



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 Service Amendment Draft Bill, 2020

We attach our written submission in response to the Public Service 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 Mihloti Sherinda (Email: mihloti@hsf.org.za).

Yours sincerely

Francis Antonie

Director



Submission in response to the Public Service 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 Service 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.

The Bill seeks to amend the Public Service Act, 1994 (“the Act”) – the legislation providing for the organisation and administration of the public service in South Africa. The HSF views this submission as a way of making a constructive contribution to the professionalism of the public service and the achievement of an effective and efficient public administration.

2. Background to this Submission

The ANC’s policy of deploying loyal cadres to posts in the public service, and in particular to senior management posts, has recently come under scrutiny at the Zondo Commission on State Capture, Corruption and Fraud.¹

¹ See the transcripts of the testimony of Gwede Mantashe delivered on day 374 of the Commission and the testimony of President Cyril Ramaphosa delivered on days 384-5 of the Commission, available at <https://www.statecapture.org.za/site/transcripts>.

Although the policy of cadre deployment may have been justified as an appropriate measure to ensure the transformation of the public service and the implementation of the new government's policies in the early years of our democratic transition, there is no longer any justification for the politicisation of appointments, promotions and removals in the public service.

The policy of cadre deployment opens the door to corruption, rent-seeking and patronage, and it played a critical role in facilitating the state capture and corruption that have imperilled our hard-won constitutional democracy and the rights promises contained in the Constitution.

The policy clearly undermines the constitutional requirements that the public administration maintains a high standard of professional ethics, uses its resources in an efficient, economic and effective manner, responds to people's needs, and is accountable and transparent.²

The policy is also blatantly inconsistent with the Constitution. Section 195(1) expressly requires that the employment and personnel management practices in the public administration be based on "ability, objectivity, fairness and the need to redress the imbalances of the past". Additionally, section 197(3) expressly precludes any employee of the public service being favoured or prejudiced only because that person "supports a particular political party or cause". The Act too provides that in making appointments in the public service, "the evaluation of persons shall be based on training, skills, competence, knowledge and the need to redress . . . the imbalances of the past to achieve a public service broadly representative of the South African people".³

The only narrow exception permitted in the Constitution is appointments based on policy considerations, which must be regulated in terms of national legislation. This is regulated in terms of section 12A of the Act, which provides for the appointment of special advisors to executive authorities.⁴

² Section 195(1) of the Constitution sets out the basic values and principles governing the public administration.

³ Section 11(2)(b) of the Act.

⁴ Section 195(4) of the Constitution.

Beyond this, political considerations, like support for a particular political party or cause, should play no role in appointments, promotions, removals and other career incidents in the public service.

However, in terms of the Act and the Public Service Regulations, 2016 (“the Regulations”), political actors hold extensive – and essentially unfettered – powers over appointments, promotions, removals and other career incidents. The allocation of powers to political actors in terms of the Act and Regulations allows political considerations to enter into the employment and personnel management practices and processes.

The HSF highlights that the National School of Government has published a National Implementation Framework towards the Professionalisation of the Public Service (“the Framework”).⁵ The Framework recognises that “[p]rofessionalising the Public Service requires a non-partisan approach. For this to be realised, the Public Service must be depoliticised and government departments must be insulated from the politics or political parties. The bureaucracy must continue to loyally and diligently implement the political mandate set by voters and the party, but to refrain from being political actors themselves.” The Framework further recommends some decisive reforms to professionalise the public service.

The HSF recognises that the Bill seeks to introduce some reforms that will contribute to the professionalism of the public service, and welcomes these reforms. But the HSF expresses concern that the Bill falls far short of the comprehensive reform effort needed to professionalise the public service, reduce corruption and patronage and insulate the public service from undue political interference.⁶ In this submission, the HSF highlights further reforms that are needed to ensure that appointments and other career incidents in the public service are based on merit rather than political loyalty.

3. The Devolution of Administrative Powers from Executive Authorities to Heads of Department

⁵ National School of Government, National Implementation Framework towards the Professionalisation of the Public Service, Government Gazette No 44031, 24 December 2020, at p 39.

⁶ Brunette, R. (2020). Position Paper on Appointment and Removal in the Public Service and Municipalities. Position Papers on State Reform. Public Affairs Research Institute, at p 2.

The Act draws a clear distinction between senior management posts and other lower posts in respect of who controls appointments and other career incidents. The Act gives the President and the relevant Premier powers over the appointment and other career incidents of certain specified employees in senior management posts in national government and the provincial governments respectively.⁷ The power over the appointments and other career incidents of employees in lower posts is held by the relevant executive authority.⁸

The Bill seeks to devolve the administrative powers over appointments and other career incidents of employees in lower posts from executive authorities to heads of departments. This it does through amendments to various sections of the Act governing the career incidents of employees, including appointments, promotions and removals.⁹

The HSF welcomes this development as it will remove some of the authority from political actors – thereby reducing the potential for undue political interference in appointments, promotions, removals and other career incidents.

However, it only does so in respect of employees in lower posts – taking no steps to safeguard the appointment and other career incidents of senior public servants from political interference. And, in any event, this reform on its own is insufficient to remove the influence of political actors, particularly in respect of appointments. More comprehensive reforms are accordingly required.

4. Comprehensive Reforms to the Appointments Process

The Public Service Regulations prescribe the procedure governing appointments in the public service. Most noteworthy, is the involvement of political actors in the selection committees that make recommendations on appointments to posts in the public service.

⁷ Section 12(1) of the Act.

⁸ See section 9 of the Act, among others.

⁹ See clauses 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 16 of the Bill.

First, Regulation 67(1) provides that an executive authority shall appoint a selection committee to make a recommendation on the appointment to a post. This allows political actors to appoint persons loyal to their political party or cause to the selection committees, which in turn leads to the appointment of persons in the public service based on political allegiance rather than merit.

Secondly, Regulation 67(2) prescribes the composition of the selection committees to make recommendations on appointments to senior management posts. The composition of these selection committees is dominated by political actors. The selection process prescribed in the Regulations clearly opens the door to political influence over appointments.

It has therefore been recommended that an independent entity be given a role in the appointments process to guard against undue political interference. The Public Service Commission is a ready-made independent entity, which may perform this task. The Constitution requires the establishment of the Commission to exercise oversight over the public services and requires that it be independent and impartial.¹⁰

The Public Affairs Research Institute (“PARI”) in its Position Paper on the Appointment and Removal in the Public Service and Municipalities recommends that the Commission “act as a check and balance in appointments processes.”¹¹

- It recommends that the power¹² over the appointment and other career incidents of employees in senior management posts, which lies with the President and the Premier in terms of the Act, be devolved onto the Chair of the Commission. This would remove the power from the hands of political actors and place it with an independent entity.
- It recommends that the Commission be given the power to plan and administer the appointment process, including the establishment of the selection committees to

¹⁰ Section 196 of the Constitution.

¹¹ PARI at p 16.

¹² PARI at p 16.

recommend appointments to posts in the public service. This would better shield the public service from political influence in the appointments process.

The HSF aligns itself with the recommendations made by PARI concerning reforms in respect of the appointments process and attaches PARI's paper to this submission.

5. Conclusion

The constitutional vision of an effective and efficient public administration, which maintains a high standard of professional ethics, is imperilled by political influence in the appointments and other career incidents of public servants. The HSF welcomes the reforms sought to be introduced by the Bill to professionalise the public service, but contends that more comprehensive reforms are needed to insulate the public service from political influence and safeguard against corruption, rent-seeking and patronage.

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