



For attention: Mr Masixole Zibeko

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28 July 2023

**Submission on the Public Service Amendment Bill [B13-2023].**

We attach our written submission in response to the invitation for comments on the Submission on the Public Service Amendment Bill [B13-2023].

We would like to confirm our interest in making oral representations at a later convenient date.

Should you have any queries, it would be appreciated if you could contact me at the following email address: [nicole@hsf.org.za](mailto:nicole@hsf.org.za).

Yours sincerely

A handwritten signature in black ink that reads 'Nicole Fritz'.

Nicole Fritz

Executive Director

Executive Director: Nicole Fritz  
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## **1. Introduction**

1.1. In this submission, the Helen Suzman Foundation (“HSF”) proposes that the Draft Public Service Amendment Bill [B13-2023] (“Bill”) be amended to better insulate high-level appointees therein from undue political interference, in line with government’s very own policy position in the National Development Plan (“NDP”) and the National Framework Towards the Professionalisation of the Public Sector (“NFTPPS”).

1.2. In summary, HSF submits that:

1.2.1. while the Bill laudably devolves operational functions to administrative heads of department, away from their political executive authorities, the absence of a role for the Public Service Commission (“PSC”) in appointing administrative heads of department in the first place means the Bill stops short of meaningfully insulating them from undue political influence;

1.2.2. the absence of the PSC’s role in appointments is most concerning in relation to the Bill’s proposed national head of the public service (“HOPS”) in the Presidency; and

1.2.3. the Bill should give the PSC a real role in settling grievances lodged thereto by placing an obligation on executive authorities to provide reasons to the PSC if they do not implement its recommendations.

## **2. The PSC’s Role in Appointing Administrative Heads of Department**

2.1. Appointment processes for administrative heads of department are often the point at which the public service’s greatest shortcomings begin.

2.2. Yet, the Bill leaves unchanged section 12 of the PSA, which provides that the President and Premiers are alone responsible for appointing national and provincial administrative heads of department.

2.3. This despite the NDP and the NFTPSS both calling for the PSC to play a hands-on role in appointing national and provincial administrative heads of department.<sup>1</sup>

2.4. Excluding the PSC from appointments in this way is not just inconsistent with government's own policy position, it undermines the PSC's constitutional design. The Constitutional Court said as much in the *First Certification Judgment* when it held that:

*“an independent PSC should have some role in the process of appointing, promoting, transferring and dismissing members of the public service...”*<sup>2</sup>

2.5. Creating such a role for the PSC would not unduly hamper the power of the President and Premiers to appoint administrative heads of department – it would simply ensure that they do so under the auspices of the PSC carrying out its constitutional mandate.

### **3. The PSC's Role in Appointing the Proposed HOPS in the Presidency.**

3.1. The Bill proposes a national HOPS by adding two notable functions to the Director-General in the Presidency:

3.1.1. to co-ordinate the “actions and legislation” of national and provincial departments; and

3.1.2. to “perform any other function, if so requested by the President, subject to the Constitution or any other law.”

3.2. The Bill's explanatory memorandum envisages that the latter of these functions would include an oversight role for the HOPS, in terms of which other Directors-General would report them “on operational, organisational and administrative matters.”

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<sup>1</sup> National Development Plan (“NPD”) 2023 p 411 and the National Framework Towards the Professionalisation of the Public Sector (“NFTPSS”) p 72.

<sup>2</sup> *Certification of the Constitution of the Republic of South Africa, 1996* (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) para 170.

- 3.3. However, such a broadly worded function could conceivably be expanded to include, as the NDP in fact suggests,<sup>3</sup> a role in appointing administrative heads of department.
- 3.4. While the NDP has long suggested a HOPS in the Presidency,<sup>4</sup> the prospect of concentrating such broadly defined oversight and co-ordination over the public service in the Presidency is not without risk.
- 3.5. It allows a powerful President to exert their influence over the public service through the HOPS's broadly defined mandate, threatening to undo the Bill's laudable devolution of operational power away from political executive authorities.
- 3.6. As such, if the proposal of a HOPS in the Presidency is to be pursued, Parliament must amend the Bill to align further with the NDP and the NFTPPS in two ways:
  - 3.6.1. to provide a role for the PSC as an independent check when appointing the HOPS;<sup>5</sup> and
  - 3.6.2. to balance the HOPS's potential power over appointing administrative heads of department by giving the PSC a role therein as well, as suggested above.<sup>6</sup>

#### **4. The PSC's Role in Solving Grievances**

- 4.1. Section 194(4)(f)(ii) of the Constitution provides the PSC with the power to "recommend appropriate remedies" to political executive authorities, either on its own accord or when complaints are made to it by employees in the public service.
- 4.2. Yet, if its recommendations are ignored, the PSA, read with the recently gazetted Public Service Commission Bill, 2023, only provides that the PSC may report the failure to the national assembly or relevant provincial legislature, as the case may be.

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<sup>3</sup> NDP p 411.

<sup>4</sup> Ibid.

<sup>5</sup> NFTPPS at p 63.

<sup>6</sup> NDP at p 412 NFTPPS p 72.



- 4.3. However, to enable the PSC to properly report on failures to follow its recommendations, a recalcitrant executive authority should at least be required to provide the PSC with its reasons why it has failed to comply.
- 4.4. This so that the national assembly or relevant provincial legislature can exercise their oversight over the recalcitrant executive authority in an informed manner.

## **5. Conclusion**

- 5.1. In this submission, HSF has welcomed the Bill's efforts to depoliticise the public service by devolving operational power away from political executive authorities towards administrative heads.
- 5.2. Nonetheless, we have submitted that the Bill falls short of meaningfully depoliticising the public service by not crafting a role for the PSC to appoint administrative heads of department – especially in the context of a HOPS in the Presidency.