not have to be amended annually like the DoRA.

A welcome development is the alignment of the legislation to other legislation of a similar nature such the Municipal Finance Management Act (2003) and the incorporation of the issues around provincial borrowing into the Act. The details with respect to the later are discussed below.

With specific reference to the Financial and Fiscal Commission Act (2003), there is a need to align the PFMA with Section 23 (2) (b) which empowers the Commission to submit at any time during the Financial year estimates of the Commission's income and expenditure supplementary to those appropriated annually by Parliament, This is in view of the fact that the PFMA once enacted overrides any legislation that is in contradiction with it.

Finally, the Bill does not provide clear guidelines on its application to Constitutional Institutions as apposed to state controlled institutions. This distinction is particularly important as the definitions of executive authority for the former is critical if the constitutional principles underlying their establishment are not to be compromised. It may in fact be necessary to have a separate section dealing with the constitutional bodies especially in light of the fact that Parliament, to whom all of these institutions report is not covered under the PFMA.

Specific Comments

Chapter 1 Definitions

The Commission welcomes the new definitions that have been added to the Act. Of particular relevance to the Commission is that executive authorities have been defined more tightly to include the definition of the Executive Authority for Constitutional entities, which was not the case in the PFMA.

Financial and Fiscal Commission Act is defined as Act No. 99 of 1999. The Commission notes that this particular Act was replaced with an amended Act in 2003 (Act No. 25 of 2003)

The commission further notes and supports the broadening of the definition of unauthorised expenditure to include DoRA violations. The amendment will help reduce the widespread practice of fiscal dumping, especial in cases where provinces transfer un-appropriated funds to municipalities.

Chapter 1 Objects

The Commission welcomes the amendment in that it goes a step further than the existing Act and entrenches the Constitutional imperative for Minister of Finance to establish uniform norms and standards in order to secure sound and sustainable financial management. The object of the Act is further expanded to allow for the regulated establishment, dissolution and conversion of state controlled institutions. This should go a long way towards addressing the appetite for government departments to establish agencies for delivering services that should otherwise be delivered by government departments often at considerably higher cost to the state than would otherwise have been the case if the alternative were used.

Chapter 1 Application of the Act

The application of the Act is expanded to cater specifically to the South African Revenue Service as a national public entity that should be treated as a special case of a government department. The amendment also empowers the Minister to issue instructions and regulate the collection and handling of state revenue by the South African Revenue Service. This is a particularly important amendment that should allow the Minister to be able to have a handle on how the Revenue Service conducts its business without having to directly intervene in the day to day activities of the public entity.

Chapter 1 Amendments to the Act

This section now includes a requirement that any amendments to the Act be introduced to Parliament only after the Minister and the Financial and Fiscal Commission have been consulted on the contents of the draft legislation and have responded in writing. This is indeed a welcome amendment that is welcomed by the Commission as it enables the Commission to carry out its mandate in respect of legislative changes that impact directly on financial and fiscal matters relating to all spheres of government. This is also consistent with the provisions in the MFMA.

Chapter 2 Treasuries

This amendment ensures the continuance of treasuries both provincial and national. Two important amendments align the powers and functions of Treasuries to Chapter 13 of the Constitution and all the contingent (enabling) legislation flowing from this chapter of the Constitution, namely the MFMA, the DoRA, the IGFA and any other legislation conferring functions or powers on the Treasury and enable the treasury to enforce compliance with the law. It is not clear why the Financial and Fiscal Commission (Act 2003) is not directly referred to here nor is it clear why the legislation flowing from section 228, 229 and 230 of the Constitution is not directly referred to here as these have direct implications for the powers of the Treasury through the Minister of Finance. The Treasury is also empowered to intervene in terms of Section 139 of the Constitution in a municipality as an addition to what existed in the old Act. This again ensures an alignment and consistency with the MFMA and is welcomed by the Commission. Similarly with respect to provincial treasuries, there is an amendment to align requirements imposed on these treasuries by the MFMA to the PFMA, namely through delegations from the national Treasuries. What may need to be done to ensure that provinces are able to perform their functions properly would be to

check relationship with the delegations to local government departments in provinces.

Furthermore, the FFC note with concern that section 12 (2) b does put more emphasis on the role of provinces in building the capacity of local governments. Reference is only made to provincial government components and enterprise as well as provincial public entities. In light of the Constitutional obligations on provinces to build municipal capacity and the requirements of section 139 (5) more emphasize needs to be given to local government financial management support. This will not only ensure that provinces carry out their mandate but also that provinces do adequately budget for this mandate.

Chapter 5 Budgets

The commission welcomes the provisions contained in Chapter 3 especially section 44 (c) on supporting documentation for budgets. The requirements for national expenditure estimates on current year, the budget year and the two financial years following the budget year as well as last three financial years presented as actual is a welcome improvement on the existing Act. This principle is also noted in section 68 (1) on performance plans. The FFC supports the initiative towards trend-able and quantifiable indicators.

Section 47 (1) on expenditure before the annual DoR Bill is enacted is supported. The provision will help create more certainty about the equitable share as a substitute for own revenue. The FFC welcomes the fact that the risks associated with the delays in passing the Bill are transferred from sub-national to the national governments.

Chapter 6 Budget Related Plans, Reports and Publications

While the FFC generally supports the provisions of section 68 (1) f on preparations of performance plans including "...life cycle cost of capital assets payments..." we further suggest that cross reference be made to the Immovable Asset

Management Act which requires a set of asset management plans for fixed assets.

Chapter 7 Intergovernmental Financial Relations

The PFM Bill addresses the promotion of intergovernmental cooperation in intergovernmental funding. The provisions generally deal with the promotion of co-operative governance including the resolution of intergovernmental disputes, national allocations and responsibilities of receiving and transferring officers and accounting officers. These are largely drawn of the IGFR Act and from the DoRA. The Commission supports the spirit of incorporating these provisions into the Bill, especially because they play an important role in the promotion of fiscal prudence and financial management. However, the Commission is of the view that section 79 (a – c) of the Bill, dealing with promotion of co-operative governance and 93 (1) on intergovernmental financial disputes should best be dealt with in the intergovernmental fiscal relations Act as they replicate the Act. The Intergovernmental Fiscal Relations Act has been enacted specifically to give credence to Chapter 3 of the constitution. Therefore, the Bill should, instead of being overly prescriptive, make reference to the provisions set out in the constitution and the Intergovernmental Fiscal Relations Act rather than repeat in this Act.

Also included in this chapter is what could be considered an expansion and detailed amendment of the old Section 35 provision in the PFMA (1999) for dealing with unfunded mandates. The amendments incorporate requirements of Section 3 of the FFC Act (2003) and align these with the provisions of Section 9 of the Local Government: Municipal Systems Act (2000) in order to spell out a process that has to be followed in the assignment and reassignment of functions between spheres of governments and organs of states where such a process has financial and fiscal implications. These requirements as outlined in Section 91 of the PFM Bill are supported by the Commission. The Commission had already prepared itself for this eventuality through its preparation of an instrument for the assessment of the financial and fiscal implications of such function movements.

Section 108 deals with borrowing by Constitutional Institutions. The provisions are new in respect of Constitutional Institutions and are welcome by the Commission as they will allow for more flexibility in respect of bridging finance within the appropriated funds and during a fiscal year for Constitutional Institutions, However this section should be aligned with Section 4 (2) of the Financial and Fiscal Commission act (2003) which prohibits the Commission from borrowing or overdrawing its bank account.

The Commission welcomes the incorporation of key financial management principles that have been hitherto part of the Division of Revenue Act. These provisions generally cover entrenched principles that have come to be accepted as the norm in the evolution of South Africa's system of fiscal decentralization and therefore can be legislated in an Act like PFMA. However, the Commission would like to caution that the incorporation of the principles should not be allowed to end up creating rigidities that may stifle the implementation of government programs at a management level as legislation such as the PFMA can not be easily amended when problems are identified. The Commission supports the principle that the DoRA should have a primary focus on allocations among the spheres of government rather than on financial management issues.

Chapter 8 Borrowing, Guarantees and Contingent Fiscal Obligations

This chapter addresses borrowings binding national revenue fund and borrowing binding provincial revenue fund. Of particular interest to the Commission is that the latter amendment is intended to establish a basis for repealing the Borrowing Powers of Provincial Governments Act 1996 which gives effect to Section 230 of the Constitution. While this aligns the Act with the MFMA, it is not clear what the implications are for the exercise of borrowing powers by provinces. The power of a province to borrow as provided for in Section 230 of the Constitution in principle involves more than matters of public finance management. The

incorporation of the BPPG Act into the PFMA reduces the power of province to borrow to a mere financial management issue rather than a deliberate policy decision that a provincial government may wish to undertake. While it is understandable that under the current environment, provinces have not been able to exercise their borrowing powers due to a common agreement, the future may well turn out to be different and the flexibility allowed in the BPPG Act will be completely lost. With respect to Constitutional Institutions and state controlled institutions, the Commission supports the principles enshrined in the Act.

Chapter 9 Executive Authorities (some questions)

The Commission notes and welcomes that the amendment to the Act proposes the Executive Authority of a Constitutional Institution as the Speaker of the National Assembly. However, of concern is the situation where the Chairperson of a Constitutional Institution is also the Accounting Officer.

Section 120(d) of the Public Finance Management Bill seeks to establish the Speaker of Parliament as the Executive Authority of Constitutional Institutions. Section 121 (1) of the Bill goes on to provide that the Executive Authority of a state or state controlled institution must, among others, provide general guidance to assist the institution in achieving the policy objectives of the Executive Authority and that such general policy guidance must monitor and oversee the exercise of responsibilities assigned to the Accounting Officer in terms of the Bill. Section 121(2) of the Bill goes on to provide that the powers of the Executive Authority of a Constitutional Institution are limited to those that pertain to ensuring that all reporting requirements are complied with and to assisting the National Assembly in exercising its oversight of those institutions.

The FFC notes that the primary function of an Executive Authority is to determine and monitor adherence to own policy. There is an inherent contradiction of this proposal with, for example Section 220(2) of the Constitution which establishes the FFC as an independent and impartial entity that is subject only to the

Constitution and the law. This section is also not aligned to the provisions of Section 2 and Section 3 of the Financial and Fiscal Commission Act.

The Commission is of the view that the Executive Authority of a Constitutional Institution should be consistent with the spirit and letter of the Constitution. For example, the Executive Authority of the Financial and Fiscal Commission is the Commission itself. The current issue of concern that was raised even during the Parliamentary Review of Chapter Nine Institutions is the workability of the scenario where the Chairperson of the Commission is also the Accounting Officer. This is obviously a broader governance issue that should be addressed outside of this Act.

Chapter 10 Accounting Officers and other Officials of State Institutions

Section 134 (2) b reads as follows: an accounting officer may not “use the position and the privileges of, or confidential information used as, accounting officer for personal gain or to improperly benefit other persons. The FFC suggests that the word persons should be extended to include other companies, institutions, organisations etc.

Chapter 15 Annual Reporting

The FFC is of the view that section 243 (2) on the contents of annual report should include specific items which parliament made request on if the purpose is to improve accountability.

Dated in Midrand this 13th day of March 2008

Signed:



Dr Bethuel Setai

Chairperson/CE

Financial and Fiscal Commission