

Position Papers on State Reform

Thematic Area 1:

Position Paper on Appointment and Removal in the Public Service and Municipalities in South Africa

DRAFT FOR COMMENT

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Prologue: Position Papers on State Reform

The position paper that follows forms part of a set of three that argue for crucial reforms of the South African state. The goals of these reforms are to realise a rigorous reduction in corruption and in the influence of patronage in South African politics, while improving the political responsiveness, efficiency, and the developmental effectiveness of its public administration.

- The present paper deals with appointment and removal in the Public Service and Municipalities in South Africa.
- A second position paper argues for reforms to the process of appointment and removal of senior leaders to key criminal justice institutions with an investigative and prosecutorial mandate.
- The third paper deals with reforms to the public procurement system in South Africa.

In his 2019 State of the Nation Address, the President recognised that “our greatest efforts to end poverty, unemployment and inequality will achieve little unless we tackle state capture and corruption in all its manifestations and in all areas of public life.”ⁱ The President further committed government to working with South African society in the fight against these threats and in strengthening the state’s ability to promote its democratic mandate and address the needs of the people. These are significant commitments. They are indicative of a widely evidenced momentum in government, and in society in general, in favour of reversing the erosion of state institutions and reaffirming the values and aspirations of the anti-apartheid project. These position papers are aligned with that momentum. They aim to contribute to the development of an overarching strategy for state reform. They do so by underlining a set of concrete institutional adjustments that aim to achieve values of integrity, democratic control, and administrative effectiveness. By identifying these specific interventions, these proposals aim to support and coordinate reform-minded politicians, public servants, and civil society actors around a targeted reform movement.

South Africa’s approach to anti-corruption has emphasised the need to select more ethical leaders and to mobilise the citizenry for accountability. While these are important concerns, no country has transcended an episode of expansive corruption and patronage politics through such efforts alone. Rather, modern governance is about designing institutions in a way that minimizes reliance on the good character of leaders and citizens. It recognises that well-designed institutions ensure good people, that it is the institutions as they are that corrupts them.

Some South Africans focus on economic growth and equality, as self-standing values and as a means to reduce corruption and patronage. Undoubtedly this is necessary, but these arguments elide the extent to which corruption and patronage act as a constraint on economic advance. In contemporary conditions of globally competitive capitalism, a professional and appropriately insulated public administration has been a necessary condition for rapid development and effective redistribution.ⁱⁱ In fact, state-building and

economic development are entangled. Insulated public administrations, an important boon to economic development, can only be sustainably founded on a reliable commitment to distributing the benefits of growth to everyone. South Africa has never closed this circle.

Radically reducing corruption and patronage, establishing the official professionalism and flexibility required by the developmental state, these goals necessitate constructing a public administration that is insulated in the right sorts of ways from political interference and factionalism. In this respect South Africa should emulate all countries that have successfully overcome political crises induced by corruption and patronage. As long as politicians retain effectively unrestrained powers over appointment and promotion, opportunities and incentives will favour pressures to violate the rules in service to narrow political and private interests. Powers of appointment and promotion must therefore be checked and balanced, through the assignment of significant duties in the process to institutionally independent administrative commissions. In the same movement rules must be loosened, to enable professional public managers to perform the policy-directed, but technical function of improving South Africa.

The first position paper, on reforming the processes for appointments and removals in South Africa's public service and municipalities aims to ensure political control over appointment and removal processes, but simultaneously to make it difficult to manipulate appointment and removal in such a way as to build illicit or inappropriate political and personal networks in public administrations.

The second paper on appointments and removals of senior leaders in the criminal justice sector argues that the legal framework that governs the appointment to and removal of senior personnel from key institutions of the criminal justice system has contributed to a blurring of the political-administrative divide and has severely constrained efforts to contain corrupt practices. The paper proposes a series of reforms to the appointment and removal processes for senior leaders in the National Prosecuting Authority (NPA), the South African Police Service (SAPS), the Directorate for Priority Crime Investigation (DPCI), and the Independent Police Investigative Directorate (IPID) which aim to improve the transparency and rigour of these processes, to better guarantee their independence from partisan politics, while ensuring that the President as head of state, and the executive, retain their Constitutional powers to appoint without these powers becoming merely administrative or ceremonial in character.

The third paper focuses on reforming the public procurement system in South Africa: The state procurement system is a major site of corruption in the state (and in the business sector). Reforms to the public procurement system are needed, but they should, we suggest, focus on enabling the state to play its intended role in supporting economic and social development. This is a vital ingredient in reducing pressure to use state resources illicitly to build economic wherewithal. Here we propose a focus on loosening the rules to facilitate good purchasing practice and black economic empowerment, but strengthening mechanisms of contract management, including through an innovative mechanism incentivising private enforcement of contracts, to ensure that goods and services purchases are delivered and private sector capacities are built.

Reforms in the three proposed areas above are overlapping and they are mutually reinforcing. There are further areas of government that require concerted attention, such as the state-owned enterprises and other public entities. We do not deal with this subject. The reform principles developed here are relevant to public entities, but these are established under particular laws outside of the public service and will require reform measures tailored to their particular establishment. There are also problems specific to sectors, such as in education and health. Our view is that the sorts of problems that the reforms developed here intend to fix apply across sectors and are to some extent necessary to resolving their specific issues.

Further, the themes covered by these three position papers do not cover all of the reforms required in such a project – they are a start. We hope to expand from these initial papers to cover further potential areas under a state reform project, including, for example, reforms to improve the oversight role of Parliament.

The papers are informed by ongoing conversations with knowledgeable and supportive political office-bearers and public managers. They are a collective product of partnership between civil society organisations, research institutes, and individuals committed to a politics oriented around the achievement of a free and equal society, devoid of racism, sexism, and other forms of oppression and marginalisation as set out in our Constitution's founding provisions. These papers recognise the importance to this goal of a democratic, lawful, and developmental public administration. They are dedicated to supporting the construction of such an administration through activism around specific reforms with widely evidenced efficacy.

While the three position papers include concrete proposals for reform, our suggestions in this regard are likely to be refined in ongoing conversation with government, experts in the field, and wider civil society. We welcome discussion and debate on the way to an effective reform coalition.

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POSITION PAPER ON APPOINTMENT AND REMOVAL IN THE PUBLIC SERVICE AND MUNICIPALITIES

Alliance for State Reform #FixTheState

Second Draft

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Executive Summary

The position paper argues for reform of the rules and procedures that govern appointment to and removal from administrative posts in South Africa's public service and its municipalities. The reforms aim to substantially reduce corruption and the influence of patronage in South African politics, while improving democratic and political control, professionalism, and the effectiveness of South Africa's public administration.

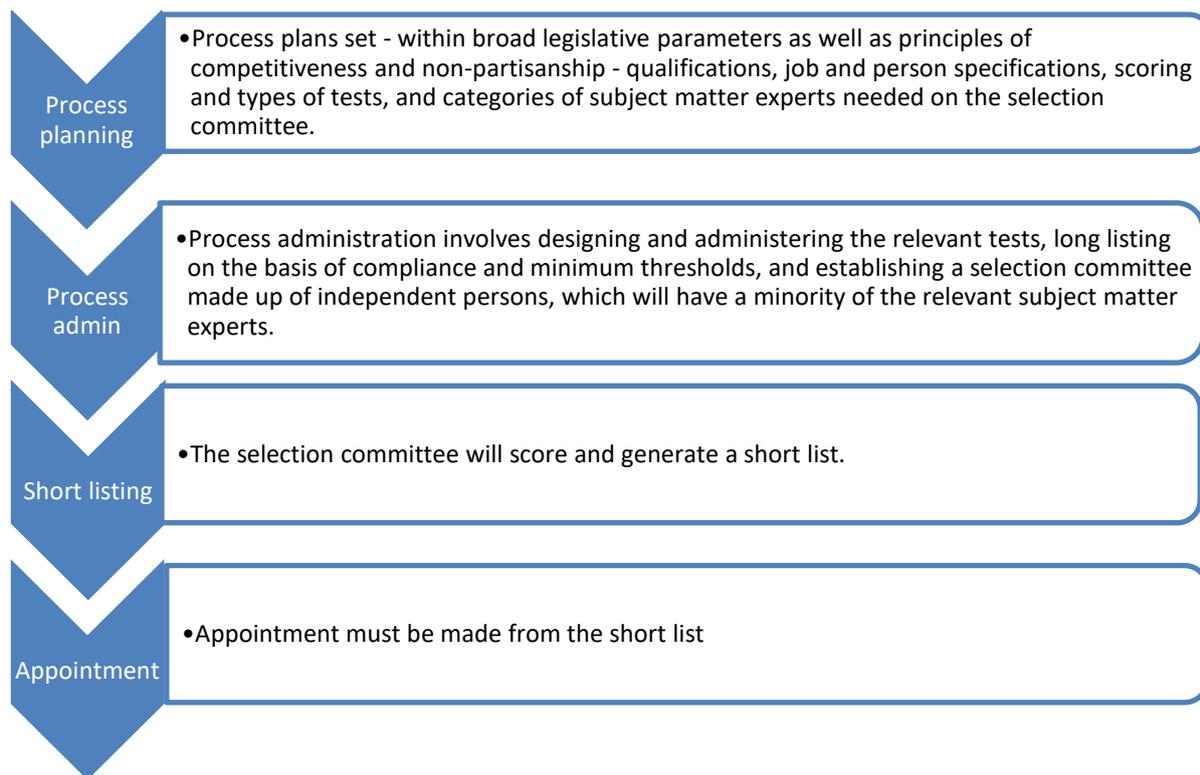
More specifically, after surveying comparative experience and the domestic situation, it is argued that significant adjustments are necessary to ensure that South Africa's public administrations operate free of political interference and other efforts at coordination that bridge segregations of duties and circumvent democratically-established rules. Centrally, what this means is the creation of an independent administrative check on appointment and removal processes, through the assignment of certain powers to independently-constituted commissions and committees. The present legal framework does not provide for, in any substantive way, such an independent check.

The position paper aims to ensure political control over appointment and removal processes, but simultaneously to make it difficult to manipulate appointment and removal in such a way as to build illicit or inappropriate political and personal networks in public administrations.

In broad outline, **a new generic process for appointments** to senior manager posts is advocated for. The process includes **four distinct stages**, which are referred to here as the process planning stage, process administration, short listing and appointment.

Process planning refers to setting qualifications, job and person specifications, scoring weights and types of tests, and categories of subject matter experts needed on selection committees. Planning should occur within broad legislative parameters. Plans that have the effect of rendering competition meaningless or introducing partisan political criteria directly into appointment processes will be invalid. The idea, nevertheless, is to keep for politicians a significant role in process planning in order to create a link between policy purposes and the expertise and personal character of appointees, but at the same time to draw back from fully partisan appointments.

Process administration involves designing and administering the relevant tests, long listing on the basis of compliance and minimum thresholds, and establishing a selection committee made up of independent persons, a minority of whom will be relevant subject matter experts prespecified in the process planning stage. **Short listing** will be conducted by this selection committee in accordance with process plans. **Appointment** must be made from the short list. Figure 1 on page 18 is reproduced here for ease of reference.



Generic appointment process

The allocation of powers across these stages must take account of differences in the constitutional character and structure of the public service and municipalities. Furthermore, who, or which office, has powers at which stages depends on what post is being filled. The position paper aligns with and elaborates on the National Development Plan in suggesting the following.

There should be the creation of a national head of the public service and equivalent provincial heads of the public service. These should be responsible for conducting general oversight over the efficiency of the public service, especially through managing the career progression, including features of the appointment, performance management and removal of senior managers in the public service. **In the appointment of national and provincial heads of the public service**, the Public Service Commission, in consultation with the President or the relevant premier, should be responsible for process planning. The Commission should be responsible for process administration, which includes establishing a selection committee of independent persons which includes a minority that fit into the prespecified categories of subject matter experts. The selection committee should short list. The President or the relevant premier should then appoint from that short list.

In the appointment of national or provincial heads of department or component, process planning should be under the authority of the relevant head of the public service, in consultation with the relevant minister or MEC. Process administration should be under the authority of the Public Service Commission, which will also establish the selection committee. Short listing would be conducted by this selection committee. Appointment would then be by the relevant minister or MEC.

The appointment of national or provincial deputy heads of department and component should be processed planned by the relevant head of the public service, in consultation with the minister or MEC and the relevant head of department and component. The Public Service Commission, to check and balance the process, should then administer it. The selection committee should short list. To align the

line of command with the office of the head of department or component, the head of department should then appoint the deputies.

The position paper endorses the National Development Plan's call for **movement towards longer term and ultimately permanent contracts** for senior managers.

It also endorses the need to **devolve appointing authority for lower positions**. For these lower posts, selection committees should be constituted and chaired by the deputy head responsible for human resources or their delegate. The head of department or component should then appoint, the result being to run a check and balance between the head and the deputy responsible for human resources throughout organisational appointment processes.

Removal, including precautionary suspension in a fast-tracked process, of the head of the public service, heads of department and component, and deputy heads, should be under the authority of their immediate superior, but subject to justification to and authorisation by the relevant commissioners. Removals further down should fall to the head of department or component.

Municipalities pose special difficulties for reform design, in that there is no equivalent to the Public Service Commission for the local sphere. Efforts to create a single public service for municipalities might be able to enlist the Public Service Commission as a support, but its direct involvement in appointment processes is likely to invite constitutional challenge. A different structure must be created.

The position paper proposes to leverage the relative strength and independence of national political and economic institutions to insert a check into municipal appointment processes. Specifically, local government is unique in that it intersects with a variety of professions that enjoy nationwide, strong and often already statutorily independent and regulated professional associations. The engineering, architecture, planning and accounting professional bodies could all be brought into independent personnel committees, the function of which would be to check and balance political office-bearers in appointment. More corporatist bodies, involving a wider set of interests, could include local business associations, unions and civil society. If municipalities are brought into the public service, then the Public Service Commission could act as an additional check on whether these committees are properly constituted. The committees could then be involved in appointment processes along the lines set out above.

The process for appointing municipal managers, then, would begin with municipal councils defining qualifications, job and person specifications, types of tests and scoring – these within legislative parameters and subject to principles of competitiveness and non-partisanship. Municipal human resource departments could administer the process until the point of long list and support those independent municipal personnel committees. These committees would then short list. Municipal councils would then appoint from this short list.

The appointment of managers reporting directly to municipal managers should proceed similarly, but with municipal managers receiving some of municipal councils' roles. Municipal managers could develop process plans in consultation with municipal councils. Municipal managers would be responsible for ultimate appointment from short list.

The position paper, also for municipalities, endorses the National Development Plan's concern with moving towards longer term and ultimately permanent contracts for senior management. It also endorses the need to **devolve appointing authority for lower positions**. For these lower posts in local government, selection committees should be constituted and chaired by the manager responsible for

human resources or their delegate. The municipal manager should then appoint. **Removal**, including precautionary suspension in a fast-tracked process, of a municipal manager or a manager reporting directly to them should be done by council, for municipal managers, and by the municipal manager, for managers reporting directly to them. Again, however, removal from these posts should be subject to justification to and authorisation by the independent committee.

Finally, the position paper advocates for a **mechanism providing for incremental reform**. The most appropriate mechanism of implementation for the sorts of provisions elaborated in this position paper is what is called a 'covering in' mechanism. What this means is that a statute providing for the reforms outlined above need not apply anywhere initially. It could include, instead, a clause which grants the President the power to, by proclamation, cover in to the statute's terms specific departments, components, and municipalities. Once proclaimed, the covering in would be irreversible except by further statute. A statute providing for the proposals in this position paper, therefore, need impose no costs on anyone initially. The covering in mechanism, however, will enable reformers to begin to shape and constrain corruption and patronage, moving it away from its most destructive outcomes, beginning to build a democratic state with integrity and effectiveness.

1. Introduction

What follows is an argument for comprehensive reform of the rules and procedures that govern appointments to and removal from administrative roles in South Africa's public service and its municipalities. The goals of this reform are to realise a rigorous reduction in corruption and in the influence of patronage in South African politics, while improving the responsiveness, professionalism and the developmental effectiveness of the South African public administration.

In pursuit of these goals, the reforms proposed have a certain centrality. They are properly understood as foundational to the practice and study of modern, especially democratic, public administration. They were a pivotal consideration in many of its first acts¹ and in the founding texts of its academic study.² Politicisation of personnel practices, the appointment and removal of administrative officials by political office-bearers, has throughout the modern era been an effective method for bringing administrative decision-making into line with the policy positions of new and ideologically distinct political leaders. In South Africa, this widely evidenced proposition provided the rationale for politicisation in the early post-apartheid years. Yet most reflection on good practice in public administration suggests the importance of some degree of insulation from politics, or specifically from unlawful political interference.

Particularly when practiced over long periods of time and when its initial rationale subsides, politicisation invariably produces concerns with administrative amateurism, an actual deterioration of political control and administrative capacity, and the rise of corruption and patronage. Max Weber, summarising the tradition of public administration as developed into the early twentieth century, argued that a person appointed not by politicians, but rather by administrative professionals, operates, 'from a technical point of view, more accurately because it is more likely that purely

¹ Hamilton, A. (1788) 'Federalist 76: The same view continued in relation to the appointment of the officers of the government' in: L. Goldman (ed.) (2008) *The Federalist Papers*. Oxford: Oxford University Press; House of Commons (1854) 'Report on the Organisation of the Permanent Civil Service'. The Northcote-Trevelyan Report. London: HMSO.

² Wilson, W. (1887) 'The Study of Administration'. *Political Science Quarterly* 2(2): pp.197–222; Goodnow, F.J. (1900) *Politics and Administration: A Study in Government*. London: MacMillan.

functional points of consideration and qualities will determine his selection and career.³ Dorman Eaton, in 1880, in perhaps the most influential study ever written against a patronage system, declared that 'Government by parties is enfeebled and debased by reliance upon a partisan system of appointments and removals,' continuing that 'methods, which leave to parties and party government their true functions in unimpaired vigour, tend to reduce manipulation, intrigue, and every form of corruption in politics.'⁴

Indeed, countries that established appropriately insulated processes of appointment and removal early on in their political development, such as Germany, Sweden,⁵ Japan,⁶ and to a significant extent Botswana,⁷ largely avoided debilitating episodes of corruption and patronage politics after the arrival of mass politics. Others, like the United Kingdom,⁸ the United States,⁹ Canada,¹⁰ Australia¹¹ and Finland,¹² dramatically reduced incidences of corruption and patronage when political and administrative leaders, sometimes pushed by extensive citizen movements, established civil service systems where personnel decisions were made by politically independent commissions. The experiences of hundreds of other countries show that the absence of a public administration free of politicisation of personnel practices is an important factor in corruption and patronage. A number of studies make this correlation quantitatively across different state organisations within countries and across large numbers of countries.¹³ Contemporary South Africa corroborates these findings.

³ Weber, M. (1968) 'Bureaucracy' in: G. Roth and C. Wittich (trans) *Economy and Society: An Outline of Interpretative Sociology*. Berkeley, C.A.: University of California Press.

⁴ Eaton, D. (1880) *Civil Service in Great Britain: A History of Abuses and Reforms and their Bearing upon American Politics*. New York: Harper and Brothers.

⁵ Ertman, T. (1997) *The Birth of Leviathan: Building States and Regimes in Medieval and Early Modern Europe*. Cambridge: Cambridge University Press.

⁶ Silberman, B.S. (1970) 'Bureaucratic Development and the Structure of Decision-making in Japan: 1868–1925'. *Journal of Asian Studies* 29(2): pp. 347–62; Johnson, C. (1982) *MITI and the Japanese Miracle: The Growth of Industrial Policy, 1925–1975*. Stanford, C.A.: Stanford University Press.

⁷ Picard, L. (1987) *The Politics of Development in Botswana: A Model for Success*. Boulder, C.O.: Lynne Rienner.

⁸ Rubinstein, W.D. (1983) 'The End of "Old Corruption" in Britain 1780–1860'. *Past & Present* 101: pp.55–86; Harling, P. (1995) 'Rethinking "Old Corruption"'. *Past & Present* 147: pp.127–58.

⁹ Van Riper, P.P. (1958) *History of the United States Civil Service*. Evanston, I.L.: Row, Peterson; Skowronek, S. (1982) *Building a New American state: The Expansion of National Administrative Capacities, 1877–1920*. Cambridge: Cambridge University Press; Glaeser, E.L. and C. Goldin. (eds) (2007) *Corruption and Reform: Lessons from America's Economic History*. Chicago, I.L.: University of Chicago Press.

¹⁰ Simpson, J. (1988) *Spoils of Power: The Politics of Patronage*. Toronto: W. Collins & Sons; Kernaghan, K. (2003) 'Corruption and Public Service in Canada: Conceptual and Practical Dimensions' in: S. Tiihonen (ed.) *The History of Corruption in Central Government*. Amsterdam: IOS Press.

¹¹ Caiden, G.E. (1965) *Career Service: An Introduction to the History of Personnel Administration in the Commonwealth Public Service of Australia, 1901–1961*. Melbourne: Melbourne University Press; Curnow, R. (2003) 'What's Past is Prologue: Administrative Corruption in Australia' In: S. Tiihonen (ed). *The History of Corruption in Central Government*. Amsterdam: IOS Press

¹² Tiihonen, P. (2003) 'Good Governance and Corruption in Finland' in: S. Tiihonen (ed.) *The History of Corruption in Central Government*. Amsterdam: IOS Press.

¹³ Neshkova, M. I. and T. Kostadinova (2012) 'The effectiveness of administrative reform in new democracies'. *Public Administration Review* 72: pp.324–33; Dahlström, C., V. Lapuente and J. Teorell (2012) 'The merit of meritocratization: Politics, bureaucracy, and the institutional deterrents of corruption'. *Political Research Quarterly* 65: pp.656–68; Rauch, J.E. and P.B. Evans (2000) 'Bureaucratic structure and bureaucratic performance in less developed countries'. *Journal of Public Economics* 75(1): pp. 49–71; Meyer-Sahling, J.-H. and K.S. Mikkelsen (2016) 'Civil service laws, merit, politicization, and corruption: The perspective of public officials from five East European countries'. *Public Administration* 94: pp.1105–23; Oliveros, V. and C. Schuster (2017) 'Merit, tenure and bureaucratic behavior: Evidence from a conjoint experiment in the Dominican Republic'. *Comparative Political Studies* 51(6): pp.759–92; Bersch, K., S. Praça and M.M. Taylor (2017) 'State capacity, bureaucratic politicization, and corruption in the Brazilian state'. *Governance* 30: pp.105–24.

In what follows, the vital mechanisms in South Africa are traced. First, the legal framework governing appointment to and removal from the public service will be examined. It will be shown, most significantly, that by facilitating the introduction of political criteria into human resource decisions, this legal framework has created opportunities for coordinating opaque and illicit activities that escape the dictates of the Constitution and other laws. We will turn, next, to the legal framework governing such personnel practices in municipalities. Similar results are evident. Finally, from this account, we will suggest the outlines of a reform that is necessary to realign political-administrative practice with the Constitution, restructure politics along more programmatic lines, and capacitate a public administration more responsive to and more capable in implementing democratic mandates and associated political commands.

2. The legal framework governing appointment and removal

The Constitution envisages a public administration that maintains a high standard of professional ethics; that is efficient, economic and effective in its use of resources; is development-oriented; provides services in a manner that is impartial, fair, equitable and without bias; encourages participation in policy-making; and is accountable and transparent. It supports good human-resource management and career development. It promotes 'employment and personnel management practices based on ability, objectivity, fairness and the need to redress the imbalances of the past to achieve broad representation'.¹⁴ Section 197 (3) provides that, 'No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.'¹⁵ Section 197 (4) gives a limited exception. It requires legislation – presently under section 12A of the Public Service Act – to regulate the appointment of persons on grounds of policy considerations.¹⁶ Beyond this countenance of a staff of special advisers attached to the offices of political executives, the Constitution only allows that appointment procedures have recourse to criteria of ability and demographic representivity. There is no provision, including in the law more broadly, for political criteria to enter into decisions about appointments to fixed posts within the public administration. For instance, in *Mlokoti v Amathole District Municipality*,¹⁷ the Eastern Cape Division of the High Court found that in a competition for the position of municipal manager, despite the fact that there was an expressed political preference for another candidate, the municipality was obliged to appoint the best candidate.

The statutory framework, although it in this way removes political criteria from consideration in appointment and removal processes, nevertheless gives to politicians all the powers necessary to include them in practice. The resulting tension sits at the heart of South Africa's governmental crisis. In arguing for a resolution of this contradiction, the present position paper has limited its own scope in two significant ways. First, it focuses on processes of appointment and removal. These processes are central, but their reform will necessitate a range of other adjustments in the allocation of powers and functions for other personnel matters and more broadly. The resulting complexity is here elided, for the sake of brevity and clarity of argument and because it still requires broader study.

The second limitation is that this position paper focuses on the public service and the municipalities. The public service includes departments, government components and service delivery units in the

¹⁴ Section 195 of the Constitution of the Republic of South Africa (1996).

¹⁵ Section 197 (3) of the Constitution of the Republic of South Africa (1996).

¹⁶ Section 197 (4) of the Constitution of the Republic of South Africa (1996).

¹⁷ *Mlokoti v Amathole District Municipality & another* (2009)30 ILJ 517 (E).

national and provincial spheres.¹⁸ Municipalities include both municipal administrations and municipal entities.¹⁹ These categories do not cover all of the organs of state established in terms of the Constitution and others laws. They do not include the so-called Chapter 9 Institutions,²⁰ the security services²¹ and the public entities.²² The functions of these latter institutions, in theory and to a significant extent in fact, are such as to justify operation outside of the Public Service Act and related legislation. Their reform, therefore, will be subject to somewhat different particulars and processes to that elaborated in this paper. It should be stressed, however, and at the outset, that international experience suggests that the reforms considered here for the public service and the municipalities will, by constraining some patronage opportunities, redirect politicians toward other patronage opportunities. Government agencies outside the public service – public entities in the South African nomenclature – are generally a preferred source. It follows that the reforms considered here must be combined with efforts to constrain opportunities for patronage in these broader parts of the state.

2.1. The public service

Appointments and removals in the public service are governed under the Public Service Act, 103 of 1994. Certain adjustments are made, for certain categories of employees, in terms of a range of other statutes, but the present discussion will confine itself to the Act and other core legislation. Under the Act, the Minister of Public Service and Administration (MPSA) is given the power to set norms and standards, by way of regulations, determinations and directives, for a wide range of administrative practices, including appointment and removals.²³ A crucial definition provided for in the Act is that of an 'executive authority'. In relation to the Presidency or an Office of the Premier, or a government component within these, the executive authority is the President or the Premier. In relation to a national or provincial department, or a government component within these, the executive authority is the minister or the member of the executive council (MEC) responsible for the relevant portfolio.²⁴ Executive authorities are given all those powers and duties necessary for the internal organisation and for practices related to employment in the department concerned.²⁵ In terms of the Act, each department and government component must have a head, with a specific designation, such as directors-general for national departments and the offices of premiers and, simply, heads for government components and provincial departments. Departmental heads are responsible for the efficient administration of their department, including the effective utilisation and training of staff, the maintenance of discipline, and so on.²⁶

¹⁸ Government components, established in terms of section 7A of the Public Service Act, are bodies directly accountable to ministers or members of executive council (MECs), but that sit outside of departments, facilitating a measure of autonomy and customisation in the performance of specific functions. Service delivery units, established in terms of section 7B, are ringfenced units within departments dedicated to the performance of specific socio-economic functions.

¹⁹ As defined in the Municipal Systems Act.

²⁰ Established in terms of Chapter 9 of the Constitution.

²¹ Established in terms of Chapter 11 of the Constitution.

²² Established often in terms of their own statute and listed in schedules 1, 2, and 3 of the Public Finance Management Act.

²³ Section 3(1) of the Public Service Act, 103 of 1994.

²⁴ Section 1 of the Public Service Act, 103 of 1994.

²⁵ Section 3(7) of the Public Service Act, 103 of 1994

²⁶ Section 7(3) of the Public Service Act, 103 of 1994.

2.1.1. The Public Service Commission

Section 196 of the Constitution provides for a single Public Service Commission to exercise oversight over the public service. The heart of attempts to professionalise the public service since the South Africa Act, 1909, the Public Service Commission has played an increasingly diminished role since the 1980s. In terms of the 1996 Constitution, the Commission is required to be independent and impartial. It consists in 14 commissioners, five for the national sphere and one for each province. The five must be recommended by a proportional committee of the National Assembly, approved by a majority of the Assembly, and appointed by the President. In appointing each provincial commissioner, a person must be recommended by a proportional committee of the relevant provincial legislature, approved by a majority of that provincial legislature, nominated by the Premier, then appointed by the President. Commissioners are appointed for a five-year term, once renewable, and must be South African citizens and fit and proper with knowledge of, or experience in, administration, management or the provision of public services. In terms of section 6(2) of the Public Service Commission Act, 46 of 1997, no commissioner may hold office in a political party or political organisation. The Public Service Commission Act, required by the Constitution, also provides for presidential designation of a chairperson and a deputy chairperson and for presidential determination of remuneration and other conditions of service of the chairperson, the deputy chairperson and any other commissioner. Remuneration and conditions may not be altered during the term of the commissioner. In terms of the Constitution, commissioners are removable only on grounds of misconduct, incapacity or incompetence, as found by a committee and resolved by a majority of the National Assembly or of the legislature of the relevant province.

The Commission's autonomy protected by these procedures of appointment, remuneration, and removal, the Constitution also enjoins all organs of state – 'through legislative and other measures' – to support the independence, impartiality, dignity and effectiveness of the Commission. It prohibits interference in the Commission's operations. The Public Service Commission Act makes it an offence to hinder or obstruct the Commission from the performance of its function, punishable on conviction by a fine or imprisonment for a period not exceeding 12 months, or both.²⁷

The Commission must exercise oversight over the public administration in a way that encourages effectiveness, efficiency and a high standard of professional ethics. It is required to promote the basic values and principles governing public administration as set out in section 195 of the Constitution. The Commission has broad powers to investigate, monitor, and evaluate the public service. It receives and investigates complaints from employees and recommends, acting as a grievance body and offering appropriate remedies. It can propose measures to improve performance. It can give direction to the effect that recruitment, transfers, promotions and removals comply with the values and principles of section 195. The Public Service Commission Act gives the power to summons, secure records and administer oaths to the Commission and it makes it an offence to violate these powers.²⁸ The Act specifies a power to set rules,²⁹ which it has used somewhat loosely and most prominently to regulate the procedure for dealing with conflicts of interest.³⁰ The Constitution implies that national commissioners can only exercise these powers and functions in the national sphere. It grants to provincial commissioners these powers and functions in their provinces.³¹ The Public Service

²⁷ Section 12 of the Public Service Commission Act, 46 of 1997.

²⁸ Section 10 of the Public Service Commission Act, 46 of 1997.

²⁹ Section 11 of the Public Service Commission Act, 46 of 1997.

³⁰ Rules of the Public Service Commission: Managing Conflicts of Interest Identified through the Financial Disclosure Framework for Senior Managers. GN 865 in GG 32298 of 12 June 2009.

³¹ It does so at subsection 196 (13).

Commission Act thus enables the relevant delegation, which is achieved with specificity in regulations.³²

The Public Service Commission, as it stands, has notable defences against politicisation and it has tended to exercise its powers and perform its functions with a degree of independence. The Chairperson of the Commission is made executive authority in terms of the Public Service Act, responsible for internal organisation, appointment and removal within the Office of the Public Service Commission. Awkwardly, the Public Service Regulations make the exercise of the power of appointment, of the Director-General and any deputy director-general of the Office, dependent on recommendation by selection committees that include political officer-bearers.³³ The selection committee for the Director-General must be chaired by the Chairperson and include the MPSA, at least one other minister and a head of department. The selection committee for any deputy director-general must include at least two deputy ministers and the Director-General. In this and other ways the Office of the Public Service Commission falls within the public service and its framework for appointments and removals. We turn to consideration of the public service more broadly.

2.1.2. Qualifications for office in the public service

The Public Service Act provides that all appointees must be citizens or permanent residents and must be fit and proper persons.³⁴ It prescribes that no appointee may be under the age of 15 or under the minimum school-leaving age.³⁵ Executive authorities, those with the power of appointment as described momentarily, must determine health requirements. Suitability checks include such factors as criminal record and credit worthiness.³⁶ The executive authority, with the assistance of DPSA benchmarks, must set job requirements that reflect the main objectives and core functions of the post, that don't unfairly discriminate, and that otherwise comply with statutory requirements.³⁷ MPSA directives, most importantly, regulate requirements for entry into the senior management service (SMS), which covers most posts in the grades 13 to 16.³⁸ Directors (generally grade 13) and Chief Directors (14) are required to have an undergraduate qualification. Deputy Directors-General (15) and Heads of Department (16) are required to have a postgraduate qualification. Work experience is also regulated. Directors, for instance, must have five years of experience in middle or senior management. Directors-General must have eight to ten years of experience in senior management and at least five in an organ of state. Similar qualifications operate across a plethora of functions – i.e. financial, medical, educational, engineering – as stipulated under a wide array of legislation.

Former employees are disqualified from reappointment on certain grounds. Where a former employee left the public service on the condition that they would not seek reappointment or due to ill-health and where there is not sufficient evidence of recovery, their reappointment is restricted. An executive authority may waive this restriction, but only once, where no other suitable candidate has

³² Section 11(b); Governance Rules of the Public Service Commission. GN 263 in GG 38620 of 30 March 2015.

³³ At 67(2)(c) and (g)

³⁴ Section 10

³⁵ Public Service Regulation 57.

³⁶ Muthambi, A.F. (2017) 'Directive on Personnel Suitability Checks'. Department of Public Service and Administration. Accessed on 15 October 2019 at http://www.dpsa.gov.za/dpsa2g/documents/ep/2018/14_1_1_P_11_01_2018.pdf; *Reference Checking Against Social Media Profiles* [Web log post]. (30 January 2019). Accessed on 15 October 2019 at http://www.dpsa.gov.za/dpsa2g/documents/ep/2019/14_1_1_p_30_01_2019.pdf

³⁷ In terms of Public Service Regulation 64.

³⁸ *Directive on Compulsory Capacity Development, Mandatory Training Days and Minimum Entry Requirements for SMS*. [Web log post]. (1 April 2015). Accessed on 15 October 2019 at http://www.dpsa.gov.za/dpsa2g/documents/sms/2016/sms_08_04_2016.pdf

been recruited, and for three years, or additional to the establishment for a period not exceeding 12 months. Removal for misconduct results in a period of prohibition on reappointment, the maximum being five years.³⁹

2.1.3. Powers and procedures of appointment

Under the Public Service Act, executive authorities are given all powers and duties necessary for internal organisation and human resourcing, including appointment and removal, but within the further terms of the Act and its subordinate legislation.⁴⁰ The Act then assigns to the President the power of appointment of heads of national departments and components⁴¹ and to the relevant premier the power of appointment of a head of the office of that premier and of the provincial departments and components.⁴² Lower appointments then fall to the executive authority, which is to say the relevant ministers in the national sphere and the relevant members of the executive council (MECs) in the provincial sphere.

These assignments of powers are then extensively entailed. The Public Service Act stipulates that appointment procedures must involve consideration of all applicants who qualify, that evaluations must be based on training, skills, competence, knowledge and representivity, and that due regard must be had for equality and other values and principles of the Constitution.⁴³ The Employment Equity Act, 55 of 1998, considers the public service to be a designated employer for purposes of affirmative action. It provides a range of regulatory means for ensuring employment equity. The Public Service Regulations, from this point, set up an elaborate set of procedures governing appointments.

The Regulations stipulate that when funded vacancies emerge these must be advertised within six months and filled within twelve months, with allowance for an acting appointment in the interim. They continue that job requirements and qualifications (covered in our section 2.1.1 above), together with a job title, salary scale, core functions, and place of work, must be incorporated into advertisements. These advertisements must be intended to reach the entire pool of potential applicants. Vacant posts in the Senior Management Service, which includes most posts in grades 13 to 16, must be advertised nationally.⁴⁴ The regulations, therefore, unambiguously favour an open career system, with lateral entry into the service at any point in the hierarchy, as opposed to a closed system that emphasises promotion from within the service. Some departments do, however, emphasise internal experience in selection criteria, enabling some approximation to a closed system.

Applicants are subjected to suitability tests and short-listed by human resources officials. Shortlisted applicants are then moved on to a selection committee. The selection committee must be established by the executive authority responsible for appointment. The regulations prefer demographically representative selection committees. Otherwise the overarching principle of constitution is that these committees are to consist in at least three members at a level equal to or higher than the grade of the post to be filled, but that the chairperson should be at a level higher than the post to be filled. So, the selection committee for the administrative head of the Presidency must be chaired by the Minister in the Presidency and include at least two other ministers and a national head of department. The selection committee, in turn, of a head of a national department or national government component must be chaired by the minister responsible for the portfolio and include at least two other ministers

³⁹ Public Service Regulation 60.

⁴⁰ Sections 3(7) and 9 of the Public Service Act.

⁴¹ Section 12(1)(a).

⁴² Section 12(1)(b).

⁴³ Section 11.

⁴⁴ Regulation 65.

and another national head of department. The selection committee for a deputy director-general of a national department must be chaired by the minister responsible for the portfolio and include at least two deputy ministers and the relevant head of department. Chief directors – although political involvement here is not precluded, and often present – would then go through selection committees consisting of administrative officials. In the provinces these patterns are replicated, with the necessary changes. A director-general of an office of a premier must be selected by a committee chaired by an MEC of the relevant province and include at least two other MECs and a head of a national department. The head of a provincial department or provincial government component must be selected by a committee chaired by the relevant MEC and include at least two other MECs and the head of the relevant premier’s office, and so on.⁴⁵

Selection committees are only recommendatory. They must make decisions after consideration only of information based on valid methods, free of bias and discrimination, the requirements of the job, the department’s employment equity plan, and in respect of candidates at grade 9 and above, understanding of the department’s mandate, the ability to identify problems and find innovative solution, and the ability to work in a team. Reasons for recommendations are recorded and if the relevant executive authority does not approve a recommendation then these reasons must also be recorded. If the executive authority does approve, they can authorise an appointment.⁴⁶ Except, in the case of directors-general and deputy directors-general, a nomination must be sent through the MPSA to Cabinet for concurrence before authorisation.

Section 12(2) of the Public Service Act restricts appointment contracts for heads of department to a maximum of five years, renewable. Staff at lower levels may be appointed on term-contracts, but they are generally subject to one-year probation and thereafter appointed on a permanent basis.⁴⁷

2.1.4. Termination of service

The Public Service Act mandates retirement on the first day of the month after an employee attains the age of 65, except for some categories and with protections for those involved in prior dispensations.⁴⁸ Provision is made for early retirement from the age of 55. With consent, an employee may be retained beyond the retirement age by approval of the relevant executive authority, but not for more than two years unless Parliament resolves otherwise. Employees may resign with the necessary notice and by the proper procedure.⁴⁹

The Public Service Act is aligned with and recognises the authority of the Labour Relations Act, providing for removal on grounds of operational requirements, misconduct, and incapacity due to ill health, injury, or poor work performance.⁵⁰ Chapter 2 of the Public Service Regulations establishes a Code of Conduct for public servants against which misconduct can be read. The Act gives the power of removal of the head of a department to the relevant executive authority.⁵¹ Cabinet has come to assert its concurrence here also. The Act gives the power of removal of any other employee to the relevant head of department.⁵²

⁴⁵ Regulation 67.

⁴⁶ Ibid.

⁴⁷ Regulation 68.

⁴⁸ Section 16 of the Public Service Act.

⁴⁹ As per Regulation 69.

⁵⁰ Section 17 of the Public Service Act.

⁵¹ Section 16B(1)(a).

⁵² Section 16B(1)(b).

The Act creates a positive obligation for executive authorities to report a head of department who has failed to comply with the Act to the MPSA, take immediate disciplinary steps, and report the outcomes of these steps.⁵³ The same obligation is given to a head of department, with reports to the Director-General: Public Service and Administration. Disciplinary processes are governed by principles of procedural and substantive fairness, which dictate a progressive and corrective approach to discipline and an absence of bias and discrimination. Managers are encouraged to pursue an informal approach, meeting with and counselling employees for minor offences and issuing verbal, written, and final written warnings to provide opportunities to correct conduct.⁵⁴

If a sanction beyond a warning is sought, notice of a disciplinary hearing must give the employee sufficient time to prepare a defence. Precautionary suspension or transfer, with full pay, is possible where a serious offence is alleged and where a continued presence in the workplace might jeopardise the investigation or endanger the wellbeing or safety of a person or state property. Disciplinary hearings must exclude legal counsel. They should consist in a representative of the employer (usually the immediate manager of the employee), the employee, and potentially a representative (usually of the labour union), and a chairperson (of higher grade than the representative of the employer or in the case of a head of department someone from outside the public service). Disciplinary hearings may recommend counselling, a written warning, a final warning, suspension without pay not exceeding three months, demotion, some combination of the above, or removal. The MPSA has set guidelines for disciplinary action.⁵⁵ The relevant person, the executive authority for a head of department or the head of department for any other employee, is responsible for issuing sanction. In the case of removal, appeal is possible, often departmentally and also to the Council for Conciliation, Mediation, and Arbitration (CCMA) and to the Labour Court.

2.1.5. Analytical summary

While the Public Service Commission provides a useful node of independent regulation, its independence is undermined by the involvement of political leaders in appointments to the higher administrative positions in its offices. The location of the Office of the Public Service Commission in the public service also may impair its flexibility and the autonomy with which it can pursue its objectives. The Commission, moreover, is relatively toothless. It is able to set rules and investigate, but it otherwise lacks powers of direction and enforcement and has remained marginal to the growing crisis of government.

The system of qualifications required for appointment to the Senior Management Service and to posts requiring professional qualifications are, although considered sparingly here, elaborate and relatively robust. These have also been the focus of extensive regulatory efforts over the past few years and are increasingly being tied to the new National School of Government established in 2015. A considerable disjoint between the qualification and competency system and the selection committee system occurs due to a lack of provision of independent subject matter experts on selection committees. Otherwise, procedures for appointment and removal, while not without their trade-offs as against other sorts of procedures, accord reasonably well with good practice. The process of appointment, most importantly, sets up in outline a system of tiered-screens, with a segregation of duties between human resources personnel, selection committees, executive authorities and, for the highest positions, Cabinet. Procedures for removal, also significantly, are relatively strong. Public servants are protected

⁵³ Section 16A.

⁵⁴ In terms of section 16B, chapter 8 and schedule 8 of the Labour Relations Act, and various resolutions and agreements under the PSCBC.

⁵⁵ *Labour Relations Sanctioning Guidelines for the Public Service*. [Web log post]. Accessed on 15 October 2019 at http://www.dpsa.gov.za/dpsa2g/documents/nlr/2015/21_1_r_4_12_2015%20Annexure%20A.pdf

from political coercion to the extent that their service can only be terminated with cause and with recourse to a range of appeal authorities. The virtues of these procedures extend little further.

Political office-bearers, as executive authorities, are granted the most important powers, especially those of appointment. Heads of department and component, on the other hand, are in terms of the Public Service Act made responsible for the efficient management of their departments, including the effective utilisation of staff and the maintenance of discipline. In terms of the Public Finance Management Act, 1 of 1999, heads of department and component are also accounting officers, responsible for the governance of departmental finances and resources, procurement, and the evaluation of major capital projects. So, while political heads get the most important powers, administrative heads get held accountable for performance management around the most important responsibilities. A result of this misalignment between powers and responsibilities is considerable conflict between politicians and administrators across the public service.⁵⁶

Quite often, though, political office-bearers and administrative heads are more closely related. South African politicians, although in terms of the Constitution and statute precluded from factoring political criteria into appointment decisions, in fact do so pervasively. They regularly appoint politically-aligned people to administrative posts. Five-year contracts for administrative heads facilitate this. Since politicians are ultimately responsible for appointing the members of the relevant selection committees, the system of tiered-screens is illusory. Regardless of the system of delegations that pertains in any specific organ of state, political appointment of a politically-allied head of department or component enables political preferences to extend to their subordinate, and so on as politicisation cascades down the hierarchy. Control of promotion and removal by political executives, the latter often through the backdoor by the power of suspension, further ties administrative positions to political favour and prejudice. The system, in these ways, enables the construction of informal networks that bridge segregations of duties, oversight, checks and balances. The system therefore facilitates the coordination of illicit operations.

Variations on this theme are multitudinous. The President and the premiers are given authority to appoint departmental and component heads. Depending on the balance in Cabinet or in a provincial executive council, this can give the President or the premier concerned very extensive patronage, involving a dangerous accumulation of power. If instead strong ministers or MECs prevail, these can secure their own administrative heads and from this angle ensure their own patronage resources. If external bodies, a party structure or otherwise, control a politician, then they can control appointments within that politician's authority. The essential mechanism of 'state capture', where administrative decisions regarding procurement and other matters are effectively externalised into undemocratically-constituted and opaque fora, thus comes into view. Resources that are by this mechanism extracted from the state are used, in part, to purchase, by patronage, the mass political support necessary to win elections and retain power.

At this point, the method of politicisation, originally intended to assert control over a potentially resistant apartheid public administration and to redirect the state toward progressive purposes, produces its antithesis, an administration that evades democratic control. The breakdown of control in South Africa's public service is amply attested to, indeed annually by Auditor General reports.

2.2. *The municipalities*

⁵⁶ Ramaite, R. (1999) 'Keynote Address'. *Journal of Public Administration* 34(4): pp. 286–92; Maserumule, M. H. (2007) 'Conflicts between Directors-General and Ministers in South Africa 1994–2004: A "Postulative" Approach'. *Politikon* 34(2): pp. 147–64.

Municipalities, like the public service, are subject to section 195 and related provisions of the Constitution. The law of local government replicates the general features of the public service system as regards appointment and removal, but in a municipal context. The Municipal Systems Act, 32 of 2000, regulates personnel practices. It gives the power to set subordinate legislation to the minister responsible for local government, presently the Minister of Cooperative Governance and Traditional Affairs (MCOGTA). The Municipal Structures Act, 117 of 1998, differentiates between different categories of municipalities. Category A or metropolitan municipalities cover South Africa's major conurbations. Beyond these, the country is carved up into category C or district municipalities, within which lie category B or local municipalities. These categories of municipality are further constituted as particular types of municipalities. Most municipalities across the country are constituted under the mayoral executive system, wherein executive mayors are given general powers of direction and oversight over municipal administrations. KwaZulu-Natal, which operates a collective executive committee system with ward participation, is the major exception. Here executive committees, composed proportionally by the parties in council, exercise general powers of direction and oversight.

The Municipal Systems Act gives to municipal managers, as heads of administration, the responsibilities of implementation.⁵⁷ Significantly, section 53 requires municipalities to establish a framework setting out all the roles and responsibilities of political structures, political office-bearers, and the municipal manager, including their relations and lines of accountability and communication between them. This has often been an invaluable mechanism for defining the line between politics and administration, if rarely fully operationalised.

The Municipal Systems Act enables the establishment of municipal entities.⁵⁸ These include private companies, established or purchased by a single municipality or by more municipalities. These also include service utilities, operating in one municipal jurisdiction or in multiple jurisdictions. Municipal entities are governed by boards and headed administratively by chief executive officers. The Act establishes the mayor of the parent municipality and the chairperson of the board as the official line of communication between the municipality and entity.⁵⁹

2.2.1. Qualifications for office in municipal administrations and entities

The Municipal Systems Act and subordinate legislation establish general requirements, competencies, and qualifications of office.⁶⁰ Appointments to municipal administrations must be South African citizens or permanent residents and possess the relevant competencies, qualifications, experience, and knowledge. Senior managers, including municipal managers and managers directly accountable to them, are subject to a competency framework that measures strategic leadership, people management, project management, financial management, change leadership, and governance leadership abilities. They are also subject to qualifications. Municipal managers, for instance, must have a bachelor degree in public administration, political science, social science, law, or some similar field. They must have five years of relevant experience at a senior management level, as well as proven knowledge in relevant policy and legislation, governance systems and performance management, council operation and the delegation system, good governance, audit and risk management, and budget and financial management.

⁵⁷ Section 55.

⁵⁸ Chapter 8A.

⁵⁹ In terms of section 93D.

⁶⁰ Sections 54A and 56, implemented under the Municipal System Act by 8 and 9 of the Regulation on Appointment and Conditions of Employment of Senior Managers.

Competency, qualification, and experience standards are also set for managers directly accountable to the municipal manager. The relevant qualifications are differentiated between development and town planning, public works, finance, community services, corporate services, and other areas. Layered over this, National Treasury regulations under the Municipal Finance Management Act, 56 of 2003, establish competency levels in terms of the National Qualifications Framework. These extend well beyond specifically financial competencies and from senior managers in municipal administrations toward financial and supply chain management officers and officials in municipal entities. At lower levels qualifications are defined by municipalities and other applicable legislation in terms of job requirements and qualifications relevant to these. Disqualifications such as a criminal record and previous removal are required to be screened.

Any board of directors of municipal entities must have the range of relevant expertise required to manage and guide the municipal entity, must be at least a third non-executive, and must have a non-executive chairperson. No director may hold office as a councillor, be a member of a legislature, be an official of the parent municipality of that municipal entity, have a criminal record, have been declared of unsound mind by a court, or an unrehabilitated insolvent. A councillor or official, however, must be designated by the municipal council as a municipal representative, in other words a non-participating observer, at board meetings and shareholder meetings.⁶¹

2.2.2. Powers and procedures of appointment

In terms of the Municipal Systems Act, the power to appoint a municipal manager is granted to the relevant municipal council.⁶² The power to appoint managers directly accountable to the municipal manager is assigned to the council in consultation with the municipal manager.⁶³ The power to appoint other staff is granted to the municipal manager.⁶⁴

Acting appointments, under the relevant authority, may not exceed three months, with extension upon application to and at the discretion of the MEC responsible for local government. When the post of a senior manager becomes vacant, the mayor, in the case of a municipal manager, or the municipal manager, in the case of a manager directly accountable to the municipal manager, must obtain approval from the municipal council to fill the post.⁶⁵ Within 14 days of receipt of this approval, the post must be advertised in a newspaper circulating nationally and in the province where the municipality is located. Advertisement must specify the job title; term of appointment; place to be stationed; annual total remuneration; competency requirements and qualifications; the need for signing an employment contract, a performance agreement, and a disclosure of financial interests; the need to undergo vetting, and so on. The closing date for applications must be a minimum of 14 days from the date of advertisement and a maximum of 30 days. Applications must be on the official form and accompanied by a curriculum vitae. These must disclose academic qualifications, proven experience, and competencies; contactable references; registration with a relevant professional body; full details of any removal for misconduct; and any disciplinary actions during previous employment. After checking applications for compliance, these are then forwarded on to a selection panel.⁶⁶

The municipal council must appoint a selection panel to make recommendations for appointment. Political criteria are excluded from appointment to the selection panel, with consideration only of the

⁶¹ In terms of section 93E of the Municipal Systems Act.

⁶² Section 54A.

⁶³ Section 56.

⁶⁴ Section 55.

⁶⁵ Regulation on Appointment and Conditions of Employment of Senior Managers, 7.

⁶⁶ Regulation 10.

nature of the post to be filled, gender balance, and skills, expertise, experience, and availability. The selection panel for the post of the municipal manager must consist of at least three but not more than five persons. The mayor or a delegate must be its chairperson. A councillor designated by the council must be included, followed by another person who is not a councillor or staff member of the municipality but that has expertise or experience in the area of the advertised post. The selection panel for the post of a manager directly accountable to a municipal manager must also have between three and five members. It must include the municipal manager, who must be chairperson, as well as a member of the mayoral committee or councillor who is portfolio head of the relevant function, and one other person from outside the municipal structures but with knowledge of its area. Panel members are required to disclose conflicts of interest and if so recuse themselves. Family relation or indebtedness to a shortlisted applicant are specifically mentioned.⁶⁷

In consultation with the selection panel, the chairperson must generate a shortlist of all candidates who meet the relevant requirements. Shortlisted candidates must be screened within 21 days. Interviews must be conducted 21 days after screening and the applicants scored by each member of the selection panel. Applicants must further be scored in terms of the requirements of the job. By consensus, or by way of the recording of dissent, the first choice, together with a second and third should these be present, must then be forwarded to council for resolution.⁶⁸ Council is responsible for conducting due diligence on the process and making an appointment. When this is done, within 14 days a report documenting the process must be sent to the relevant MEC for local government.⁶⁹ A similar system is established within the municipal administration and under the authority of the municipal manager for lower positions. There is no statutory requirement of open advertisement at these lower levels, which means that municipalities may and occasionally do approximate to a closed career system, preferring promotion from within the administration over lateral appointments from without.

The municipal council is responsible for establishing a process for the appointment of directors of municipal entities. The process must simply ensure, in terms of section 93E of the Municipal Systems Act, that applications are widely solicited, that a list of applicants is compiled, and that appointments are made from this list in light of relevant requirements of the job. An entity's board of directors is responsible for the appointment of a chief executive officer, subject to statutorily defined requirements of the job. The chief executive officer is then responsible for appointment further down, under statutory requirements and the policies of the board. Municipal entities co-owned by multiple municipalities or that are multi-jurisdictional are constituted along similar lines by agreement between municipalities.

Municipal managers must be employed on contracts not exceeding five years or a year after the election of a new council. These contracts can be renewed by agreement. Lower positions within municipal administrations can be on probation and under permanent contract.⁷⁰

2.2.3. Termination of service

Termination of service is by retirement at the appropriate age, by notice, and by removal for reasons of operational requirements, incapacity, and misconduct. Misconduct must be established as against the Code of Conduct for Municipal Staff Members contained in schedule 2 of the Municipal Systems Act. Disciplinary processes are, as with the public service, subject to the Labour Relations Act.

⁶⁷ Regulation 12.

⁶⁸ Regulation 13.

⁶⁹ Regulation 17.

⁷⁰ Section 57(6).

2.2.4. Summary

Municipalities do not have an independent central regulatory authority charged with general oversight of municipal administration. By statute, they fall legally outside of the public service. They thereby fall beyond the regulatory reach of the Public Service Commission. They have no equivalent, constitutionally independent body with jurisdiction over them, the closest approximation being the political offices of the MCOGTA in the national sphere and the nine MECs responsible for local government in the provinces. The effect is to generate some complications for a reform agenda concerned with building administrative independence, but these – as will be considered momentarily – do not appear insurmountable.

The municipalities, otherwise, broadly share the virtues and vices of the national and provincial public service system. The framework of competencies and qualifications is elaborate and relatively robust, if open to imprecision in decision-making and accountability. Procedures for appointment and removal are suitably flexible and accord well with good practice in human resourcing. The process of appointment sets up in outline a system of tiered screens, with a segregation of duties between human resources personnel, selection committees, municipal managers, and councils. Independent subject matter expertise is included in selection committees for senior managers. Procedures for removal are strong, an important protection for administrative officials against illicit political pressure. Municipal entities are given considerable autonomy from board level down, so are better able to tailor their internal operations to their specific functions, for good or ill. Employees within them retain the protections of the labour relations framework.

Municipal managers enjoy more definitely assigned powers of appointment below senior manager level. What this means is that the Municipal Systems Act is more closely aligned with the Municipal Finance Management Act, 56 of 2003, which sets municipal managers up as accounting officers for financial matters. This is even more precisely achieved for municipal entities, where chief executive officers are designated accounting authorities and are granted considerable powers to manage their operations.

Still, although in the municipal sphere, too, political criteria are formally excluded from appointment decisions, in fact they figure prominently. A vacancy in the post of municipal manager is often a pretext for some of the most vicious and debilitating factional conflicts in councils. Political appointment and control of a municipal manager enables politicisation of personnel practices right down to the lowest grade. Independent-minded municipal managers have tended to emphasise section 53 definition of the relations between political office-bearers and administrative officials. Council's powers of suspension have been used liberally to remove them, with infamous golden handshakes securing termination and more compliant successors. As political appointees have been layered into municipal administrations by successive municipal managers, administrators with political connections have constructed fiefdoms responsible for direct distributions of patronage jobs, contracts, houses, and what have you. These have become an important feature of municipal governance and a major impediment to democratic control of municipalities.

3. Reform principles and proposals

The law as it applies to appointment and removal of administrative officials in the public service and in municipalities exhibits, therefore, a series of characteristic problems. It provides politicians with considerable power over appointment decisions. De jure, this power in the case of appointment is

constrained by the exclusion of political criteria from the relevant decision-making, by complex frameworks of necessary competencies and qualifications, and by a system of tiered screens that segregates duties between human resource officials, selections committees, and appointing authorities. De facto, political appointing authorities are in any case empowered to play a determining role in appointing across the screens, so they are ultimately not prevented – there is no check and balance that does so – from introducing political criteria into appointment decision. Adding the power of suspension and the ability to pay off contracts, used to get around the relatively strict protections of the Labour Relations Act, politicians and those who might control them can appoint political allies across segregations of duties and otherwise project political pressure in such a way that circumvents rules and coordinates the illicit extraction of resources from public administrations. Democratic control is in this way loosened. Political appointees, in their own right often powerful political players, carry into administrations political networks which can be mobilised to resist direction through the administrative line of command. Control loosens even further as political turnover layers these political networks into administrations.

In fact, this is how corruption and patronage politics works in South Africa. Analysis of the vast majority of corruption scandals will reveal these mechanisms at play. Comparative experience, from a large number of other countries, considered at the outset, provides another set of evidence for their centrality. If South Africa is to decisively tackle its problems of corruption and patronage politics, here is the point at which to do so.

3.1. Principles of reform

The principles guiding reform have been dealt with at length above and are embedded in the Constitution of the Republic. South Africa's public administration must be responsive to democratic direction, professional, and developmentally effective. In these respects, the current legal framework is not working. Significant adjustments in the direction of an independent administrative check, a functional segregation of duties, in appointment and removal processes is necessary.

A further principle rests on a fact that has been only obliquely touched upon. Patronage, a now central feature of South African politics, has become fundamental to the workings of power. Its basic mechanism will not easily be reformed. A direct and wholesale confrontation will in present circumstances be fruitless. The reform process, therefore, must be relatively indirect and incremental. It will be designed in such a way that the President will have the discretion, by proclamation, to determine in which organs of state and when it will be rolled out.

3.2. The reform of appointment and removal processes

Reform will by necessity proceed somewhat differently for the public service and municipalities. Specifically, the reform in structures will be distinct, given that municipalities do not have a ready-made, constitutionally independent body, like the Public Service Commission, that can act as a check and balance in appointment processes. The reformed process, however, follows in both a similar design. The basic idea is to enable political office-bearers to specify the expertise and professional characteristics that their policy orientations require of appointees and also to ensure that they can work with these appointees. Simultaneously, the point is to prevent them from manipulating appointment processes in such a way that extends illicit and inappropriate personal networks across public administrations. The generic process is divided into stages of process planning, process administration, short listing and appointment. It will apply through to managers reporting directly to heads of administration, with appointment lower down falling to these heads. The process should be

maximally transparent throughout. The content of each stage, with each tending to be under the authority of a different actor, can be illustrated as follows.

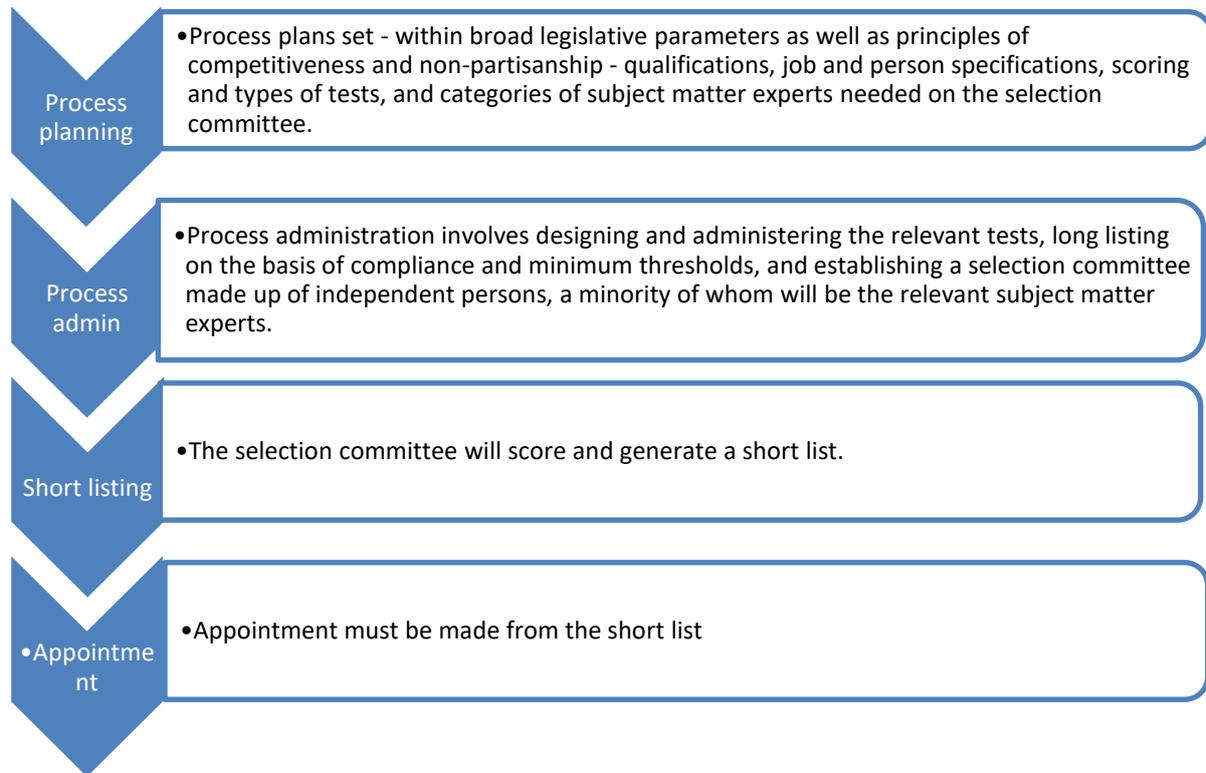


Figure 1. Generic appointment process

3.2.1. The reform of the public service

In the public service, the Commission is a ready-made structure that offers an important lever for reform. Under the present Constitution, the Commission is provided with relatively robust protections of its independence. In implementing legislation, however, its independence is attenuated by provision for political involvement in appointments to the Office of the Public Service Commission. In order to play the role envisioned for it here, that legislation must be amended to place the power of appointment to and removal from these offices squarely with the Chair of the Public Service Commission, for the director-general and deputy directors-general, and then with the director-general for lower posts.

The Public Service Act, we have seen, does not sufficiently check and balance the power of political office-bearers in making appointments and removals in the broader public service. The Public Service Commission, rendered suitably independent and empowered, can provide this check and balance. It should do so through a series of elaborations of the National Development Plan, which is itself centrally concerned with insulating public administrations from unlawful political interference and is already government policy.

The National Development Plan proposes the creation of a new administrative head of the national public service.⁷¹ The appointment of the head of the public service – on which the Plan remains silent

⁷¹ See chapter 13.

– should be dealt with as follows. The national public service commissioners should take the power to plan the appointment process. It should do so in consultation with the President. Planning should involve establishing the necessary qualifications, job and person specifications, the scoring and types of tests, and the categories of subject matter experts that will sit on the selection committee. Appointment plans, however, would have to be within broad legislative parameters, as regards qualifications and other matters. Plans that design the process in such a way as to render competition in selection meaningless, or that introduce partisan political criteria directly into the process, will be invalid. The national public service commissioners should at this point administer the process, including designing and conducting tests, long-listing on the basis of compliance and minimum thresholds, and establishing a selection committee made up of independent persons. A minority of these persons should fit within the categories of technical experts prescribed in the appointment plan. The selection committee would be responsible for arriving at a short list of candidates. The President should then appoint from the short list.

In this process, a link is created between the policy concerns of the government, the technical needs of the administration, and the expertise and personal qualities required of the appointee. The Public Service Commission, situated centrally in a segregation of duties, operates as a check and balance on political manipulation. Simultaneously, the Commission does not short list or act as an appointing authority. It simply administers the process to ensure that it aligns with the law. Its new role is therefore not in substantial conflict with existing, constitutionally-inscribed grievance and other functions. The involvement of only national commissioners preserves the quasi-federal structure of the Constitution.

The National Development Plan recommends the creation of an equivalent to the national head of the public service in each province. These should be appointed through an equivalent process, substituting for the President and the national commissioners, the relevant premier and the relevant provincial commissioner. The assignment of powers and responsibilities for the process of appoint of heads of national and provincial public service, then, can be illustrated as follows.

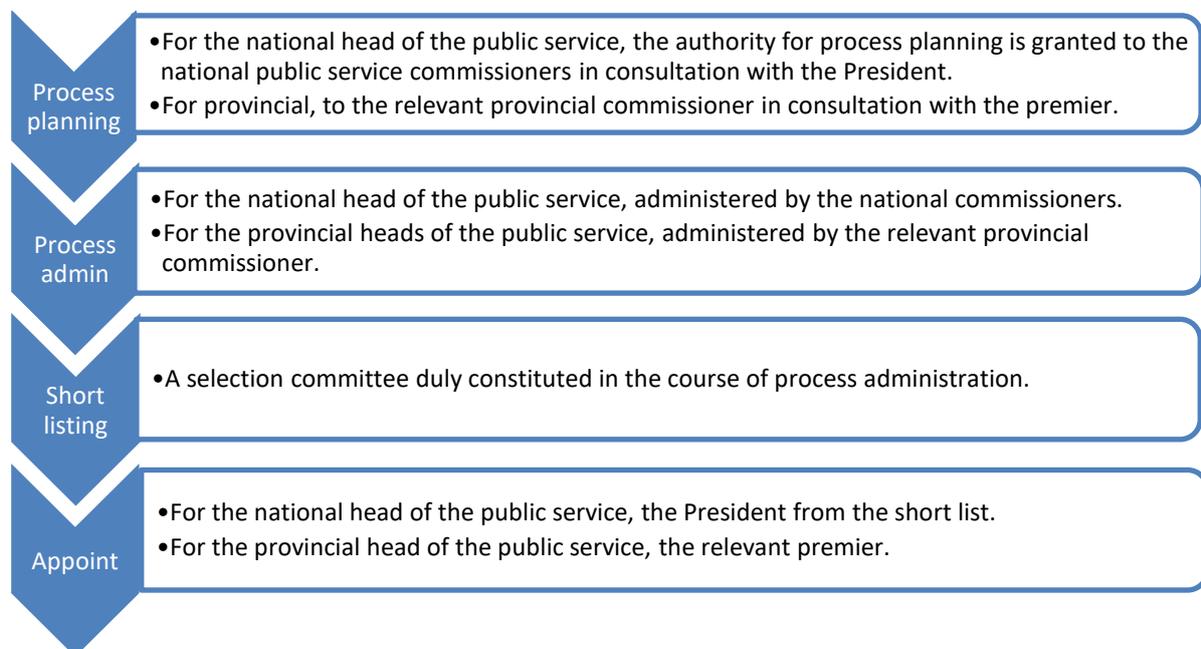


Figure 2. Allocation of powers and responsibilities for appointment of heads of public service

The National Development Plan envisions that the head of the public service, among other matters, will see to the career progression of senior public managers, by convening appointment processes,

conducting performance assessments, and running discipline. It recommends that it convene appointment processes in conjunction with the Public Service Commission. In the case of national heads of department and component, then, much the same process as for heads of the public service should be followed. The major difference should be that now the head of the public service should take over process planning, doing so in consultation with the relevant minister. The minister should take the power to appoint. Similar adjustments must be made in the provincial sphere.

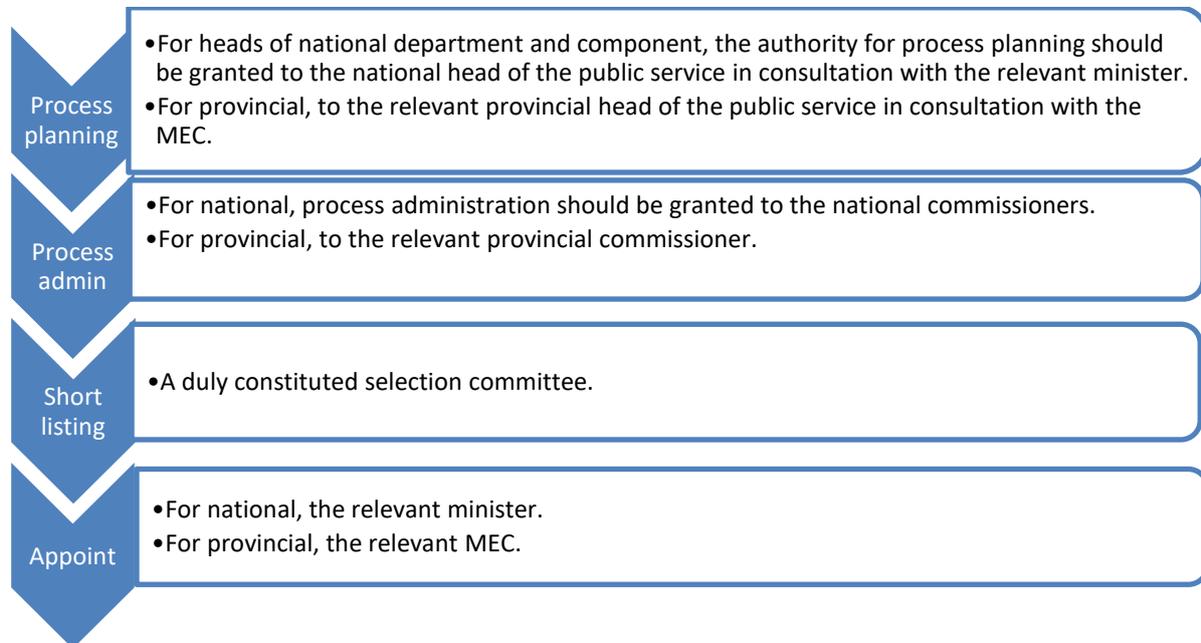


Figure 3. Allocation of powers and functions for appointment of heads of department and component

In the case of deputy heads of department and component, since these are still within the strategic level of organisations, the relevant head of the public service should plan the process, in consultation with the relevant minister and the head of department or component, to ensure coherence between policy purposes and technical expertise. The relevant commissioner, to check and balance the process, should then administer the process. A duly constituted selection committee should short list. To align the line of command with the office of the head of department or component, he or she should then appoint.

The position paper endorses the National Development Plan’s concerns with moving towards longer term and ultimately permanent contracts for senior management. It also endorses the need to devolve appointing authority for lower positions. In operationalising the latter, selection committees should be constituted and chaired by the deputy head responsible for human resources or their delegate. The head of department or component should then appoint, running a check and balance throughout organisational appointment processes. Excluding these lower posts from the remit of the Public Service Commission and the head of the public service serves to avoid making these structures a bottleneck over personnel processes. It also more precisely aligns authority and accountability in these organisations on the head of department or component.

Removal, including precautionary suspension in a fast-tracked process, of the head of the public service, heads of department and component, and deputy heads, should be by their immediate superior, but subject to justification to and authorisation by the relevant commissioners. Removals further down should fall to the head of department or component.

3.2.2. The reform of municipalities

Municipalities lack a constitutionally independent regulatory authority equivalent to the Public Service Commission. There is some concern within government to bring municipal administrations within the public service. There are a number of advantages to this. Still, even if a unified public service is created, the direct administration of municipal appointment and dismissal processes by the Public Service Commission would likely invite constitutional challenge. It seems likely that such a challenge would be fatal to reform legislation in this sphere.

Municipalities, therefore, pose special difficulties for reform design. Indeed, international experience with civil service reform along the lines proposed here suggests that it moves most slowly across municipalities. There are a number of ways in which one might proceed. A classic option, widely practiced for instance in the United States over the course of the twentieth century, might be to have local councils appoint independent committees, with tenured membership on staggered terms, as a substitute for the Public Service Commission. The success or failure of such a system would tend to be defined by the sort of pressure that could be brought to the process of constituting these committees. Wide transparency provisions could facilitate political mobilisation behind trustworthy candidates, but in contemporary conditions the balance of pressure in most localities is likely to favour forces of patronage.

An alternative, more robust option would seek to leverage the relative strength and independence of national political and economic institutions to insert a stronger check into municipal appointment processes. The position paper prefers this option. Specifically, local government is unique in that it intersects with a variety of professions that enjoy nationwide, strong, and often already statutorily independent and regulated professional associations. The engineering, architecture, planning and accounting professional bodies could all be brought into new, independent personnel committees the function of which would be to check and balance political office-bearers in appointments to senior management. More corporatist bodies, involving a wider set of interests, could include local business associations, unions and civil society. If municipalities are brought into the public service, then the Public Service Commission could act as an additional check on whether these committees are properly constituted. The committees could then be involved in appointment processes along the lines set out above.

The process for appointing municipal managers, then, would begin with municipal councils defining qualifications, job and person specifications, types of tests and scoring. Municipal human resource departments could administer the process until the point of long list and also support the work of those independent municipal personnel committees. These committees would then short list. Municipal councils would then appoint from this short list.

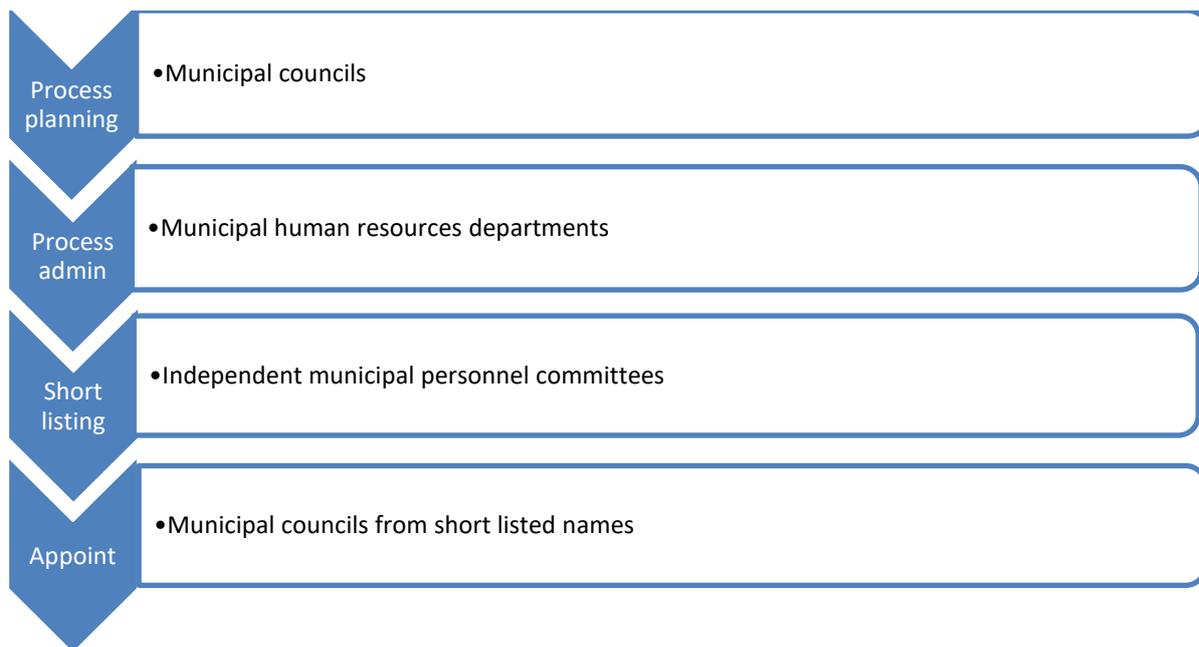


Figure 4. Allocation of powers and functions for appointment of municipal managers

The appointment of managers reporting directly to municipal managers should proceed similarly, but with municipal managers taking on a more substantial role.

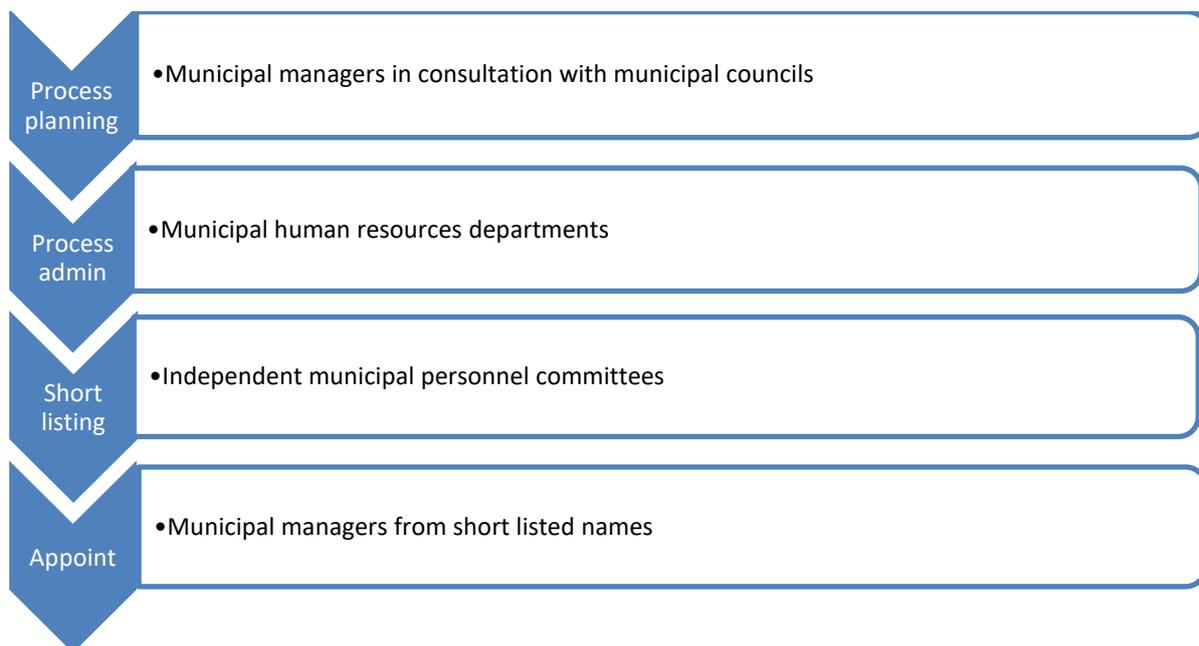


Figure 5. Allocation of powers and responsibilities for appointment of managers reporting directly to municipal managers

The position paper, also for municipalities, endorses the National Development Plan’s concern with moving towards longer term and ultimately permanent contracts for senior management. It endorses the need to devolve appointing authority for lower positions. For appointments to these lower positions, selection committees should be constituted and chaired by the manager responsible for human resources or their delegate. The municipal manager should then appoint, with the result being to run a more robust segregation of duties throughout municipal appointment processes.

Removal, including precautionary suspension in a fast-tracked process, of a municipal manager or a manager reporting directly to them should be by council, for municipal managers, and by the municipal manager, for managers reporting directly to them. Again, however, removal from these posts should be subject to justification to and authorisation by the independent municipal personnel committee.

3.3. A mechanism for incrementalism

Since it is unlikely that sufficient power could be mobilised to achieve these reforms all at once, a more incremental approach is necessary. In fact, this is always the case with expansive and deep-rooted patronage systems, efforts to undo them must develop a mechanism that reformers can mobilise around to gradually push corruption and patronage back.⁷² The most appropriate mechanism for the sorts of provisions elaborated in this position paper is what is called a “covering in” mechanism. To elaborate, a statute providing for the reforms outlined above need not apply anywhere initially. It could include, instead, a clause which grants the President the power to “cover in” into the statute’s terms, by proclamation, specific departments, components, or municipalities. A proclamation covering parts of the administration into the statute would be irrevocably, except by another statute.

Mechanisms for covering in have been a common feature of the proposed reforms, especially in the Americas. They have a number of advantages. Not only do they provide a point around which reformers can mobilise, they also maximise the chances that reformers will make gains when crises and shifts in broader political alignments and interests create opportunities for reform in the direction of administrative insulation. Covering in mechanisms even create incentives for politicians who are otherwise disinclined toward these reforms, such as when a political party about to lose incumbency covers parts of their administration in to deny patronage resources to an incoming opposition.⁷³ Leveraging scandals and other such events, a covering in mechanism can be used to steer patronage away from those parts of the state where it has had its most devastating consequences. Parts of the state that perform more vital functions or ones otherwise in especial need of insulation can be covered in. In carving at corruption and patronage politics from these sorts of angles, covering in mechanisms not only reduce corruption and patronage, they channel it in less dangerous directions. Legislation with a covering in clause will produce no immediate costs for patronage politicians. It can, however, set off powerful, virtuous dynamics that result in the construction over time of more democratic, professional, and developmental public administrations.

ⁱ <https://www.gov.za/speeches/president-cyril-ramaphosa-2019-state-nation-address-7-feb-2019-0000>

ⁱⁱ E.g. Peter Evans and James Rauch. 1999. “Bureaucracy and growth: a cross-national analysis of the effects of ‘Weberian’ state structures on economic growth,” *American Sociological Review* 64 (5), pp. 748-65; Atul Kohli. 2007. *State-Directed Development: Political Power and Industrialization in the Global Periphery*. New York: Cambridge University Press.

⁷² See, for instance, Skowronek, S. (1982) *Building A New American State: The expansion of national administrative capacities, 1877-1920*. New York: Cambridge University Press.

⁷³ Geddes, B. (1994) *Politician's dilemma: building state capacity in Latin America*. Berkeley, C.A.: University of California Press; Grindle, M. (2012) *Jobs For The Boys: Patronage and the state in comparative perspective*. Cambridge, M.A.: Harvard University Press.