

Public Service Amendment Bill 2023 [B13B—2023]

Submission of Public Comment to the NCOP

Public Affairs Research Institute (PARI)
The Ethics Institute (TEI)

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Introduction

1. PARI and TEI welcome the opportunity to make submissions on the **Public Service Amendment Bill [B13B—2023]** (the Bill), as introduced in the National Council of Provinces in February 2024. We would welcome an opportunity to address this public comment to the Select Committee in person.
2. This version of the Bill follows a previous draft [B13—2023], published for public comment in mid-2023, on which PARI, together with TEI, the Public Service Accountability Monitor, and Corruption Watch made joint submissions in July 2023. We commend Parliament and the Department of Public Service and Administration for engaging with some of the concerns raised in the public participation process in 2023.
3. PARI and the TEI support the Bill, for the reasons we outline in the next section ('Why do we need this reform?'). In addition, we emphasise the need for safeguards to ensure the effective implementation of these powers, and for further reform to achieve the broader vision of a professional, impartial, and developmentally responsive public service, as envisaged in Section 195 of the Constitution of the Republic of South Africa, 1996.
4. States are never neutral. It is for this reason that 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 therefore not about creating a neutral state, but about insulating the public administration from inappropriate political interference, while ensuring that it remains responsive to democratic mandates and committed to the values of the Constitution.
5. 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 welcomed the draft Public Service Commission Bill, on which we have and will continue to provide comment. We also note efforts in the local government sector to professionalise municipal administrations, including amendments to the Municipal Systems Act.

Why do we need this reform?

6. 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.
7. 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.¹
8. 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 PSA, and the responsibilities assigned to departmental heads as Accounting Officers under the Public Finance Management Act (PFMA).
9. 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.
10. The Bill introduces several important and welcome reforms that more clearly delineate the powers and responsibilities of political executives and senior administrators. In particular, the systematic transfer of operational and administrative powers—such as appointments, performance management, and discipline—from ministers and MECs to Heads of Department (HODs) represents a significant step towards implementing the principle of a professional, accountable, and impartial public administration, as required by Section 195 of the Constitution.
11. This clearer separation of roles strengthens the integrity of the state by taking steps to limit political interference in day-to-day administration, while preserving the executive’s appropriate role in setting policy, overseeing implementation, and ensuring political accountability. Senior officials, in turn, must implement policy, within the framework of constitutional values and applicable law, and must be empowered with the necessary authority and autonomy to manage departments effectively and ethically. The Bill therefore moves in the right direction.
12. We note, however, that the revised amendments introduced in B13B–2023 still fall short of realising the vision set out in the National Development Plan (NDP) and the Professionalisation

¹ 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/>

Framework: it does not yet introduce the stronger checks and balances these policy frameworks recommend for appointments and dismissals at senior levels.

13. In particular, both the NDP and the Professionalisation Framework envisage a role for the Public Service Commission (PSC) in supporting senior appointments and ensuring merit-based selection. They also propose an expanded role for the Head of the Public Administration, including oversight over the career management of senior public servants. While section 4 (c) of the Bill designates this office as chair of the DG Forum and administrative coordinator, it does not grant any formal role in appointment processes, performance management, or succession planning.
14. 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

Executive authority in relation to Departments and HODs

15. 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".
16. 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 provide further clarify the different roles of the Ministers/MECs and the President in relation to departments and HODs.
17. Regarding the B version [B13B-2023] of the Bill, we acknowledge that Parliament has clarified ambiguity in this regard in amendments to Section 3(9)(a) by inserting the phrase "of the department". This is welcomed. (And we welcome changes made in the B version of the Bill that make it mandatory for the executive authority of a department to report failures or refusal by an HOD to fulfil a power or duty as required in terms of the Act).
18. However, we worry that there is still ambiguity in the Bill regarding the powers and responsibilities of the President/Premier as executive authority versus the Minister/MEC as executive authority. 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.”

19. A reading of this section *in context* may suggest that the executive authority being referred to is the Minister/MECs, but an “ordinary” reading of that section could lead to both the President/Premier and the Ministers/MECs claiming 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 negative organisational consequences. Under conditions of coalition government (where the President and the Minister may not be from the same political party), it is important to ensure that all such ambiguity in the Bill is removed.
20. Addressing this ambiguity 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.

Responsibilities of Departmental Heads

21. We note and strongly support the assignment of operational authorities and responsibilities to departmental heads under the amended section 7(3)(b). HODs are now explicitly 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.
22. This amendment addresses a well-established misalignment within the legislative framework regarding HODs as Accounting Officers: in the Public Finance Management Act, the Public Audit Act, and other legislation, Accounting Officers are subject to special duties and sanctions for maladministration of their departments. Under the Public Service Act, however, Accounting Officers as HODs do not have the original legislative powers necessary for properly staffing and organising those departments and, thereby, preventing maladministration. Rather, what is unusual in international comparison, and even in relation to public entities and municipalities in South Africa, is that EAs are granted these powers. And then HODs remain responsible as Accounting Officers and can be sanctioned for the maladministration that might result from Executive actions. Parliament has passed laws expanding mechanisms for sanctioning Accounting Officers. These include, for instance, the certificates of debt for material irregularities created by the Public Audit Amendment Act of 2018. The courts have also been building precedent for expansively applying

such sanctions. This was the case most recently in *Mbambisa and Others v Nelson Mandela Bay Metropolitan Municipality*, where in relation to statutory language with parallels in the public service, the Supreme Court of Appeal held that officials could be held liable for irregular, fruitless and wasteful expenditure, and that there is a positive obligation for institutions to undertake recovery proceedings. Despite this tightening of potentially personally ruinous accountability mechanisms around HODs as Accounting Officers, the existing Public Service Act creates an impossible situation by not granting those HODs full control over the staffing, organisation and discipline necessary for ensuring compliance within their department. If this is not addressed, we also risk increasing the flight of talented and ethical people from the calling of public service. The proposed amendments that give HODs the full operational and administrative responsibilities in their departments, including for Human Resources, must therefore be passed into law.

23. For these changes to be meaningful in practice, they must be matched by clear procedural guidance, effective administrative systems, and strategic investments in HOD capability and leadership development.

The Head of the Presidency

24. Clause 4 of the Bill amends section 7 by introducing new responsibilities for the Director-General in the Presidency, who is designated as the administrative head of the public administration. The explanatory memorandum notes that this clause is intended to reflect the vision set out in the NDP, which calls for a professionalised public service and a central administrative authority to promote coherence, coordination, and continuity. The proposed new section 7(3)(c) outlines these functions, including: (i) acting as Secretary to the Cabinet; (ii) chairing the Forum of South African Directors-General; (iii) managing intergovernmental relations at an administrative level; (iv) supporting the President on matters entrusted under law; and (v) performing additional functions at the President's request.
25. We welcome the formalisation of the Director-General in the Presidency as the administrative head of the public administration as a positive step toward improving coordination and coherence across the public service. However, the revised Bill still does not assign this office a formal function in relation to the appointment or performance management of HODs. This omission is misaligned with the vision set out in the NDP and the Professionalisation Framework, both of which envisage an active, institutionalised role for the administrative head of the public service in promoting professionalism, coherence, and merit-based appointments. While the President may assign such responsibilities, this remains discretionary and lacks the clarity and permanence those policy frameworks call for. Additionally, we recommend that clear criteria and safeguards be introduced to govern appointment to this influential office.

Senior Public Service Appointments and the Need for Checks and Balances

26. The Bill in its current form, while advancing the delineation of the political and administrative interface, does not yet provide for robust checks and balances in senior public service

appointments. Despite recommendations in the NDP and the Professionalisation Framework neither this Bill nor the Public Service Commission Bill addresses this issue.

27. This creates ongoing space for political influence in appointments and undermines long-term professionalisation goals. Under the regulatory framework (included as updated by this Bill) 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.
28. 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.
29. 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.
30. 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.²
31. In recognition of political sensitivities, we further propose that any enhanced role for the PSC in this regard be phased in incrementally—for example, by authorising the President to designate departments in which these enhanced safeguards would initially apply. 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 approach would mirror successful transitional models in other jurisdictions and reduce resistance to reform while laying the foundation for a fully institutionalised system.

² 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/>

Termination of HODs employment

32. We note that while clause 11 of the Bill amends section 17 to reflect devolved disciplinary authority, it does not expand the powers of the President or Premier to dismiss HODs on grounds other than misconduct³. Section 17 is only applicable to dismissal of ordinary employees by HODs. This creates a lacuna, as the Bill does not clearly confer powers to dismiss an HOD for incapacity due to ill health or injury, poor performance or operational requirements as per the Labour Relations Act, 1995 — grounds which are applicable to other employees under section 17(2). We recommend that this be rectified to avoid legal uncertainty in labour relation and disciplinary processes for HODs. We propose that this be clarified by making an additional amendment to section 17 of the PSA by inserting the following subsection after section 17(1)(b):

“(bA) In addition to the grounds of misconduct referred to in paragraph (b), the President, in relation to a head of a national department or national government component, or the Premier, in relation to a head of a provincial department or provincial government component, may terminate the employment of a head of department on the grounds of—

(i) incapacity due to ill health or injury;
(ii) operational requirements as contemplated in the LRA; or
(iii) incapacity due to poor work performance,
provided that such termination is preceded by a procedurally fair inquiry and is consistent with the provisions of section 17(2).”

33. This amendment would ensure that the appointing authority of HODs - the President or Premier - is also empowered to terminate employment on the full range of recognised grounds under the LRA and section 17(2) of the PSA. The current omission of this authority for grounds other than misconduct introduces ambiguity and weakens accountability at the most senior level of administration.

Performing remunerative work outside of the public service

34. Under Section 30(3)(b) the HOD decides whether an employee may perform remunerative work outside of the public service. If the HOD fails to make a decision within 30 days, permission is deemed to have been granted. While this mechanism is intended to streamline decision-making, it may also lead to unintended approvals due to oversight or administrative delays. To strengthen the integrity and efficiency of this process, we recommend that all applications first be reviewed by the relevant departmental ethics officer for ethical compliance and potential conflicts of interest. The ethics officer’s input would not only provide a necessary safeguard against ethical risks but could also serve as a practical support mechanism for the HOD, helping to inform and expedite decision-making.

³ Section 17(1)(b) of the Public Service Act, 1994 provides for the power to dismiss an employee on account of misconduct.

35. Clause 13 amends section 31 so that HODs (as opposed to Ministers / MECs) may authorise payments in “exceptional circumstances” to employees in addition to ordinary remuneration to approve the paying out of revenue an amount equal to that salary, allowance, fee, bonus or honorarium, or a portion thereof, to an employee. First, we recommend that the term “exceptional circumstances” be further defined on regulations or guidelines to ensure consistent application and to prevent potential misuse. Treasury should ideally set regulations that set a monetary cap (for example, a percentage of the employee’s annual salary) as well as objective criteria for authorisation.

Limitation on political rights

36. Clause 16 of the Bill inserts a new section 36A into the Public Service Act, prohibiting an HOD or employee directly reporting to the HOD from holding political office in a political party, with a one-year transitional period. Political office is defined as holding senior roles such as chairperson, deputy chairperson, secretary, deputy secretary or treasurer at any level of the party, or any equivalent role regardless of the designated title. We strongly support this amendment as a meaningful step towards safeguarding the impartiality of the public service. We do however propose that the definition of a political office is extended to include membership of a party’s executive committee. And we recommend extending this prohibition to cover all members of the Senior Management Service (SMS).

Conclusion

37. In conclusion, the Bill represents a significant and commendable advance toward professionalising the South African public administration. By clarifying the political-administrative interface, devolving core operational authority to HODs, and aligning the legislative framework with constitutional and policy imperatives, the Bill lays the foundation for a more coherent, capable, and accountable state. However, legislative clarity is only the first step. Key institutions — particularly the PSC, the DG in the Presidency, and Parliament — must be empowered and resourced to play their oversight, advisory, and coordinating roles effectively. We urge that this Bill be passed into law with urgency, and that its rollout be accompanied by detailed guidance, and active monitoring by Parliament.

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