



HELENSUZMAN FOUNDATION

Department of Public Service and Administration

For attention: Ms Renisha Naidoo

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6 May 2021

Dear Ms Naidoo

Submission on the Public Administration Management Amendment Draft Bill, 2020

We attach our written submission in response to the Public Administration Management Amendment Draft Bill, 2020.

Should you have any queries, it would be appreciated if you could contact Catherine Kruyer (Email: catherine@hsf.org.za) and Zeenat Emmamally (Email: zeenat@hsf.org.za).

Yours sincerely

Francis Antonie
Director



**Submission in response to the Public Administration Management Amendment
Draft Bill, 2020**

1. Introduction

The Helen Suzman Foundation (“HSF”) welcomes the opportunity to make submissions to the Department of Public Service and Administration (“the Department”) on the Public Administration Management Amendment Draft Bill, 2020 (“the Bill”).

The HSF is a non-governmental organisation whose main objective is to promote and defend the values of our constitutional democracy in South Africa, with a focus on the rule of law, transparency and accountability.

Given the importance of the Public Administration Management Act, 2014 (“the Act”), the HSF views this submission as a way of making a constructive contribution to the achievement of an effective and efficient public administration and to the eradication and prevention of corruption within the public service.

2. Background to this Submission

The HSF recognises that the Act was passed to give effect to section 195(3) of the Constitution, which requires national legislation to ensure the promotion of the basic values and principles governing the public administration.¹ In particular, the Act seeks to “promote a high standard

¹ These values and principles are set out in section 195(1) of the Constitution.

of professional ethics in the public administration” and to “facilitate the eradication and prevention of unethical practices in the public administration”.²

To achieve these purposes, it contains provisions prohibiting public servants from conducting business with the State and imposing disclosure obligations on public servants in respect of their financial interests.³ It also, among other things, establishes the Public Administration Ethics, Integrity and Disciplinary Technical Assistance Unit (“the Unit”).⁴

These measures have been welcomed as significant advancements against corruption in the public service. However, in practice they have failed to stem the tide of corruption.

The HSF notes the amendments proposed in the Bill, but expresses concern that these amendments do not go far enough. In this submission, the HSF makes proposals on further amendments needed to ensure that the Act is an effective bulwark against corruption.

The HSF highlights that corruption in the public service directly imperils the ability of the State to deliver on the rights promises contained in the Constitution. As elucidated by the Constitutional Court in *Glenister II*—

“There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable development and economic growth are stunted. And in turn, the stability and security of society is put at risk.”⁵

The Constitution itself, therefore, imposes an obligation on the State to take *reasonable and effective* measures to fight corruption, including measures to ensure a high standard of professional ethics in the public administration.⁶ To the extent that the anti-corruption

² Sections 3(a) and (f) of the Act.

³ Sections 8 and 9 of the Act.

⁴ Section 15 of the Act.

⁵ *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (*Glenister II*) at para 166.

⁶ *Glenister II* *ibid* at paras 175 and 189. Section 7(2) read with section 195(1) of the Constitution.

measures adopted in the Act fall short of the standards of reasonableness and effectiveness, the State has failed in its constitutional obligation.

3. The Prohibition against Conducting Business with the State

Section 8 of the Act prohibits an employee from conducting business with the State or from being a director of a public or private company conducting business with the State.⁷ The prohibition is repeated in Regulation 13(c) of the Public Service Regulations of 2016.

The Act further provides that a contravention of this prohibition is an offence, attaching a sentence of a period of imprisonment or a fine, and constitutes “serious misconduct”, which may result in termination of employment.

Notwithstanding the prohibition in the Act and the Public Service Regulations, the number of public servants and family members of public servants doing business with the State has been increasing sharply every year – opening the door to corruption.⁸

Clause 5 of the Bill seeks to amend section 8 of the Act. Clause 5 seeks to introduce an exception to the prohibition against employees being a director of a company conducting business with the State. It seeks to insert section 8(1)(b) into the Act, providing that the “director” in section 8 “does not apply to an employee appointed *ex officio* as a director of a public entity”. The HSF submits that this needs to be more narrowly worded in line with Regulation 13(c) of the Public Service Regulations to limit the exception to an employee appointed *ex officio* as a director of a company listed in schedule 2 and 3 of the Public Finance Management Act.

In addition, clause 5 does not offer any changes that will improve the monitoring and enforcement of the prohibition against public servants conducting business with the State. The HSF contends that such amendments are necessary in order to ensure that the measures against corruption in the Act are reasonable and effective.

⁷ Section 8(2) of the Act.

⁸ South African Government News Agency, Focus on public servants doing business with the State, 3 September 2020, available at sanews.gov.za.

First, the HSF submits that express positive obligations be imposed on heads of departments or government components to report contraventions of section 8(2) of the Act to the South African Police Services for investigation⁹ and to initiate disciplinary proceedings against the implicated employee for serious misconduct within a prescribed period of time. This seeks to ensure that appropriate action is taken and that section 8(3) is not rendered toothless by the absence of any express positive obligations.

Secondly, the HSF recommends that the functions of the Unit be expanded to include exercising oversight to ensure that public servants do not conduct business with the State. The Unit should be given the power to conduct investigations and institute disciplinary proceedings where there is prima facie case of corruption-related misconduct and where the head of department fails to take adequate action within a prescribed time period of the uncovering of the misconduct. These expanded responsibilities and powers are necessary to ensure that the prohibition against employees conducting business with the State is effectively monitored and enforced.

Finally, the HSF recommends that the prohibition against conducting business with the State be extended to family members of employees in the senior management service, as defined in section 1 of the Act.¹⁰ The HSF contends that a ban is necessary in respect of the family members of employees in the senior management services because senior public servants are the ones with patronage and whose families stand to benefit.

The HSF contends that if such a prohibition limits the right to freedom of trade, occupation and profession in section 22 of the Constitution, such limitation is reasonable and justifiable in terms of section 36 of the Constitution. This is because the prohibition would serve the critically important purpose of eradicating and preventing corruption; the limitation would impact a relatively small group of people and would not remove their ability to trade entirely;

⁹ To the extent that contraventions of section 8(2) of PAMA are not included within the reporting obligation in section 15(5)(a) of PAMA.

¹⁰ Section 1 provides:

“family member”, in relation to any person, means his or her parent, sister, brother, child or spouse—

(a) including a person living with that person as if they were married to each other, namely a spouse or life partner;

(b) whether such relationship results from birth, marriage or adoption;

(c) including any other relative who resides permanently with that person; and

(d) including any other relative who is of necessity dependent on such person.

and curtailing the prohibition to family members of employees in the senior management service is less restrictive than a blanket ban.

4. Disclosure Obligations in respect of Financial Interests

Section 9 provides that an employee must “disclose to the relevant head of the institution all of his or her financial interests and the financial interests of his or her spouse and a person living with that person as if they were married to each other”.¹¹ These financial interests include shares and other financial interests in an entity; sponsorships; gifts above a prescribed value; benefits and immovable property. The Act further provides that failure to comply with these disclosure obligations constitutes misconduct.¹²

The HSF notes that section 9 has not yet been brought into effect by proclamation. At present, only ‘designated employees’, including employees in the senior management service, have disclosure obligations in respect of their financial interests in terms of Regulation 13 of the Public Service Regulations. The HSF urges a speedy proclamation by the President to bring section 9 of the Act into effect, as further delay will only impede the fight against corruption.

Even so, the disclosure obligations in section 9 need to be expanded in order to ensure that they are an effective safeguard against corruption.

The HSF recommends that the types of financial interests to be disclosed in terms of section 9(1) should therefore be expanded to include:

1. directorships in any companies as defined in section 1 of the Companies Act, 2008;
and
2. remunerative work outside of the employee’s employment along with proof of compliance with section 30 of the Public Service Act, 1994.¹³

¹¹ Section 9(1) of PAMA.

¹² Section 9(2) of PAMA.

¹³ Section 30 of the Public Service Act requires an employee who wants perform remunerative work outside his or her employment to get the written permission of the executive authority of the department. (It is proposed that permission be obtained from the Head of Department in terms of the Public Service Amendment Draft Bill).

These amendments would facilitate the monitoring of compliance with the section 8 prohibition against conducting business with the State.

The HSF further recommends that an additional amendment be made to section 9 imposing a disclosure obligation on employees in respect of any business conducted with the State by employees' family members.¹⁴ And providing that the failure to comply with this disclosure obligation too constitutes misconduct. This amendment is necessary because the HSF has proposed an outright ban against conducting business with the State only in respect of the families of employees in the senior management services. This further safeguard against patronage and corruption is, thus, necessary.

5. Conclusion

Widespread, if not endemic, corruption in the public service impedes service delivery and undermines the ability of the State to fulfil the rights in the Bill of Rights. It also contravenes the high standard of professional ethics required for the public administration in terms of section 195(1) of the Constitution. Effective measures must be adopted to eradicate and prevent corruption in the public service. While the Act puts in place some anti-corruption measures, these have had little effect in practice. And the Bill does not improve matters. The HSF has proposed further amendments to the Act in order to improve the effectiveness of these anti-corruption measures.

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¹⁴ As broadly defined in section 1 of the Act.