

COMPANIES AMENDMENT BILL, 2021 Bill [B-2021] Submission of Public Comments

I. Background

1. The Public Affairs Research Institute (PARI) is a Johannesburg-based organisation, attached to the University of the Witwatersrand and University of Cape Town, which studies the effectiveness of state institutions in the delivery of services and infrastructure. Since its establishment in 2010, PARI has generated high-quality research to better understand the drivers of institutional performance in the public sector, and improve implementation of policies in relevant fields.
2. PARI's state reform programme is centrally focused on the relationship between politics and the state administration, it seeks to reduce the influence of corruption and patronage on South African politics, and to develop a public administration that better serves its democratic mandate. This programme provides practical, evidence-based recommendations for reforms in key regulatory and administrative institutions and sectors.
3. Two of these recent PARI focus areas include the professionalisation of the public administration and public procurement reform. Whereas the amendments proposed to the Companies Act have relevance beyond PARI's areas of work, PARI would like to take the opportunity to comment on the relevance of the proposed amendments linked to the provision of beneficial owner information to enhance transparency in public procurement practices and the accountability of public servants. Over the past two years, PARI has made extensive submissions on the Draft Public Procurement Bill¹, as well as the proposed amendments to the Public Administration Management and Public Service Acts² in pursuit of these objectives.
4. PARI welcomes the proposed amendments to Section 56 of the Act linked to the definition of a true owner aligned to the amended Financial Intelligence Act and the definition put forward by the Financial Action Task Force (FATF). It welcomes the requirements for the compilation and disclosure of beneficial ownership information, which are in line with South Africa's Open Government Partnership Action Plan for 2020-2022 and G20 commitments. Over and above complying with such commitments, these amendments are likely to have a significant impact in the detection of possible conflicts of interest and the combatting of fraud, money laundering,

¹ <https://pari.org.za/submission-to-the-draft-public-procurement-bill/>

² <https://pari.org.za/proposed-amendments-to-the-public-service-act-psa-and-public-administration-management-act-pama/>



collusion and corruption linked to public procurement practices. They are also likely to enhance the ability of civil society organisations to monitor government procurement spending as well as the implementation of consequence management against public servants.

5. The Public Service Accountability Monitor (PSAM), based at Rhodes University, has contributed towards this submission by PARI and endorses its contents. The PSAM seeks to contribute to addressing societal problems originating from systemic public resource management failures. The PSAM participated in the development of the OGP Action Plan 2020 – 2022 for South Africa and continues to engage to advance its objectives, which include commitments related to Beneficial Ownership Transparency and Fiscal Transparency and Open Contracting.

II. Beneficial ownership information to enhance accountability of public servants

6. In February 2021, the DPSA published amendments to the Public Administration Management Act (PAMA) aimed to tighten provisions to prevent employees from conducting business with the state, especially where employees are directors of companies (as defined in the Companies Act, 2008 (Act No. 71 of 2008)) that conduct business with the state. As much as this provision is to be welcomed, it does not adequately address situations where employees might not be directors of such companies but are nonetheless the ultimate beneficiaries of such contracts. By proposing that all companies must disclose information about the ‘true owners’ of such companies, and by facilitating public access to such information, the amendments have the potential to facilitate the identification of public servants who try to hide their conflicts of interest behind corporate vehicles or professional intermediaries.
7. The current limitations faced by the Companies and Intellectual Property Commission (CIPC) in supporting the DPSA in identifying public servants who do business with the state - in violation of regulations to the Public Service Act, 2016 - were recently highlighted in a presentation to Parliament.³ In this presentation, the CIPC noted that, in terms of the current Companies Act, it is only required to record information about directors but not shareholders or others who might be the true owners or beneficiaries of a particular contract (i.e. natural persons on whose behalf a transaction is being concluded, even where that person does not have actual or legal ownership or control). Consequently, the CIPC can only provide partial information.
8. The limitation on the recording of only director information also has detrimental effects to verify whether public servants who are members of the Senior Management Service (SMS) have

³ CIPC (2020), “CIPC’s efforts in assisting government prohibiting public servants from doing business with the state”, presentation to the Portfolio Committee on Public Service and Administration, 2 September 2020.



shares in companies, which they have a duty to disclose annually but many nonetheless fail to do so. For instance, in a presentation to the Portfolio Committee on Public Service and Administration on 17 February 2021, the Public Service Commission (PSC) reported that 638 (21%) of SMS members who have interests in companies did not disclose their companies and 69 (11%) of these members were repeat offenders.⁴ By adopting mandatory provisions to disclose information about true owners of companies (including shareholders or other beneficiaries who ultimately exercise control over a company), the current Bill will go a long way towards enabling the identification of senior public servants who commit perjury in the completion of their annual financial disclosure declarations and the provision of concrete evidence on the basis of which disciplinary action can be taken.

9. The benefits of beneficial ownership information are not circumscribed to public servants. The availability of beneficial ownership information could also strengthen the public's ability to assess the extent to which Cabinet members, Deputy Ministers and MECs comply with their duties under the *Executive Members' Ethics Act 82 of 1998* and the *Executive Ethics Code*, which require them to declare conflicts of interest as well as to disclose all financial interests on an annual basis, including shares and other financial interests in companies and other corporate entities.
10. Similarly, by containing clear and robust beneficial ownership provisions, the Companies Amendment Bill has the potential of making accessible beneficial ownership information that could enable the verification of compliance by members of Parliament with their obligations to disclose their financial interests in line with the *Code of Ethical Conduct and Disclosure of Financial Interests*.

III. Beneficial ownership information to enhance public procurement processes

11. In addition to assisting in identifying public servants who might be conducting business with the state, the requirement to provide beneficial owner information has significant advantages for compliance, internal control and fraud detection purposes, since it can assist in identifying networks between people and companies involved in procurement. For instance, the draft regulations to the PAMA Act make provision for the disclosure of financial interests to be extended beyond SMS members to what are termed 'specified' employees. These employees

⁴ Public Service Commission (2021), "Overview Report on the Implementation of the Financial Disclosure Framework: 2019/2020 Financial Year", Presentation to the Portfolio Committee on Public Service and Administration, 17 February 2021, Slide 11.



include staff employed on salary levels 11 and 12, employees involved in financial and supply chain management processes, as well as those employed in municipalities.⁵

12. Importantly for our purposes, the availability of beneficial owner information would provide a valuable internal control by assisting in detecting whether a conflict of interest exists between public servants involved in supply chain processes (i.e. bid adjudication committees, etc) and bidders, as well as between political figures on one hand and bidders and supply chain/procurement officials on the other. Lastly, access to beneficial ownership data could assist in identifying common ownership among bidders which could result in price rigging or collusion.⁶
13. PARI notes that there seems to be general agreement between business, labour and government on the requirement on a company to *disclose/publish* beneficial ownership information only where the threshold of 5% or more is exceeded but that there is no agreement on whether companies should be required to *request* information relating to true ownership from those shareholders with 5% or more shareholding of a company or whether this should apply to all shareholding (regardless of threshold). The threshold of 5% is low compared to that adopted by a number of countries⁷; the lower the threshold, the better authorities can ensure ownership is not intentionally split up by individuals to avoid detection and disclosure. Nonetheless, it is submitted that South Africa should follow the lead of countries like Botswana, which do not adopt a threshold and consider that beneficial ownership is inextricably linked to transparency.⁸ In other words, it is about “knowing all the individuals who are ultimately related to a legal vehicle, and who could be using it for illegal reasons, or who may be

⁵ See, ‘Schedule 1: Specified Employees’, (Draft) Public Administration Act Regulations on Conducting Business with the State, the Disclosure of Financial Interests, and the Ethics, Integrity and Discipline Technical Assistance Unit, 2019, available at

www.dpsa.gov.za/dpsa2g/documents/acts®ulations/pmar2019/Public%20Administration%20Managment%20Regulations%20on%20conducting%20business%20with%20the%20State%20and%20the%20disclosure%20of%20financial%20interests%20in%20the%20public%20service,%202019.pdf, p.23.

⁶ Murillo, Dagoberto Jose Herrera (2019), “Part I: Graph databases for journalists: Using Neo4j to explore public contracting data”, <https://medium.com/neo4j/graph-databases-for-journalists-5ac116fe0f54>; see also Open Ownership (2021), *Beneficial Ownership Data in Procurement*, March 2021, <https://www.openownership.org/uploads/OO%20BO%20Data%20in%20Procurement.pdf>

⁷ Etter-Phoya, Rachel and Danzi, Eva and Jalipa, Riva, *Beneficial Ownership Transparency in Africa: The State of Play in 2020* (June 1, 2020). Tax Justice Network, June 2020, Available at SSRN: <https://ssrn.com/abstract=3640402> or <http://dx.doi.org/10.2139/ssrn.3640402>

⁸ In February 2019, Botswana introduced amendments to Sections 21 and 345 of its Companies Act, which require persons who register companies to provide the Companies and Intellectual Property Authority (CIPA) with beneficial ownership information which it is tasked to maintain in a register. This requirement is also in line with its Financial Intelligence Agency (FIA) Act. For more information, see <https://www.rsm.global/botswana/news/beneficial-ownership>



accumulating wealth through it”.⁹ In this scenario, even one share should be enough to require registration.

14. While there are numerous benefits to having access to beneficial ownership information, it will be important that it is not only comprehensive, accurate (and thus subject to verification) but also up to date. There is likely to be a time delay since companies shall be required to provide updated information at least annually. Importantly, however, in order to maximise its benefits, beneficial ownership information should be freely and publicly available, in an open data format and not subject to the submission of PAIA requests. Making the information public could also have the added benefit of allowing civil society organisations to contribute to the process of verification.

IV. Conclusion

15. We welcome the opportunity to make the above limited contribution to the proposed amendments as they relate to the work that PARI and PSAM are currently pursuing. The examples of fraud, corruption and patronage that have characterised the workings of the public administration over the last decade and beyond act as a sober reminder that South Africa needs to adopt mechanisms, processes and practices that enhance transparency and accountability within the state. The adoption of amendments that require the provision and disclosure of beneficial ownership will go a long way to rebuilding such transparency and accountability. We strongly believe that any prejudice that might be suffered by businesses in the provision of such information far outweighs the gains and benefits that the availability and use of such information could bring.
16. We appreciate the opportunity to make these comments and recognise the time and effort of members of Parliament and other public servants in soliciting and carefully considering them.

⁹ Andres Knobel (2019), “Not just about control: one share in a company should be enough to be a beneficial owner”, <https://www.taxjustice.net/2019/10/02/not-just-about-control-one-share-in-company-should-be-enough-beneficial-owner/>, published 2 October 2019.

