

Reforming Appointment and Removal in the Public Service and Municipalities

POLICY BRIEF

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ABOUT THIS BRIEF

This policy brief is one of a series developed by the Public Affairs Research Institute (PARI), intended to contribute to a strategy for state reform. The series focuses on specific interventions to achieve integrity, democratic control and effectiveness in the public administration. It is designed to provide reform-minded politicians, public servants and civil society actors with a programme for constructive change upon which they can agree and act.

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Introduction

South Africa is in a deep social crisis. As the Covid-19 pandemic began, the state was already undergoing a process of systemic deterioration. The progressive, programmatic politics of the post-apartheid era had widely degenerated into a politics of spoils and patronage. The fiscus was strained. The public administration's capacity to deliver on the promise of democracy was impaired. In a number of sectors, policy became gridlocked and error-prone, delivery became inefficient and erratic, and basic infrastructure was often collapsing. The economy, reflecting these developments, was stagnant. The average South African was becoming poorer and the poverty rate was rising.

In response to the pandemic, key political leaders behaved responsibly, competently, and in a way that was informed by science. However, they had to work through a state which was decrepit. The public administration failed to build the sophisticated testing, tracing and quarantine operations which, as some East Asian countries showed, would reduce transmission and avoid the economic damage of extensive lockdowns. Corruption prevailed across emergency procurement. Public healthcare in a number of regions disintegrated. Economic and social support was limited and its implementation was delayed and chaotic. By the end of 2020 the economy had contracted by 7 percent. More than two in every five people available for work did not have a job. In the NIDS-CRAM survey of November/December, nearly one in five households reported hunger.

The deterioration of the state, its inability to move decisively to lift South Africa out of this crisis, is rooted institutionally in the ways in which personnel are appointed to and removed from the public service and municipalities. The Constitution envisages a non-partisan administration, obedient to democratic law and policy and positively oriented to the

achievement of substantive freedom and equality for all the people of South Africa. In the early post-apartheid years, however, there was a tension between these imperatives. Non-partisan personnel practices would leave the public administration in the hands of old apartheid administrators, who might resist the state's new direction. So, to overcome them, politicians expanded their powers of appointment and removal. Today, as a consequence, supporters of the constitutional project prevail across the public administration, but continuing politicisation is now producing the opposite of democratic rule, it is implicated in eroding the integrity, controls and capabilities needed to achieve popular, constitutional goals¹. This policy brief considers how to address this problem.

Appointment and Removal in South Africa's Public Administration

The Constitution of the Republic of South Africa provides against the introduction of political criteria into appointment and removal decisions. Section 195 states that "employment and personnel management practices" are to be "based on ability, objectivity, fairness and the need to redress the imbalances of the past to achieve broad representation." Section 197 continues that "No employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause." Section 195(4) provides a limited exception. It requires legislation to regulate appointments made in terms of policy considerations, which under section 12A of the Public Service Act allows political executives to exercise political discretion in the establishment of a personal staff, which may include a chief of staff, private secretaries, special advisors, and others. Beyond these, there is no provision for political criteria to enter into decisions about appointment to and removal from the public administration.

The Public Service Act regulates personnel matters in national and provincial departments. The Municipal Structures Act and the Municipal Systems Act cover municipalities. The courts, interpreting this legislation, have affirmed that the absence of provision for political criteria in personnel decisions entails their exclusion from consideration. In *Mlokoti v Amathole District Municipality*, for instance, the Eastern Cape Division of the High Court found that in a competition for the position of municipal manager, the municipality was obliged to appoint the best candidate, even though there was an expressed political preference for another candidate. The legislation, however, also introduces a discrepancy. Although political criteria are formally precluded from consideration, politicians are given all the powers and functions needed to include them in fact. The legislated procedures lack rigorous and independent checks and balances. They proceed without the regular safeguards necessary to guarantee that constitutional principle is made into practical reality. The resulting inconsistency, between principle and reality, sits at the heart of South Africa's governmental problems.

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¹ For an earlier, fuller discussion, see the PARI position papers on state reform, available online at www.pari.org.za. The theme of this policy brief is dealt with in R. Brunette (2020), Position Paper on Appointment and Removal in the Public Service and Municipalities. Position Papers on State Reform. Public Affairs Research Institute.

The legal framework is complicated but its character is clear. In the appointment of administrative heads, in national, provincial and local government, the power to constitute a selection committee is granted, respectively, to the relevant minister, member of executive council (MEC) or municipal council. The selection committee must be chaired by the relevant minister, MEC or mayor. It must include certain other ministers, MECs or municipal councillors. The power to appoint from committee recommendations then goes to the President, the relevant premier or the municipal council. In national and provincial government, the final power to appoint has sometimes been delegated from the President and premiers to ministers and MECs. Some form of concurrence with appointment decisions is often required from Cabinet, the relevant executive council or the MEC responsible for local government. Despite the intricacies, these procedures offer no substantial constraint on the introduction of political criteria into appointment decisions. Powers across the process are sometimes divided between different offices, but these offices are almost always political offices which will be filled from the governing party or coalition. What this means is that these powers are readily coordinated, through deployment committees, very often through factional and other informal arrangements, to get politically aligned individuals into administrative leadership.

Much the same holds for appointments to posts lower down the hierarchy, except that administrative heads and other officials progressively take on a more substantial role. In the appointment of deputy heads, the relevant minister, MEC or municipal council has the power to constitute a selection committee. The committee must be chaired by the relevant minister, MEC or, in local government, the local administrative head, the municipal manager. The committee must include certain other political and administrative office-bearers. The power of appointment then goes to the relevant minister, MEC or municipal council, often with concurrence required from the Cabinet, the relevant executive council or the relevant MEC responsible for local government. In relation, finally, to posts below the deputies, the power to constitute selection committees and to finally appoint goes to the minister or the MEC – these sometimes delegating to the administrative head – or to the municipal manager. Where administrative heads take on a more significant role, it should be recognised that the heads themselves are appointed through processes controlled by politicians, so they will tend to be amenable to cascading political preferences in appointment down the hierarchy. Where, therefore, heads have delegated powers further into human resources divisions, these divisions will tend to be filled through politicised appointment processes, and so on.

The allocation of powers and functions to do with discipline and removal broadly mirrors the allocation for appointment. These powers include, crucially, establishment of disciplinary hearings, precautionary suspension, and sanctions extending to dismissal. In national and provincial government, in the case of administrative heads, these powers go to the relevant minister or MEC, often with concurrence required from Cabinet or the relevant executive council. In relation to posts lower down the hierarchy, powers of removal go to administrative heads. In local government, in the case of municipal managers, the relevant council initiates, the mayor constitutes disciplinary hearings, and the council applies sanctions. In the case of managers reporting directly to municipal managers, the relevant municipal manager constitutes a disciplinary hearing and council applies

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service may be favoured or
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sanctions. The municipal manager assumes these powers over posts below senior management. Politicians, therefore, as with appointment, wield the powers and functions of discipline and removal, either directly or through officials appointed by them. So, where administrative officials are not politically or personally aligned, then political office-bearers can use powers of discipline and removal to cajole them into compliance with political directives, or to make way for new political appointments, serving to bolster the politicisation of the public administration.

In summary, although the legal framework for appointment and removal formally excludes political criteria from decisions, the absence of rigorous checks means that politicians include them pervasively in practice. In South Africa, political office-bearers routinely appoint politically aligned individuals into key positions in the public administration.

They use their powers of removal to intimidate and remove other administrative officials, freeing posts for more political appointments. The general outcome is that technical criteria are downplayed in personnel decisions; the most competent people are overlooked in favour of politically connected people. Even more destructively, these politically connected people are appointed across the checks and balances that are designed to protect the state's regulatory and allocative decisions from corruption. Thus positioned, they can be instructed to circumvent procedural controls, to facilitate self-enrichment and accumulation of the patronage need to build political support. Politics, given such wide opportunities for malfeasance, has drifted away from emancipatory and egalitarian projects; it has eroded the administrative rationalities and capacities which our democracy relies on to get things done.

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The Historical and Comparative Experience

Defenders of the current system of appointment and removal often acknowledge these problems, but they want to keep the system anyway, on the view that politicians in all countries exercise equally wide discretion in appointment and removal decisions. The historical and comparative record shows otherwise.

Germany, led by the Hohenzollern realm of Brandenburg-Prussia, established an autonomous civil service by the early nineteenth century, characterised by legal training, competitive examinations, a closed career system, elaborate regulation of official conduct, and the formation of civil servants into a solidary status group, the leading members of which often rose above administrative posts into properly political office. When Germany democratised, this group balanced political parties and restrained them from raiding public administrations for patronage. Their presence then is a key reason for why German politics today is constructed along fairly clean and programmatic lines, while say Italy's remains fraught with corruption. Similarly to Italy, the United States democratised without a strong bureaucracy. Politicians, after they won elections, routinely purged the bulk of administrative officers to make posts available for supporters. This practice produced debilitating levels of corruption until, from the last decades of the nineteenth century, a reform movement established independent civil service commissions, which administered appointment and removal across progressively wider reaches of the public administration. Corruption was curbed, confined

to transactions at the political level, and even now the public administration itself remains relatively free from it.

In South Africa, informed by these experiences, the Public Service Commission (PSC) was initially conceived to be the central player in personnel processes. In the decades after its establishment in 1912, it gradually, if haltingly and imperfectly assumed a direct role in appointments and removals. From the later years of apartheid, however, its powers started to be curtailed, until 1997 amendments to the Public Service Act finally marginalised it. The body, however, is now set to make a comeback. The National Development Plan recognises the problem of inappropriate political interference in public administration and argues for the PSC to regain a direct role in appointment processes. In December 2020, following this argument, the Draft National Implementation Framework Towards the Professionalisation of the Public Service was gazetted. In April 2021, a draft Public Service Amendment Bill was released for public comment. It preserves the role of the President and premiers in the appointment of administrative heads but devolves personnel powers over lower ranks to the latter.

These policy statements represent an important acknowledgement, at the highest levels of government, of the key problems with the current system. The proposals, however, remain vague and uncomprehensive. In contemporary South African politics, the distribution of patronage, secured through the appointment of political allies into the public administration, has become key to building power. Comparative experience with this condition suggests that reform will proceed tentatively and incompletely, unless broad and strategic social mobilisation works to push things along. In order to advance this movement, this policy brief aims to orient debate and collective action by posing certain principles and a model for reform.

Reform Principles and Proposals

The Constitution provides a number of overarching principles to guide reform. The public administration must be non-partisan, democratic, and it must work to promote substantive freedom and equality. We have argued that an important reason for why these principles are not honoured is that political office-bearers have unchecked powers of appointment to, and removal from, the public administration. We propose, therefore, two further reform principles. **First**, independent bodies must be constituted and empowered to act as effective checks and balances in appointment and removal processes. **Second**, in order to overcome the forces of corruption and patronage, the reform process must be strategically incremental, defined by statutory mechanisms that bring the public administration into a new system gradually, in ways that reduce initial costs for politicians, while creating incentives and opportunities for the reform process to ratchet up.

These principles can be achieved in a number of ways. We offer, to give them substance, the following concrete suggestions. The proposed model preserves democratic control. Political office-bearers will retain the power to set policy and law and, in accordance with these, to issue instructions and maintain administrative discipline. They will have the opportunity to specify the expertise and professional orientations

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which appointment processes must select for to promote their public political programmes. Simultaneously, however, a check will be established to prevent politicians from introducing personal-political considerations directly into appointment and removal decisions, to impede their ability to extend inappropriate and illicit social networks into the public administration.

We propose, for appointments, a process which is divided into stages of process planning, process administration, short listing and final appointment. In order for any process to be effectively checked and balanced, it is imperative that no single person or group should be able to decide the outcome across all stages. What this means is that these stages need to be separated out, placed under the authority of different people, and as far as possible these people must themselves not be directly or ultimately appointed by the same person or group. The generic stages are detailed in Figure 1 below. We then consider the specifics of reform in the national and provincial public service.



Figure 1. Generic appointment process

Reform of the National and Provincial Public Service

The PSC consists of 14 commissioners appointed by the President. Five of these are so-called national commissioners, because they are recommended by the National Assembly. Nine are provincial commissioners, with each recommended by one of the nine provincial legislatures, then nominated by the relevant Premier. Commissioners are appointed for five-year terms, once renewable. Each is removable only on grounds of misconduct, incapacity and incompetence, upon resolution of the relevant legislature. The PSC is constitutionally independent and must exercise its powers and functions impartially. These powers and functions include any assigned by an

Act of Parliament. The body was conceived to play a significant role in appointment and removal decisions, and it should be at the centre of reform in the national and provincial public service.

To play this role, the PSC's independence must be assured. In the current framework, it is funded through the national budget. The selection of its director-general, responsible for managing the Office of the PSC, goes through a committee which includes political office-bearers, with the power of appointment lying with the President. The selection procedure for its deputy directors-general is also through a committee which includes political office-bearers. These provisions impinge on the PSC's independence and they should be overhauled. Secure sources of funding must be explored. The commissioners of the PSC should assume the power to constitute selection committees and to appoint and remove the director-general and deputy directors-general.

The PSC's role can then be elaborated from the National Development Plan, the Draft Implementation Framework, and the draft amendments to the Public Service Act. These policy statements propose the creation of a new administrative head of the public service, but they don't pronounce on how this post should be filled. We propose that the public service commissioners should plan this appointment in consultation with the President. Plans that design the process so as to render competition in selection meaningless, or that introduce political criteria into decisions, should not be permitted. Within these and broader legislative parameters, planning will involve determining the necessary qualifications, job and person specifications, the types of tests and scoring, and the categories of subject matter experts who will sit on the selection committee.

The public service commissioners should, then, with the support of the Office of the PSC, administer the process, including designing and conducting tests, long-listing on the basis of compliance and minimum thresholds, and establishing a selection committee chaired by a commissioner and made up of other independent persons, including subject matter experts. The selection committee would be responsible for arriving at a short list of candidates, from which the President should then appoint.

This process creates a link between the policy concerns of the government, the technical needs of the administration, and the professional qualities required of the appointee. The PSC, situated centrally in a segregation of duties, operates as a check on political manipulation. It does not decide the short list or act as an appointing authority. It simply administers the process to ensure that it accords with the law. Its new role is therefore not in conflict with existing, constitutionally-inscribed grievance and other functions. The PSC, in any case, for much of its history, combined a more substantial role in both appointments and grievances, without concerns as to conflicts.

The allocation of powers and functions for the appointment of the head of the public service and other posts is summarised in Table 1 below. In the case of heads of department, much the same process as for the head of the public service should be followed. The major difference is that the head of the public service should take over the planning, in consultation with the relevant minister or MEC. Moreover, in order to preserve the quasi-federal arrangement of the Constitution, the national commissioners should be responsible for administering the process for national heads of department, while the relevant provincial commissioner should administer the process for provincial heads of department, with the support of the Office of the PSC. A selection committee, constituted and chaired by national or provincial commissioners as the case may be, should again short-list and recommend. The President or relevant premier would then appoint.

In the case of deputy heads of department, the relevant head of the public service should plan the process, in consultation with the relevant minister or MEC and the relevant head of department.

The relevant commissioner should then administer the process, and a selection committee constituted and chaired by them should short list and recommend. In order to align the line of command with the head of department, the head should then appoint. In appointments to lower ranks, selection committees should be constituted and chaired by the deputy head responsible for human resources or their delegate. The head of department should then appoint, running a check and balance through the department’s appointment processes. Leaving the PSC to focus on the higher appointments will avoid turning it into a bottleneck.

	Head of the public service	Heads of department	Deputy heads of department	Lower ranked posts
Process plan	Public service commissioners, consult with President	Head of public service, consult with Minister / MEC	Head of public service, consult with head of department and minister / MEC	Deputy head for human resources, consult with head of department
Process admin	Public service commissioners	Public service commissioners	Public service commissioners	Deputy head for human resources
Short listing	Selection committee chaired by commissioner	Selection committee chaired by commissioner	Selection committee chaired by commissioner	Selection committee chaired by deputy head for human resources
Appointment	President	Minister / MEC	Head of department	Head of department

Table 1. Powers and functions in appointment processes

With regards to discipline and removal, in the case of the head of the public service, the heads of department, and deputy heads, such powers should lie with their immediate superior, the President, the head of the public service, and heads of department respectively. However, in each case, the exercise of these powers should be justified and authorised, in a fast-tracked process if necessary, by the relevant commissioners. Powers of discipline and removal over lower ranked posts should fall to the relevant head of department.

Reform of Municipal Administrations

Municipal administrations do not fall under the public service and there is no constitutionally independent regulatory authority equivalent to the PSC. A key challenge for reform, therefore, is to establish such a body for the local sphere. Two options appear feasible. First, government has for some time been considering bringing local government into a single public service, which may then open municipalities to regulation from the PSC itself. Second, another option may be to give a role to recognised professional associations with an interest in local government, such as those engaged in planning, architecture, law, engineering and accounting. These associations are independent and regulated by statute. They have considerable experience with local government and appropriate expertise.

A statute could require that members of selection committees be nominated by either the PSC or by such professional bodies. In such a system, for the posts of municipal manager and managers reporting directly to them, the municipal council should be responsible for establishing a plan for the appointment process. The process should then be administered, to the point of long list, by the relevant municipality's human resources department. The selection committee, constituted by the PSC or by professional bodies, should be able to audit the process and to construct a short list. Municipal councils would then appoint from the short list. For lower ranked posts, appointments should be processed by the relevant head of human resources and appointment should be made by the municipal manager. Precautionary suspension and dismissal of municipal managers and managers reporting directly to them should go through disciplinary hearings constituted by the PSC or the professions. Discipline lower down the hierarchy should fall to the municipal manager.

Easy does it: introducing reform

The present system cannot be reformed all at once. Patronage has become central to power in South Africa, so any attempt to break it once and for all would produce overwhelming political resistance and associated unintended consequences. A more strategic approach is necessary. The best way to introduce the proposed model is through what is called a "covering in" mechanism.

What this involves is that an Act of Parliament must provide for the new system, but its commencement, its coming into force in specific organs of state, should be determined by presidential proclamation. Put another way, the Act would give the President the power to cover in under the statute's provisions particular departments and municipalities, department-by-department, municipality-by-municipality. Presidential proclamation to this effect would be irrevocable, except by another Act of Parliament.

A covering in mechanism was developed for the first time in the Pendleton Act of 1883, the statute under which the Federal government of the United States established its civil service system. Ever since, covering in, or something similar, has been widely used in countries where the prevalence of patronage would otherwise make reform impossible. The mechanism has a number of advantages. Since it does not impose costs on politicians at the outset, it allows reform strategists to decide the pattern of engagement in ways that divide and disperse opposition. It provides a point around which reformers can mobilise. It is a tool which can be picked up when crises, scandals and shifts in broader political alignments and interests maximise the momentum behind reform. A covering in mechanism can be used on organs of state which have been particularly affected by corruption and maladministration, or on those where appropriate insulation can serve specific and important purposes, as is often the case in industrial strategy. By insulating some organs of state from corruption and patronage politics, covering in can be used to channel these dynamics in less destructive directions. By demonstrating the benefits of reform and slowly reducing the incidence of patronage, covering in can set off powerful, virtuous feedback loops which result in the construction, over time, of a more democratic, professional and developmental public administration.

By demonstrating the benefits of reform, a covering in mechanism can set off powerful, virtuous feedback loops which result in the construction, over time, of more democratic, professional and developmental public administrations.