



## **Public Service Amendment Bill 2023**

### Submission of Public Comment

Public Affairs Research Institute (PARI)  
Public Service Accountability Monitor (PSAM)  
The Ethics Institute (TEI)  
Corruption Watch

July 2023

#### **Introduction**

1. PARI, PSAM, TEI and Corruption Watch welcome the Public Service Amendment Bill (2023) as an important step in ensuring the vision of a public administration that is professional, effective, impartial, and developmentally directed (Section 195 of the South African Constitution). States are never neutral. The South African state's policies should be, as the Constitution itself dictates, strongly oriented towards building a more socially just and equitable society. Achieving the vision of a professional and impartial public administration is not about creating a neutral state, but about insulating the public administration from inappropriate political interference, at the same time as ensuring it is more responsive to democratic mandates and committed to the values of the Constitution.
2. We have previously welcomed Cabinet's adoption, in 2022, of the National Framework Towards the Professionalisation of the Public Sector (hereafter Professionalisation Framework). We support commitments to ensuring integrity in personnel practices as outlined, for example, in the President's response to the State Capture Commission and in pillars 2 and 4 of the National Anti-Corruption Strategy (NACS). We also welcome the draft Public Service Commission Bill, on which we recently provided comment.<sup>1</sup> We also note efforts in the local government sector to professionalise municipal administrations, including recent amendments to the Municipal Systems Act.

---

<sup>1</sup> Submission to the Public Service Commission by PARI and PSAM on the Public Service Commission Bill: [https://pari2.wpenginpowered.com/wp-content/uploads/2023/07/PARI\\_Submission\\_PSC\\_Bill\\_20230707\\_Final\\_withEndorsements.pdf](https://pari2.wpenginpowered.com/wp-content/uploads/2023/07/PARI_Submission_PSC_Bill_20230707_Final_withEndorsements.pdf)

## The case for reform

3. The State Capture Commission identified the primary mechanism of state capture to be the “the strategic positioning of particular individuals in positions of power”, which was then used to gain control of public procurement and over law enforcement agencies. Corrupt politicians and officials used appointment and disciplinary processes to remove law-abiding public servants and replace them with those who were willing to be complicit in corruption.
4. Broad executive powers of appointment and removal, without effective checks and balances, have allowed patronage considerations to pervade public administrative personnel practices, blurring lines in the political-administrative interface.<sup>2</sup>
5. Furthermore, tensions in the political-administrative interface have been created by a lack of alignment between the extensive administrative powers given to executive authorities in the public service under the Public Service Act, and the responsibilities assigned to departmental heads as Accounting Officers under the Public Finance Management Act (PFMA).
6. As outlined in both the National Development Plan (NDP) and the Professionalisation Framework, reforms are urgently needed to stabilise the political-administrative interface and better insulate the public administration from patronage politics.
7. The Public Service Amendment Bill of 2023 includes some important and positive provisions for better delineating the powers and responsibilities of political leaders vis-a-vis senior administrators. Ideally, the executive should play its appropriate role in defining policy, exercising oversight over implementation, and disciplining senior administrators for non-compliance. Officials should implement policy within the framework and values of the Constitution and other applicable laws, and senior officials should have the appropriate authority to manage departments in pursuit of this outcome.
8. We also welcome prohibitions on senior public servants holding political office. This serves to further distinguish political and public administrative roles and functions, clarifying the political-administrative interface.
9. We note, however, that the proposed amendments do not go far enough to bring into reality the vision of the NDP and the Professionalisation Framework with regard to stabilising the political-administrative interface and better insulating the public administration from patronage politics. In particular, although these policies appropriately retain the executive as the ultimate appointing authority, they both propose stronger checks and balances in the appointment and dismissal process for senior administrators. They envision a role for the Public Service Commission (PSC) in supporting the appointment of senior officials, working with a Head of the Public Administration

---

<sup>2</sup> Brunette, R. 2021. “Appointment and Removal in the Public Service and in Municipalities” in Jonathan Klaaren (ed), *Reforming Public Administration in South Africa a path to professionalisation*. Cape Town: Siber Ink: <https://pari.org.za/reforming-the-public-administration-in-south-africa-a-path-to-professionalisation/>

(Director General in the Presidency). The Head of the Public Administration is also meant to play a role in managing the career paths of senior public servants. The Professionalisation Framework also proposes, for example, delinking the contracts of departmental heads from political terms.

10. In the following submission we provide specific comments on amendments contained in the Bill. We also make broader proposals for reform in the spirit of supporting the state's ongoing efforts to professionalise and depoliticise the public administration.

### **Specific comments on the Public Service Amendment Bill 2023**

#### *Clarifying the roles and authorities of Ministers/MECs versus those of the President in relation to Heads of Departments*

11. In Section 1, the definition of "executive authority" has been amended by the inclusion of a new paragraph (b), which reads, "executive authority", in relation to a head of a national department or national government component, means the President and in relation to a head of the Office of a Premier, provincial department or provincial government component, means the Premier".
12. We acknowledge the Bill's aim of clarifying the role of the President as executive authority of Heads of Department (HODs) as per Section 85(1) and (2) of the Constitution. We propose that related clauses in the Bill are amended to address ambiguity and to further clarify the different roles of the Ministers/MECs and the President in relation to HODs.
13. First, the Bill proposes to amend Section 3 of the Public Service Act, adding a new sub-section (9). The passage is ambiguous between the President/Premier as executive authority and the ministers/MECs as executive authority. We propose that this be clarified by inserting executive authority "of the department" as follows:

"If a head of department refuses or fails to fulfil a power or duty as required in terms of this Act, the executive authority of the department [our proposed insertion] may intervene by taking appropriate steps to ensure the fulfilment of that power or duty— (i) by issuing a written instruction to the head of department, describing the extent of the refusal or failure and stating any steps required to fulfil that power or duty; and (ii) in the event that the head of department fails to take such steps, the executive authority of the department [our proposed insertion] may report such failure to the President or the Premier, as the case may be."
14. Incidentally, regarding the last sentence, we suggest that it be made mandatory for the executive authority of a department to report such failures to the President/Premier. The proposed section should read: "[may] must report such failure to the President or the Premier." Given the role of the President/Premier in appointing and disciplining HODs, the mandatory language would assist in ensuring that they are kept fully abreast of serious cases of breach of duty by HODs.
15. Second, and more broadly, we worry that ambiguity between the powers and responsibilities of the President/Premier as executive authority and the Minister/MEC as executive authority pervades

the Bill and would plague implementation. For example, the Bill proposes to substitute section 3(7) of the Public Service Act, with the following provision:

“An executive authority — (a) is accountable for the department in his or her functional area; (b) is responsible for approving the strategic plan of the department, including, but not limited to, the department’s core objectives, based on its legislative mandate; (c) shall ensure that the head of department’s role and responsibilities are aligned to the strategic plan of the department; (d) shall establish clear relationships and facilitate co-operation, co-ordination and communication with the head of department and other employees of the department; (e) shall hold the head of department accountable for the administration of the department; and (f) may exercise other powers and must perform other duties conferred or imposed on the executive authority by this Act.”

It is often unclear whether these powers and responsibilities are being assigned to the President/Premier or to the relevant Ministers/MECs. On an ordinary reading, for instance, the President/Premier and the Ministers/MECs could both claim power and responsibility for aligning the HOD’s role with the strategic plan of a department, facilitating cooperation with the HOD and other employees of the department, and holding the HOD to account for their administration of the department. This ambiguity seems ripe for encouraging conflict between the President/Premier and their Minister/MEC. It may proliferate competing instructions going into departments, with predictable consequences in terms of organisational paralysis and chaos.

We propose that the Bill move to unify the line of command running from the President/Premier, through the Cabinet/Executive Council and individual Minister/MEC, into the HOD and department. The first step to achieving this would be to clarify the powers and responsibilities of the President/Premier and the ministers/MECs respectively in the Bill. At the level of legislative drafting, this could be achieved by differentiating “executive authority” from “ministerial authority” in the definitions. It could, alternatively, be achieved by breaking the proposed section 3(7) into two parts dealing with the powers and responsibilities of executive authorities in relation to HODs and executive authorities in relation to departments respectively. The broader Bill should be carefully analysed for further ambiguities in the assignment of powers and responsibilities to the President/Premier and ministers/MECs respectively.

16. Third, and relatedly, we are worried that the construction in the current Bill will open a lacuna regarding dismissal of HODs. Specifically, the proposed section 17(1)(a) will allocate general powers of dismissal of departmental employees to HODs. The following section 17(1)(b) read with section 16B(1)(a) will assign powers of dismissal of HODs to the President/Premier, but only in cases of misconduct. The section 17(2) grounds for dismissal include not only misconduct, but also incapacity due to ill health or injury, operational requirements as per the Labour Relations Act, and incapacity due to poor work performance, but the Bill appears to provide for no concomitant assignment of power to dismiss HODs on these grounds to the President/Premier. There may be other provisions of the Public Service Act, the Labour Relations Act, and broader law which covers this, but in the interest of legislative certainty and clarity the Bill should clearly

assign these powers to dismiss HODs on grounds not only of misconduct but also of ill health, poor performance, and operational requirements to the President/Premier.

### *Responsibilities of Departmental Heads*

17. As suggested by the previous section, we strongly support proposed amendments to Section 3(7) of the Act read with proposed amendments to Section 7(3)(b) of the Act<sup>3</sup> to the extent that these clauses move **authority and responsibility for administration, organisation, appointment, and wider human resource management** of a national or provincial department from the executive authority of a department to the departmental head. Notably, as per section 7(3)(b)(vi), Heads of Departments (HODs) will be responsible for, "(aa) the internal organisation of the department, including the establishment and the transfer of functions within the department; (bb) human resource management; and (cc) the recruitment, appointment, performance management, transfer, dismissal, remuneration and other career incidents of employees of that department, including any other matter which relates to such employees in their individual capacities."

### *The Head of the Presidency*

18. A new proposed clause in Section 7 outlines the responsibilities of the "Head of the Presidency" (Section 7(3)(c) in the Bill). The explanatory notes to the Bill state that this, "augment[s] the functions of the Director-General in the Presidency to include the functions envisaged by the NDP for an administrative head of the public service". The explanatory notes further state that the new clause seeks to, "provide for additional functions of the Director-General in the Presidency to align with the NDP objective to create an administrative head of the public service to whom Directors-General would report on operational, organisational and administrative matters."

19. The proposed new clause on the Head of the Presidency reads:

"The head of the Presidency shall, in addition to any power or duty entrusted or assigned to him or her by or under this Act or any other law— (i) be the Secretary to the Cabinet; (ii) co-ordinate, convene and chair the Forum of South African Directors-General comprising all heads of departments listed in Column 2 of Schedule 1; (iii) subject to sections 85(2)(c) and 125(2)(e) of the Constitution, be responsible for intergovernmental relations on an administrative level between the Presidency and national departments, provincial departments and government components, including the co-ordination of their actions and legislation (iv) support the President on any matter entrusted or assigned to the President by or under this Act or any other law; and (v) perform any other function, if so requested by the President, subject to the Constitution or any other law."

20. The new clause is welcomed to the extent that it defines in law a role for the Director-General in the Presidency to support coordination of government activity across the public service. However,

---

<sup>3</sup> And other consequent amendments to sections of the Act.

we argue that Section 7(3)(c) of the Bill should be strengthened to give better effect to the NDP and the Professionalisation Framework.

21. In particular, we note that Section 7(3)(c) stops short of outlining a role for the “Head of the Presidency” in supporting appointment processes of senior officials in the public service and managing their career incidents. Whilst we assume that the new proposed clause allows room for the President to assign such a responsibility to the Head of the Presidency, this would (as far as the legislation stands now) make this a discretionary decision on the part of the President.
22. If the role of the head of the public service in supporting appointment processes and career progression of senior public servants is established in statute, this would make the head of the public service an important and powerful office. Additional protections will be needed to ensure that they perform their role with competence and integrity, which means that the Bill should consider elaborating a fit and proper standard and other requirements for potential appointees to the office.

*Improving the processes for appointing senior public servants*

23. As previously noted, despite proposals to this effect in the NDP and the Professionalisation Framework, the Bill does not provide for robust checks and balances in the appointment processes. There is still large room for partisan politics to enter into decisions regarding who gets appointed as HODs, and for HODs to carry these partisan considerations down through the administrative hierarchy via their (new) authority over appointments and recruitment processes in their department. There is thus still large room for the destabilising politicisation and factionalism that has been a feature of our politics to impact on the public administration.
24. Aside from our comments above on the silence in the Bill on the role of the Head of the Presidency in this regard, the Bill does not provide for the PSC to play a role in supporting these appointment processes (nor does the Public Service Commission Bill, which was recently published by the PSC for public comment).
25. We emphasise that establishing stronger checks and balances in appointment and dismissal processes for senior public servants must be a central strategic thrust of the professionalisation agenda, and mechanisms should be built into this process to ensure transparency to the public for the very senior levels of the public service. The task here is twofold. The first is to develop institutions that enable the government to recruit for expertise and integrity, and the second is to provide effective checks on the room available for partisan considerations to enter appointment decisions. In order to establish an effective check, it is imperative that appointment processes are divided into stages, such as process planning, short-listing, and appointment, and that no single person or group be empowered to decide the outcome across all of these 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.

26. The PSC, given its formal independence and mandate, and the public trust it has developed as a non-partisan body, has a potentially vital role to play in this regard. PARI has developed detailed proposals on the role that the PSC, with its independence suitably bolstered by the Public Service Commission Bill, could play in administering appointment processes.<sup>4</sup>
27. In these respects, as noted, the proposed amendments do not advance the vision of the NDP or the Professionalisation Framework. It seems likely that this is because introducing robust checks on political discretion in appointments is not politically feasible at present. At this point, in our view, a major impediment to advancing reform is the tendency to adopt an overly encompassing approach to reform, such that each legislative promulgation must apply across the whole of the public service simultaneously. Such an approach plausibly *maximises immediate opposition to reform. Instead, a more nuanced, incremental approach would defuse opposition.* Legislation providing the PSC with a more robust role in checking appointment and removal processes could include a clause empowering the President to cover specific departments into such a system one at a time. This sort of approach, which has been successfully pursued in other jurisdictions, has been developed at length elsewhere.<sup>5</sup>

#### *De-linking the tenure of HODs from political term*

28. The Professionalisation Framework argues for an increase in the standard term of HODs from five to at least ten years. The Bill does not apply the appropriate amendment to section 12(2)(a) of the Public Service Act, which remains unchanged with the appointment of HOD still linked to political terms via five-year employment contracts. We suggest, as proposed by the Professionalisation Framework, that reforms must de-link HOD tenure from political term, as well as introducing other initiatives to stabilise the senior levels of the public administration (see above). At the same time, performance management of senior personnel should be strengthened so that Ministers / MECs are not saddled with non-performing HODs. (The Municipal Systems Act (amended 2022) keeps the Municipal Manager at a five-year contract but stabilises the administration by making those who report to the municipal manager permanent employees).
29. Our legislative framework in this regard should be stress-tested against both the present political landscape and an era of coalition government. Efforts to stabilise the senior levels of the public service will be more important than ever should coalition government at national and provincial level be associated with the same levels of instability we have seen at the local level.

#### *Prohibitions on senior public servants holding political office*

---

<sup>4</sup> Brunette, R. 2021. "Appointment and Removal in the Public Service and in Municipalities" in Jonathan Klaaren (ed), *Reforming Public Administration in South Africa a path to professionalisation*. Cape Town: Siber Ink: <https://pari.org.za/reforming-the-public-administration-in-south-africa-a-path-to-professionalisation/>

<sup>5</sup> Brunette, R. 2021. "Appointment and Removal in the Public Service and in Municipalities" in Jonathan Klaaren (ed), *Reforming Public Administration in South Africa a path to professionalisation*. Cape Town: Siber Ink: <https://pari.org.za/reforming-the-public-administration-in-south-africa-a-path-to-professionalisation/>

30. We strongly support the amendment of Section 36 by the insertion of a new clause (36A) which prohibits an HOD or an employee directly reporting to the HOD from holding political office in a political party, whether in a permanent, temporary, or acting capacity.

31. Political office is defined in the Bill as:

“(a) the position of chairperson, deputy chairperson, secretary, deputy secretary or treasurer of the party nationally or in a province, region or other area in which the party operates; or (b) any position in the party equivalent to a position referred to in paragraph (a), irrespective of the title designated to the position”.

32. First, we propose that the definition of political office is extended to include membership of a party’s executive committee.

33. Second, we note that Section 71B of the Municipal Systems Act goes further than the Public Service Amendment Bill in the case of municipalities, prohibiting all municipal employees from holding political office. This is an important response to a range of issues that have emerged around dual political-administrative officeholding, which blurs and often subverts the line of command within state organisations, promotes inappropriate political interference in administrative operations, and detracts from time and attention devoted to administrative duties. The same issues have emerged in the public service, and we see no reason in principle or practice as to why this shouldn’t be resolved similarly. We propose that section 36A be extended to prohibit all public servants from holding office within political parties.

28 July 2023

**Submitted by:**

Public Affairs Research Institute (PARI)  
Public Service Accountability Monitor (PSAM)  
The Ethics Institute (TEI)  
Corruption Watch

**Contact:**

Dr Sarah Meny-Gibert, PARI  
[sarahmg@pari.org.za](mailto:sarahmg@pari.org.za), 084 478 0112