 

Public Service Commission Bill (2023):

Submission of Public Comment to the Portfolio Committee on Public Service and Administration

Submitted by the Public Affairs Research Institute (PARI), University of Johannesburg and The Ethics Institute (TEI)

16 February 2024

**Introduction**

1. The Public Affairs Research Institute (PARI) and the Ethics Institute (TEI) welcome the opportunity to contribute to the Portfolio Committee’s deliberations on the Public Service Commission (PSC) Bill. We also request an opportunity to address this public comment to the Committee in person.
2. This submission is made in the spirit of supporting the state’s ongoing reform efforts to professionalise the public administration. We have previously welcomed Cabinet’s adoption, in 2022, of the National Framework towards the Implementation of Professionalisation of the Public Sector (hereafter Professionalisation Framework). We note government’s commitments regarding greater integrity in appointment and dismissal processes as signalled in the President’s response to the State Capture Commission, and we note goals set in in pillars 2 and 4 of the National Anti-Corruption Strategy (NACS) that aim to introduce greater integrity in personnel practices in the public administration.
3. Such reforms are urgently needed: large parts of the South African state are afflicted by systemic corruption and patronage politics. This is destabilising and paralysing state organisations and directing attention and resources away from public programmes. The effect, in some parts of the state, has been to crowd out concern with developing and implementing transformative policy aimed at building a more just and equal society. The fiscus is under strain, compromising the sustainability of social grants, and many of our state-owned enterprises are in crisis. Public infrastructure is rapidly decaying in many areas. Public confidence and trust in state institutions has been severely impacted.
4. A project of state reform is necessary to reduce the influence of corruption and patronage on South African politics – the professionalisation of the public administration should be an important part of this, including steps to stabilise the political-administrative interface. Achieving the vision of an impartial public administration as outlined in the Constitution is about insulating the public administration from inappropriate political interference, whilst ensuring it is more responsive to democratic mandate and committed to the values of the Constitution.

# Broad comment on the Bill

1. PARI and TEI welcome the Public Service Commission (PSC) Bill as a step towards ensuring the vision of public administration that is professional, effective, impartial and developmentally directed (Section 195 of the South African Constitution). The Bill primarily seeks to enhance the conditions for the impartiality and independence of the PSC, and to strengthen the Commission in playing its constitutionally mandated role in relation to local government and public entities.
2. However, we note two major gaps in the Bill. First, we suggest that further provisions are needed to effectively bolster the independence of the Commission – this includes providing an appropriate framework and processes for the appointment of the head of the PSC Secretariat.
3. Second, government’s Professionalisation Framework envisions the PSC playing a role in supporting the appointment of senior administrative staff in the public administration towards the development of a stable, productive political-administrative interface. The Bill is silent in this regard. The new Public Service Commission Act should provide an empowering framework for the PSC to play a role as a check and balance in appointment processes (even if the details of this role are outlined in regulations or other instruments).
4. 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 disciplinary processes, suspensions and dismissals to remove non-compliant employees and replace them with complicit – or at least more pliant – individuals. PARI’s research highlights that ineffectively checked powers of appointment have allowed political office-bearers to place associates across administrative checks and balances, operating to circumvent the law.1
5. The National Development Plan recognised the problem of inappropriate political interference in public administration and argued for the PSC to have a role in appointment processes. It envisions that the head of the public service, among other matters, will convene appointment processes in conjunction with the PSC. PARI has developed detailed proposals on the role the

1 Brunette, R. 2021. “Appointment and Removal in the Public Service and in Municipalities” in 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/

PSC, rendered suitably independent and empowered, could play in administering appointment processes.2 The idea is for the PSC to play a supportive role, including as a check and balance, while preserving political leadership’s power to appoint.

1. Neither this Bill, nor the Public Service Amendment Bill (currently also making its way through Parliament), address this reform imperative despite policy outlined by government in the NDP and the recent Professionalisation Framework.
2. Last, a note on the work of the PSC in relation to possible restructuring of South Africa’s anti- corruption architecture: the National Anti-Corruption Council (NACAC) has been mandated to advise the President on a future model for this architecture, and the State Capture Commission made a number of recommendations in this regard. There may be future implications for the PSC’s work and reporting resulting from these changes. Should there be an obligation, for example, for the PSC, via its investigations in terms of sections 196(4) of the Constitution, to report cases of suspected systemic violations of relevant sections of the Constitution and public administration legislation to a future anti-corruption agency (whether this in the form of an SIU or a more broadly mandated body tasked also with investigating cases of maladministration and suspected systemic corruption)?3 While we appreciate that the PSC Bill before Parliament cannot anticipate the details of a future model (and supporting legislation that might accompany it), coordinated discussion on this topic is required across the JCPS and governance clusters, with NACAC, and with the public afforded an opportunity to contribute to these debates.

**Specific comments on the PSC Bill**

PART B: Public Service Commission

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| **Section** | **Context and rationale** | **Suggested amendment** |
| Part B - proposal for the insertion of new section | Government’s Professionalisation Framework and the National Development Plan envision the PSC playing a role in supporting the appointment of senior administrative staff in the public administration towards the development of a stable, productive political-administrative interface. Appointment processes for heads of departments do not include appropriate checks and balances to reduce the room for improper political interference. The Bill is silent in thisregard. | The Public Service Commission Act should provide an empowering framework for the PSC to play a role as a check and balance in processes for senior appointment (at least DG/HoD level), while preserving the prerogative of political leadership to make the appointment.This would require amendments to this Bill, to the Public Service Act, the Municipal Systems Act, and the Public Service Regulations. |

2 Brunette, R. 2021. “Appointment and Removal in the Public Service and in Municipalities” in 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/

3 There is, of course, an obligation on those in positions of authority in both the public and private sectors to report corruption related criminality to the DPCI (Hawks) under PRECCA.

Section 4: Appointment of Commissioners

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| **Section** | **Context and rationale** | **Suggested amendment** |
| Section 4(4)(b)(i)through (v) | We suggest a minor amendment here to aid in efficiency and precision of language – “at least eight to 10 years” experience is slightly ambiguous – it should simply read, “at least eight years” or, “at least 10years”, whichever the drafters intended. | We suggest changing these sections to “at least eight **[to 10]** years”. |

Section 5: Disqualification from appointment as commissioner

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| **Section** | **Context and rationale** | **Suggested amendment** |
| Section 5(e) | The current proposed wording regarding reasons for disqualification for appointment as a commissioner is too narrowly framed. It reads, “5(e) has at any time been removed from a position of trust by reason of improper conduct involving a breach of such trust…”. It should be expanded to include misconductin the workplace. | We suggest this section reads, “has at any time been dismissed from employment for misconduct or by reason of improper conduct involving a breach of trust…”. |
| Section 5 – proposal for the insertion of a new sub-section | Section 5(f) as currently phrased does not cater for a range of other serious offences such as assault, attempted murder, murder, robbery, intimidation etc. | We propose an additional subsection: “5(g) is a person who was at any time convicted of a criminal offence.” |

Section 6: Limitation on performing other work by commissioners, renewal of term of office of commissioners and vacation of office by commissioners

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| **Section** | **Context and rationale** | **Suggested amendment** |
| Section 6(1) | We propose that clause 6(1)(b) should be amended such that no remunerative work outside the duties of his or her office is allowed. It is not clear what circumstances the Bill is envisioning that might justify this clause, but remunerative work outside their official duties detracts from those duties, and it is potentially rife with conflicts. Furthermore, the fact that the President will be responsible for authorising this work creates inappropriate political leverage over what are constituted as politically independentpositions. | We propose amending section 6(1) so that it reads, “A commissioner may not—1. hold office in any political party or political organisation or be a member of a structure of any political party or political organisation; or
2. **[without the written consent of the President]** perform or engage himself or herself to perform any remunerative work outside of official duties.”
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Section 10: Investigations by the Commission

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| **Section** | **Context and rationale** | **Suggested amendment** |
| Section 10 | Section 10 of the Bill deals with investigations by the Commission, and Section 13 deals with reporting by Executive Authorities (and others) on recommendations, directions, and so forth issued by the Commission. Section 35 of the Public Service Act deals with investigations of grievances in the public service. And related amendments are proposed for the Municipal Systems Act (as outlined in Schedule 2 of the PSC Bill).Despite these sections in the Bill and other pieces of legislation, we note that the status of directions issued by the PSC is unclear in the case of directions emanating from investigations not triggered by a grievance for organisations in the public service and public entities. By virtue of proposed amendments to the Municipal Systems Act (as outlined in Schedule 2 of the PSC Bill), the status of directions (i.e. the onus on relevant executive authorities to implement) is clearer for local government than for public entities and the public service (including as these issues are outlined in the current PublicService Act). | We propose the insertion of a new subsection in Section 10, “The Commission may investigate whether the organisation and administration, and the personnel practices, of a department or other organisational component in the public service or public administration are in compliance with the Constitution and this Act, and may—1. issue directions contemplated in section 196(4)(d) of the Constitution in order to ensure compliance with the Constitution or this Act; or
2. provide advice in order to promote sound public administration.

(b) If the Commission issues a direction contemplated in paragraph (a), the municipal council or municipal manager, executive authority, accounting officer or accounting authority, as the case may be, must implement the direction as soon as possible after receipt of the written communication conveyingthe direction but, in any event, within 60 days after the date of such receipt.” |

Section 12: Access to reports of Commission

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| **Section** | **Context and rationale** | **Suggested amendment** |
| Section 12 – | To support mandatory disclosure of | We propose an additional sub-section: |
| proposal for | Commission reports that are in the public | “12(5) The Commission must promptly |
| the insertion | interest, we propose the insertion of an | release on its website all finalised reports |
| of a new sub- | additional paragraph under Section 12: | that reveal evidence of a substantial |
| section |  | contravention of, or failure to comply with |
|  |  | the law; or an imminent and serious |
|  |  | public safety or environmental risk; and |
|  |  | such reports should be included in its |
|  |  | reporting to Parliament in terms of |
|  |  | Section 196(6) of the Constitution.” |

Section 13: Implementation of decisions of Commission

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| **Section** | **Context and rationale** | **Suggested amendment** |

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| Section 13(2) | Section 13(2) reads, “13(2) In the event of a refusal or failure by the executive authority or person referred to in subsection (1) to report as provided in that subsection, the Commission may report such refusal or failure—….”.We strongly propose that Section 13(2) should require (rather than permit) the Commission to report such refusal or failure, as it will support accountability and consequence management. Placing an obligation on the Commission to report such matters will also provide additional information to support citizen action andoversight of public duty bearers. | We propose that the wording be revised to read as follows: “13(2) In the event of a refusal or failure by the executive authority or person referred to in subsection (1) to report as provided in that subsection, the Commission must **[may]** report such refusal or failure—…”. |

Section 16: Secretariat of the Commission

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| **Section** | **Context and rationale** | **Suggested amendment** |
| Section 16 – proposal for the insertion of new sub- section | We welcome the creation of a dedicated PSC Secretariat which will sit under the authority of the Commission, in contrast to the (current) Office of the PSC which sits as a unit under a national department (DPSA).We strongly propose that this Bill inserts further detail under Clause 16 to provide for the principles and processes for recruiting and appointing the CEO and Deputy CEO of the PSC Secretariat.Currently, the PSC’s independence is attenuated by provision for political involvement in appointments to the Office of the PSC. Under Section 67(2) of the current Public Service Regulations, the selection committee for, “(c) the head of the Office of the Commission, shall be chaired by the chairperson of the Commission and include at least the Minister and one other executive authority of a national department and the head of a national department”.The Bill should clearly place the power of appointment to and removal from the offices of the CEO and Deputy CEO | We propose Section 16(2) is amended as follows, “(2) The Chairperson as the executive authority of the Secretariat has all those powers and duties necessary for the internal organisation of the Secretariat, including its organisational structure and establishment, the transfer of functions within the Secretariat, human resource planning; the recruitment, appointment, performance management, dismissal, remuneration and other career incidents of the CEO and any other person or persons appointed as Deputy Chief Executive Officer; the creation and abolition of posts and the provision for the employment of persons additional to the fixed establishment.”Second, we propose a new sub-section as follows, “16(4B)(a) when the Chairperson appoints a Chief Executive Officer or deputy Chief Executive Officer as contemplated in section 16(2), the Deputy Chairperson shall appoint a selection committee to make a recommendation on the appointment to a post."And, “16(4B)(b) A selection committee constituted for the appointment of theChief Executive Officer, or deputy Chief |

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|  | squarely with the Chairperson of the PSC and provide details on the selection committee for these two offices. | Executive Office, shall be chaired by Deputy Chairperson and shall include an equal number each of additional national commissioners and provincial commissioners.”Amending Section 67(2)(c) of the Public Service Regulations. |
| Section 16 – proposal for the insertion of new subsection | Further, the power of appointment for posts below the CEO and Deputy should in turn be clearly placed with the CEO him/herself – this would follow the logic of recent proposed amendments to the Public Service Act, which place appointments for staff in departments under the HoD.We note that subsection 16(3) states that, “(c) such employees appointed by the Chief Executive Officer, subject to the laws governing the public service, either full- time or part-time, to the Commissionto assist the Chief Executive Officer in the performance of his or her functionsin terms of subsection (6).” | We propose the insertion of a new subsection in Section 16, “(4A) The CEO of the Public Service Commission——(a) shall be responsible for the recruitment, appointment, performance management, transfer, dismissal, remuneration and other career incidents of employees of the Secretariat appointed below the level of the Deputy CEO, including any other matter which relates to these employees in their individual capacities.” |
|  | We suggest that this leaves ambiguity regarding who precisely will play a role in the appointment of the CEO and Deputy (or deputies), and specifically, whether executive authorities (as per the current Public Service Regulations) will be included in the selection committee for these posts. |  |
|  | We therefore propose the insertion of a new subsection (see next column). |  |
| Section 16 – | And last, we propose that the CEO and | We proposed the insertion of a new |
| insertion of | Deputy CEO should not hold office in a | subsection in Section 16 – 16(3)(d), “(d) |
| new | political party or political organisation for | The Chief Executive Officer and Deputy |
| subsection | the duration of their tenure. | Chief Executive Officer contemplated in |
|  |  | this subsection (3) may not hold office in |
|  |  | any political party or political organisation |
|  |  | or be a member of a structure of any |
|  |  | political party or political organisation”. |

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