Annexure to the Supplement to Submissions on the Public Procurement Bill to the NCOP

NCOP Select Committee on Finance

25 March 2024

From AmaBhungane, Public Affairs Research Institute (PARI) and Public Service Accountability Monitor (PSAM)

Please see new column: assessment of Treasury responses

PUBLIC PROCUREMENT BILL

[B18B – 2023]

COMMENT MATRIX – NATIONAL TREASURY'S RESPONSES TO WRITTEN SUBMISSIONS TO SELECT COMMITTEE ON FINANCE, NATIONAL COUNCIL OF PROVINCES

14 March 2024 & 18 March 2024

NOTE: Due to time constraints-

(a) a quality check of the responses to ensure alignment and correct textual errors should still be done; and

(b) some instances not all comments of a particular commentator have been responded yet (e.g. clause-by-clause comments of the Western Cape Government).

LIST OF COMMENTATORS

1. Construction Industry Development Board (“CIDB”)
2. Pharmaceuticals Made in South Africa (“PHARMISA”)
3. Pharmaceutical Task Group (“PTG”)
4. GS1 South Africa trading as the Consumer Goods Council of South Africa (“GS1 South Africa”)
5. Perishable Products Export Control Board
6. South African Medical Technology Industry Association
7. **AmaBhungane Centre for Investigative Journalism (“AmaBhungane”)**
8. South African Institute of Chartered Accountants (“SAICA”)
9. Solidarity Trade Union (“Solidarity”)
10. Western Cape Government
11. African Procurement Law Unit
12. A Group of Civil Engineering Contractors
13. Sakeliga (formerly Afribusiness)
14. **Health Justice Initiative**
15. Webber Wentzel
16. Construction Sector Charter Council
17. **Public Affairs Research Institute**
18. **Equal Education and Equal Education Law Centre**
19. City of Cape Town
20. Congress of South African Trade Unions (“Cosatu”) and Southern African Clothing and Textile Workers’ Union (“Sactwu”)
21. Venter, Quinot and Scott
22. **Budget Justice Coalition (“BJC”) and Imali Yethu (“IY”)**
23. **Public Service Accountability Monitor (PSAM)**
24. Michael Freema
25. Black Business Council (“BBC”)
26. IRR Legal NPC
27. National Research Foundation (NFF) – summary
28. Joint Strategic Resource (“JSR”)
29. Busa
30. **Corruption Watch**

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AmaBhungane	General	1. The amaBhungane Centre for Investigative Journalism welcomes the opportunity to make written submissions to the National Council of Provinces on the **Public Procurement Bill, 2023**. 2. AmaBhungane is an independent, non-profit company founded in 2009 to develop investigative journalism so as to promote free, capable and worthy media and open, accountable, just democracy. 3. AmaBhungane takes seriously its role as an active member of South African society, and has advocated for improvement to information and freedom of expression laws since 2010. We recognise the importance of freedom of expression and access to information, and of how transparent and accountable government is necessary to serve the country’s citizens.	The overview is noted.		

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		4. As investigative journalists we have witnessed the realities of corruption – how it occurs and its massive impact on the citizens of South Africa. Many of our investigations have been into procurement-related corruption, and so we have developed a clear understanding of how the weaknesses in the procurement system have facilitated its abuse and how the utter lack of accountability has ensured this corruption has become systemic. 5. We appreciate the opportunity to make these submissions. 6. We attach the submissions we made to the National Assembly as 'Annexure A', and the Supplementary Submissions we made as 'Annexure B'. Those submissions contain the entirety of our concerns with the Bill. 7. In these submissions, we highlight only those concerns which had direct relevance to the provinces and which we believe complicate the cooperative governance needs within public procurement.	Issues relating to the fight against corruption and anti-corruption measures need collaboration with relevant government institutions and law enforcement agencies. The Bill with all its provisions on integrity of the procurement system and anti-corruption measures and transparency may not be the only instrument through which to combat corruption. Regarding the proposed anti-corruption agency, our view is that such an agency is best placed within the departments in the justice cluster. This includes recommendations of Judge Zondo.		
AmaBhungane	General	8. We believe that the Bill fails in its objective to address the legislative and regulatory fragmentation that has rendered the procurement system unworkable. 9. While we disagree with the sweeping powers conferred on the Minister to regulate the procurement system, the delegation of seemingly analogous powers to the Public Procurement Office (PPO) and the provincial treasuries is of particular concern here. 10. The Bill empowers provincial treasuries to issue binding instructions for procuring entities *within their provinces* but only when they are not inconsistent with instructions from National Treasury (through the PPO).	Noted, however, this is a constitutional requirement as per section 216 of the Constitution to ensure uniform norms and standards to mitigate fragmentation in the procurement system. Therefore, the development of the regulations by the Minister does not mean that the public would not be afforded an opportunity to make comments. Regulations would be published for comments. Further, the Bill provides that even binding instructions by the PPO or the provincial treasuries should be published for comments. There will be full transparency.		These responses do not address the central contention, which is that the Bill makes sweeping delegations of legislative powers to a range of regulatory authorities, and that this risks reproducing fragmentation present in the current system.

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		11. In theory this may be possible, but in practical terms, this will cause significant problems: a. It is not always simple to determine whether an instruction will or will not be inconsistent with a nationally-issued instruction. Seemingly consistent instructions may, in practice, be inconsistent and may result in court challenges to determine their applicability. This causes uncertainty and delays in the implementation of provincial procurement priorities and policies. b. This also creates the risk of a proliferation of instructions for procuring officials to follow. As the Zondo Commission noted, the 'difficulties in interpreting the legislative mosaic' was as an 'intractable problem'.	11-14: Before making a regulation, the Minister must publish— (a) a draft of the regulation. (b) a statement explaining the need for and the intended operation of the regulation. (c) a statement of the expected impact of the regulation; and (d) a notice inviting submissions in relation to the regulation and stating, the form and way submissions are to be made. The Minister must submit regulations to be made to Parliament for parliamentary scrutiny at least 30 days before their promulgation.		
		12. The requirement of consistency also removes the opportunity for provincial treasuries to be able to issue context-specific instructions for their province's needs. 13. To avoid the traps of fragmentation that bedevils our existing procurement system, we recommend that the key components of the system be established in the primary legislation. 14. The fundamentals of a procurement system must be set out in legislation. This ensures that the design of the system is subject to parliamentary consideration and public participation. It also ensures that the system is stable and not subject to political pressures or policy whims; it is far easier to change processes governed by regulation than to amend statutory processes.	Further (a) with each regulation, the Minister must publish a consultation report. (b) A consultation report must include— (i) a general account of the issues raised in the submissions made during the consultation; and (ii) a response to the issue		
		15. In our submissions to the National Assembly, we referred to the United Nations Commission on International Trade Law's (UNCITRAL) model procurement in law in 2011 which provides guidance on how procurement should be statutorily regulated. We reiterate that the model law should serve as a guide for how South Africa legislation should regulate procurement.	15) 2. The issues that are covered in some of the comments referencing procurement procedures from other jurisdictions, such as UNCITRAL law, including Open Contracting, are		

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		16. If the primary regulation of procurement is done in legislation, the context specific needs of different categories of procuring entities could be addressed in provincial instructions. 17. This would retain the ability of provinces to mould procurement policy to the extent that it is necessary to give effect to the principle of cooperative governance, without creating the web of legislation, regulation and instructions that we presently have.	technical procurement issues that would be covered through regulations as provided for in clauses 18 and 58 of the Bill.		
AmaBhungane	General	18. It is no secret that procurement has facilitated much of the country's corruption. The SIU has stated that 90% of its cases are procurement related corruption. 19. The Bill's failure to introduce truly effective oversight and accountability mechanisms is therefore one of its key failings. 20. The Bill introduces a Tribunal in section 38: *1) The Public Procurement Tribunal is hereby established to review decisions taken by—* *a. a procuring institution in terms of section 37; and* *b. a procuring institution to debar a bidder or supplier in terms of* *section 15.* *2) The Tribunal—* *a. is independent;* *b. must be impartial and exercise its powers without fear, favour or prejudice;* *c. is a tribunal of record; and* *d. must perform its function in accordance with this Act and other* *relevant legislation.* 21. It is not clear from the Bill that the Tribunal will be adequately resourced to effectively fulfil its duties. 22. The structure of the Tribunal is such that it is likely that a majority of the cases before it will be resolving disputes raised bidders and supplies rather than addressing possible corruption. 23. For this, and for the reasons we set out in our submissions to the National Assembly, we do not believe that the Tribunal meets the urgent need to address corruption in procurement.	18) Noted, see response 15 above. 19) The Bill in its current form does address issues related to accountability as well as monitoring and oversight by the PPO of the procurement system as outlined in Clause 7 and 5(1)(g) of the bill respectively. The Tribunal will be appointed by the Minister but will remain independent and will also operate in terms of the Panels as per clause 47. The functions of the Tribunal are precisely to deal with disputes involving procurement processes.		

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		24. The existence of a centralised Tribunal also calls into question the ability of provinces to create their own dispute resolution and accountability mechanisms. 25. KwaZulu Natal has had success with their Bid Appeals Tribunal and it is not clear how such a system would operate within the framework created by the Bill. 26. Given the lack of innovation in the Bill's approach to both simple dispute resolution and the more complex problem of combatting corruption, it would be a great pity to remove the capacity of provinces to create their own systems to meet these goals in their jurisdictions. 27. We urge the NCOP to recognise that the Bill simply does not respond to the enormity of our procurement-related corruption problem. As we detail in our submissions to the National Assembly, we recommend that the Bill be redrafted to include innovate ways to include citizen monitoring and independent oversight and monitoring of procurement.			
AmaBhungane	General	Transparency 28. The Bill does attempt to strengthen the transparency of procurement documents but does not go far enough. 29. We know that individual provinces have introduced open and or electronic procurement systems which have greater transparency than is nationally required. This is extremely positive and we welcome these sorts of developments. 30. One weakness in the Bill is that, although it mandates that information on bidders and the 'date, reasons for and value of an award' be disclosed, it does not require the publication of information from other stages of the procurement process. 31. The Open Contracting Partnership – the global non-profit organisation that established and advocates for a global norm of open and transparent procurement systems – recommends that information from all five phases of procurement be disclosed. The phases are: planning; tender; award; contract and implementation. 32. We therefore encourage the NCOP to push for greater transparency and amend section 27 of the Bill to include the requirement to disclose information throughout the procurement process, including the annual procurement plans and details about the financial and physical implementation of the contract.	28) The Bill in its current form does address in detail issues related to transparency of the procurement system as outlined in Clause 33 and other parts of the Bill. The Bill contains several transparency provisions, e.g. cl 2(2)(b) (objects), 15(6) (debarment register), 30(3)(a) and (b) (access to procurement services and open data), 32 (access to procurement processes) and 33 (disclosure of information) and 64 & 65 (process to make regulations & instructions).		Does not respond to concerns regarding the scope of information that must be proactively disclosed, and the breadth of the definition of confidential information contained in the Bill.

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		33. This would ensure that the provinces that have already taken steps to develop transparency through the procurement chain will have legislative backing to their efforts. 34. We are deeply concerned that the Bill excludes 'confidential information' from the obligation to disclose. The concept of 'confidential information' in the Bill is far too vague and overly-broad to constitute a legitimate ground for secrecy. 35. As we explain in our submission to the National Assembly, there is no reason for all 'commercial' information to remain confidential and, The Open Contracting Partnership has highlighted the dangers of an over-reliance on 'commercial confidentiality' within procurement legislation, commenting that "[v]ague confidentiality provisions also have a chilling effect on public disclosure where public authorities tend to redact information by default which harms markets, service delivery, and public trust." 36. Obligations to disclose commercial information do not hinder commercial practices and do, in fact, improve competition. 37. The Bill also confers blanket confidentiality over personal information. 38. There is no legitimate need for all personal information to remain confidential. 39. We urge the NCOP to consider the real benefits – to procuring entities, accountability mechanisms, the tax payer, and citizens – of transparency in the procurement process. 40. We recommend that section 27 of the Bill permit only 'legitimately sensitive' confidential information be severed from what is published, and that there is a statutory public interest override. This would ensure that transparency is prioritised when the public interest demands. 41. We also recommend that the blanket personal information confidentiality be removed.			
AmaBhungane	General	Annexure A **Introduction** 1. The amaBhungane Centre for Investigative Journalism welcomes the opportunity to make written submissions on the **Public Procurement Bill, 2023**.	Noted, part repetition of the above and already responded to.		

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		2. AmaBhungane is an independent, non-profit company founded in 2009 to develop investigative journalism so as to promote free, capable and worthy media and open, accountable, just democracy. 3. AmaBhungane takes seriously its role as an active member of South African society, and has advocated for improvement to information and freedom of expression laws since 2010. We recognise the importance of freedom of expression and access to information, and of how transparent and accountable government is necessary to serve the country's citizens. 4. As investigative journalists we have witnessed the realities of corruption – howe it occurs and its massive impact on the citizens of South Africa. Many of our investigations have been into procurement-related corruption, and so we have developed a clear understanding of how the weaknesses in the procurement system have facilitated its abuse and how the utter lack of accountability has ensured this corruption has become systemic. 5. Our submissions focus on the fundamental weaknesses in the Bill. We believe it is an insufficiently detailed law, which would delegate far too much decisionmaking power to the executive and which fails to introduce truly robust anticorruption mechanisms. On these topics, we submit that a significant reworking of the Bill be undertaken. 6. We also believe that the Bill fails to introduce a transparency regime necessary to give effect to the constitutional obligation for government to 'provide effective, transparent, accountable and coherent government' and the principle of public administration that 'transparency must be fostered by providing the public with timely, accessible and accurate information.'2 On this topic, we submit that textual amendments can bring the Bill's provisions into line with the Constitution and international best practice. 7. We appreciate the opportunity to make these submissions. 8. We do however note our disappointment and concern at the short time period the public was given to prepare submissions. This Bill is a vitally important one because of the role public procurement can play in economic development and transformation, and of how it is uniquely vulnerable to corruption. The issue of public procurement is also technically complex. The three weeks the public was given to prepare their submissions was insufficient to enable all interested parties to conduct thorough research, consult with experts in different			

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		fields, and liaise with like-minded organisations and individuals. It is also particularly concerning that the oral submissions are scheduled for the day after the written submissions are due. This means it is practically impossible for the members of the committee to read the written submissions in preparation for the oral presentations. 9. This Bill deserves thorough consideration and deliberation. It should not be rushed through the Parliamentary process without the opportunity for legislators to engage thoroughly with the issues and the public submissions.			
AmaBhungane	General	**Fragmentation** 10. The preamble to the Bill recognises that 'legislation regulating procurement by organs of state is fragmented'. This is because procurement has been regulated by a number of different pieces of legislation, regulations to those laws, and numerous instructions notes issued by National Treasury. This fragmentation has had practical and ethical consequences. It has led to poor adherence to the rules and confusion resulting from the large number of legal instruments containing different and sometimes inconsistent obligations. This resulted in inefficiency and over-spending, and the complexity of the processes and obligations made it difficult to monitor and so easy to abuse. 11. The Zondo Commission report described this fragmentation – what Judge Zondo saw as 'difficulties in interpreting the legislative mosaic' – as an 'intractable problem'.	Noted, however, this is a constitutional requirement as per Section 216 to ensure uniform norms and standards to mitigate fragmentation including the issuance of numerous instruction even though regulatory in nature, in the procurement system. Therefore, the development of the regulations by the Minister does not mean that the public would not be afforded an opportunity to make comments. Regulations would be published for comments. Further, we have proposed that even binding instructions by the PPO or the provincial treasuries should be published for comments. There will be full transparency. 11)-14) Before making a regulation, the Minister must publish— (a) a draft of the regulation. (b) a statement explaining the need for and the intended operation of the regulation. (c) a statement of the expected impact of the regulation; and		See response on fragmentation above

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		12. Despite its recognition of the problem, the structure of the Bill risks recreating that same fragmentation by creating a procurement system governed by regulation and instruction. 13. There are two main problems with this: a. In respect of regulations, it abdicates primary law-making power to the executive, which contradicts the principles of representative and participative democracy; and b. In respect, primarily, of instructions, it is not practical to have so many responsibilities conferred on the Minister and the PPO as it will create that problematic fragmentation we have now and the PPO is not being capacitated to take on this workload. 14. In leaving so much to regulation, the Bill fails to **establish** a procurement system. Regulations will design and establish procurement methods; the processes for bid specification, invitation, submission, opening, evaluation, adjudication and award of bids; the bid committee system; the disclosure of procurement information and the use of technology. These are some of the most fundamental components of procurement. 15. The fundamentals of a procurement system must be set out in legislation. This ensures that the design of the system is subject to parliamentary consideration and public participation. It also ensures that the system is stable and not subject to political pressures or policy whims; it is far easier to change processes governed by regulation than to amend statutory processes. 16. As Parliament, you have the primary constitutional obligation to make law. There is multi-party deliberation in the parliamentary process and it must involve meaningful public participation. This ensures that all voices are heard and considered and that lawmakers are able to learn from experts and realworld experience of the issues being considered. Denying the public the opportunity to participate in the	(d) a notice inviting submissions in relation to the regulation and stating, the form and way submissions are to be made. The Minister must submit regulations to be made to Parliament for parliamentary scrutiny at least 30 days before their promulgation. 12)/(a) With each regulation, the Minister must publish a consultation report. (b) A consultation report must include— (i) a general account of the issues raised in the submissions made during the consultation; and (ii) a response to the issue		

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		substantive design of the procurement system is anti-democratic. 17. Regulations and other subordinate legislation clearly have their place in law. But they must not be used as substitutes for primary legislation; they should be used to provide guidance on the implementation of that primary legislation. 18. An additional concern is that, because of the significant decision-making left to regulations, it is impossible to understand how the Bill will work in practice in the absence of those regulations. Members of Parliament and of the public are therefore not able to truly understand the impact of the Bill which means that any deliberations or submissions are made half-blind. 19. On the practical level, leaving so much to regulation and instruction – by the Minister, the PPO and provincial treasures – risks creating a new proliferation of subordinate legislation. 20. We have seen that Treasury issues a high number of instructions, and if this is allowed to continue, the confusion and inconsistencies that exist in our present system will be recreated. 21. Provincial treasuries are empowered to issue binding instructions for procuring entities within their province as long as they are not inconsistent with National Treasury instructions. This means similar procuring entities in different provinces may have different obligations which could cause confusion and an inconsistency in standards. 22. National Treasury justified this system on the need for flexibility. They said that empowering the Minister to regulate procurement methods and systems ensures that appropriate methods and processes can be designed for the vastly different types of goods and services that need to be procured. This flexibility is overblown, and does not represent international best practice. 23. International best practice is that methods and procedures for procurement be included in legislation rather than subordinate legislation. The United Nations Commission on International Trade Law (UNCITRAL) prepared a model procurement in law in 2011. This model law provides guidance on how procurement should be statutorily regulated. 24. For example, Article 27 concerns methods of procurement and states:	Clause 7 provides that accounting officers/ authorities make decisions. Furthermore, this Bill will repeal the current issued instructions and issue uniform norms and standards through regulations and instructions where necessary to ensure consistency in the implementation of the procurement standards. The issues that are covered in some of the comments referencing procurement procedures from other jurisdictions, such as UNCITRAL law, including Open Contracting, are technical procurement issues that would be covered through regulations as		The issues covered by UNCITRAL should find

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		1. The procuring entity may conduct procurement by means of: *a) Open tendering;* *b) Restricted tendering;* *c) Request of quotations;* *d) Request for proposals without negotiation;* *e) Two-state tendering;* *f) Request for proposals with dialogue;* *g) Request for proposals with consecutive negotiations;* *h) Competitive negotiations;* *i) Electronic reverse auction; and* *j) Single-source procurement.* 25. The following article states that open tendering is the default, and that the use of any other method must be justified. 26. The model law then sets out in detail the specific circumstances under which another method of procurement can be used, and provides comprehensive guidelines and requires that any use of those other methods be justified. 27. For example, Article 32 concerns the 'Conditions for use of a framework agreement procedure'. It states: *1. A procuring entity may engage in a framework agreement procedure in accordance with chapter VII of this Law where it determines that:* *a. The need for the subject matter of the procurement is expected to arise on an indefinite or repeated basis during a given period of time; or* *b. By virtue of the nature of the subject matter of the procurement, the need for that subject matter may arise on an urgent basis during a given period of time.* *2. The procuring entity shall include in the record required under article 25 of this Law a statement of the reasons and circumstances upon which it relied to justify the use of a framework agreement procedure and the type of framework agreement selected.* 28. The model law also provides guidance on the language to be used and information to be included in bid documents. For example, Article 10(4) states: *To the extent practicable, the description of the subject matter of the procurement shall be objective, functional and generic. It shall set out the relevant technical, quality and performance characteristics of that subject matter. There shall be no requirement for or reference to a particular trademark or trade name, patent, design or type, specific origin or producer* *unless there is no sufficiently precise or intelligible way of describing the characteristics of the subject matter of the*	provided for in clauses 18 and 58 of the Bill. The notion that by applying the preferential procurement and that alone increases the opportunity for corruption is inaccurate. Further, the concept of value for money should not be limited to the best price - value for money should also have eyes for the achievement of government socio-economic objectives and other policy imperatives. The Bill in its current form does address issues related to the integrity of the procurement system as outlined in chapter 3 and other parts of the Bill. This includes recommendations of Judge Zondo. 5. Issues relating to the fight against corruption and anti-corruption measures need a collaboration with relevant government institutions and law enforcement agencies. The Bill with all its provisions on integrity of the procurement system and anti-corruption measures and transparency may not be the only instrument through which to combat corruption. Regarding the proposed anti-corruption agency, our view is that such an agency is best placed within the departments in the justice cluster. The examples from other jurisdictions are appreciated regarding the role of NGOs and other similar structures		principles-based expression in statute. This is essential to legal certainty, effective adjudication of disputes, and ensuring guardrails against abuse. There is no reason, for instance, why the Bill can't assert that open tendering is the default method.

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		procurement and provided that words such as "or equivalent" are included. 29. It also includes an example of a provision to regulate preferential procurement. Article 11, titled 'Rules concerning evaluation criteria and procedures', sets out the criteria that may be used by procuring entities. Subsection 3(b) provides the detail on the nature of the preferential criteria that may be considered by procurement officials, and then refers only the 'margin of preference' to regulations. In addition to the criteria set out in paragraph 2 of this article, the evaluation criteria may include: … A margin of preference for the benefit of domestic suppliers or contractors or for domestically produced goods, or any other preference, if authorized or required by the procurement regulations or other provisions of law of this State. The margin of preference shall be calculated in accordance with the procurement regulations. 30. The model law is instructive in understanding the level of detail required in legislation. For example, Article 14 address 'Rules concerning the manner, place, and deadline for presenting applications to pre-quality or applications for pre-selection or for presenting submissions', and states that If the procuring entity issues a clarification or modification of the prequalification, pre- selection or solicitation documents, it shall, prior to the applicable deadline for presenting applications to pre-qualify or for preselection or for presenting submissions, extend the deadline if necessary or as required under paragraph 3 of article 15 of this Law in order to afford suppliers or contractors sufficient time to take the clarification or modification into account in their applications or submissions. 31. The International Monetary Fund assessed the South African Bill in June 2023 and noted the failures of the Bill to firmly establish policy in the legislation. It stated that: *A comparison with the UNCITRAL model procurement law suggests that the bill leaves many important procurement areas to be specified by regulation such as, the definition of procurement methods (including for preferential procurement) and circumstances for use, and the standardization of transparency standards among other areas covered in the general provisions. This risks exposing the procurement system to excessive regulatory discretion and insufficient public scrutiny of changes in key areas.* 32. In summary, leaving so much fundamental decision-making and regulation to the Minister, and national and provincial	to monitor compliance by state institutions on procurement and accountability, however we are not informed of the successes of those structures in the countries referenced in this comment or even that we are fighting the same battles. Establishing a number of structures to monitor and combat corruption in procurement is not equal to successes thereof.		The contention is that the Bill does not do enough to address issues of corruption. International best practice recommendations regarding structures are generally developed in light of widespread experience, and cannot be simply dismissed by the assertion that AmaBhungane have not submitted evidence of efficacy.

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		treasuries risks creating a system that is unstable and unclear, and which is liable to ad-hoc change based on prevailing political priorities. 33. The Bill's failure to provide the necessary detail to provide practical guidance to procuring officials and firmly establish the policy underpinning procurement in South Africa renders it fundamentally inappropriate to serve as the 'single framework' to regulate public procurement. It requires significant redrafting. 34. The last concern with the excessive responsibility assigned to the PPO is capacity. National Treasury is extremely under-staffed and there is no commitment to increase its capacity from a resource and expertise perspective. If the Bill seeks to improve the existing system, it is illogical to assign significant decision-making power to an under-capacitated entity. With so much required from the PPO the likelihood of achieving a stable, efficient and effective system is low.			
AmaBhungane	General	**Policy Direction** 35. The Bill fails to address how procuring entities should balance the – sometimes competing – requirements of a procurement system in section 217 of the Constitution. This section requires that procurement take place through a system that is fair, equitable, transparent, competitive and cost-effective. 36. Judge Zondo emphasised the importance of value-for-money in public procurement. He stated: *the failure to identify the primary intention of the Constitution is unhelpful and it has negative repercussions when this delicate and complex choice has to be made, by default, by the procuring official … the primary national interest is best served when the government derives the maximum value- for-money in the procurement process and procurement officials should be so advised.* 37. This also reflects the focus on value-for-money in the National Development Plan. In the chapter on Building a Development State, the NDP states: *Ensure procurement systems deliver value for money. The state's ability to purchase what it needs on time at the right quality and for the right price is central to its ability to deliver on its priorities. Public-sector procurement expenditure also needs to be used to drive national priorities such as localisation and economic transformation. Procurement systems tend to focus on procedural compliance rather than value for money, and place an* *excessive burden on weak support functions.*	Section 195(1) of the Constitution (references in the Preamble) stipulates that public administration must be governed by among others by the promotion of efficient, economic, and effective use of resources. The Bill is premised on sections 195, 216 and 217 of the Constitution – see the Preamble of the Bill. Fairness and transparency are Constitutional provisions and form part of the requirements of the Bill		That the Constitution requires this does not address the issue that the Bill does not follow through with appropriate mechanisms and guardrails. The contrary holds, the Bill must establish mechanisms and guardrails implementing constitutional requirements.

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		The plan focuses on proposals which will help the country design a procurement system that is better able to deliver value for money, while minimising the scope for corruption. 38. However, there is nothing in the Bill to stipulate that procuring entities' decisions must be informed by the need for cost-effectiveness and does not include any guidance on when other priorities – such as fairness and the advancement of certain categories of persons. 39. The Bill deals with preferential procurement in one provision, section 17. This provision defers all substantive decision-making to the Minister. It is not clear that this deference to regulation will meet the constitutional requirement that national legislation be implemented to give effect to preferential procurement.			
AmaBhungane	General	Combatting Corruption 40. It is not controversial to say that procurement is seen as a vehicle to wealth accumulation and that the existing system has been unable to prevent the rampant corruption. 41. About the existing system, Judge Zondo highlighted the lack of accountability. *The absence of accountability makes the system unworkable, corrupts those who operate within that system and establishes and embeds criminal relationships involving commercial entities and public officials and, implicates political party funding.* 42. There are some aspects of the integrity and accountability provisions in the Bill that could be strengthened through textual amendment: a. The category of automatically excluded persons in section 13(1)(b) should be expanded to include office bearers of political parties. b. In section 16, where the PPO is empowered to set periods of debarment, there should be a statutory limit. 43. However, there is a far more fundamental and fatal weakness in the Bill's ability to create a truly accountable and corruption-resilient procurement system – that the PPO is given all oversight, monitoring and accountability responsibility. This means there is no independent accountability mechanism and it is unclear that the PPO will be able to conduct these responsibilities effectively given that it is already severely under-capacitated. 44. Judge Zondo recommended the 'establishment of a single, multifunctional, properly resourced and independent anti-	The fight against corruption and anti-corruption measures need collaboration with relevant government institutions and law enforcement agencies. Noted see response above		

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		corruption authority with a mandate to confront the abuses inherent in the present system'.7 Zondo emphasised that independence requires that the body be 'free from political oversight' and that it be 'independent in the full and untrammeled sense, i.e. that they are subject only to the Constitution and the Law'.8 This then requires that the officials responsible for monitoring and accountability functions are not appointed through government, and that the accountability body be adequately staffed. 45. The system of monitoring, oversight and accountability in the Bill is not significantly different from the existing system. Judge Zondo identified two primary accountability mechanisms in the existing system – both of which were ineffectual. Accounting officers of procuring entities provided internal oversight, which Zondo identified as being problematic because of the lack of independence. The Auditor General of South Africa did provide some external monitoring, but as Judge Zondo highlighted, the fact that it was unable to hold corrupt officials and departments to account brought into questions its suitability as a true accountability mechanism. 46. The depth and breadth of procurement corruption uncovered in the Zondo Commission is proof of the inability of the system to prevent, identify, and hold accountable instances of corruption. 47. At a procuring entity level, accountability is enforced by the accounting officers. Section 21 of the Bill obliges accounting officers to take various measures to 'prevent abuse of procurement system.' While these obligations are vital, and must be kept in legislation regulating procurement, they are not sufficient. The accounting officers must have the powers, capacity and responsibility to monitor non-compliance within their own entity. 48. The problem is at the next level up. The Bill's next layer of accountability is the PPO, which is tasked with monitoring and oversight under sections 5, 50 and 55. 49. Section 5(g) requires the PPO to 'monitor and oversee the implementation of this Act'. This would include overseeing the accounting officers' performance in fulfilling their obligations under section 21. 50. Section 50, titled 'Investigation by Public Procurement Office' states: *(1) The Public Procurement Office may, if requested by the relevant treasury, a procuring institution or on its own initiative,*	The objective of the Tribunal is not a corruption fighting structure but established as an alternative dispute mechanism within the procurement system. A misunderstanding it seems, the Bill in its current form, states clause 5 is a provision for oversight and monitoring, while clause 50 refers to a debarment review decision and clause 55 outlines the process to be followed during a stand still process when there is a review.		The relevant sections are now 35 and 56. AmaBhungane's concerns about these sections and the general accountability mechanisms provided by the Bill stand.

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		investigate any alleged noncompliance with this Act other than an alleged commission of an offence, referred to in section 55. *(2) The Public Procurement Office must, if an investigation in terms of subsection (1) indicates—* *a. non-compliance with this Act—* *i. instruct the procuring institution to take steps to stop or prevent the non-compliance; and* *ii. direct that appropriate action be taken against the official responsible for the non-compliance; and* *b. an alleged commission of an offence, referred to in section 55, refer the matter to the relevant law enforcement body.* *(3) Where a procuring institution is required to act in terms of subsection (2), the procuring institution must, as required by the Public Procurement Office, report on the progress made.* 51. Section 55 creates criminal offences for knowingly providing false information; interfering with or exerting undue influence over a procurement official; opening any bid without authorisation; conniving or colluding to commit corrupt, fraudulent, collusive, coercive or obstructive acts; and causing the loss of public assets or funds due to willful or grossly negligent conduct in implementing the Act. 52. The PPO plays the central role in identifying any offences under section 55. Although it is required to refer any alleged commission of these offences to the relevant law enforcement body it identifies through its investigations, the lack of automatic access to procurement information for law enforcement means that the PPO is the only body that is statutorily empowered to conduct real monitoring to identify those offences. 53. Section 29 stipulates that information can only be made available to law enforcement 'at the initiative of the Public Procurement Office, the relevant provincial treasury or the request of an authorised official of the entity' and when the PPO or provincial treasury 'reasonably believes such information is required to investigate suspected unlawful activity or is in the public interest to provide such information'. 54. The PPO therefore acts as a gatekeeper to access to procurement information for law enforcement. It is illogical to restrict law enforcement access to information that may contain evidence of criminal offences. 55. The accountability mechanisms in the Bill are therefore: a. Accounting officers of procuring entities; b. The PPO; c. Law enforcement.			

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		56. This hierarchy of accountability failed to prevent the rampant corruption we have seen within our existing system. It is inconceivable that the drafters have not learnt from these failures to implement a stronger and more independent monitoring and accountability system. 57. The Bill does establish a Tribunal. However, the concern with the Tribunal established in the Bill is its lack of independence, as all members are appointed by the Minister. This disregards Judge Zondo's warning to keep appointments of accountability officials out of the hands of government. 58. There are numerous international examples the drafters could have drawn on to introduce an innovative approach to combat corruption in procurement. 59. For example: a. The Netherlands has a procurement-specific extra-judicial review body, the Commission of Procurement Experts. This is an impartial and independent body which, although it cannot issue binding judgments, has been designed to address procurement-related complaints speedily and effectively. b. Colombia has created formalised citizen oversight mechanisms called *Veedurius Ciudadanas* which are informed of all public procurement processes and can chose whether or not to actively participate in that process. The country also has a Procurement Observatory which reviews and advises procuring entities in their design of tender documents and how to ensure competitive processes. c. Mexico has a system of social witnesses to all public procurement processes above a certain threshold. These social witnesses are NGOs and individuals who have applied for this status and been appointed by the Ministry of Public Administration through a public tender process. The Ministry evaluates the witnesses' performance and maintains a database of suitable witnesses. d. Brazil has a Public Spending Observatory which is responsible for realtime identification of and sanctioning of corruption in procurement. The Observatory facilitates the cross-checking of government databases to identify red flags which are then investigated. e. Peru and Germany have created specialized procurement tribunals to adjudicate on pre-award and contractual disputes. f. Argentina has a National Procurement Office and an Anti-corruption Office. Although part of the Department of Justice, the Anti-corruption Office is able to intervene in procurement processes and identify problems in specific processes and in the system as a whole. The Anticorruption Office can then work			

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		with the Procurement Office to strengthen the operation of the system. g. The OECD recommends that 'to ensure an impartial review, an independent body with the power to enforces its decisions should rule on procurement decisions and provide adequate remedies'. 60. These examples illustrate the possibility of innovative approaches to government and external monitoring and accountability. The Bill's lack of imagination in designing accountability mechanisms is disappointing given the clear evidence of the vulnerability of procurement to corruption. 61. Another concern with locating all accountability mechanisms within the PPO is the lack of expertise National Treasury officials have in forensic investigations of criminal conduct. Regulation of procurement requires a vastly different skill set to identifying and investigating corrupt procurement practices. 62. Given the severe under-resourcing of the department, it is unlikely that there will be sufficient experts within the PPO to conduct the type of monitoring that will be required across all procuring entities. 63. In his conclusion on the lack of accountability in procurement, Judge Zondo stressed that the ![a]bsence of a robust, detailed and intrusive monitoring of the system undoubtably facilitates corruption and inefficiency and helps to mask abuse'. He added that it was concerning that "the legislative design makes no proper provision for an effective monitoring function". 64. It is even more concerning that a new, post-State Capture and post-Zondo legislative design still does not provide for effective monitoring. 65. Despite the inclusion of transparency and access clauses in the Bill, there are still some significant weaknesses in the transparency system it creates. These weaknesses are not unsurmountable, and can be addressed through the addition of clauses and amendment of existing ones. 66. Section 27 concerns disclosure of procurement information. It obliges the PPO to determine the requirements for disclosure and sets out the minimum categories of information that must be covered in the PPO's instruction.			

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		67. Subsections 2(iii) and (iv) are welcome in that they stipulate that all company information – including beneficial ownership – for every bidder and the 'date, reasons for and value of an award' be disclosed. 68. However, the range of information that should be disclosed should not be limited to the bid and award phases. Although subsection 2(v) does require that the *contract* be disclosed, there is additional information that should be included. 69. The Open Contracting Partnership – the global non-profit organisation that established and advocates for a global norm of open and transparent procurement systems – recommends that information from all five phases of procurement be disclosed. The phases are: planning; tender; award; contract and implementation. 70. Section 27 should therefore be amended to include the requirement to disclose annual procurement plans and details about the financial and physical implementation of the contract. 71. The most concerning aspect of section 27 is subsection 3 which excludes from the disclosure obligations 'confidential information'. The type of information included within the category of confidential information is impermissibly broad. 72. The Open Contracting Partnership has highlighted the dangers of an overreliance on 'commercial confidentiality' within procurement legislation. It has commented that "[v]ague confidentiality provisions also have a chilling effect on public disclosure where public authorities tend to redact information by default which harms markets, service delivery, and public trust." 73. In a 'mythbusting' document, the Open Contracting Partnership reported on its research in 20 countries which interviewed 70 experts. The research demonstrated that there were virtually "no examples of commercial harm to companies from disclosing contracting information and a multitude of benefits, including improved competition and public probity". It made five main recommendations on the disclosure of commercial information: "disclosure should involve minimal redaction", "all information that is not legitimately sensitive should be disclosed unredacted", "a clear and detailed public justification for redactions should be provided", "it should be stated how long/what period of time the information is considered sensitive", and "withheld information should be disclosed the moment it ceases to be sensitive".			

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		74. Section 27(3) of the Bill demonstrates an overly deferential approach to commercial confidentiality, and serves to dramatically curtail the transparency commitments in the legislation. 75. Section 27(2)(b)(ii)(cc) does state that only confidential information be severed from disclosed documents. However, we recommend that this be strengthened by adding the clarifier 'legitimately sensitive', so that it reads: 'that the information referred to in paragraph (a) be published as quickly as possible … in a format that … if it contains legitimately sensitive confidential information, only that information is severed.' 76. Section 27(3) should also include a 'public interest override' to permit the disclose of even legitimately sensitive commercial information if doing so is in the public interest. 77. Section 27 should also include a requirement that the information that had been redacted be disclosed as soon as it is no longer 'legitimately sensitive'. 78. Section 27's deference to the Protection of Personal Information Act (POPIA) is also problematic. POPIA has an extremely broad definition of 'personal information', and conferring confidentiality on all information defined as 'personal' under POPIA for the purposes of procurement transparency is both illegitimate and unnecessary. 79. The Open Contracting Partnership has 'busted the myth' that because there is personal data in procurement documents they cannot be disclosed. It stressed that '[d]isclosing some personal data is important for transparency in the procurement process and to prevent fraud'. 80. The Bill should reflect a weighing up of the importance of transparency in procurement and protection of personal information. As the Open Contracting Partnership explained, 'certain personal data can be disclosed without endangering people's privacy and safety'. The Bill should not confer blanket confidentiality on all personal information as this does not serve the interests of procurement transparency and serves to privilege the protection of personal information that is not 'legitimately sensitive' in the procurement sense. 81. Section 26 concerns measures for the public, media and civil society to access procurement processes, scrutinise procurement and – for high-value or complex procurement –			

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		monitor it. The existence of this provision is welcome, but its structure threatens to water-down its benefits. 82. The PPO should not be the entity responsible for determining these measures. This is another example of a provision that should establish the measures within the legislation or, at the minimum, set out clear guidelines for the PPO's determination of those measures. 83. The limitation of the ability to monitor procurement to 'high-value or complex procurement' should be removed. The wording of the provision is unclear, but it could be read as meaning that monitoring these types of procurement is necessary because it is only these types of procurement that 'entail significant risks of mismanagement and corruption'. It is incontrovertible that low-value procurement is vulnerable to corruption, and restricting enhanced monitoring to high-value and complex forms of procurement risks making low-value procurement being seen as an even more appealing route to corrupt wealth accumulation. 84. We accept that there is the risk of abuse of the civil society monitoring system by unscrupulous suppliers or interest groups. However, the solution to this is not to permit limitations of access but rather to provide strong guardrails in the legislation to prevent any abuse. 85. Section 26 should therefore set out the way in which this access, scrutiny and monitoring should be regulated, and very clear and narrow situations in which this access could be restricted. It cannot be up to the PPO to establish the boundaries for this access. 86. At the heart of the Bill's weakness is its failure to confront the realities and lessons of the State Capture era and beyond - for instance the shameful abuse of emergency procurement during Covid-19. 87. The State is seen by elites of every hue as a soft target and the primary vehicle for self-enrichment (whether or not this is dressed up as 'empowerment') and with little regard for impact of such an approach on the objective of a capable State. 88. That would suggest that the Bill should do its utmost to limit inappropriate discretion and provide clear policy choices and rules. Instead, Treasury has presented a flawed Bill - particularly in regard to section 17 which provides for a Preferential Procurement regime that is chaotically permissive - presumably			

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		because confronting elite accumulation is politically unpalatable. 89. What was evident from much of the discussion in Parliament is how preoccupied many MP were with the size of 'empowerment premium' and who gets to benefit from it (including the family members of MPs) without any consideration as to how the premium is allocated (which is the source of much clientilism, patronage, corruption and disfunction) or paid, which is mostly by the majority in the form of poor delivery, excessive prices and corruption. 90. The poor and the State that should serve them deserve better.			
AmaBhungane	General	**Annexure B** **SUPPLEMENTARY SUBMISSIONS ON PUBLIC PROCUREMENT BILL 2023** 1. As we set out in detail in our primary submissions, we believe that the Bill is in need of wholesale revision. We maintain that these fundamental problems may render the Bill unconstitutional, and establish an unworkable and vulnerable procurement system which make it open to legal challenge. 2. We stand by the content of our primary submissions (attached to these supplementary submissions for ease of reference). 3. However, in the spirit of constructive engagement, we make the following recommendations. These submissions primarily support those made by various other stakeholders which seek to make small but impactful changes to the Bill.	Noted.		
AmaBhungane	General	Transparency and Access 4. Access to and transparency of procurement information is vital to ensure the procurement system operates effectively, efficiently and without abuse. 5. The way sections 26 and 27 frame access and transparency respectively risks creating a secrecy regime rather than a transparency regime. Monitoring by state and non-state actors must be facilitated and limitations of access or disclosure of information must be expressly limited to extreme circumstances. 6. We believe that there are a number of small but impactful changes that can be made to the Bill which will greatly strengthen the transparency regime it creates.	See clause 30 of the Bill [B 18B-2023} This comment seems to be on the previous version.		AmaBhungane's concerns about the transparency and access provisions of the Bill remain and have not been addressed by this response.

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		7. We support COSATU/SACTWU and PARI's recommendations that section 26 and 27 be swapped around. This ensures that the substantive transparency clause comes before any limitations or contractions of the rights to access and transparency are seen as deviations from the broad right. 8. In respect of limitations to the ability of the public to access any processes or information we make the following recommendations: a. In respect of the present section 26, we support COSATU/SACTWU, PARI and PSAM's recommendations that the words "and observation of" be added to the text of the present section 26; that the wording be simplified to remove any confusion over what may be limited to "high-value or complex procurement"; and that an express subsection be added to confirm that this provision does not detract from any other right to access. "26. Access to and observation of procurement processes 1) The Public Procurement Office must determine, by instruction, measures for the public, civil society and the media to access, scrutinise and monitor procurement processes and systems**.[— (a) access procurement processes; (b) scrutinise procurement; and (c) monitor high-value or complex procurement that entail significant risks of mismanagement and corruption**.] … 3) The instruction referred to in subsection (1) provides rights to access and information that are additional to and not in substitution or derogation of rights to access and information advanced in other provisions of this Act or any other law." b. In respect of the present section 27, we strongly recommend that the exclusion of "confidential information" be limited, to only 'legitimately sensitive' information, and that a public interest override be added. "27. Disclosure of procurement information … (2)(b) that the information referred to in paragraph (a) be published as quickly as possible— (i) on an easily accessible central online portal that is publicly available free of charge; and (ii) (ii) in a format that— (aa) enables tracking of information relevant to the entire process of a specific procurement;			

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		(bb) is electronic and interoperable; and (cc) if it contains legitimately sensitive confidential information, only that information is severed. (4) The Public Procurement Office must, by instruction, establish procedures for the disclosure of information where, despite any other provisions of this Act, the public interest in the disclosure of the record clearly outweighs the harm contemplated in the provision in question. (5) The instruction referred to in subsection (1) provides rights to access and information that are additional to and not in substitution or derogation of rights to access and information advanced in other provisions of this Act or any other law.”			
AmaBhungane	Clause 17	**Preferential Procurement in Section 17** 9. Section 217(3) of the Constitution states that “national legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.” Subsection (2) permits the implementation of a procurement policy that provides for “categories of preference in the allocation of contracts [and] the protection or advancement or persons, or categories of persons, disadvantaged by unfair discrimination”. The Constitution therefore requires that a framework for preferential procurement be established in ***national legislation***. 10. In the oral hearings on the public submissions it was very clear that members of the public, labour, academics and others are deeply concerned about the weakness of the Bill’s preferential procurement provision. 11. This was also echoed by many members of the Committee. 12. It is fundamental that any provisions designed to give effect to the transformative objectives of the Constitution be clearly formulated so as to ensure that imperative is balanced with the others of fairness, transparency, competitiveness and cost-effectiveness.	It is correct that section 217(3) of the Constitution states that national legislation must prescribe a framework within which the policy referred in subsection (2) must be implemented. The term "national legislation" includes subordinate legislation, according to section 239 of the Constitution.		There may still be constitutional concerns about the extent to which the national legislature is transferring its powers to the executive under this Bill.
AmaBhungane	General	**Conclusion** 13. In summary, we maintain our belief that the Bill has significant weaknesses which require substantial redrafting. We reserve any right to challenge (legally or otherwise) an enacted Act. 14. We have endorsed COSATU/SACTWU and PARI’s textual amendment recommendations in respect of: a. emphasizing that sections 26 and 27 of the Bill create a transparency regime rather than a secrecy one. 15. We have made our own recommendations on textual amendments to sections 26 and 27 to introduce a “public	Noted, see previous response.		

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		interest override" for access and disclosure and to narrow the exclusions and protection given to commercial information.			
Health Justice Initiative	General	1. Thank you for the opportunity to make a written submission on the Public Procurement Bill [B18B – 2023] (the Bill). 2. The Health Justice Initiative (HJI) is a dedicated public health and law initiative addressing the intersection between racial and gender inequality, with a special focus on transparency, fair pricing and addressing Intellectual Property (IP) and other forms of patent and pricing barriers, that prevent timely and affordable access to life saving diagnostics, treatment, and vaccines for everyone. We often draw on the expertise of researchers in law, public policy, economics, and public health, as well as on universities and scientific experts in and outside of South and Africa. 3. The HJI is a supporter of a unified health care system - and to that end, South Africa's commitment to Universal Health Coverage (UHC) which depends heavily on open, transparent and accountable procurement processes.	Introduction is noted.		
Health Justice Initiative	General	4. We believe that open and transparent procurement processes, and access to information, are key aspects and principles of our democracy that must be upheld in all legislation too. 5. A key health rights and health access issue for HJI is whether a rich and poor person can access the same life-saving medicine, at the same time, for the same condition, at a price that is affordable and transparent using the state's negotiating power.	General comment is noted, no proposed amendment for the Bill.		
Health Justice Initiative	General	6. As you are well aware, the public health sector serves about 85% of people living here, and under the proposed NHI Fund, this may increase – of a population of approximately 61 million people, only about 9 million people are beneficiaries of private Medical Schemes, including government employees – meaning that the majority of people living here already depend on the states procuring power – itself considerable.	General comment is noted, no proposed amendment for the Bill.		
Health Justice Initiative	General	7. Unfortunately, from the budget information available to the public, we cannot disaggregate the actual 'medicine or health products' spend within the overall health budget – but the latter, for 2023/2024 is considerable – at ZAR 62 billion (ZAR 58 billion is made up of Transfers and Subsidies to provincial Health Departments). a. If one considers spending at the Programme level it reveals that the largest spending occurs within 3. Communicable and Non-Communicable Diseases and 5. Health Systems Programmes – with the former projected to spend ZAR 25.3 billion and the latter, ZAR 23.9 billion.	General comment is noted, no proposed amendment for the Bill.		

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
Health Justice Initiative	General	8. In this short submission, we want to draw the Committees attention to the example of COVID vaccine procurement in South Africa, that took place under a Disaster Declaration, and in a global pandemic, amounting to millions of rands. We share some of the concerns emanating from that secretive and one-sided procurement, now widely reported on too, and even acknowledged by the Health Department. a. This was in a time of supply scarcity, where the state was bullied by non-state actors into secrecy and one sided procurement and contractual terms. This should never happen again – and additional safeguards in this Bill, could prevent that.	General comment is noted, no proposed amendment for the Bill. Please refer to the response below regarding measures for transparency that are provided for in the Bill.		
Health Justice Initiative	General	9. The HJI Submission draws on the following, and we request the contents of the following to be incorporated into our submission: a. HJI's September 2023 Submission on the NHI-B-Bill. Please also refer to pages 3 to 5 of that submission, it addresses the issue of health procurement under NHI. b. HJI's October 2022 public analysis of the NHI Bill entitled, 'South Africa's National Health Insurance Bill and the Future of Medicine Selection, Pricing and Procurement – Some Critical Questions for Affordable Patient Access', National Health Insurance Series: Issue Paper 1. 1 Please refer to pages 25 to 33 of that submission, it addresses health procurement. c. The contents and analysis of several COVID related vaccine contracts due to legal action initiated by HJI using PAIA in 2022 - which disclosure government resisted and refused until a Court ordered the unredacted disclosure in 2023, in a ground breaking case and Judgment of the Gauteng High Court [Health Justice Initiative v The Minister of Health and Information Officer, National Department of Health (Case no 10009/22); 17 August 2023]. i. The contracts concerned substantial public funds, and the procurement and contracting process had been marred by allegations that the government procured vaccines at differential, comparatively inflated prices, and that the agreements contained onerous and inequitable terms, including broad indemnification clauses, export restrictions and non-refundability clauses. Opening them through a Court mandated process was significant for the public interest. ii. The case and judgment were widely reported both locally and globally. i. The legally mandated disclosure led to shocking and scandalous revelations about the ''bullying'' terms and conditions included in health procurement contracts for South Africa, which amounted to hundreds of millions of rands. It also	It should be noted that the NHI Bill in clause 38(7) states that the provisions of this section are subject to public procurement laws and policies of the Republic that give effect to the provisions of section 217 of the Constitution, including the Preferential Procurement Policy Framework Act, 2000 (Act No. 5 of 2000), and the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003). Therefore, it is clear that the procurement processes that would be followed when procuring in terms of the NHI Bill would be consistent with those outlined in the Bill. Furthermore, clause 32 of the Bill makes provision for the Minister to prescribe "measures for the public, civil society and the media to access, scrutinise and monitor procurement processes," subject to the provisions provided for within the clause; and clause 33 makes provision for the Minister to prescribe the requirements for the disclosure of procurement information.		

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		gave a glimpse into the phenomenal negotiating power (one sided) of -in this case- the pharmaceutical industry. ii. So far, we are one of the few countries in the world to have had sight of the unredacted procurement contracts, where disclosure was ordered by a Court. Similar efforts are underway in other jurisdictions. iii. The case, judgment and analysis of the contracts was also extensively covered in local and international media outlets. A Geneva Heath File interview explains the rationale of the case. A list of media reports' is attached for your information. iii. More importantly, when the four contracts were disclosed, the HJI, with other groups, reviewed the contracts and issued a Multi-stakeholder Joint Analysis and with that, shared the contracts publicly. The analysis was released in early September 2023, and found that, inter alia: In all four Contracts/Agreements, the pernicious nature of pharmaceutical bullying and GAVI's heavy-handedness are evident: the terms and conditions are overwhelmingly one-sided and favour multinational corporations. This placed governments in the Global South, and in turn, the people living in these countries, in an unenviable position of having to secure scarce supplies in a global emergency (2020-2022) with unusually hefty demands and conditions, including **secrecy, a lack of transparency, and very little leverage against late or no delivery of supplies or inflated prices resulting in gross profiteering. Moreover, SA's sovereignty was bartered for scarce supplies. This should never happen again. It is unconscionable, imperial, and unethical**. [emphasis added]	It should be noted that there are other stakeholders that have a role to play with regards regulating competition and fair market conditions, patents etc. namely the Competition Act, and the Bill is not repealing those powers as they are not within the mandate of the Bill, and thus will not be regulated through the Bill. Instead, all procuring institutions have to consider all other applicable laws when contracting for goods and services in terms of the Bill, and comply with the provisions of those laws.		
Health Justice Initiative	General	10. The key elements of these one-sided vaccine procurement contracts which are of relevance to this submission relate to five key aspects – which we hope lawmakers will address in its deliberations on this Bill: a. Broad Non-Disclosure Agreements (NDAs) imposed on the SA government (Health Department, as the proxy); b. Broad secrecy clauses, especially on price; c. Secrecy and non-disclosure of the Contracting Parties details (the parties bizarrely alleged that even their legal name/address and details were confidential, in addition to the terms and conditions'. We note that the Court ruled otherwise and stated at Para 50: "…there is a public interest in the disclosure of the records". d. Indemnification provisions and demands without which supplies would not be released (Pfizer, J&J, Serum II); e. Provisions relating to undertakings extracted from the SA government to benefit third parties - enabling unfettered discretion on imports and exports, benefiting European	General comment is noted. Please refer to the response above regarding measures for transparency that are provided for in the Bill.		

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		customers and governments, not people in South Africa or Africa (J&J).			
Health Justice Initiative	General	11. The multi-stakeholder analysis referred to above, also found that (at page 3): …''the pernicious nature of pharmaceutical bullying and GAVI's heavy-handedness are evident: the terms and conditions are overwhelmingly one-sided and favour multinational corporations. That placed governments in the Global South, and in turn, the people living in these countries, in an unenviable position of having to secure scarce supplies in a global emergency (2020-2022) with unusually hefty demands and conditions, including secrecy, a lack of transparency, and very little leverage against late or no delivery of supplies or inflated prices resulting in gross profiteering. Moreover, SA's sovereignty was bartered for scarce supplies… The most egregious example of this in our review has been a multinational pharmaceutical company (J&J) trading scarce or very delayed supplies for extractionist terms and conditions that undermine national sovereignty. This was mainly to benefit their bottom line or patients in Northern countries first: in Europe, not Africa. This relates to approximately 30 million vaccines filled in East London by Aspen, BUT exported to Europe, while SA was facing the Delta wave and had no meaningful access to vaccines, affecting the national vaccination programme, in 2021). For the SII, it is also likely that SA overpaid compared to European countries by at least more than two and a half times! In the UK and EU, Astra Zeneca charged £2.17 and £2.15, respectively. The Contracts require SA to seek permission from said companies to divert or donate or sell doses which have already been paid for by the SA public, despite the benefit to other poorer countries or buyers. In particular, J&J, Pfizer, and COVAX did not commit themselves to supply volumes and dates making it increasingly difficult to plan and run a timely and proper vaccination programme. … this type of "take it or leave it" contracting signals a dangerous precedent for future pandemic readiness measures and systems, and [shows] why this level of bullying, secrecy, and lack of transparency has no place in any democracy. The lack of timely public access to these Contracts created mistrust and limited public accountability action towards these corporates during a global pandemic. It created opportunities for price variations and enabled these multinationals to negotiate on an unequal footing with Government, which defeats the purpose of signing a supply agreement. The point of a contractual purchase agreement is to have a minimum certainty for SA to order and purchase vaccines or medicines. These Contracts belie that purpose. And regrettably, this is not a once-off Covid-related modus of operating: At present, even more pharmaceutical corporations are insisting on Non-Disclosure Agreements (NDAs – with broad	General comment is noted. Please refer to the response above regarding measures for transparency that are provided for in the Bill.		

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		confidential information clauses) and including them more aggressively in supply agreements to suppress the disclosure of pricing and supply terms, particularly in negotiations covering monopoly products such as HIV medicines.'' Thus, HJI calls on law makers to ensure that this Bill outlaws the above worrying practices as in the next pandemic, we cannot have a repeat of the above.			
Health Justice Initiative	General	12. We appreciate that industrial policy is connected here, but procurement using public resources must be for the benefit of the public, not private companies, and it should prioritise the cheapest version of a medicine even if it is manufactured elsewhere. a. Preferential procurement for health products, will have to grapple with the reality that often preferential procurement – if possible – could limit manufacturers and supplies unintentionally, affecting the supply chain and medicine access, and also add to the financial health bill burden. b. In any event, our view is that health preferential procurement is not often feasible especially where generics or substitutable medicines are NOT available for use (again, because of patent periods, medicine registration submissions and clinical eligibility) – this does not preclude the state from considering other forms of incentives that could encourage a preference for local procurement where local production is possible (example: fund the research and commercialisation costs in full, or provide financial incentives for local production that result in a net reduction in the price of a medicine offered to the state, to enable price competitiveness).	The comment is noted. Clause 20 of the Bill makes provision for the Minister of Trade Industry and Competition to, in consultation with the Minister of Finance, designate a sector, sub-sector or industry or product in accordance with national development and industrial policies for local production and content, where only locally produced or manufactured goods meet the stipulated minimum threshold for local production and content, taking into account economic and other relevant factors". The proposals made regarding the incentives that can be considered to "encourage local procurement" can be submitted to the Minister of Trade Industry and Competition during the public consultation process that this Minister must comply with before any designation happens by that Minister.		
Health Justice Initiative	General	13. We also draw the Committees attention to the Rural Health Advocacy Project (RHAP) Report entitled Procurement and Audit Outcomes in the South African Health Sector: 5 a. The report sheds light on the critical gaps in South Africa's health sectors procurement and spending. b. It also offers valuable insights into the factors affecting audit outcomes, the potential challenges associated with procurement under the NHI Bill, institutional arrangements and the potential for reform through this Bill. 14. In relation to medicine selection,	Clause 3(1) of the Bill, read together with the definition of "procuring institution" in clause 1 of the Bill, outlines to which institutions the Bill applies, and therefore if the "NHI Health Products Procurement Unit" falls within any of the institutions		

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		procurement, pricing and access, while the provisions of the NHI B-Bill are confusing and at times unclear – it provides that in respect of medicines selected by the state under NHI, the Health Products Procurement Unit (the NHI B-Bill changed the name - originally called the ''Office of Health Procurement'') will procure medical products including medicines, on the advice of multiple Advisory Committees, including the advice of a NHI Benefits Advisory Committee and a NHI Health Care Benefits Pricing Committee (s 25 and 26). One imagines that the NHI Health Products Procurement Unit will be regarded as a ''procurement institution'' by the [Procurement] Bill.	listed under clause 3(1), then that office will be a procuring institution and the Bill's provisions will apply to the procurement processes that t will apply.		
Health Justice Initiative	General	In this submission, we recommend that: 15. The legislative process that shapes procurement has a vital opportunity – and Constitutional responsibility - to ensure that procurement under NHI is better managed, is fully transparent, includes minimum norms on ''open procurement'', even in health emergencies to avoid a repeat of the secrecy, bullying and one-sided terms that we saw during COVID. 16. But, we should add that even with procurement reform, if medicine pricing reform is not urgently attended too, the former could be not as affective: without - price benchmarking for medicines; passage of the Patent Amendment Act (which surprisingly has not yet been tabled in Parliament, despite Cabinet6 approving a new IP framework in 2018); a suit of policies to bring the high prices (often unjustified) of medicines down - the national fiscus often wastes and will waster valuable health resources (South Africa is overpaying for medicines when compared to certain middle income countries). This should not be news to lawmakers – it has been raised by the NPC and the Competition Commission7 previously. 17. Regrettably, government seems unable to address this glaring gap in our law for two decades now. Thus, there will be complex price demands in health products negotiations which this Bill will have to prepare itself for. 18. For this reason, the real and immediate intersection between health care and medicine access, health product and medicine pricing, IP reform, pharmaceutical sole supplier negotiating power, procurement processes, and procurement rules in South Africa, require greater consideration and could be partially addressed with additional safeguards in this Bill.	General comment is noted. Please refer to the response above regarding measures for transparency that are provided for in the Bill.		
Health Justice Initiative	General	19. So, while the Bill addresses emergency situations, it needs increased safeguards for same: a. Should there be another global pandemic or health emergency, during a state of disaster or state of emergency, it	General comment is noted. Please refer to the response above regarding measures for transparency that are provided for in the Bill.		

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		is imperative that even with emergency procurement, the basic principles of open procurement are not flouted, meaning that the legislative room for companies in the health industry and similar to dictate procurement that flouts the basic principles included in the Constitution – openness and transparency – should be dealt with in the Bill and not permitted. b. NDAs, secrecy on price and other terms including about contracting parties legal and address details, and bullying clauses on imports and exports should not be permitted.			
Health Justice Initiative	General	20. Health related procurement structures that are subject to fewer competitive bids because of patent monopolies and the lack of generic competition (often there is only one supplier, the Department of Health and its Essential medicines Division should provide historical medicine procurement data to the Committee in this regard) must be legally mandated and required under this Bill in no uncertain terms to be open, transparent in its dealings, accountable, so that general procurement terms and conditions, especially price, are publicly accessible. With respect, this does not flout the requirement for commercially sensitive information to be protected.	General comment is noted. Please refer to the response above regarding measures for transparency that are provided for in the Bill.		
Health Justice Initiative	General	21. Because the Bill intends to provide an overarching framework and norms for public procurement across all state departments –it should at least consider how it will include, protect and ensure now, and under the NHI: a. Specific measures to enable and promote public transparency related to medicine selection, procurement, and contracting processes. b. Improved transparency and mandated sharing of all deliberations of procurement institutions, officers and related advisory committees. c. That the public disclosure of any conflicts of interest between professional work, paid consultancies, and duties on respective Boards and Committees especially related to health products procurement is legally required and mandated, across all procurement related legislation. d. That broad NDAs and secrecy clauses are not permitted, nor the bartering of secrecy for scarce supplies. Given the scale of public resources being used for health procurement, and under the NHI, this is critical. It must be made clear that no private company, can enter or be in South Africa, and bid for a health tender, while it alone determines the terms, conditions, and price, whilst imposing broad NDAs that go against the public interest and our law. We welcome an opportunity to engage further on these issues should the Committee deem it necessary. Attached for your convenience, are various pdf versions of key documents referenced in this submission.	It is not within the mandate of the Bill to regulate transparency of the NHI and its broader processes. However, where procurement processes are engaged in by procuring institutions, then the provisions of the Bill regarding transparency in clauses 32 and 33 (Access to procurement processes and Disclosure of procurement information, respectively) will have to be complied with. It should be noted that there are other stakeholders that have a role to play with regards regulating competition and fair market conditions, patents etc. namely the Competition Act, and the Bill is not repealing those powers as they are not within the mandate of the Bill, and thus will not be regulated through the Bill.		

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			Instead, all procuring institutions have to consider all other applicable laws when contracting for goods and services in terms of the Bill, and comply with the provisions of those laws.		
Public Affairs Research Institute	General	Introduction 1. The Public Affairs Research Institute (PARI) welcomes the opportunity to contribute to the Select Committee on Finance's deliberations on the Public Procurement Bill. We also request the opportunity to address this submission to the Committee in person. 2. PARI is an institute affiliated to the University of Johannesburg providing high quality social science and public administration research in South Africa, including support to government partners. Over the last decade it has developed a depth of expertise in public procurement. 3. In making this submission, we hope to promote the Constitution's s217 vision of a public procurement system that is fair, equitable, transparent, competitive and cost-effective. These principles already enable, and s217(2) reinforces, the constitutional imperative of using public procurement to advance racial transformation and economic development, both fundamental to the post-apartheid project. It is widely agreed that in relation to these principles and objectives, South Africa's existing procurement regime falls short. There is pressure to move quickly to address critical issues, by consolidating and cohering the public procurement legislative framework, introducing stronger differentiation between types of procurement and procuring institution, enabling a more strategic approach to procurement methodology across some of these types, enhancing integrity and transparency measures to address rampant corruption, and moving preferential procurement, Broad-Based Black Economic Empowerment (B-BBEE) and local content onto stronger legislative foundations.	Introduction is noted.		
Public Affairs Research Institute	General	4. There are legitimate questions, however, about whether the Bill now before the NCOP achieves these goals. Many of these questions were raised in submissions to the Standing Committee on Public Finance. The serious hazards projected by those submissions were of such an extent and variety as to give anyone pause for thought, but we see no evidence that the Committee considered them. Apparently abrogating its responsibilities under the separation of powers, the National	Comment is noted, however, the OCPO merely expatiated on the provisions in chapter 4 on preferential procurement to bring more clarity on the intent of the provisions without bringing far reaching changes as indicated.		PARI does not agree with this characterization. Chapter 4 now: - omits mention of the points system, which under the earlier chapter appeared to be the main system,

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		Assembly instead off-loaded this work onto the Office of the Chief Procurement Officer (OCPO), and the OCPO responded to only 36% of participants. The last-minute redrafting undertaken by the OCPO and the Standing Committee also introduced far-reaching changes to preferential procurement, which have not gone through rigorous consultation and participation processes. 5. These new provisions are problematic. They add to a series of deficiencies that we have addressed at length elsewhere. In earlier submissions and publications, we have raised concerns about the Bill's problematic grasp of constitutional requirements, its misalignment with legislative and operational contexts, its extensive and unnecessary recourse to subordinate law, and the vagueness and ambiguity of a number of crucial provisions.1 In many instances we have suggested concrete fixes, including through our participation in drafting the so-called Joint Strategic Resource version of the Bill. 6. In this submission, we focus on how changes introduced in the National Assembly reproduce existing fragmentation, ambiguity, and incoherence between and within preferential and broader procurement law. We hope, by making this argument, to move debate in this area beyond its currently polarised, overly simplistic, and ultimately unproductive terms. The Constitution and the future of our country require a conscientious, meticulous process of configuring preferential procurement in ways that optimally sustain, expand, and deracialise our economy and society, and this submission emphasises that challenge. We conclude with some continuing concerns around integrity, transparency, and public access to procurement processes.	Noted.		- it includes a range of new procedures and mechanisms within set-asides, pre-qualification, sub-contracting, and local content - it establishes new relationships between set-asides, pre-qualification, sub-contracting, and local content - it is sometimes clearly inconsistent with other parts of the Bill. These amount to considerable policy departures, never consulted in this Bill process. They exceed the ordinary language definition of mere expatiation.
Public Affairs Research Institute	CHAPTER 4	7. It has been a quarter century since the promulgation of the Preferential Procurement Policy Framework Act (PPPFA). The PPPFA was passed in a rush in 2000, under pressure of a constitutional deadline. It is a relatively simple and plainly written statute, but it was drafted at a distance from broader public procurement law and practice. In consequence, it gave South Africa years of experience with the operational and legal effects of legislative fragmentation, ambiguity, and incoherence, which the new Public Procurement Bill does not sufficiently address. 8. There have been persistent issues with procuring institutions distorting the PPPFA's meaning and moving beyond its ambit. This has not been helped by such vague formulations as creating preferences around "specific goals," including "implementing the programmes of the Reconstruction and Development Programme," nor by the PPPFA's sometimes	Noted, but it must be realized that this Bill will repeal the PPPFA in its entirety, and ensuring constitutional alignment.		PARI understands that the Bill will repeal the PPPFA. But the Bill reintroduces new problems of misalignment between clauses dealing with procurement methods and clauses dealing with preferential procurement.

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		convoluted interactions with broader law. In 2010, the High Court found that the PPPFA precluded the use of functionality as an adjudication criterion within the points system. This undermined elementary practice across various types of procurement and procuring institutions. Together with problems of under-specification of product requirements, it facilitated a process of ruinous competition where prices have pushed below the costs of maintaining product quality. In 2021, the Afribusiness decision undercut the statutory foundations of long-standing preferential procurement practices, seriously threatening enterprises, employees, and other beneficiaries of B-BBEE and local content programmes.5 A central reason for rushing this Bill through is to re-establish these programmes on sound statutory foundations. We agree that this is vital, but we worry that the Bill does not do this.			
Public Affairs Research Institute	CHAPTER 4	9. We begin to see how when we look at the regulatory architecture proposed by the Bill. s217 of the Constitution contains the critical concepts of procurement "framework," "policy," and "system": 217. Procurement (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a **system** which is fair, equitable, transparent, competitive and cost-effective. (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement **policy** providing for —- (a) categories of preference in the allocation of contracts; and (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. (3) National legislation must prescribe a **framework** within which the policy referred to in subsection (2) must be implemented. 10. A crucial task of the Bill is to develop a consolidated, clear, and coherent regulatory architecture, by establishing the scope of these concepts and allocating powers over their subject matters. If we have regard to the language of s217, existing law and practice, and the OCPO's expressed reform preferences, the Bill attempts to do so as follows: it seeks to construct a single national legislative framework, which includes the Act and subordinate law. This framework is to be administered and developed primarily by the Minister of Finance, the Public Procurement Office (PPO), and provincial treasuries. The framework, in turn, is meant to guide procuring institutions in the development of their own procurement policies, which serve to govern the operation of their procurement systems.	We note the comment, although clause 16 of the Bill states: A procuring institution must implement procurement policy providing for- a) categories of preference in the allocation of contracts: and b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination, envisaged in Section 217(2)		It is not clear how this responds to PARI's comment

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		This approximates to a consolidating, clear, and coherent application of the constitutional concepts of “framework,” “policy,” and “system.” 11. In its preamble and its memorandum of the objects, the Bill sometimes appears to move in this direction. It purports to create “a single framework that regulates public procurement.” The most important powers to develop this framework are accordingly provided to the Minister of Finance, the PPO, and provincial treasuries. The provisions of the Bill also repeatedly make reference to procuring institutions, “within this framework,” implementing “their” procurement policies and systems.	and (3) of the Constitution, in accordance with the objects of this Acts and the framework in this Chapter, being Chapter 4.		
Public Affairs Research Institute	Chapter 4	12. But from this point, fragmentation, ambiguity, and incoherence creep in. s2 asserts that the objects of the Act are to (a) “introduce uniform treasury norms and standards for all procuring institutions to implement their procurement systems,” and to (b) “determine a preferential procurement framework for all procuring institutions to implement their procurement policies.” s25 continues that “The Minister must prescribe a framework within which procuring institutions must implement the procurement system.” s16, entitled “Preferential framework and procurement policies,” continues that “A procuring institution must implement a procurement policy… in accordance with the objects of this Act and the framework in this Chapter [4].” In these provisions, we can see that the “single framework” breaks into two. The first, what we call the “s25 framework,” seeks to regulate the procurement functions, structures, and methods that constitute the “procurement systems” of procuring institutions. The second, the “s16 framework,” seeks to regulate the preferential “procurement policies” of procuring institutions.	Noted, however, it must be understood that the framework is the basic structure as mandated by section 16 uniform norm and standards. There is no conflict between section 217(1) and s217(2) and (3) of the Constitution. All subsections of 217 of the Constitution are anticipated to coexist within the procurement system envisaged in subsection 217(1). The Bill, in chapter 4, which is the preferential procurement framework, should be understood within the context of the procurement system envisaged in section 217(1) of the Constitution. Chapter 4 is also linked to chapter 5, which provides for the framework for the system to be prescribed by the Minister within which procuring institutions must implement their policies. It is within this context that the trade-off between the competing objectives and principles in section 217(1) is maximised and balanced.		PARI is not arguing that the s217(1), (2), and (3) are inconsistent. They are arguing that Chapter 4 and 5 of the Bill are inconsistent, and they point directly to various aspects in which they are.. That Chapter 4 and 5 are linked does not address the fact that Chapter 4 and 5 are inconsistent in a number of particulars.

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Public Affairs Research Institute	Chapter 4	13. The basic problem is that these two frameworks reinscribe existing fragmentation between preferential and wider procurement law into the Bill itself. The distinguishing of procurement systems, which deal with procurement generally, and procurement policies, which are now seemingly confined to preferential procurement, replicates this fragmentation within procuring institutions. The consequent threat of ambiguity and incoherence between preferential and wider procurement law and practice is not merely theoretical, but is already apparent from the Bill: A. There is, most significantly, an issue of constitutionality. s217(1) of the Constitution asserts that public procurement in South Africa must proceed in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. s217(2) continues that these principles "do not prevent," indeed their plain meaning already enables preferential procurement. s217(3) then recognises, as our courts have often suggested,6 that preferential procurement must continue to strike a balance between the constitutional principles, which is why it requires national legislation to construct a framework to guide procuring institutions to within this balance. The Bill, in the process of separating its s25 and s16 frameworks, loses sight of this. In the existing South African procurement system, open competitive tenders evaluated on the basis of a combination of price and preference are the norm. This norm strikes a clear balance between the s217(1) principles and procuring institutions must justify departures from it. Chapter 4 of the Bill instead restricts competition from the outset with setasides, where only persons or enterprises in specific categories can make bids. Departures from set-aside requirements must be justified, and procuring institutions must then revert to prequalifications, again restricting competition to persons or enterprises in specific categories, and so on. Price as a criterion of adjudication is at no point mentioned, which is a first in the world of procurement law. We have here a series of radical departures from the principles of fairness, equitability, transparency, competitiveness and cost-effectiveness and the reader struggles to discern any scheme for ultimately balancing or constraining them. This suggests clear grounds for a claim of unconstitutionality.	It is important to preface this response by recalling what was stated in the Constitutional Court Judgment in the matter between Afribusiness (now Sakeliga) and the Minister of Finance, when Justice Mhlantla stated that: "The stand-alone reading of section 217(1), which ignores section 217(2), is not only a disservice to statutory interpretation, but also ignores the founding values of the Constitution." This statement confirmed the view that any drafting of the national legislation that must provide a framework to give effect to section 217(2) of the Constitution that must take into account the founding values of the Constitution and the need to deliberately redress past discriminatory practices and provide for measures for preference that will make a meaningful difference to the lives of South Africans who have suffered under the yoke of oppression. Parliament is entitled and required to enact legislation laying down a "framework" for preferential procurement policy. Section 217(3) of the Constitution states that national legislation must prescribe a framework within which the policy referred in subsection (2) must be implemented. The question of how tight or loose that framework is – that is, how much discretion it affords to organs of state to develop their own policies or depart		Mhlantla also asserted that "that is not to say that the five important principles in section 217(1) become a nullity when section 217(2) is in play. The tenders in question must still be evaluated in a manner that gives effect to the purposes of section 217(1) in respect of fairness, equity, transparency, competitiveness, and cost-effectiveness." A s217(3) framework that gives procuring institutions too much leeway to depart from the s217(1) principles, which PARI argues this framework does, is open to structural litigation, and to disruptive litigation of the practices of procuring institutions themselves.

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			from the national policy is for Parliament to determine via national legislation. The constitution defines "national legislation" as including regulations.		
Public Affairs Research Institute	Chapter 4 / Clause 25	B. There is also a mismatch between how the s25 and s16 frameworks attempt to regulate procurement procedure and methodology. The OCPO has long argued that the fast-changing and differentiated nature of public procurement practice makes it difficult to detail procurement functions, structures, and methods in statute. It has for this reason written s25 and its accompanying Chapter 5 at a high level, which it says will enable more flexible, fleetfooted development in regulations and instructions. But this objective is now undercut by the new s16 framework and its accompanying Chapter 4, which elevates a great deal of detail about procurement procedures into statute. This detail overlaps with the subject matter of Chapter 5, and so militates against its concern with legislative flexibility. Instead, preferential procurement already frames the detailed construction of the procurement regime, and broader procurement operations become an afterthought.	The Bill sets a framework for procurement with specificity to be provided in Ministerial regulations, Public Procurement Office's instructions (limited in nature), and procurement systems and policies of institutions determined within the framework of the Bill and requirements of the regulations. The primary reason for this approach, which is still the case, is to allow for different regulations to be made for different categories of procurement (e.g. infrastructure, capital assets, PPPs, normal goods and services, consultants, etc) and different categories of institutions (e.g. department, government business enterprises, municipalities), and to cater for new developments in procurement. However, to provide for a clearer framework for the implementation of preference measures in chapter 4 is well within the ambit of Parliament's mandate, as stated in a previous response.		PARI's comment is that s16 contains procedural details that interfere with the flexible approach adopted in s25. It may not be appropriate in many cases for procurement processes to evaluate functionality first, and then other prescribed criteria and complementary goals. This response does not address that comment.
Public Affairs Research Institute	Chapter 4	C. We can see this at s17(5). s17(1) asserts that procuring institutions must set-aside bids for specific categories of persons, within prescribed thresholds and conditions. s17(5) continues to establish a procedure, asserting that where bids are set-aside they must: first, be assessed according to terms and conditions stated on bid documents; second, where functionality is part of the bid, they must be evaluated	It is not correct that set-asides interferes with the section 25 framework. Section 217(1) of the Constitution already mentions the concept of "equitable" as one of the five		PARI is not asserting that set-asides interfere with s25. They are asserting that the procedures established for advancing set-asides provided under s17(5) interfere with the

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		according to a minimum threshold for functionality; third, those bids that fail to meet a minimum qualifying score on functionality must be rejected; and, fourth, qualifying bids must be evaluated further in terms of prescribed criteria, which may include complementary goals. The problem is that these procedures are arguably inconsistent with various procurement methods, such as certain forms of strategic procurement, two-stage tendering, competitive negotiation, innovation partnership, and framework agreement. In the case of set-asides, it can be seen then that the s16 framework already interferes with the s25 framework, which the OCPO has hoped would facilitate more flexibility, and which actually already makes reference to "strategic" procurement, "innovation" methods, and the construction of an "electronic marketplace" presumably through framework agreements.	principles that must be adhered to when conducting procurement. The term "equitable" has a two-pronged focus, namely distribution and redistribution: i. distribution is about sharing the wealth, opportunities and resources of the country; and ii. redistribution is about distributing something in a different way, typically to achieve socio economic equality. When looking at the ordinary meaning of the term equitable, it means "*accounting for varied circumstances and allocating the resources and opportunities each person needs to receive an equal outcome*". As stated in previous responses, the preferential procurement framework in chapter 4 should be understood with within the context of the procurement system envisaged in section 217(1) of the Constitution. Therefore, the measures that are provided for the protection and advancement of persons or categories of persons, and the provision of preference in the allocation of contracts (as provided in section 217(2)) are envisaged to coexist within the clause 25 framework. To reiterate,		regulatory flexibility intended under s25. PARI have made the argument that s217(1) already enables preferential procurement in numerous submissions. But this argument has no clear bearing on PARI's comments here.

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			chapter 4 is also linked to chapter 5, which provides for the framework for the system to be prescribed by the Minister within which procuring institutions must implement their policies, and take into account the different nuances within the sectors and industries within which the respective procuring institutions operate. It is within this context that the trade-off between these competing objectives and principles is maximised and balanced.		Merely to assert that Chapter 4 and 5 are linked is not to establish how the s217(1) principles are balanced and optimised.
Public Affairs Research Institute	Chapter 4	D. Relatedly, we noted at paragraph 5 above that an important objective of procurement law reform has been to enable the inclusion of functionality alongside price and preference within points system adjudication. But s17(5) now appears to require that functionality be considered prior to the assessment of other criteria, potentially blocking its consideration alongside price and preference in the points system. These implications of s17 are not peripheral to procurement operations, because s17 also appears to establish set-asides as a new norm across those operations. This suggests that the procedural rigidities of s17 will apply very broadly across procurement expenditure.	The evaluation on functionality criteria has always been an important part of the evaluation process to ensure that the successful bidder has the necessary capability and ability to carry out the provision of services. That is why even when preference measures are being used, quality and capability must not be compromised.		But functionality can enter into procurement processes at different points. As a prequalification criterion, as a qualification criterion, or as an adjudication criterion within the points system. These provisions pre-empt that complexity and so interfere with the Bill's concern with regulatory flexibility.
Public Affairs Research Institute	Chapter 4	14. These are early signs of what is likely to become a pervasive problem. The Bill doesn't create a single framework, but two. These two frameworks have already been drafted inconsistently. They respond to potentially divergent sets of operational imperatives and political interests, and insufficient attention has been given to how these imperatives and interests can be optimised and accommodated within a single coherent statute. The process for drafting statutes is relatively rigorous, so this incoherence is likely to persist and proliferate in subordinate law and across the procurement systems and policies of procuring institutions. This does not augur well for the Bill's central objective, which has been to consolidate, clarify, and cohere the public procurement legislative landscape. It heralds persistent tension between preferential and broader public procurement law and practice.	See responses above.		
Public Affairs Research Institute	Chapter 4	The new Chapter 4 raises a series of further issues, which we now address in sequence:	Noted		What PARI is suggesting is that granting procuring institutions the power to "implement" preferential

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		15. The above discussion assumes that procuring institutions will be empowered to develop "their" procurement systems and policies, but actually the Bill never clearly assigns them this power. The Minister must prescribe a framework for procurement systems, which must include procurement policies. Procuring institutions are never empowered to formulate these procurement systems and policies, with s2, s8, s16, and s25 only granting the power to "implement" them. This leaves open the question of which public agencies will be responsible for the development of procurement policies and systems.	The wording of the Bill is aligned to that of the Constitution, which states that an organ of state must contract for goods or services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. Clause 25 in chapter 5 therefore provides for the framework for the system to be prescribed by the Minister, within which procuring institutions must implement their policies and take into account the different nuances within the sectors and industries within which the respective procuring institutions operate.		procurement policy does not equal granting them the power to "develop" that policy. Treasury's own legal opinion on interpretation of s217 asserts this distinction when it says that s217(2) "seems to make clear that Parliament is entitled, should it so choose, to develop the policy and then require organs of state to simply "implement" it." The point remains that the Bill never clearly assigns to procuring institutions the power to "develop" their own procurement policies.
Public Affairs Research Institute	Chapter 4	16. The term "set-aside" is introduced in s17(1), and the term "prequalification" is introduced in s18(1). These terms are never defined in the Bill and, to the extent that they refer to the restriction of procurement processes to certain categories of suppliers, they mean the same thing. This departs from standard procurement terminology, where a set-aside refers to the restriction of procurement awards to disadvantaged persons, and prequalification involves screening suppliers according to minimum regulatory and functional criteria, including such matters as tax clearance, legal certification, professional qualifications, demonstrated capabilities, and financial stability. Generally, the purpose of prequalification is to provide a once-off procedure for populating databases of potential bidders and, thereby, to reduce the administrative burden of repeated screenings. The Bill confuses this terminology and so may undermine operational coordination and legal certainty in procurement.	The Bill is clear in chapter 4 that prequalification criteria in this context is specifically for preferential procurement and not prequalification criteria in the context of mandatory disqualification criteria. Provisions of prequalification for preferential procurement have been in the procurement arena since 2017, and practitioners are accustomed to these concepts.		Even if so, the chapter is not clear as to why this novel definition of prequalification is any different from the standard definition of set-asides, or why this additional mechanism is being created.
Public Affairs Research Institute	Chapter 4	17. s18(1) requires ("must") procuring institutions, in accordance with the prescribed thresholds and conditions, to apply prequalification criteria, which, as noted above, operate as set-asides for a list of categories of bidders. There is no equivalent to s17(6), which in the case of set-asides allows procuring institutions to depart from the rule and to report their reasons. s18(4), (5), and (6) instead require procuring institutions to proactively identify opportunities for applying prequalification, using market research and industry analysis to determine whether there are a prescribed number of bidders necessary to ensure competition. Procuring institutions are in	Clause 17 is drafted in a manner that recognizes that it may not always be possible to implement the set-aside provisions, and subclause 17(6) states what should happen in such instances. Furthermore, clause 18(7) is written in a manner that ensures that competition is not flouted when procuring		There is a high risk in the Bill that procuring institutions constrain competition to such an extent that it no

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		most cases unlikely to have the capacity to conduct this research and analysis across their procurement systems. There is also no clear requirement that this research and analysis should determine that these bidders are actually capable of performing the work. It follows that procuring institutions are likely to rely heavily on prospective bidders self-reporting their intention to bid, that these reports will often be from bidders that are not capable, but they will still be accepted as sufficient evidence that the prescribed minimum number of bidders has been met. This risks predisqualifying all capable bidders from many procurement processes. It will wreak havoc in procurement operations and the requirement of market research and industry analysis is likely to be a persistent source of further, disruptive litigation.	institutions make use of the pre-qualification provisions. So, checks and balances have been built into the framework. The Bill, in chapter 4, seeks to address the fundamental constitutional provisions in section 217(2) and (3), and also makes provisions for regulations to be drafted with the necessary conditions, thresholds, parameters to ensure that these preference measures are implemented in a responsible manner. This would also look at provisions that address negotiations with bidders, which is envisaged would include, amongst others, the negotiation of a fair market price to prevent government paying exorbitant prices for contracts awarded.		longer functions as an effective check. That these issues will be addressed in regulations is merely aspirational. There should be appropriate checks and balances to be included within the Bill itself.
Public Affairs Research Institute	Chapter 4	18. s19(1) requires procuring institutions, “where feasible,” to subcontract contracts above a prescribed amount. The word “feasible” is amorphous. It is likely to generate similar problems to those discussed under prequalification in paragraph 16 above, in which evidence for feasibility is insufficient, or the standard of feasibility is set too low, and this results in operational disruption and litigation.	It should be noted that even where subcontracting may be relevant, the Bill does recognise that it may not always be feasible to do so, therefore, the provision has been written in a responsible manner. The term feasible is a well-recognized concept. Procuring institutions have the responsibility to carry out the requirements of the act with due care and diligence and not to abuse the system.		Abuse is rampant across the system. There are many procuring institutions that have accumulated irregular expenditure balances - largely in procurement - that are larger than their total annual expenditure. In these conditions it is irresponsible to rely on the responsibility of procuring institutions. Appropriate checks and balances must be built into the Act itself.
Public Affairs Research Institute	Chapter 4	19. s17, s18, and s19 tend to marginalise the B-BBEE Act. In the B-BBEE Act, preferences in public procurement are a significant incentive promoting not only black ownership, but also management control, employment equity, skills development, supplier development, and socio-economic development. These goals are mostly not provided for within the Bill and so	It should be noted that there is no legal basis for provisions that are developed under the Public Procurement Bill to incorporate provisions that give effect to a separate		This response seems to assert that that there is no legal basis for the PPB to refer to the B-BBEEA, but the PPB already refers to the B-BBEEA. PARI’s

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		the marginalisation of the B-BBEE Act may threaten the opportunities and existing livelihoods of especially broadbased beneficiaries. We are concerned that the scale of potential harm has not been studied, nor has any effort been made to consult with beneficiaries who stand to lose.	piece of legislation (B-BBEE Act). The B-BBEE Act is a separate Act of parliament, with its own objects. Should it require strengthening, the Act should be amended or regulations be amended to give effect to its provisions. Chapter 4 is the framework provided for in national legislation (the Public Procurement Act, when enacted) that is giving effect to section 217(3) of the constitution in order to allow for the implementation of the policy provided for in section 217(2) of the constitution. The Public Procurement Bill does not change any provision of sector and industry codes. Whilst B-BBEE legislation may assist in incentivizing businesses to play a role in developing smaller businesses, the reality is that Therefore, the provisions of Chapter 4 should not be diluted by letting Chapter 4 be an extended arm of B-BBEE policy.		argument is that they're concerned that the interests of B-BBEEA beneficiaries have not been adequately addressed in the Bill or consulted. These beneficiaries include some of the most disadvantaged people in the country and the comment must be addressed head on. The B-BBEEA does not only incentivise businesses to play a role in developing smaller businesses. It also incentivises businesses inter alia to promote affirmative action in employment, to promote upskilling of their workforces, and to promote broader socio-economic objectives through establishing schools, bursaries and other social expenditure. The potential implications of this Bill on that expenditure has not been scoped nor have the people who will be affected been approached in consultation processes around the Bill.
Public Affairs Research Institute	Chapter 4	20. s17, s18, and s19 all refer to final adjudication of bids being made in terms of "prescribed criteria," which may include "complementary goals." The concept of "prescribed criteria" is arguably too open-ended for this constitutionally-required framework, which is meant to guide regulatory agencies and procuring institutions to within the bounds of the s217(1) principles. The concept of a "complementary goal" is a novelty with no clear meaning in the context of the Bill.	As stated previously, section 217(3) of the Constitution requires national legislation to prescribe the framework. The Constitution, in section 239, defines national legislation as including regulations. The regulations will provide more clarity on the prescribed criteria, since "prescribed: is defined to mean, prescribed by regulations in terms of section 64. Notwithstanding	Consider defining complementary goals.	The National Treasury is guardian of the fiscus. Purchases in the market universally make reference to price and the Constitution requires cost-effectiveness. It is a notable feature of the discussion around Chapter 4 that Treasury is not willing to advise that price be a statutorily required consideration in

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			the aforesaid, the definition of "complementary goals" will be considered for defining.		adjudication of purchases from suppliers.
Public Affairs Research Institute	Chapter 4	21. s20 establishes comprehensive procedures for research, consultation, and designation of sectors for local production and content by the Minister of Trade and Industry. The provision allows procuring institutions to seek a waiver where the required quantity of goods can't be sourced locally, with the waiver then applying generally across procuring institutions for an appropriate period of time. Should the waiver not be forthcoming, a procuring institution may still depart from local content requirements, if it has sufficient evidence that the required quantity of goods cannot be sourced and it reports accordingly. This second measure for flexibility may be excessive, but s20 laudably recognises the significance of smooth public procurement operations to state performance and economic development. Therefore, it seeks carefully to avoid disruptions associated with imprudent and inflexible application of local content measures. The same awareness is seemingly absent from provisions for ministerial prescription of other policy goals under Chapter 4, which if prescribed imprudently and inflexibly may cause significant disruption to state operations and damage to the economy. We believe that Chapter 4 should in its entirety proceed in a spirit of scientific and strategic industrial policy, with statutory provision being made for careful research and consultation by a highly capacitated central authority as part of the process for developing preferential procurement rules.	The positive comments regarding clause 2 are noted. Clause 17 is drafted in a manner that recognizes that it may not always be possible to implement the set-aside provisions, and subclause 17(6) states what should happen in such instances. Furthermore, clause 18(7) is written in a manner that ensures that competition is not flouted when procuring institutions make use of the pre-qualification provisions. So, checks and balances have been built into the framework. The Bill, in chapter 4, seeks to address the fundamental constitutional provisions in section 217(2) and (3), and also makes provisions for regulations to be drafted with the necessary conditions, thresholds, parameters to ensure that these preference measures are implemented in a responsible manner. This would also look at provisions that address negotiations with bidders, which is envisaged would include, amongst others, the negotiation of a fair market price to prevent government paying exorbitant prices for contracts awarded. Moreover, the subcontracting provision in clause 19 recognises that it may not always be feasible to subcontract and is therefore not written irresponsibly.		These measures are far weaker than what is required in local content. PARI does not see any reason in principle or practice why set-asides, sub-contracting, etc. should be treated differently.

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Public Affairs Research Institute	Chapter 4	PROPOSAL ON CHAPTER 4 AND THE BILL: 22. In summary, the Bill exhibits continuing fragmentation, ambiguity, and incoherence. These issues have been greatly amplified by the late introduction of new and far-reaching preferential procurement provisions, which themselves create two frameworks that are poorly aligned within the broader Bill. This problem eludes easy rewriting and would ideally be addressed through rigorous optimisation of potentially competing operational imperatives, consultation between and accommodation of divergent interests, the formulation of a clear policy direction, and careful redrafting. 23. The NEDLAC Act asserts at s5(1)(d) that NEDLAC shall "consider all significant changes to social and economic policy before it is implemented or introduced in Parliament." NEDLAC was instrumental in addressing a range of issues in the Bill before it was introduced into the National Assembly, it has not considered the new preferential procurement provisions, and, given their wide-ranging implications for the state, business, labour, and the economy, it would be the appropriate forum for fine-tuning those provisions. We propose on these grounds that the Committee refer Chapter 4 back to NEDLAC for proper consultation. This should be done before passage of the Bill into law.	Please see previous responses. Moreover, the provisions of chapter 4 were extensively discussed at the public hearings and these provisions were largely accepted by the public, whose concern was that these provisions must not be prevented from being implemented. Where there were dissenting views, those views were submitted in writing, to which responses have been provided		
Public Affairs Research Institute	Clause 5	24. The Bill introduced into the National Assembly provided the PPO, if the procurement policies of procuring institutions did not comply with the Act, with the power to review those procurement policies and advise on appropriate amendments. The OCPO and the Standing Committee subsequently removed these provisions, essentially on the view that the PPO would not have the capacity to review and advise across what is envisaged to be an appropriately differentiated procurement regime. We believe that the power of review is an essential regulatory power for an effective PPO, and if applied prudently to procurement policies that clearly transgress the Act, that this is a power that will not require exceptional capacity. PROPOSAL ON SECTION 5 25. We accordingly make the following proposal, which revives the power with appropriate adjustments. Note that the inclusion of both "procurement policy" and "system" reflects the use of these terms in the Bill passed by the National Assembly. In the following, _____ indicates an addition and [ ] indicates an omission from the Bill: 5. Functions of Public Procurement Office (partially reproduced)	See the above response.		

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		(2) The Public Procurement Office may, in accordance with this Act– (a) issue binding instructions as provided for in this Act and on any other procurement matter for the effective implementation of this Act; (b) issue guidelines to assist procuring institutions with the implementation of this Act or any other procurement related matter; (c) after consultation with the relevant category of procuring institutions, determine a model procurement policy for different categories of procuring institutions and different categories of procurement; (d) <u>if the procurement policy or procurement system applied by a procuring institution does not comply with a provision of this Act, review such policy or system and advise the institution on amendments and operational changes</u>; and (e) exercise other powers conferred by this Act.	Not supported as clause 5 sufficiently addresses the proposed inputs.		At no point does clause 5 provide for powers of review
Public Affairs Research Institute	Clause 6	26. The same argument made regarding s5 is relevant to s6. 27. We therefore propose as follows: 6. Functions of provincial treasuries (partially reproduced) (2) A provincial treasury, within its province, may– (a) issue binding provincial instructions on procurement matters for the effective implementation of this Act and not inconsistent with an instruction issued by the Public Procurement Office; (b) issue guidelines to assist procuring institutions with the implementation of this Act or any other procurement related matter; (c) assist procuring institutions in building their capacity for efficient, effective and transparent procurement management; (d) <u>if the procurement policy or procurement system applied by a procuring institution does not comply with a provision of this Act, review such policy or system and advise the institution on amendments and changes</u>; and (e) exercise other powers conferred by this Act.	Not supported as Clause 5 sufficiently addresses the proposed inputs.		At not point does Clause 5 provide powers of review for provincial treasuries.
Public Affairs Research Institute	Clause 11	28. The following comment was included in our submission to the Standing Committee on Public Finance, but does not appear to have received consideration. It is our view that the Bill could do more to align with burgeoning regulation of prominent influential persons under recent amendments to the Financial Intelligence Centre Act, No. 38 of 2001 (FICA). A number of procuring institutions, often because they issue debt on the Johannesburg Stock Exchange, are classified as accountable institutions under FICA. Many have already embarked on the regulation of prominent influential persons (PIPs), family, and known close associates, including in their procurement operations. At least in their formal policies, these institutions conduct enhanced due diligence when entering into relationships with such persons, they reserve the right to exclude them from business where the risks exceed their	Noted and not supported as The Bill makes detail provision on debarment in clause 15 as well as clause 13 on automatic exclusion.		This response does not clearly speak to PARI's specific comment

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		tolerance, and they require business partners to disclose the roles of PIPs, family, and known close associates in their operations. When contracting, they also establish consent to publish the names of PIPs who are disclosed by suppliers. 29. These measures are provided for in various ways under the Bill, but the Bill would be enhanced if it were to also facilitate the publication of the names of automatically excluded persons, family, and related persons who conduct business with the state. Any associated limitation of rights is justified by the public purpose of uncovering and regulating conflicts of interest and corruption in state contracting. PROPOSAL ON SECTION 11: 30. This could be achieved through a minimal rewrite of s11, which already provides for the identification of such persons: 11. Due diligence and declaration of interest regarding persons involved in procurement (1) A procuring institution must take steps in accordance with prescribed procedures to identify— (a) automatically excluded persons as envisaged in section 13 and their immediate family members; and (b) related persons as envisaged in subsection (3). (2) (a) The steps envisaged in subsection (1) include the prescribed declaration of interest to be made by— (i) all bidders, in the case of bids; and (ii) all applicants, in the case of applications for registration on a database created by the Public Procurement Office in terms of section 5(1)(i). (b) A failure to submit a declaration or submitting a false declaration renders a bid invalid. (3) If a person related to an accounting officer or other official or a member of an accounting authority, a bid committee or the Tribunal involved in procurement in terms of this Act, has, or intends to acquire, a direct or indirect personal interest in a procurement matter, the accounting officer or other official or a member of an accounting authority, a bid committee or the Tribunal— (a) must disclose such interest, immediately after receiving the agenda of the meeting of a bid committee of the procuring institution regarding a procurement, or on notification of a matter being brought to the attention of the bid committee or at any time during the consideration of the bid when the official or other person becomes aware of the interest; and (b) may not be present at or participate in the deliberations or decision-making process of the procuring institution in relation to the agenda item or the matter in question. (4) A disclosure of interest made in terms of subsection (3) must be recorded in the minutes of the meeting at which it is made, or it relates to or any document seeking a decision. (5) The Public Procurement Office must maintain and publish a register of all automatically excluded persons,			

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		immediate family members and related persons who contract as suppliers, including the procuring institutions with which they are contracted.			
Public Affairs Research Institute	Clause 30	31. We have noticed that s30 appears to create a regulatory regime parallel to those established under s25 and s33, but, rather than through ministerial regulations, this parallel regime follows a design and instruction process of the PPO. We think it vital to align s30 with those sections. It is also important that design of the information and communication technology-based procurement system envisaged in s30 be responsive to the concerns of procuring institutions and the public, so we propose that due diligence be followed by consultation with procuring institutions and comments by the public. Moreover, we suggest that what is envisaged in s33 is an "electronic marketplace" and that it provides for the procurement of both "commercially available off-theshelf" and "transversal" goods and services. Commercially available off-the-shelf goods and services are those that are standard, sold commercially in broader marketplaces, are not tailored specifically to government, and so are appropriately included in an electronic marketplace, but that may not be used transversally. PROPOSAL ON SECTION 30: 32. These suggestions are provided for in the following, where we have also rearranged the provisions under subsection (2) so as to facilitate interpretation: 30. Information and communication technology based procurement (1) The Public Procurement Office must develop an information and communication technologybased procurement system in order to enhance efficiency, effectiveness, transparency and integrity, and to combat corruption. (2) After conducting an information and communication technology due diligence of the sector, consulting with procuring institutions, and seeking comment from the public, to assist with the formulation of the design brief for the development of the procurement system, referred to in subsection (1), the system must**[, subject to the due diligence conducted,]** provide for the following components progressively– (a) A single platform that at least provides access for officials, bidders, suppliers and members of the public to all procurement related services; (b) **[standardised and interoperable open data across the procurement cycle to be used by procuring institutions according to their readiness determined in accordance with an instruction]** an electronic marketplace to enable efficient	Rephrasing not supported.		This response does not address PARI's comment

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		procurement of commercially available off-the-shelf and common goods and services; (c) **[uniform procurement procedures and processes]** central procurement procedures and processes as may be prescribed under section 25; (d) **[reporting requirements on procurement]** a suitable hosting option for procurement data to enable easy reporting, analysis, research, transparency and oversight of procurement transactions and systems; and (e) **[a marketplace to enable efficient procurement of common goods and services]** disclosure of standardised and interoperable open data across the procurement cycle as required under section 33.**[; and (f) a suitable hosting option for procurement data to enable easy reporting, analysis, research and oversight of procurement transactions.]**			
Public Affairs Research Institute	Clause 33	33. The provision for the publication of beneficial ownership information contained in s33 was negotiated in Nedlac on the basis of the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill, which was subsequently passed as an Act. The contents of the proposed amendment of s56(12) of the Companies Act, No. 71 of 2008, was ultimately separated in the amendment act into both s56(7)(aA) and (12). We noted in our submission to the Standing Committee on Public Finance that the Bill should be corrected accordingly. The OCPO and the Standing Committee appear to have agreed, but instead of including both s56(7)(aA) and (12), they swapped s56(12) for s56(7)(aA). PROPOSAL ON SECTION 33: 34. We propose that the Bill be amended as follows: 33. Disclosure of procurement information (partially reproduced) (1) The Minister must prescribe requirements to disclose information regarding procurement. (2) The instruction envisaged in subsection (1) must, among others, require— (a) the categories of information to be disclosed to enable effective monitoring of procurement, which includes among others— (i) the reasons for the decision, where a decision is made to not follow an open competitive tender process; (ii) all information regarding a bid; (iii) the identity of each entity which submits a bid, including information relevant to that entity contained in the companies register established under section 187(4) of the Companies Act, 2008 (Act No. 71 of 2008), if applicable; (iv) the date, reasons for and value of an award to a bidder, including the record of the beneficial ownership of that bidder	Not supported as the Bill suffice in its current form		This does not suffice. The Bill provides for beneficial ownership seemingly only for public companies, state-owned enterprises, and a small subset of private companiess. It omits the beneficial ownership information of the vast majority of private companies that contract with the state.

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		required under section 56(7)(aA) and (12) of the Companies Act, 2008 (Act No. 71 of 2008); and (v) contracts entered into with a supplier and invoices submitted by the supplier; …			
Public Affairs Research Institute	Clause 34	35. The following comment and proposal, made in our submission to the Standing Committee on Public Finance, also appears not to have been considered. The Bill makes provision for procurement policies. In current practice, these policies are often treated as law, but these instruments are often not published, thereby falling short of the definition of law contained in the Constitution and the Interpretation Act, No. 33 of 1957. Even if policies do not have the status of law, they have considerable implications for transparency, accountability, and rights and so should be published. PROPOSAL ON SECTION 34: 36. We argue that this situation be remedied as follows: 34. Documents to be made available The Public Procurement Office must ensure that copies of— (a) this Act and any regulations made thereunder; and (b) all instructions, guidelines,**[and]** codes of conduct and procurement policies that are issued in terms of this Act, are accessible at the offices of the Public Procurement Office and National Treasury website.	Not supported as the Bill suffice in its current form		This Bill does not provide for publication of procurement policies.
Public Affairs Research Institute	Clause 1	37. We recognise the need for some confidentiality in procurement, but we are concerned that the definition of confidential information contained in s1 exhibits a flaw. In South African law, confidentiality is provided for under the Promotion of Access to Information Act, and the Protection of Personal Information Act is largely concerned with establishing procedures for the handling of personal information by responsible institutions. The definition of confidential information in the Bill, however, includes “personal information protected in terms of the Protection of Personal Information Act,” which could be read so broadly as to include all personal information. The scope of confidentiality should instead hinge on the Promotion of Access to Information Act. PROPOSALS ON SECTION 1: 38. There are two ways to address this, either by hinging the personal information clause on the Promotion of Access to Information Act, or by hinging the whole definition of confidential information on the Promotion of Access to Information Act. The first solution might proceed as follows: 1. Definitions (partially reproduced) “confidential information” means - (a) personal information **[protected]** legitimately confidential in terms of the **[Protection of Personal Information Act, 2013 (Act No. 4 of 2013)]** Promotion of Access to Information Act, 2000 (Act No. 2 of 2000);	Not supported		The reasons for why this is not supported are unclear

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		(b) commercial information, the disclosure of which is likely to damage a commercial interest of a bidder; (c) information that is likely to endanger the life or safety of a person; (d) information that is likely to prejudice or impair the security of a building, structure or critical system, including but not limited to, a computer system, a communication system and a transportation system; (e) information that is likely to prejudice law enforcement or legal proceedings; or (f) information that is likely to prejudice national security; … 39. The second solution has the advantage of aligning the whole provision with the carefully crafted balance of the Promotion of Access to Information Act: 1. Definitions (partially reproduced) "confidential information" means information that is legitimately confidential under the Promotion of Access to Information Act **[- (a) personal information protected in terms of the Protection of Personal Information Act, 2013 (Act No. 4 of 2013); (b) commercial information, the disclosure of which is likely to damage a commercial interest of a bidder; (c) information that is likely to endanger the life or safety of a person; (d) information that is likely to prejudice or impair the security of a building, structure or critical system, including but not limited to, a computer system, a communication system and a transportation system; (e) information that is likely to prejudice law enforcement or legal proceedings; or (f) information that is likely to prejudice national security;]** …			
Public Affairs Research Institute	Clause 64	40. In its response to our proposal for incentivised whistleblowing to be included in procurement, the OCPO has agreed with the principle, but it argues that incentivised whistleblowing is best treated within general whistleblowing legislation, because whistleblowing is needed more broadly than in public procurement alone. This elides the extent to which South Africa already has a tradition of incentivised whistleblowing provisions in legislation dealing primarily with other matters, which we see especially in environmental legislation. Procurement also has special features which justify making provision for incentivised whistleblowing in the Bill. Procurement handles large sums of money, which means that whistleblowing can be incentivised without cost to the state. In order to do so, incentivised whistleblowing provisions must be carefully moulded to procurement operations, which is doubly necessary to ensure that abuse of incentivised whistleblowing doesn't become disruptive of those operations. The Protected Disclosures Act also only applies to employees, but in procurement incentivised whistleblowing is often by persons	Not supported		The reasons for why this is not supported are unclear

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		who are not employees. The Protected Disclosures Act would therefore have to be radically reconceptualised to enable incentivised whistleblowing in procurement. The appropriate place for incentivised whistleblowing in procurement is in this Bill. PROPOSAL ON SECTION 64: 41. We propose the following: 64. Regulations (partially reproduced) (1) The Minister— … (b) may make regulations— (i) permitted by this Act to be prescribed; (ii) regarding negotiations with a preferred bidder or bidders before the award of the bid; (iii) regarding requirements for bidders to comply with specified legislation; (iv) regarding lifestyle audits of persons automatically excluded in terms of section 13 and their immediate family members and related persons, if an immediate family member or a related person is awarded a bid or bids above a threshold stipulated in the regulations; (v) <u>after consultation with the Minister responsible for justice and constitutional development, regarding the protection and promotion of whistleblowers in procurement;</u> **[(v)]**(vi) regarding the retention of procurement data; and <u>(vii)</u> regarding any procedural or administrative matters that are necessary to implement this Act.			
Public Affairs Research Institute	Clause 65	42. A number of submissions to the Standing Committee argued that binding instructions, since they have the force of law, should only be issued after a public participation process. The proposal was accepted. The Standing Committee, however, also expanded the definition of "this Act" in s1, which now includes instructions, codes of conduct, and notices. It is submitted that since all these instruments have the force of law, they should all be issued after a public participation process. PROPOSAL ON SECTION 65: 43. Therefore, we make the following proposal: 65. <u>Issuing of</u> [I]instructions, <u>codes of conduct, and notices</u> (partially reproduced) (1) The Public Procurement Office or a provincial treasury must, before making an instruction, <u>code of conduct, or notice</u>, publish– (a) a draft of the instruction, <u>code of conduct, or notice</u>; (b) a statement explaining the need for and the intended operation of the instruction, <u>code of conduct, or notice</u>; (c) a statement of the expected impact of the instruction, <u>code of conduct, or notice</u>; and (d) a notice inviting submissions in			

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		relation to the instruction, code of conduct, or notice and stating the form and manner in which the submissions are to be made. (2) (a) With each instruction, code of conduct, or notice the Public Procurement Office or a provincial treasury must publish a consultation report. (b) A consultation report referred to in paragraph (a) must include– (i) a general account of the issues raised in the submissions made during the consultation; and (ii) a response to the issues raised in the submissions.			
Equal Education and Equal Education Law Centre	General	First, we note with concern the short period for public comment. Despite the far-reaching human rights implications of the Bill, the public was given only 22 days to provide comments, and this timeline included a 10-day extension from the initial deadline of 12 February 2024. Secondly, parts of the Bill are either entirely misaligned with or do not reflect the Zondo Commission report recommendations. For further discussion of specific provisions, see below. Lastly, we note that a lot of critical procurement issues are intended to be contained in regulations (per section 58 of the Bill) and are not sufficiently or at all dealt with in the core provisions of the Bill. This leaves a lot of important content or information unknown until such a time as the Minister publishes said regulations. We are concerned that most of the provisions of the Bill cannot function or be implemented without these detailed regulations and that this will render the Bill inoperative. In addition to this, we have noted a growing trend where the President has refused to accede to a Bill that has required detailed regulations without the regulations being presented at the same time as the Bill for this very reason.	The general comments are noted and the time provided for public consultation is a matter for the committee to consider. Specific comments and proposals will be responded to below. Issues relating to the fight against corruption and anti-corruption measures need a collaboration with relevant government institutions and law enforcement agencies. The Bill with all its provisions on integrity of the procurement system and anti-corruption measures and transparency may not be the only instrument through which to combat corruption. Regarding the proposed anti-corruption agency, our view is that such an agency is best placed within the departments in the justice cluster, this includes recommendations of Judge Zondo. The Bill sets a framework for procurement with specificity to be provided in Ministerial regulations, Public Procurement Office's instructions (limited in nature), and procurement systems and policies of institutions determined within the framework of the		

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
			Bill and requirements of the regulations. The primary reason for this approach is to allow for different regulations to be made for different categories of procurement (e.g. infrastructure, capital assets, PPPs, normal goods and services, consultants, etc) and different categories of institutions (e.g. department, government business enterprises, municipalities), and to cater for new developments in procurement. These regulations may be amended or repealed when required without the need for amendments to the primary legislation. Notwithstanding the aforesaid, it should be noted that the process to develop regulations is more rigorous than before. The development of the regulations by the Minister does not mean that the public would not be afforded an opportunity to make comments. Regulations would be published for comments. Further, even binding instructions by the PPO or the provincial treasuries would be published for comments. There will be full transparency.		
Equal Education and Equal Education Law Centre	General	Non-Alignment with Zondo Commission Report Recommendations In principle, the concept of the Public Procurement Office ("PPO") as an oversight body is welcome. That said, it is concerning that the role, structure, independence, and accountability mechanisms of the PPO are not clearly defined and sometimes absent in the Bill. Part 1 Volume 1 of the Report of the Judicial Commission of Inquiry into State Capture notes,	The objects of the Bill are with due regard to sections 195, 216 and 217 of the Constitution. Section 216(2) of the Constitution requires NT to enforce compliance with, among others, uniform norms and standards, which		

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		in respect of public procurement oversight, that "the appropriate starting point for any scheme of reform must include the establishment of a single, multi-functional, properly resourced and independent anti-corruption authority with a mandate to confront the abuses inherent in the present system". The Commission concludes that, given the need and the rationale for combating corruption that State capture has shown, the requirement of independence is not satisfied sufficiently if such an institution sits within a government department: "The ultimate responsibility for leading the fight against corruption in public procurement cannot again be left to a government department or be subject to Ministerial control. What is required are specialised oversight and monitoring authorities which operate upon the basis that they are independent in the full and untrammelled sense, i.e. that they are subject only to the Constitution and the Law. This also implies that the choice of officials who will lead and staff such bodies is not left in the discretion of Government. Such appointments must be in accordance with a transparent procedure in a public process." We note that the Bill, in the establishment of the PPO, does not adopt the Commission's recommendation. Should the PPO not be established as an independent institution outside of the National Treasury, the Bill should, at the very least, provide clarity on how the PPO will not only remain independent, impartial, and fair but also accountable. Non-alignment of PPO Functions and the Functions of Provincial Treasury Generally speaking, provisions are drafted in broad and vague terms which leads to confusion on the structure and specific functions of the PPO. In particular, it is not clear how the functions of the PPO are intended to align with and be carried out relative to those of Provincial Treasuries or institutions. Various provisions in the Bill illustrate the implications of this lack of clarity. For example, the PPO is empowered to "intervene by taking appropriate steps to address a material breach of this Act by a procuring institution as may be prescribed". Provincial Treasuries are empowered to do so in respect of "an institution within its province". There is no guidance on what would constitute "appropriate steps" for intervention by either the PPO or Provincial Treasury, and steps with the descriptor "as may be prescribed" are insufficiently clear - thus, the specific power being granted by the Act is uncertain and unclear. This type of confusion is endemic to the Bill's articulation of the role of the PPO and we recommend that the provisions generally be carefully reconsidered to ensure that there is clarity and consistency in this regard.	includes procurement rules, determined in primary and subordinate legislation. Therefore, having the Public Procurement Office (PPO) in National Treasury accords with section 216(2). Considering functions of PPO in the Bill and section 216(2) of the Constitution, the creation of a separate entity with associated costs is not justified. The establishment of an "anti-corruption authority" falls outside the scope and mandate of the Bill. The functions of the Public Procurement Office, Provincial Treasuries and the Procuring Institutions are clearly articulated in the Bill and in the case of Provincial Treasuries, there are some functions that they will perform which are exactly the same as the PPO with the difference being that such functions will only be performed within the Provincial Administration of that Provincial Treasury; and in relation to procuring institutions within that province; and some are only functions that the PPO can perform as they relate to functions which set the minimum norms and standards for all procuring institutions. The Bill is drafted to capture the principles and the details to be prescribed in regulations.		

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
Equal Education and Equal Education Law Centre	Clause 4 - Establishment of Public Procurement Office	Section 4 of the Bill establishes a Public Procurement Office (PPO) "within the National Treasury", and requires the Head and officials of the PPO to "perform their functions in terms of this Act impartially and without fear, favour, or prejudice". The Bill is insufficiently clear on the envisaged institutional structure of the PPO and no content is given to how the PPO will ensure impartiality and independence. Absent from the Bill are key provisions that ensure the impartiality and independence of the PPO, including the process of appointment of the Head of the PPO; the protection of employment of the Head; the employment of staff; and how the independence of the PPO will be ensured as a body which sits inside the National Treasury. Organisational protections such as these are crucial to any independent oversight body and, without them, it leaves the PPO open to political interference and partiality. In light of the extensive powers granted to the PPO, we are especially concerned regarding the absence of a transparent and public appointment process for the head. The current Office of the Chief Procurement Officer (OCPO) is also established within the National Treasury and its independence has come under scrutiny. Some would argue that the PPO should be entirely independent, such as the current Competition Commission, established in terms of the Competition Act, 89 of 1998. However, to the extent that the PPO remains in National Treasury, added measures must be put in place to ensure its independence. For the PPO to be an effective oversight, operational, and regulatory mechanism, there need not only be independence but also accountability. The Bill is silent with regard to who holds the PPO accountable and through what mechanisms. EE and the EELC recommend that the Bill be amended to include comprehensive provisions on: 1. The role and appointment of the Head of the PPO, including: a. that the Head of the PPO be appointed by the Minister following a public and transparent nomination process to be confirmed by Parliament; b. the process in terms of which the Head of the PPO is appointed; c. the maximum term of the appointment and terms of renewal; d. how, and under what circumstances the Head of the PPO may be removed from office; e. required qualifications of the Head of the PPO. 2. The employment of staff by the PPO, including: a. that this must be performed directly by the Head of the PPO.	Refer to the response provided above on the establishment of the PPO, note that it regulates procuring institutions only. The PPO and officials will be appointed in terms of the Public Service Act and the provisions of that Act will apply to those officials. The PPO will have original powers in terms of the Bill which are not subject to the authority of the Minister of Finance or the DG of Treasury.		

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		The Bill must also be amended to include a provision clearly setting out the independence of the PPO, including: 1) clarifying the relevant reporting structures within the PPO; 2) prohibiting the Head of the PPO and each employee from: a) engaging in any activity that undermines the integrity of the PPO; b) participating in any investigation, hearing or decision concerning a matter in respect of which that person has a direct interest; c) making private use of, or profit from, or divulge to a third party any confidential information obtained as a result of performing that person's official functions. The Bill must be amended to include provisions setting out: 1. Who the PPO is accountable to; 2. Mechanisms available to hold the PPO accountable			
Equal Education and Equal Education Law Centre	Clause 5 - General functions of the PPO	Section 5(1) of the Bill sets out the general functions that the PPO must perform, ranging from various monitoring, oversight, intervention, and support roles. We note that the functions set out in 5(1) largely reflect, and thereby give a statutory footing to, the de facto functions of the OCPO. We support section 5(1) to the extent that it aims to clarify and clearly set out the powers of the PPO as this is vital to the institution's efficacy. However, some of the functions of the PPO as articulated in the Bill require further scrutiny as they are overly broad or unclear. We recommend that the functions of the PPO generally be carefully reconsidered to ensure clarity and consistency in this regard. See specific recommendations per sub-section below.	Comment is noted and responses will be considered in line with the recommendations made below.		
Equal Education and Equal Education Law Centre	Clause 5 - General functions of the PPO	Section 5(1)(h) provides that the PPO must: "intervene by taking appropriate steps to address a material breach of this Act by a procuring institution as may be prescribed". The Bill does not provide any guidance on how the PPO may a) determine that an institution is in breach of the Act, and b) what appropriate steps for intervention might include. While it notes that appropriate steps are those that "may be prescribed", it is unclear which instrument will prescribe these steps. This is too broad and there is no guidance given anywhere else in the Bill. This means this important accountability function is likely to only be effective if regulations are published. EE and the EELC recommend that the Bill should provide clarity on the process the PPO would undertake to determine whether an institution is in material breach of the Act. The Bill should also be amended to clearly indicate what steps the PPO may take to intervene.	Clause 5(1)(h), while clause 6(1)(b) refers to the provincial treasury, is creating an enabling provision for the Minister to prescribe interventions in the regulations should it be necessary to do so. Refer to response above on the rationale for the manner in which the Bill is drafted, setting high-level principles in the Bill (primary legislation) and prescribing the details in the regulations.		
Equal Education and	Clause 5 - General	Section 5(2) of the Bill sets out the powers which the PPO may exercise. The powers of the PPO as articulated in the Bill require	Refer to previous responses provided above on the		

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
Equal Education Law Centre	functions of the PPO	further scrutiny as they are often overly broad, or unclear and incomprehensible. In addition, the PPO's powers should be more aligned with the recommendations of the Zondo Commission Report. We recommend that the powers of the PPO generally be carefully reconsidered to ensure clarity and consistency in this regard. See specific recommendations per sub-section below.	establishment of the PPO and the recommendations of the n measures and transparency may not be the only instrument through which to combat corruption.		
Equal Education and Equal Education Law Centre	Clause 5 - General functions of the PPO	Sections 5(2)(a) and (b) grant the PPO powers to: (a) issue binding instructions; and (b) issue non-binding guidelines to assist procuring institutions with the implementation of the Act or any procurement related matter" Broadly speaking, the Bill's use of multiple binding and non-binding instruments has the potential to create significant regulatory confusion. More specifically, there is an unclear, and in some cases, inconsistent use of the term "instructions" throughout the Bill. For example, even though "instruction" is defined as "an instruction issued by the Public Procurement Office in terms of section 5", Provincial Treasuries may also issue their own binding instructions in terms of section 6(2)(a). Significantly, the definition of "this Act" in section 1 of the Bill includes reference to "instructions". This has wide-ranging implications for the legal effect of instructions. For example, any offence committed in terms of the Act, would include an offence committed in the implementation of any instruction. This provision does not withstand legal scrutiny as there must be certainty in criminality. In addition, by including "instructions" in the definition of "this Act" (especially when those instructions are binding, have serious consequences for non-compliance and can be issued on any topic at full discretion of the issuing body), the Bill essentially gives the PPO and Provincial Treasuries not just regulatory powers but de facto unfettered law-making power. This is especially concerning because the lack of independence and organisational protections envisioned for the PPO leaves the body vulnerable to corruption and political influence. The power afforded to the PPO to issue "binding instructions as provided for in this Act and on any other procurement matter for the effective implementation of this Act" is too broad since the only other provision that specifies/guides the scope and exercise of that power is section 5(3), which simply states that instructions may be issued for different categories of institutions, goods, services or infrastructure. This results in an overly broad power/ discretion. EE and the EELC recommend that: 1) The definition of "this Act" in section 1 of the Bill be amended to remove reference to "instructions"; and	The words "instruction" or "instructions" have been consistently used in the Bill and in line with the definition in clause 1. The provincial treasuries have autonomy to exercise certain functions within their provincial administrations and in some instances, there may be a need for the provincial treasuries to issue further instructions to regulate issues that are specific to that province. It should be noted that even when Provincial Treasuries are exercising this right, they may not issue instructions which are inconsistent with the Bill. Furthermore, all instructions that will be issued, whether by the PPO or the Provincial Treasuries must now follow a more stringent process which includes a public consultation process, with the requirement that "With each instruction, the Public Procurement Office or a provincial treasury. must publish a consultation report."		

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		2) A section be introduced in the Bill that limits the scope and ambit of the power to issue binding instructions and details and circumscribes the specific issues around which binding instructions be issued. 3) The definition of "instructions" to be amended to provide clarity and bring coherence to where the Bill gives other institutions that are not the PPO the power to issue instructions.			
Equal Education and Equal Education Law Centre	Clause 5 - General functions of the PPO	The Bill does not clearly provide for a process whereby complaints can be submitted directly to the PPO, either by institutions or by the public. The Bill must be amended to provide for such a complaints mechanism	The Bill makes provision for this in clauses 56(1) and 64(1)(a)(xiv).		
Equal Education and Equal Education Law Centre	Clause 6- Functions of Provincial Treasuries	We have already noted above the general concerns regarding the lack of clarity on how the functions of the PPO are intended to align with and be carried out relative to those of Provincial Treasuries or institutions; and the gaps relating to enforcement powers for both. More specific comments are listed below.	Comment is noted. Refer to response provided above on the functions that are provided by Provincial Treasuries. and responses will be considered in line with the recommendations made below.		
Equal Education and Equal Education Law Centre	Clause 6- Functions of Provincial Treasuries	Section 6(1) lists various duties that Provincial Treasuries must perform in relation to procurement including overseeing institutions within its province in respect of the procurement function. Section 6(1)(b) requires Provincial Treasures to "intervene by taking appropriate steps to address a material breach of this Act by a procuring institution within its province". The provision does not provide sufficient clarity as to the specific enforcement powers that Provincial Treasuries have to address a material breach of the Act by institutions. Section 6(1)(b) to be revised so as to specifically list the type of enforcement powers Provincial Treasuries have in order to address a material breach of the Act by relevant institutions.	The appropriate steps will be prescribed. Refer to the response above to comments on clause 5(1)(h) on the rationale for the manner in which the Bill is drafted to include only high-level principles in the Bill and for regulations to prescribe the details.		
Equal Education and Equal Education Law Centre	Clause 6- Functions of Provincial Treasuries	Section 6(2)(c) indicates that Provincial Treasuries "may" assist procuring institutions in building their capacity for efficient, effective, and transparent procurement management. We are encouraged by the recognition that institutions require capacity development. However, procurement capacity is an important challenge and the Provincial Treasuries should not just be empowered but should be clearly required to provide such support. EE and EELC recommend that section 6(2)(c) be made a mandatory function of Provincial Treasuries. This would be achieved by amending section 6(1) to include the underlined wording: "6(1) A provincial treasury must- …	The provisions on the Bill are not intended to encroach on the responsibility and accountability of procuring institutions to capacitate their officials. Whilst the PTs		

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		(e) assist procuring institutions in building their capacity for efficient, effective and transparent procurement management.”	are enabled to assist, they should not usurp the role of the procuring institutions.		
Equal Education and Equal Education Law Centre	Clause 7 – Decision-making for institution	Section 7 of the Bill makes reference to an “accounting officer” and “accounting authority” respectively, which are responsible for decisions on behalf of the procuring institution in terms of the Act. These terms, defined separately in the Bill, are used interchangeably and without clear distinction throughout the Bill. The use of the terms “accounting officer” and “accounting authority” should be carefully reviewed throughout the Bill to ensure consistency and appropriateness.	Accounting officer or accounting authority are not used interchangeably but rather refer to the accountable persons in procuring institutions, as defined in the PFMA and MFMA. For example, in a department and Municipality, you will have an accounting officer, whereas in public entities listed under schedule 2 to the PFMA, you will have an accounting authority which is effectively the board of that public entity. There is thus no needs to reconsider the use especially without a clear indication of where the inconsistency or incorrect use of the terms is specifically.		
Equal Education and Equal Education Law Centre	Clause 8 – Duties of institution	Section 8 sets out the duties of the institution. It does not, however, specify who in the institution is responsible for carrying out particular duties. That is, there is no specific reference to an accounting authority/officer or other functionary. In addition, Section 8(c) does not exist. To ensure clarity, the Bill should specify which functionaries in an institution are responsible for carrying out particular duties.	Clause 7 of the Bill indicates that the accounting officer or accounting authority of an institution is responsible for making decisions on behalf of the procuring institution. It should be noted that the Bill should be read with all other applicable legislation, in this case the PFMA and MFMA so as to understand that both these Acts provide for delegation of authority. It is not clear from the comment where the reference to “8c” which “does not exist” is captured so that it can be corrected.		
Equal Education and Equal	Chapter 3	EE and EELC welcome specific attention given in the Bill to provisions that uphold the integrity of the procurement process and promote accountability. However, there remains ambiguity as to how the debarment processes outlined in the	The comment is noted. It should be noted that the PPR 2022 repealed the PPR 2017, and the PPR 2022 will in turn		

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
Education Law Centre		Bill will align with/relate to existing debarment processes. Existing debarment processes, which bar bidders and suppliers from participating in procurement, include the following: 1. In terms of infrastructure procurement, a bidder or supplier's name can be removed from the Construction Industry Development Board's ("CIDB") Register of Contractors. In terms of the Construction Industry Development Regulations, 2004, this can be done following a formal inquiry by an investigating committee appointed by the CIDB. The CIDB allows for any aggrieved individual to bring a complaint against a contractor which may lead to their debarment. 2. A bidder or supplier's name may be added to the National Treasury's List of Restricted Suppliers. Under the Preferential Procurement Regulations, 2017, an organ of state must initiate an investigation into any contractor that submits false information affecting the evaluation of their tender and refer the results of the investigation to National Treasury. National Treasury then has the discretion to place a contractor on the List of Restricted Suppliers for up to ten years. 3. A bidder or supplier's name may be added to National Treasury's Register for Tender Defaulters. 1 In terms of the Prevention and Combating of Corrupt Activities Act, Act 12 of 2004, companies must be convicted of corruption, and a court must make a special order that the company be placed on the defaulters register. Any individual with standing can bring such a court application.	be repealed by the Bill as the Preferential Procurement Policy Framework Act will be repealed by the Bill. When the Bill comes into effect, debarment for transgressions committed in terms of the Bill will be done in done in line with the provisions of clause 15. It should be noted that the administrator of the Prevention and Combating of Corrupt Activities Act is the Minister of Justice and Correctional services, and thus compliance with the Act would be that Minister's responsibility, including any prosecutions of the offences committed in terms of the Act. The Minister of Finance is only assigned the role of establishing and maintaining the Register for Tender Defaulters by the Act.		
Equal Education and Equal Education Law Centre	Chapter 3	With specific reference to the schooling sector, there have been important shortcomings in existing debarment processes, especially in terms of the ability of these processes to hold accountable stakeholders responsible for school infrastructure delivery. ● List of Restricted Suppliers: There are currently no contractors, suppliers, or implementing agents that have been listed by either the national Department of Basic Education or the provincial education departments on the list of restricted suppliers, despite the DBE speaking often in public forums to issues they experience with contractors and implementing agents. Internal departmental investigations into contractor malpractice are often protracted and do not result in punishment. 2 This also suggests a failure on the part of National Treasury to adequately enforce this debarment process. ● Register of Tender Defaulters list: There are currently no companies listed on this list. This may relate to a lack of	The comment is noted; however, it should be noted that that accountability for decisions within a procuring institution vests with the accounting officer or accounting authority. Within the current regulatory regime, debarment (restriction) was left to the accounting officer or authority to decide whether or not to debar (restrict a supplier). Clause 15(3) is clear that the procuring institution must issue a debarment order against a bidder or supplier and may issue a debarment order against any of the	It is proposed that clause 61(3) be replaced with a provision that an accounting officer or accounting authority who fails to take reasonable steps to implement this Act and the procurement system of the procuring institution in accordance with this Act commits financial misconduct.	

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		knowledge among stakeholders, including the public, involved in court cases related to tender fraud about the requirement for a specific order. EE meetings with provincial education department officials in the Eastern Cape and IAs in the Eastern Cape have revealed that departments and IAs are reluctant to launch protracted court procedures against contractors. This also suggests a failure on the part of National Treasury to adequately enforce this debarment process.	directors, members, trustees or establishes who is responsible for the decision of a procuring institution and will thus be accountable for failure to comply with clause 15(3). It should be noted that the administrator of the Prevention and Combating of Corrupt Activities Act is the Minister of Justice and Correctional Services, and thus compliance with the Act would be that Minister's responsibility, including any prosecutions of the offences committed in terms of the Act. The Minister of Finance is only assigned the role of establishing and maintaining the Register for Tender Defaulters by the Act. partners of that bidder or supplier, for the transgressions listed in that clause. Clause 7 already		
Equal Education and Equal Education Law Centre	Chapter 3	It is crucial that the Bill addresses and avoids these challenges, including: ● Cumbersome and protracted processes that discourage institutions from reporting malpractice by bidders and suppliers; ● A lack of accessible processes through which the public can report bidders and suppliers for investigation; ● A lack of capacity within institutions tasked with investigating malpractice; and ● A lack of accountability for institutions that fail to implement adequate consequence management practices to hold suppliers and bidders accountable. It is further important that, to the extent that the intention of this Bill is not to replace existing debarment processes but rather complement or supplement existing processes, clarity is provided in terms of the relationship between these various processes and the implication of a contractor being debarred by one of these processes and not the others. In the absence of clarity on these issues, there may also be confusion about which entity to report a specific complaint to.	The comment is noted, however due to the consequence of debarment being that the bidder or supplier or any person identified in clause three possibly being restricted from being able to supply goods and services to all procuring institutions for the period of restriction, the process of restriction must follow a process of natural justice. Furthermore, a member of the public who suspects that a contravention of a law has been occurred has a right to approach a law enforcement agency to report such suspected contravention. Clause		

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		If the intention is that the Bill will invalidate, replace, or override the other debarment processes, then it appears to extinguish the ability of the public to report contractors and initiate debarment proceedings. The Bill does not contain any mechanism or channels for the public to hold contractors accountable.	38(1)(a) clearly addresses the fact that the Tribunal will review the decisions taken in terms of clause 15 to debar a supplier		
Equal Education and Equal Education Law Centre	Clause 2 - Objects of the Act	In terms of section 2(1)(a) of the Bill, "The objects of this Act are… to introduce uniform treasury norms and standards for all procuring institutions…" To promote certainty and allow for proper accountability as required in terms of section 195(1)(f) and (g) of the Constitution, EE and the EELC recommend that the Bill explicitly refers to and clarifies the interplay of existing debarment processes, such as those under the Construction Industry Development Board Act, 38 of 2000, the Preferential Procurement Regulations, 2017 and the Prevention and Combating of Corrupt Activities Act, 12 of 2004.	The CiDB regulates the Construction Industry (including the private sector) and deals with processes related to the development of the construction industry only, and not any other sectors. Therefore, any provisions included in the CiDB Act would not apply to other sectors that are not within the construction industry and thus the mandate of that Act. The Preferential Procurement Regulations, 2017 (PPR) 2017 were repealed by the PPR 2022, therefore, there is no longer provision for restrictions in terms of the PPR 2017 as those regulations are no longer in effect. Furthermore, it should be noted that the PPR2022 and the Preferential Procurement Policy Framework Act will be repealed by this Bill (refer to Item 9 of the Schedule Amendments and Repeals of Legislation). The processes outlined in the Prevention and Combating of Corrupt Activities Act, relates to offences committed in terms of that Act and a court in addition to any sentence that may be imposed rules that the particulars of that person be endorsed on the Register for Tender Defaulters and that process is not being		

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
			repealed by the Bill; whereas debarment as provided for in the Bill is for transgressions listed in clause 15(3), with the difference being that it does not require a conviction from a court of law before a person can be debarred.		
Equal Education and Equal Education Law Centre	Clause 9 - Code of Conduct	These sections speak to the requirement of "an accounting officer or other official, a member of an accounting authority, a bid committee or the Tribunal, a bidder or a supplier or any other person involved in procurement in terms of the Act" to comply with a prescribed code of conduct. Failure to comply as stipulated constitutes misconduct with steps being taken "in terms of the applicable procedure". Requiring any individual to comply with and be legally bound to a code of conduct, this code of conduct must exist, and be freely available to the parties it purports to govern. There is no indication in these clauses of where the code of conduct is currently housed, whether it is publicly available, whether relevant officials or individuals will be provided with copies, which department or official is currently legally empowered to draft and enforce the code of conduct, and how enforcement is expected to occur. It is not legally sound to bind an official or individual to a code of conduct that does not yet exist. More detail on the code of conduct could be contained in the Regulations, however vital information, such as the actual code of conduct should be annexed to the Act.	Clause 9. (1) indicates that "An accounting officer or other official, a member of an accounting authority, a bid committee or the Tribunal, a bidder or a supplier or any other person, involved in procurement in terms of this Act, must comply with the **prescribed** code of conduct." It is not the intention of the Bill to include the code of conduct in the primary legislations due to reasons articulated above on why the Bill captures the high-level principles with the details being prescribed in regulations.		
Equal Education and Equal Education Law Centre	Clause 10 - Conduct of persons involved in procurement	The explicit inclusion of conduct expectations of all officials and individuals involved in procurement is welcomed. These principles should however be legally enforceable and hold adverse consequences for the official or individual if not complied with. These principles should as such be included in the code of conduct. These conduct principles should be included in the Code of Conduct so that officials and individuals involved in procurement can properly be held to account in an instance of non-compliance.	Clause 9 indicates that the Code of Conduct will be prescribed, clause 61(1)(e) states that a person who contravenes section 10(b) or (c), constitutes an offence "and is liable on conviction to a fine or to imprisonment for a term not exceeding 10 years or to both, and in addition to the penalty imposed in this section, the court may order that the amount of loss incurred by the complainant be compensated, failure of which the court may issue an order of confiscation of personal property of the		

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
			person convicted in order to recover the loss."		
Equal Education and Equal Education Law Centre	Clause 11 - Due diligence and declaration of interest regarding persons involved in procurement	There is a lack of accountability to procuring institutions in this clause. No mention is made of what will happen if the procuring institution fails to undertake or fails to adequately undertake the steps prescribed in this provision. Accountability should be incorporated in this clause with consequences being included for procuring institutions who fail to perform in terms of this clause.	In terms of clause 7, the accounting officer or accounting authority of a procuring institution is responsible for making decisions on behalf of the procuring institution in terms of this Act.		
Equal Education and Equal Education Law Centre	Clause 11	There is a stark lack of practical detail in these provisions relating to, for example: - What documentary evidence must be produced to prove familial relations. - Against what information declarations will be checked to ensure its accuracy. - Whether minutes of meetings recording disclosure interests will be made publicly available. Practical details required to ensure the proper functionality of these provisions can be included in Regulations. However, these provisions will then need to allow for their inclusion in regulations and where possible, cross reference to the relevant regulations.	Clause 11(1) states that "a procuring institution must take steps in accordance with prescribed procedures to identify—" Therefore, details of the procedures will be provided in regulations.		
Equal Education and Equal Education Law Centre	Clause 12 - Undue influence	There is again a lack of accountability built into this important section. Whilst provision 12(1) speaks to actions that are prohibited in terms of procurement processes, no consequences are listed where individuals or officials involved in procurement fail to abide by this provision. Adequate consequences should be included in this section to allow for required accountability	In terms of clause 7, the accounting officer or accounting authority of a procuring institution is responsible for making decisions on behalf of the procuring institution in terms of this Act.		
Equal Education and Equal Education Law Centre	Clause 13 - Automatic exclusion from submitting bid	This section outlines which "persons" are excluded from participating in procurement There is no acknowledgement or cross-reference in this section to existing National Treasury defaulter and restricted supplier processes. A bidder or supplier that has been listed as either restricted suppliers or tender defaulters should also be automatically excluded from procurement. EE and EELC recommend that this section be rephrased to avoid confusion and be expanded to include all existing debarment processes as well as an obligation on institutions to consider these factors before awarding a bid. Specifically, we recommend the following wording be included:	Clause 67 makes provision for amendment sand repeal of legislation and saving, as even though they will be saved in line with clause 67 but it would be made clear to deal with provisions of regulations that will fall away.	Propose amendment to clause 67(2) to deal all required savings.	

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		"The following persons may not submit a bid: … (k) A bidder or supplier listed on National Treasury's List of Restricted Suppliers; (l) A bidder or supplier listed on National Treasury's Register of Tender Defaulters; (m) In terms of construction procurement, a bidder or supplier who is not on the Construction Industry Development Board's Register of Contractors; An institution must determine that a bidder or supplier does not fall into any of these categories, before awarding a bid." EE and EELC further recommend that the Bill stipulate the consequences for an institution that awards a contract without taking reasonable steps to determine whether the bidder or supplier is excluded from participating in procurement, and the steps the PPO must take in such a case.			
Equal Education and Equal Education Law Centre	Clause 15-Debarment	These sections state that: "A debarment order may not exceed the prescribed period and different periods may be prescribed for debarment in terms of subsection (3)." "A debarment order prohibits the affected person for the period specified in the debarment order, from participating in procurement by procuring institutions generally or in circumstances specified in the order." These provisions are overly broad with no guidance as to the practical operation of these clauses. It does not provide factors to be taken into account in determining the period specified in the debarment order; it does not stipulate a maximum or minimum period that may be imposed; nor what other circumstances may be specified in the order. There is no guidance as to how periods will be "prescribed". In addition, there is no guidance as to what must happen either during or after the debarment period besides not participating in procurement. In other words, whilst the debarment order is in place, should the affected person undergo training to equip themselves with knowledge so that they do not repeat the malpractice, will they be subject to a probationary period after the expiry of the debarment order? EE and EELC recommend that these sections be amended to include a minimum debarment period of one year and a maximum debarment period of ten years.	The transgressions that a person may be debarred for are identified in clause 15(3) and makes provision for different periods to be prescribed and the provisions proposed may be considered for these regulations.		

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		We further recommend that an amendment be included to stipulate factors that must be considered in determining the period of debarment including, but not limited to: 1. The severity of the contractor's acts or omissions; 2. The financial cost to the state resulting from the contractor's acts or omissions; 3. The delay in delivering the service procured, resulting from the contractor's acts or omissions; and 4. A pattern of transgressions by a contractor. To the extent that the Bill contemplates specific circumstances under which a contractor may be barred from participating in procurement, as opposed to being generally debarred from participating in procurement, these specific circumstances must be outlined in the Bill.			
Equal Education and Equal Education Law Centre	Clause 15(6) -	Section 15(6) requires that: "The Public Procurement Office must (a) establish and maintain a debarment register of persons debarred in terms of this section; and (b) make the register publicly available" Although institutions will have access to these names, the Bill fails to clarify how such publication should occur. It has been EE and EELC's experience that obtaining information regarding debarred contractors in the context of school/education-related procurement is extremely difficult. Public access to these names is therefore critical to ensuring transparency and accountability and essential to curbing corruption in procurement processes. Moreover, to encourage accountability and accessibility, the publication of such names should not be limited to inclusion in the government gazette. EE and EELC recommend that section 15(6)) of the Bill be amended by the insertion of the following underlined words: "(2) The Public Procurement Office must publish <u>a regularly updated list of</u> the names of debarred bidders or suppliers <u>on a publicly accessible website</u>. and must make such names available to institutions upon request. <u>This list must include the following information:</u> <u>(a) the name of the contractor concerned;</u> <u>(b) the period of debarment;</u> <u>(c) the reason for debarment; and</u> <u>(d) the name of the organ of state that was party to the agreement in terms of which the contractor was found to be in default.</u>"	Clause 15(6) makes provision for the Public Procurement Office to establish and maintain the register of persons debarred and does not specify that it will be published in the government gazette. The ordinary meaning of the word maintain in itself means to keep something going or alive therefore there is no need to add "regular". It is not necessary for the details of what information the register must contain and where it must be housed (website as proposed) are not necessary to be included in the primary legislation.		
Equal Education and Equal	Clause 28-Establishment of procurem	Section 28(2)(b) states: "The responsibilities of the procuring unit must at least include the following: (b) maintenance of its procurement system to ensure effectiveness and efficiency."	The ordinary meaning of the word maintain in itself means to keep something going or		

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
Education Law Centre	ent function	EE and EELC recommend that the word regular be inserted so it reads: (b) regular maintenance of its procurement system to ensure effectiveness and efficiency	alive therefore there is no need to add “regular”		
Equal Education and Equal Education Law Centre	Clause 29 - Bid committe e system	The clause empowers the Minister to establish a bid committee system for procuring institutions and the functions of each committee. Section 29(2)(c) explicitly excludes any person having a conflict of interest from being a member of said bid committee. While this is an important anti-corruption provision to prevent individuals with vested personal interests from influencing procurement processes, it is still vague as to what constitutes a conflict of interest in this case. EE and EELC recommend the term “conflict of interest” be clearly defined.	The ordinary meaning of conflict of interest is “a situation in which a person is in a position to derive personal benefit from actions or decisions made in their official capacity.” And this meaning does not differ from the meaning ascribed in the Bill and should not be defined.		
Equal Education and Equal Education Law Centre	Part 2 - Use of technolog y in procurem ent	We welcome the inclusion of sections 30 and 31in the Bill as it empowers the public with access to critical information related to procurement. In the basic education sector, this provision will help ensure procurement project information contained in systems such as the Education Facilities Management System (“EFMS”) is made publicly available.			
Equal Education and Equal Education Law Centre	Clause 37- Reconside ration of decision to award	Section 37(1) in the Bill permits a bidder to apply for reconsideration if that bidder is not satisfied with a decision to award a bid by an institution. We are concerned that the Bill does not allow for a third party to apply for reconsideration or review of a decision. We recommend that the Bill be amended to include an application for review or reconsideration by a third party. Applicants must cite the section of the Bill in terms of which the application is being brought.	The outcome of a tender affects the suppliers and bidders who submitted a bid. Clause 56 makes provision for “Investigation by Public Procurement Office” where if requested by the relevant treasury, a procuring institution, a member of the public or on its own initiative, investigate any alleged non-compliance with this Act other than an alleged commission of an offence, referred to in section 61. This is sufficient to address a third party who have concerns about any decision which does not comply with the provisions of the Bill.		
Equal Education and Equal Education Law Centre	Clause 39- Compositi on of Tribunal	Section 39 regulates the composition of the Tribunal. We are concerned that the provision is still broad. As it stands, the Bill stipulates that the Tribunal may consist of “as many members as the Minister appoints with due regard to section 40.” We recommend that the Bill stipulate a maximum number of members of the Tribunal. Additionally, members of the Tribunal must be representative of a broad cross-section of the population.	Comment is noted.		

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
Equal Education and Equal Education Law Centre	Clause 40- Qualification of members of Tribunal	The clause is silent on the vetting process of prospective members to the Tribunal to ensure that their qualifications are adequate. It is also unclear if the nomination process will be conducted publicly and how the public input on the shortlisting process after nominations. These vital issues are relegated to regulation which the Minister must make without any timeframe. We recommend that some of the core considerations regarding the vetting process be included in the Bill itself and outlined in this section and not left to the Minister to deal with in a regulation as suggested in section 64(1)(a)(iii)(bb).	Comment is noted.		
Equal Education and Equal Education Law Centre	General	TRANSPARENCY AND PUBLIC PARTICIPATION (ACCESS) Section 195(1) of the Constitution states that the public administration must be governed by the democratic values and principles enshrined in the Constitution, which include the prescript that public administration must be accountable, and that transparency must be fostered by providing the public with timely, accessible, and accurate information. 3 In addition, section 217(1) of the Constitution states that: "When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective." (own emphasis) In terms of section 195 of the Constitution, transparency must be fostered by providing the public with timely, accessible, and accurate information. The State's failure to do so is not only unconstitutional but limits the public's ability to properly monitor procurement processes that involve the spending of public funds and thereby leaves procurement processes vulnerable to corruption. We, therefore, recommend that the principle of transparency finds greater expression throughout the Bill and that the need for public access to procurement processes and information be carefully balanced with the need for the protection of information.	The Bill provides for transparency in clauses 32 and 33, read together with clause 35 and 36.		
Equal Education and Equal Education Law Centre	Clause 5 - General Functions of the PPO	The Bill fails to compel procuring institutions to make information concerning procurement proceedings publicly available. Access to regularly updated information on project progress is equally important and institutions should be obliged to make regularly updated information publicly available. In the case of school infrastructure, the Education Facilities Management System, which will soon be used by all provincial education departments, and contains critical information on school infrastructure delivery, which should be made publicly available.	The Bill provides for transparency with regards to public procurement processes in clauses 32 and 33 read together with clause 35 and 36, as regulated by the Bill. However, it should be noted that the regulations for transparency of matters governed by other legislation		

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		EE and EELC recommend that section 5 be amended to oblige the PPO to require institutions to publish regularly updated information on their procurement proceedings and project implementation, and to ensure that this is made publicly available. This may, for example, be achieved by posting information on an institution's website or making critical information on existing platforms publicly available. For example: ● The name of the IA overseeing a specific construction project (where there is one) as well as the name and contact details of the individual who is responsible for managing that specific project. ● The name of, and contact details for, the contractor and any subcontractors responsible for construction. ● The specifications of the construction project. ● The total budget for the project. ● Regularly updated information (including photos) on project progress. ● Regularly updated information on expenditure. ● Minutes from Steering Committee meetings or other committees responsible for overseeing the construction project	or other mandate holders will not be addressed in the Bill, but should be addressed in the other applicable legislation or by the other mandate holder.		
Equal Education and Equal Education Law Centre	Clause 15-Debarment	As indicated above, Section 15(62) requires that: "The Public Procurement Office must (a) establish and maintain a debarment register of persons debarred in terms of this section; and (b) make the register publicly available" For true transparency, public participation, and accountability to occur, there must be guidance and assurances that the public is made adequately and holistically aware of information about debarred individuals. This is particularly important in the context of basic education where school infrastructure impacts the safety and dignity of learners and where school governing bodies are required at times to manage construction projects at schools. As such it is vital that accurate, up-to-date, and detailed information be included in the proposed debarment register. This information will allow the public and schools to not only hold procuring institutions to account but also raise the alarm on any nefarious activities. As such, the recommendation made above by EE and the EELC remains of vital importance. This recommendation is that the following underlined words be inserted in the Bill: "(2) The Public Procurement Office must publish <u>a regularly updated list of</u> the names of debarred bidders or suppliers <u>on a publicly accessible website</u>. and must make such names available to institutions upon request. <u>This list must include the following information:</u>	Comment is noted. Clause 15(6) makes provision for the Public procurement office to establish and maintain the register of persons debarred and does not specify that it will be published in the government gazette. The ordinary meaning of the word maintain in itself means to keep something going or alive therefore there is no need to add "regular". It is not necessary for the details of what information the register must contain and where it must be housed (website as proposed) are not necessary to be included in the primary legislation.		

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		(e) the name of the contractor concerned; (f) the period of debarment; (g) the reason for debarment; and the name of the organ of state that was party to the agreement in terms of which the contractor was found to be in default."			
Equal Education and Equal Education Law Centre	Clause 32- Access to procurement processes	We are concerned that subsection (2) will be used to deny public access to some procurement processes, which are in the public interest to make transparent, particularly if it conceals corruption or nefarious activities. We recommend that section 32(2)(b) is removed as it is overly broad and may be subject to abuse.	. The clause must not be read in isolation to other provisions of the Bill. It is not practical for access to all procurement processes to be granted, however clause 33 makes provision for disclosure of categories of procurement information, thus the public would have access to information pertaining to procurement information, even if as a result of a threshold prescribed by the Minister in terms of clause 32, they may not have been granted access to all procurement processes		
Equal Education and Equal Education Law Centre	Clause 33- Disclosure of procurement information	We welcome the inclusion of provisions that deal with public disclosure of procurement information, particularly subsections (1) and 2(b), as these will enhance transparency and empower the public to hold procuring institutions to account. However, there is an existing practice of National Treasury issuing instructions calling for mandatory publication of procurement information but very few departments and entities comply. It is, therefore, unclear how this provision will change the status to ensure that at least the minimum level of information is published by all procurement entities in a timely fashion. We recommend that the bill specify the minimum information to be published, a suitable time frame, and an appropriate sanction for non-compliance.	Comment is noted. See response above regarding the reason for the Bill to capture high level principles for public procurement in the Bill and the details to be prescribed in regulations. Clause 33(2) sufficiently provides for the minimum requirements information that must be reported.		
Equal Education and Equal Education Law Centre	Clause 36 - Protection of information	Although the clause may be intended to prevent the malicious use of procurement information, this provision must be balanced with an imperative for transparency in order to ensure that public funds are used effectively. There should only be limited instances in which procurement information is deemed confidential.	Comment is noted. Clause 36 must be read together with clauses 32, 33 and 35		

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
Equal Education and Equal Education Law Centre	Clause 64-Regulations	Section 64(1)(a)(xii) authorises the Minister to make Regulations concerning emergency procurement without any specific time frame. Other than Section 1 defining "emergency", there are no other substantive provisions relating to emergency procurement. As the COVID-related national state of disaster has demonstrated, emergency procurement requires careful regulation and oversight. It is therefore necessary to ensure that Regulations dealing with the issues set out in section 64(1)(a)(xii) be published within a particular period of time from the commencement of the Act. The Bill should prescribe a timeframe in which the Minister must promulgate regulations regarding emergency procurement. We also recommend that more stringent measures to ensure transparency be in place for the purpose of emergency procurement.	The comment is noted. The process of drafting any regulations will only commence once the Bill is passed, therefore it is not possible to indicate timelines for this process.		
.Equal Education and Equal Education Law Centre	General	INFRASTRUCTURE DELIVERY MANAGEMENT EE and the EELC have a specific interest in school infrastructure delivery. EE members, with the support of the EELC, have been campaigning for safe, adequate, and dignified school infrastructure at all public schools since 2008. In 2013, EE's campaign achieved a significant victory with the promulgation of the Regulations Relating to Minimum Norms and Standards for Public School Infrastructure ("Norms and Standards"), which provide clear deadlines by when certain minimum infrastructure standards and basic services such as adequate toilets, classrooms, water, and electricity must be provided at all public schools. Despite this law, there have been significant delays in delivering infrastructure and basic services to schools, with the first deadline (November 2016) not yet met and the second deadline (November 2020) set to be missed as well. There are multiple reasons for these delays, one of which is multiple challenges experienced with Implementing Agents ("IAs") - entities who are appointed on behalf of national and provincial education departments to oversee construction projects. In various reports and public presentations, the Department of Basic Education ("DBE") and provincial education departments, have blamed delays in infrastructure delivery on poor-performing IAs. In a presentation to Parliament's Portfolio Committee on Basic Education on 29 October 2019, the DBE highlighted various procurement and supply chain management ("SCM") challenges related to IAs, including:	Clause 15 adequately addresses debarment in terms of the Bill. Clauses 32 and 33 address transparency in the Bill. Issues pertaining to matters regulated in other legislation that is not within the mandate of the Bill must be dealt with in terms of that legislation, including any transparency measures that are required.		

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		● non-compliance with SCM processes resulting in irregular expenditure; ● late appointment of service providers; ● inaccurate reporting; ● poor programme and project management; ● failure to meet milestones and expenditure targets; ● a lack of capacity among IAs resulting in delays and poor quality work; and ● contractual obligations not carried out. In the same meeting, the Director General of the DBE, Mr. Hubert Mweli, acknowledged that there has not been sufficient consequence management for IAs. EE's Implementing Agents report makes a number of proposals on ways in which IA accountability can be strengthened. These include: ● developing effective processes that ensure the debarment or blacklisting of defaulting IAs and contractors; ● empowering the public with access to critical information related to procurement projects, by making systems such as the Education Facilities Management System ("EFMS") publicly available; and ● strengthening other accountability structures such as, in the case of school infrastructure, steering committees, which bring together school communities, contractors, IAs and government officials to discuss progress and challenges with construction projects.			
Equal Education and Equal Education Law Centre	Clause 25(1)(a)(ii) & section 64(7)(b)(i)	Section 25(1)(a)(ii) & section 64(7)(b)(i) of the Bill compel the Minister to make regulations on infrastructure procurement. Although the rationale for wanting to address infrastructure procurement in the regulations seems reasonable as it will allow the Minister to deal with infrastructure delivery in detail according to the sector, the provisions do not have any specific timeframe attached. Without this specific regulation, the SCM and service delivery challenges currently plaguing the basic education sector will persist, violating the constitutional rights of school communities. Specific deadlines relating to the enactment of Regulations will not only ensure that binding obligations in terms of the Bill to develop Regulations are complied with but that certainty and transparency relating to further practical procurement detail is encouraged. It is recommended that within three years of the promulgation of this Bill, Regulations be drafted and published. Alternatively, and because the Bill as it currently stands requires a significant amount of important detail to be contained in Regulations, that Regulations be immediately drafted and finalised alongside the Bill.	The comment is noted. The process of drafting any regulations will only commence once the Bill is passed, therefore it is not possible to indicate timelines for this process.		

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Budget Justice Coalition (BJC) and Imali Yethu (IY) Joint Submission	General comments	It is important that procurement should be regarded as a strategic imperative rather than an overly administrative one. The bill should foster a culture shift towards streamlined processes without compromising safeguards against misconduct. The bill follows the State Capture Commission's prolonged deliberations. If it is to close the legislative loopholes that facilitated large-scale corruption in South Africa and safeguard against future abuses of power, it is crucial for this legislation to act as a bulwark. However, concerns arise regarding institutional arrangements concentrating power in the Public Procurement Office and the Minister of Finance. While supporting the introduction of the Bill, we advocate for revisions to address concentrated powers and enhance institutional frameworks based on our experiences and lessons learnt with state capture. To mitigate these risks, we propose adopting the State Capture Commission's recommendation of establishing an Anti-Corruption Agency. Balancing multiple aims, the Bill must promote transparency, efficiency, and accountability in public procurement. The Procurement Bill must ensure adequate access to information and open data, along with active and timely responses to requests for information. In its current form, we are concerned that it will result in procurement data being harder to obtain rather than becoming more transparent. It is crucial that this be addressed through amendments to the bill rather than being left to supplementary legislation.	Noted, however, The Bill in its current form does address in detail issues related to transparency of the procurement system as outlined in Clause 33 and other parts of the Bill, such as issues related to accountability as well as monitoring and oversight by the PPO of the procurement system as outlined in Clause 7 and 5(1)(g) of the bill respectively amongst others.		
		The draft Bill grants the Public Procurement Office (PPO) the authority to issue both binding instructions and non-binding guidelines. Furthermore, it provides provincial treasuries with the authority to issue provincial binding instructions. However, the use of multiple binding and non-binding instruments within the legislation raises concerns about potential regulatory confusion and perpetuates the problem of excessive regulation in public procurement. The term "instructions" is inconsistently used throughout the Bill, creating ambiguity. The inclusion of "instructions" in the definition of "this Act" extends their legal implications, giving the PPO and Provincial Treasuries considerable law-making power, which may lead to unfettered discretion. The broad power granted to the PPO to issue binding instructions lacks specific guidance, resulting in an overly broad and discretionary authority. As a remedy we recommend introducing a new section in the bill that restricts the authority to issue binding instructions, and specifies the issues for which binding instructions can be issued.	Noted, however, there will be no regulatory confusion as Clause 6(2)(a) provides for provincial instructions NOT inconsistent with the instruction issued by the PPO. Instruction is clearly defined under definitions. The guiding power resides under section 216 that provides for the National Treasury to issue uniform norms and standards.		The response does not address the concern with proliferation of subordinate instruments, which may lead to continuing fragmentation and incoherence of procurement rules. The proposal for more precise provision for instruction does not appear to have been considered.
		Whistleblowers play a crucial role in upholding the rule of law by exposing corruption and misconduct that undermine the integrity of	Noted, this matter requires the		There are incentivised whistleblowing provision

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		institutions. Despite their pivotal contribution, whistleblowers face an alarming onslaught, with insufficient legislative and practical measures in place to safeguard their rights and protect them from retaliation. There is an urgent need to fortify whistleblower safeguards and ensure the effectiveness of these individuals in exposing wrongdoing without fear of reprisal. BJC and IY are aware of discussions currently underway within the DOJ&CD process regarding whistleblower legislation. However, while urgent legislative measures are being prioritised in certain areas such as procurement, the protection of whistleblowers seems to be given less urgency, often left out of bills with promises of inclusion in subsequent legislation. This delayed approach raises concerns as whistleblowers play a pivotal role in upholding transparency and accountability often at their own personal and professional expense. To ensure a comprehensive legal framework, there is an imperative need to align the timeframes for enacting legislation, addressing whistleblower protections promptly and with the same level of urgency as other critical legislative matters. The prioritisation of this legislative reform will serve to not only enhance safeguards for whistleblowers but also potentially protect funds that would have been lost in the public purse. Furthermore, we wish to support the call by various civil society formations for the inclusion of incentivised whistleblowing within this bill.	collaborative effort and best led by DOJ&CD as it is within their mandate. Thus, the recommendation to speed up the process may be directed to the said department.		within other specialised legislations outside of the DOJ&CD fold. This is the case in environmental legislation. There is no strong reason for why similar provision may be made here.
		The bill makes provision for the protection of information, however we argue that these provisions will only serve to exacerbate the existing frustrations with PAIA and other protection of information mechanisms. We wish to note that this may not only have implications for whistleblowers' ability to expose corruption but that it will also hinder the public's ability to request and receive full information. Additional mechanisms must be put in place in this bill to ensure that this is not the case.	Noted, information is as per PAIA, therefore mechanisms are informed by this legislation.		
		We recommend: ● A section be introduced in the bill that limits the scope and ambit of the power to issue binding instructions, and details and circumscribes the specific issues around which binding instructions be issued; ● The definition of "instructions" to be amended to provide clarity and bring coherence to where the bill gives other institutions that are not the PPO the power to issue instructions; ● The bill should make provisions in the envisioned institutional landscape for adopting the State Capture Commission's recommendation of establishing an Anti-Corruption Agency; ● Urgent attention is called for in addressing the critical gap in whistleblower protections identified in the current bill and in additional legislation specific to whistleblowers; ● Enhancing the transparency measures contained in the bill to integrate open data and open contracting seamlessly into the legislative landscape; and	The objective of instruction is to assist with the implementation of the Act, therefore, it is not feasible to provide limitations at this stage. Furthermore, instructions are issued in terms of what the Act provides. Noted, see above. Noted		But the response invites the problem of fragmentation and incoherence in subordinate legislation.

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		● There must be a greater balance and clarity on the protection of access to information mechanisms in the bill.	Noted		
	Clause 5(2)	Sections 5(2)(a) and (b) grant the PPO the powers to issue binding instructions and issue non-binding guidelines. Broadly speaking, the Bill's use of multiple binding and non-binding instruments has the potential to create significant regulatory confusion. It maintains the status quo where there are a plethora of regulatory instruments governing procurement and perpetuates the issue of "over-regulation of public procurement" which this Bill is aimed at preventing. Moreover, there is an unclear, and in some cases, inconsistent use of the term "instructions" throughout the Bill. For example, even though "instruction" is defined as "an instruction issued by the Public Procurement Office in terms of section 5", Provincial Treasuries may also issue their own binding provincial instructions in terms of section 6(2)(a). Significantly, the definition of "this Act" in section 1 of the Bill includes reference to "instructions". This has wide-ranging implications for the legal effect of instructions. For example, any offence committed in terms of the Act, would include an offence committed in the implementation of any instruction. In addition, by including "instructions" in the definition of "this Act" (especially when those instructions are binding, have serious consequences for non-compliance and can be issued on any topic at full discretion of the issuing body), the Bill essentially gives the PPO and Provincial Treasuries de facto unfettered law making power. The power afforded to the PPO to issue "binding instructions as provided for in this Act and on any other procurement matter for the effective implementation of this Act" is too broad since the only other provision which specifies / guides the scope and exercise of that power is section 5(3), which simply states that instructions may be issued for different categories of institutions, goods, services or infrastructure. This results in an overly broad power / discretion. **Recommendations**: The definition of "this Act" in section 1 of the Bill be amended to remove reference to "instructions"; A section be introduced in the Bill that limits the scope and ambit of the power to issue binding instructions, and details and circumscribes the specific issues around which binding instructions be issued; The definition of "instructions" to be amended to provide clarity and bring coherence to where the Bill gives other institutions that are not the PPO the power to issue instructions.	Noted, see response above. The objective of instruction is to assist with the implementation of the Act, therefore, it is not feasible to provide limitations at this stage. Furthermore,		

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
			instructions are issued in terms of what the Act provides.		
	Clause 6 (2)	This is going to result in an extreme amount of complexity in that each province could have instructions and guidelines that are different. This further perpetuates the problematic nature of the current legal framework. **Recommendation**: Consider whether this extent of complexity will be beneficial and if this section should therefore be retained in the final version of the Bill.	Noted, however, there will be no regulatory confusion as Clause 6(2)(a) provides for provincial instructions NOT inconsistent with the instruction issued by the PPO.		
	Clause 6(3)	Adding to the complexity of different provinces having different instructions, there can be different instructions for different categories of procuring institutions and categories of procurement too. This is going to make the task of persons serving in the Tribunal and SCM officials within organs of state extremely challenging. The same concerns highlighted in terms of section 5 (3) apply here. Provincial treasuries should not be granted powers to regulate procurement processes by instructions. **Recommendation**: the entire provision should be removed.	Not supported. The Tribunal will have panels at each province, therefore, there will not be any complexity.		It is clear that the regulatory approach adopted by this bill will create new layers of complexity. This may be justified in certain circumstances, but the issue does not appear to have been adequately considered by the OCPO.
	Clause 8 (2)	The provision does not require a procuring institution to consult either with the Public Procurement Office or Provincial Treasury when reconsidering its own decision. Thus, there is no oversight over whether the reconsideration of any decision is in actuality due to an error of law, error of fact or fraud. The powers given to the PPO and to Provincial Treasuries similarly do not provide for oversight over the reconsideration of decisions by procuring institutions. **Recommendation**: "A procuring institution may, as prescribed, [and in consultation with the Public Procurement Office], reconsider its own decision made in terms of this Act, if the decision was based on error of law, error of fact or fraud."	Noted, however, this is to ensure accountability of actions taken but nothing precludes the involvement of the PPO or PT.		Requiring reconsiderations to be passed through the PPO and PTs would be a stronger safeguard against abuse of this provision.
	Clause 14 (1) and (2)	(14 (1) (a)): The fact that the Bill requires officials with a power differential compared to politicians to commit their objections to writing may put officials (who in effect become whistleblowers) in danger. This in turn could make it difficult to fill Accounting Officer positions, which are usually five-year contracts that are political appointments. (14(2)): The affected person who is faced with detriment such as being pushed out of the job (constructive dismissal) has usually already faced the detriment by the time of getting to the CCMA. **Recommendation:** It should be included in the Bill that if disciplinary procedures are initiated after an official has indicated their objection in writing, they may alert the PPO and the PPO may	Comment is noted. This should be reported to		This does not address BJC/Imali Yethu's concern that the Bill puts additional obligations on officials, without additional protections.

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		recommend that those disciplinary proceedings are conducted by a relevant body (such as the Public Service Commission or DPSA) aside from the procuring institution.	the Public Service Commission and the Public Protector.		
	Chapter 2	Our reading of Chapter 2 of the draft Bill is that it will lead to a high level of complexity, as each province may have its own set of instructions and guidelines thus creating further fragmentation and incoherence between provinces. This exacerbates the challenges posed by the current legal framework. By way of remedy we recommend weighing up the potential advantages of this level of complexity to determine if it is necessary to retain certain sections in Chapter 2 in their current form.	Noted, see response above		
	Clause 36(1)	This provision must be balanced with an imperative for transparency in order to ensure that public funds are used efficiently and effectively. It can potentially be used in a punitive manner against potential whistleblowers and result in greater opacity of procurement information. There should be limited instances in which procurement information should be deemed confidential. There are currently existing challenges with access to information by members of the public with PAIA applications which may be further exacerbated by this provision.	Noted, see response above		
PUBLIC SERVICE ACCOUNTABILITY MONITOR (PSAM)	General comments	The PSAM has examined the existing transparency measures and notes that despite South Africa being founding members of the Open Government Partnership, and having made numerous commitments to making procurement information available for civil society monitoring and oversight, there currently are limited amounts of information available, and this is completely insufficient to allow for meaningful monitoring amongst other forms of public participation. Simply, eTenders in its current form does not enable citizen oversight of procurement, or easy access to procurement information to give effect to a range of constitutional rights. It is unclear how existing measures in the Bill will overcome some of these persistent challenges. We believe that the reporting requirement must be explicit in the Procurement Bill, with all entities required to publish minimum amount of information, and consequences for those who do not comply. There are frameworks and technology solutions available that can make it simple and affordable for entities to comply. The loose time frame and vague references to readiness will no doubt result in further delays in establishing a complete central portal for procurement data.	The approach to drafting the primary legislation was to focus on the principles, whereafter the operational details would be prescribed in the regulations. The Bill in its current form does address in detail issues related to transparency of the procurement system as outlined in Clause 33 and other parts of the Bill. These transparency provisions are dealt with in the following clauses: clause 2(2)(b) (objects), 15(6) (debarment register), 30(3)(a) and (b) (access to procurement services and open data), 32 (access to procurement processes) and 33 (disclosure of information) and 64 & 65 (process to make		Many of the accountability mechanisms proposed are already present in the current system, but are not adequately operationalised. This speaks to the concern that the Bill does not credibly resolve existing issues.

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
			regulations and instructions). The Bill seeks to address and overcome some of the challenges that are experienced in the current regulatory regime. Other parts of the Bill provide for issues related to accountability as well as monitoring and oversight by the PPO of the procurement system as outlined in Clause 7 and 5(1)(g) of the Bill respectively, amongst others.		
		Although the bill has some positive provisions related to transparency, notably the requirement for machine readable, standardised data, the use of technology and a list of information to be published, we believe that the provisions are not strong enough to compel entities to publish data timeously, and the wording in the provisions may create a situation in which entities who do not want their data to be published, will be able to ignore instruction notes, as has been the case over the past few years.	As a preface to the response, it should be noted that clause 31(1) recognizes and provides for circumstances when it might not be possible to use technology. Clause 31(2) (a) provides that during the development of the procurement system, referred to in section 30(1), the Public Procurement Office must, by instruction, determine requirements for digitisation, automation, reporting and innovations that information and communication technology may enable… Furthermore, clause 61(3) states that an accounting officer or accounting authority who fails to take reasonable steps to		See prior response.

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
			implement the procurement system of the procuring institution in accordance with this Act commits an offence and is liable on conviction to a fine or to imprisonment for a term not exceeding three years or both, so the Bill takes compliance to the provisions seriously.		
	Clause 30(1)	The National Treasury of South Africa has committed to use open contracting data to create a more transparent procurement system and one that is less vulnerable to corruption. There is already a technology-based procurement system, eTenders, in its current form does not provide sufficient information to the public on procurement that has been developed by the existing OCPO over time. The system was intended to have all kinds of features, including linkage with home affairs and other databases, and ensure the publication of procurement information, but many of these features do not seem to be currently in operation. Despite this observation, which has been brought to the attention of National Treasury, representatives still often maintain that the data exists and is available. We are also concerned that the progressive adoption of the system "to be used by procuring institution according to their readiness determined accordance with an instruction", will not be enough to compel entities who currently don't publish information to comply. **Recommendation:** We urge this committee to request that the National Treasury/OCPO demonstrate the availability of data and explain how a new system can overcome the limitations of the existing system. Further, we would like to request that the committee consider whether the reliance on instruction and allowance for readiness creates a loophole for entities who do not want to publish information.	The Bill seeks to address and overcome some of the challenges that are experienced in the current regulatory regime. As stated previously, there are a number of transparency provisions in the Bill, which do not exist in the current procurement legislative landscape. Moreover, clause 61(3) states that an accounting officer or accounting authority who fails to take reasonable steps to implement the procurement system of the procuring institution in accordance with this Act **commits an offence and is liable on conviction to a fine or to imprisonment for a term not exceeding three years or both**, so the Bill takes compliance to the provisions so seriously that certain conduct or misconduct has been criminalised.	.	This does not address whether allowance for readiness creates a loophole in open data
	Clause 31(1)	The Procurement Bill has been "in the pipeline" for more than a decade. In this time departments and entities have developed their own systems, employing technology to varying degrees and some	It is important to bear in mind that not every procuring institution may be at the same		

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		have quite well established e-procurement systems (Western cape, City of Johannesburg, Limpopo). This creates the possibility that each entity develops its own system which is likely to: - Increase costs - Increase timeframe - Limit interoperability/standardisation - Create more confusion It seems that many entities prefer not to use technology as the inefficient paper XXX creates ample opportunity for interference. Entities who wish to continue can use the excuse that **Recommendations:** Apply OCDS or similar and ensure that compliance (use of technology and publication of information) is enforced in the Bill and not left to instructions, which have been ineffective in the past.	state of readiness when it comes to ICT matters. It is for this reason that clause 30 provides for the PPO to develop an ICT-based procurement system and requires conducting a due diligence of the sector. This due diligence process will assist with the formulation of the design brief for the development of the procurement system, referred to in subsection (1). It is at this stage and during this process that risk mitigation strategies may be developed. This is not going to be a single ICT system.		
	Clause 32(1)	To date, the Department of Public Service and Administration, the Human Sciences Research Council and civil society partners within the National Open Data Steering Committee have sought to inform the public about open data and access to information policy. To this end, the provisions in the Bill can be strengthened by proposing measures more closely aligned with existing national open data platforms. Access to full cycle procurement processes enables real time monitoring and oversight that can assist in the prevention of poor procurement outcomes. The wording here leaves this to the Minister to prescribe rather than clarifying appropriate measures here in the Bill. The Open Contracting Partnership has highlighted the dangers of an overreliance on 'commercial confidentiality' within procurement legislation. It has commented that "[v]ague confidentiality provisions also have a chilling effect on public disclosure where public authorities tend to redact information by default which harms markets, service delivery, and public trust. **Recommendations:** We request that the committee investigate whether these measures can be clarified in the Bill itself.	The Bill sets a framework for procurement with specificity to be provided in Ministerial regulations, Public Procurement Office's instructions (limited in nature), and procurement systems and policies of institutions determined within the framework of the Bill and requirements of the regulations. Both regulations and binding instructions will be subject to public comment, which will then influence what will be contained in the subordinate legislation. The regulations will also be subjected to Parliamentary scrutiny. It is at this stage that		The Bill itself should be strengthened by aligning it more closely with government's existing open data commitments.

Commentator	Clause	Comment	Response	Proposed amendment to Bill	Assessment of Treasury responses
		This must align at the very least with the South African government's current open data principles per Public Service Cloud Computing Determination and Directive; *'Government data shall be considered open if it is made public in a way that complies with the principles: Complete; Primary; Timely; Accessible; Machine processable; Non-discriminatory; Non-proprietary; License-free.'*	provisions relating to the comments may be strengthened.		
	Clause 33(1)	We note the importance of establishing systems of disclosure that ensure the regular publication of beneficial ownership information in alignment with the Anti-Money Laundering and Combating Terrorism Financing Amendment Act. Here, rather than stating that certain procurement information must be disclosed, the Minister must prescribe requirements to disclose. It is unclear whether this will be done via the regulations or instruction but we are concerned that the current situation will prevail, where disclosure is not actually mandatory, and enforceable. With regards to timeframes for disclosure, we believe that a set timeframe should be included, rather than requiring disclosure "as quickly as possible". Again, we have raised concerns regarding the inclusion of "confidential information" without clarification of what constitutes legitimately **Recommendations:** We urge the Committee to consider whether the Bill could include specific requirements for disclosure, along with consequences for non-compliance. We have suggested the inclusion of a specific timeframe of 15 days for disclosure. We suggest that the bill rather refer to "legitimately confidential information" or specify what can be considered as genuinely confidential information.	Clause 33(1) provides that the Minister must prescribe requirements to disclose information regarding procurement. Clause 33(2) sets out that the regulation envisaged in subsection (1) must, among others, require— (a) the categories of information to be disclosed to enable effective monitoring of procurement. The regulations will provide for the necessary details and, as stated in previous responses, will be subjected to public comments and even parliamentary scrutiny. The approach to drafting was that the primary legislation should provide for principles and the details would be expanded upon in regulations. Lessons had been learnt from previous legislation that putting details in the primary legislation creates problems because it "locks" details in legislation, which cannot be modified by regulations.		Concerns about the scope of confidentiality created by the Bill remains a concern. There is some uncertainty in the existing language and PSAM would like this to be clarified to mean legitimate confidentiality within the existing constitutional and promotion of access to information framework.

Corruption Watch		**INTRODUCTION AND EXECUTIVE SUMMARY**	Comment is noted.		

		• On 30 June 2023, version B18-2023 of the Public Procurement Bill was tabled in Parliament. Corruption Watch ("CW") made written submissions to the Standing Committee of the National Assembly on 12 September 2023 and thereafter made oral submissions to the Committee on 13 September 2023. • On 5 December 2023, the National Assembly sent a revised version of the Bill - B18B - 2023 - to the National Council of Provinces for deliberation. CW now makes the following submissions and written comments on the Public Procurement Bill [B18B - 2023] subsequent to the call for public comments made by the Select Committee on Finance ("the Select Committee") on 30 January 2024. • CW thanks the Select Committee on Finance for the opportunity to do so and furthermore requests the opportunity to make an oral presentation to the Committee on 23 February 2024. **PUBLIC PROCUREMENT IN THE SOUTH AFRICAN CONTEXT & THE NEED FOR REFORM** • In the 2022-23 period, accounting officers and authorities in South Africa managed an estimated expenditure budget of R3,10 trillion in national and provincial government1. This figure show just how indispensable public procurement is in the Country's economic system. • Despite the responsibilities imposed on the public procurement system - in so far as the critical role it plays in the country's GDP, the economic ecosystem, the country's economic development, as a service delivery mechanism and in economic redress for previously disadvantaged persons - there has been, and we continue to have - a well-established link between procurement and corruption. This has been of significant concern in South Africa; with corruption having devastating consequences on basic human rights, on service delivery, for the economy as a whole and for the trust in government. • Irregularities in the tendering process have been a common breeding ground for corruption in South Africa. This includes instances where contracts are awarded to companies or individuals, not based on merit, but instead on personal connections, bribery, or kickbacks. The lack of transparency and competition in some procurement processes has exacerbated this issue with a knock-on effect on basic human rights and service delivery. • Weak oversight and enforcement mechanisms have allowed corrupt practices to persist. In some cases, regulatory agencies tasked with monitoring and enforcing procurement laws have been ineffective, leading to a culture of impunity. • The objectives of B18B – 2023 • Section 217(c) of the Constitution lays down an imperative of a public procurement system that is fair, equitable, transparent, competitive, and cost-effective. Concerningly, these policy principles were not articulated in B18-2023 nor have they been	Comment is noted. The Bill is premised on sections 195, 216 and 217 of the Constitution. Various provisions in the Bill deal with		

		articulated in B18B-2023. Policy principles of this nature ought to be embedded into primary legislation as opposed to merely incorporating them into subordinate legislation, which would be inappropriate. • A failure to embed policy principles into subordinate legislation carries a risk of vesting too much discretion with the relevant Minister on procurement methods available without offering guiding principles in the Bill. It likewise poses a risk for service delivery, open doors for corruption and influence and invite legal challenges in future. CW therefore calls upon lawmakers to statutorily embed these. **THE PUBLIC PARTICIPATION PROCESS, ABROGATION OF RESPONSIBILITIES & CHANGES TO THE BILL** • Sections 4(1) of the Bill problematically establishes the Public Procurement Office (PPO) within the National Treasury. CW maintains its stance, continuing to raise a concern about the positioning of the PPO within the National Treasury as highlighted in our previous submission to the National Assembly. This is largely because a separation of the two offices would rightly ensure that there is sufficient transparency. • making on public spending. It would also reduce potential conflicts between the PPO and National Treasury as the two offices mandated with authorising payments and maintaining the integrity of the procurement system, respectively would remain separate. • Although one of the functions of the PPO within the Bill is to ensure the professional development and training of officials involved in procurement processes, CW is of the view that a separate PPO would be better placed to contribute towards the professionalisation of the procurement space. A dedicated procurement office can develop expertise in procurement practices in a move towards fairness, efficiency, and legal compliance. CW maintains that this specialisation would lead to attaining better value-for-money in public procurement. • A PPO separate from the National Treasury would assist with establishing an additional layer of checks and balances within governmental operations which would assist in anti-corruption	the five principles in section 217(1) of the Constitution and will be augmented by the regulations. Importantly, the principles in section 217(1) must also be adhered to together with other provisions of the Constitution, which includes section 217(2) and (3), and sections 195(1)(b) and 216. These provisions are referred to in the Preamble and the objects (clause 2). The Bill, read together with regulations, will direct procuring institutions on how to give effect to these principles in their procurement systems which includes their policies. Section 216(2) of the Constitution requires NT to enforce compliance with, among others, uniform norms and standards, which includes procurement rules, determined in primary and subordinate legislation. Therefore, having the Public Procurement Office (PPO) in National Treasury accords with section 216(2). Therefore, the PPO should be located in NT. It is not a body distinct from NT, it is to be located within NT. The Bill provides for original powers for the PPO and it will not be dependent on delegations from the Minister and the DG NT which provides for a separation from the other functions of NT. Further, the		

		efforts preventing fraud, mismanagement, and wasteful expenditure. • The PPO should therefore be a free-standing entity accountable to Parliament and funded directly by Parliament and not by any Government Department. • The Bill currently provides that the Head and officials of the Public Procurement Office must perform their functions impartially and without fear, favour or prejudice. This autonomy of the PPO from the National Treasury will also guard against political interference and enable the PPO to facilitate an integrated perspective on public procurement regulation as opposed to being influenced by a particular department's mandate. **STRENGTHENING OF ANTI-CORRUPTION ENFORCEMENT MECHANISMS** • We note that B18B-2023 decentralises debarment. The function is now extended to local governments which would send information regarding debarment to the PPO for inclusion in the central register. • Lawmakers have missed an opportunity to align procurement debarment provisions with the tender defaulter provision in the Prevention and Combating of Corruption Act, 20046- which provides for a register of tender defaulters at the National Treasury. • There are a number of areas of uncertainty around the provisions of debarment which require crystallising. These include whether or not section 15(3) is an open or closed list of grounds for debarment; whether it is the responsibility of the procuring institution to oversee the debarring of a supplier and what standard of proof is required for the process. CW recommends clarification on various issues surrounding debarment prior to passing the Bill.	role of the PPO is to perform functions regarding government's requirements which could not be provided in-house, and not that of the private sector. It does not regulate procurement by the private sector for their needs. The PPO and its officials will be appointed in terms of the Public Service Act and the provisions of that Act will apply to those officials. The comment is noted, however, it should be noted that that accountability for decisions within a procuring institution vests with the accounting officer or accounting authority. Within the current regulatory regime, debarment (restriction) was left to the accounting officer or authority to decide whether or not to debar (restrict a supplier). Clause 15(3) is clear that the procuring institution must issue a debarment order against a bidder or supplier and may issue a debarment order against any of the directors, members, trustees or establishes who is responsible for the decision of a procuring institution and will thus be accountable for failure to comply with clause 15(3). It should be noted that the administrator of the		

			Prevention and Combating of Corrupt Activities Act is the Minister of Justice and Correctional Services, and thus compliance with the Act would be that Minister's responsibility, including any prosecutions of the offences committed in terms of the Act. The Minister of Finance is only assigned the role of establishing and maintaining the Register for Tender Defaulters by the Act. The processes outlined in the Prevention and Combating of Corrupt Activities Act, relates to offences committed in terms of that Act and a court in addition to any sentence that may be imposed rules that the particulars of that person be endorsed on the Register for Tender Defaulters and that process is not being repealed by the Bill; whereas debarment as provided for in the Bill is for transgressions listed in clause 15(3), with the difference being that it does not require a conviction from a court of law before a person can be debarred. It is not a closed list because clause 15(3)(h) refers to contraventions of a provision of the Act.		
		Incentivised whistleblowing • An opportunity has been missed to include incentivised whistleblowing in the Bill as previously highlighted by partners at NEDLAC7 in 2022 and in the CW 2023 submission. As noted in our previous submission, it is envisaged that incentivised whistleblowing will play a significant role in public procurement processes by encouraging individuals with inside information to report misconduct, corruption, or fraudulent activities related	Strengthening the protection of whistle-blowers is supported through amendments to the		

		to government contracts and public spending in successfully been made. • Incentivised whistleblowing has had the benefit of assisting with early detection and prevention of corruption, fraud, bid rigging, and other illegal activities that may undermine the integrity of the procurement process. This will become even more crucial at a provincial and local government level where procurement serves to provide for the delivery of services. • In our August 2023 submission to the DOJ & CD on Proposed reforms for the whistle-blower protection regime in South Africa, we highlighted the need for legislative reform on whistleblowing and noted the benefits of incentivised whistleblowing. Incentivised whistleblowing is an approach that has been adopted in several jurisdictions across the globe including Namibia, Ghana and the United States of America8 which may prove key in providing the necessary financial safeguard for whistleblowers. • CW therefore proposes the explicit inclusion of incentivised whistleblowing in the Bill along with adequate whistleblowing mechanisms that will serve to protect whistleblowers in the public procurement process.	Protected Disclosures Act (PDA) administered by the Department of Justice and not through this Bill. The Minister of Justice has published a paper for which public comment was sought. During the public hearings, stakeholders raised concerns that by introducing incentivized whistle-blowing, as this would create an unwelcome market for criminal conduct because they were concerned that unscrupulous people would plant information implicating persons involved in procurement; fabricate proof, and then later claim the payment, and so the cycle continues. To this end, rather than paying whistle-blowers, they called for enhanced protection of whistle-blowers. They made mention of a recent incident and asked, "how much money can save a life?"		
		RECOMMENDATIONS CW, in summary, makes the following recommendations: • The embedding of section 217 policy principles into the Bill. • Meaningful public participation must be considered throughout the legislative process in the NCOP. Progress made in receiving public input should not be lost. • That the changes given effect by OCPO to the Bill following the Bill's tabling at the National Assembly (most importantly in respect of Chapter 4 of the Bill) be sent back to NEDLAC for further consideration. • That Chapter 4 of the Bill be reconsidered, particular in material provisions such as the issue of price and what criteria determine cost-effectiveness.	Chapter 4 that was tabled before Parliament on the 30*th* of June 2024 proposed a new method of advancing historically disadvantaged persons, and the revised chapter 4 that was passed by the National Assembly expanded on the provisions that were already tabled in		

		• Transparency, accountability mechanisms in the Bill should be strengthened - such as requiring policy transparency and open data for the full procurement life cycle. • That access to information does not mean a reliance on PAIA as a method for accessing information. • That the principles of open contracting be embedded in the Bill. • Separation of powers between the various entities (National Treasury, PPO, provincial treasuries) must be reinforced for clarity and efficiency purposes. • Those issues surrounding the public procurement tribunal be resolved. • Those issues surrounding debarment be resolved - including aligning debarment with the tender defaulter provisions in PRECA and areas of uncertainty. • That the Bill incorporates incentivized whistleblowing in the final version of the Bill.	response to the comments made during the SCOF process. Therefore, the principles that are included in chapter 4 had been discussed during the NEDLAC process. Parliamentary committees respect the NEDLAC process, but are not subordinate to NEDLAC, and it is Parliament that ultimately decides on a Bill. Therefore, it is not mandatory for the Bill to be referred back to NEDLAC before it can be passed into law. The Bill is premised on sections 195, 216 and 217 of the Constitution. Transparency is a constitutional provision and forms part of the requirements of the Bill. Issues relating to the fight against corruption and anti-corruption measures need collaboration with relevant government institutions and law enforcement agencies. The Bill with all its provisions on integrity of the procurement system and anti-corruption measures and transparency may not be the only instrument through which to combat corruption. The Bill contains several transparency provisions, e.g. clauses 2(2)(b) (objects), 15(6) (debarment register), 30(2)(a) and (b) (access to procurement services and open data), 32 (access to procurement processes) and 33 (disclosure of information) and 64 and 65 (process to make regulations and instructions).		

			The issues that are covered in some of the comments referencing procurement procedures from other jurisdictions, such as UNCITRAL law, including Open Contracting, are technical procurement issues that would be covered through regulations as provided for in clauses 18 and 58 of the Bill.		