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The Portfolio Committee on Public Service and Administration

The Committee Secretary

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WRITTEN COMMENTS FROM CORRUPTION WATCH ON THE PUBLIC ADMINISTRATION MANAGEMENT BILL, [B55B-2013]

1. Corruption Watch ("Corruption Watch / CW") makes this submission on the Public Administration Management Bill, [B55B-2013] ("the PAM Bill"), in response to the call for written comments, issued by the Honourable J. Moloi-Moropa, MP and Chairperson of the Portfolio Committee on Public Service and Administration.

2. Our submissions are structured into the following sections:

   1 **INTRODUCTION TO CORRUPTION WATCH**

   2 **COMMENTS ON VAST CHANGES TO THE INITIAL BILL**

   Call for reintroduction of the following provisions:

   i. The introduction of a 'cooling-off' period; and

   ii. The Anti-Corruption Bureau.

   3 **COMMENTS ON THE VERSION OF THE BILL BEFORE PARLIAMENT**

Directors: V Dubula, RM Godsell, A Hassim, DH Lewis (Executive Director), ME Metcalfe, M Msimang, Archbishop WN Ndungane, CME O'Regan, ZJ Vavi

i. Prohibition on public officials conducting business with the State

4 **CONCLUSION.**

1 INTRODUCTION TO CORRUPTION WATCH

3. Corruption Watch (CW) is a civil society organisation. Corruption Watch is independent, and has no political or business alignment. CW exposes corruption and the abuse of public funds in South Africa, and promotes transparency and accountability to protect the beneficiaries of public goods and services.

4. CW believes that confronting corruption requires an active and engaged citizenry that is prepared to hold leaders to account. CW aims to ensure that the custodians of public resources, including public officials, act responsibly to advance the interests of the public.

5. It is on the basis of this mandate that CW's activities include monitoring and responding to legislative developments which impact on public goods and services and the custodians thereof. Given the importance of the PAM Bill in setting standards and introducing systems for improved public administration, CW welcomes the opportunity to respond to this important piece of legislation.

6. Corruption Watch however expresses grave concern as regards the manner in which the PAM Bill has changed since it was first released for public comment by the Department of Public Service and Administration in June 2013.

2 COMMENTS ON VAST CHANGES TO THE INITIAL BILL

7. The PAM Bill that was released for comment in June 2013 by the Department of Public Service and Administration contained a number of important advances in the law governing public administration. The majority of these provisions now no longer find expression in the statute before Parliament.

8. That is, the statute has changed from a 100 odd page statute that sets out to comprehensively and substantively change the public service, to a 20 page statute that only seeks to amend and advance on a few sections of our existing public service legislation.

9. Corruption Watch will not address each and every provision that has been excised from the previous draft of the Bill.

10. Rather, Corruption Watch will confine its submissions to two key provisions that were initially introduced by the Department of Public Service and Administration but no longer find expression in the statute. These are: the Anti-Corruption Bureau and the introduction of a 'cooling-off' period. We submit that both these provisions should be reintroduced.

I. INTRODUCTION OF COOLING-OFF PERIOD FOR PUBLIC OFFICIALS WHO SEEK TO MOVE FROM THE PUBLIC SECTOR TO THE PRIVATE SECTOR

Summary of this Section that was in the previous draft of the PAM Bill and Corruption Watch's views:

11. This section: (Which was Section 38 of the previous draft of the PAM Bill)

    1 Introduced a 'cooling-off' period before public officials could move from government jobs to the private sector;

    2 Was novel in our law;

    3 Corruption Watch endorsed this provision;

    4 Corruption Watch viewed this provision as striking the correct balance between preventing corruption and allowing freedom of choice in one's profession.

CW's detailed view:

12. Corruption Watch welcomed the provision that introduced a 'cooling off period' for any employee directly involved in the awarding of a contract before he/she could take up work in the private sector. That is, on introduction of this section contained in the previous draft of the PAM Bill, an employee involved in contract awards could not take up work with a service provider (i.e. a private entity) within 12 months of the award of the contract to the private entity by the State.

13. This clause also prohibited appointment by a former state employee to the Board of the service provider (in cases where the state employee had been directly involved with the private entity while working for the state); as well as prohibited the receipt of any gratification by a state employee from the service provider.

14. The relevant authority in terms of this Section was empowered to approve a shorter 'cooling-off' period than 12 months (in accordance with prescribed criteria).

15. The Section provided in particular that a service provider could not, within a 12 month period, employ an employee or appoint an employee to the board of the service provider, or engage the employee to provide any service to the provider for payment in money or kind or grant any other gratification to the employee if:

    1 The employee set the criteria for the award of the work to the service provider;

    2 Evaluated or adjudicated the providers for the award of the work; or

    3 Recommended or approved the awarding of the work.

16. On contravention of this proposed provision (which no longer finds expression in the Bill before Parliament), the contract with the service provider could be cancelled. In addition, as against the individual state employee, any person who contravened this section would be liable on prosecution to a fine.

17. Corruption Watch welcomed the proposed introduction of a 'cooling-off period'.

18. The phenomenon of moving between government and the business sector is colloquially referred to as the 'revolving door' syndrome. It can be problematic for many reasons, including undermining the integrity of the State. Public officials are required to make decisions that benefit the public good, without taking into account possible personal gain, such as, for example, the prospect of a future lucrative employment opportunity in a private company. Public officials are also required to make decisions in a fair and impartial manner that does not favour any particular interest.

19. Three clear reasons have been advanced for the enactment of 'revolving door' laws in other jurisdictions[1]:

   1 These laws are necessary to protect the Government from use against it of proprietary information by former employees who leave Government and take with them such information and then use it on behalf of a private party in an adversarial proceeding against the Government;

   2 These laws are necessary to limit the potential influence and allure of a lucrative private arrangement or the prospect of such arrangement may have on current public officials when dealing with private entities while still in government;

   3 These laws are necessary to prevent corruption and prevent the appearance of corruption of government processes.

20. Corruption Watch lauded the DPSA for introducing an anti- 'revolving door' provision into our law. Corruption Watch is mindful of the balance that must be struck between eradicating conflicts of interest on the one hand and unduly curtailing career movement and advancement on the other. In this regard, CW, in written submissions to the DPSA last year, supported the 12 month period proposed in the PAM Bill, and viewed and still views it as a reasonable and balanced approach.

21. Corruption Watch however called upon the DPSA to ensure that appropriate systems are in place for the monitoring and enforcement of this provision so as its intended purpose is achievable.

22. In this regard, CW aligned itself with the policy proposals of the Public Service Commission[2] that suggest that clauses should be included in contracts between service providers and the State that prohibit the service providers from recruiting and

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[1] These reasons have been advanced in the United States (which laws have been on the statute books in the US since as far back as 1872) but are also relevant in Corruption Watch's view to the South African context

[2] See: http://www.psc.gov.za/newsletters/docs/2010/PSC%20NEWS.pdf

appointing public officials who they have encountered in Government. (Thus shifting part of the compliance burden to the private sector).

23. In sum, Corruption Watch is greatly disappointed that the 'cooling-off' provision has been excised from the PAM Bill as currently before Parliament. Corruption Watch hereby calls for its reintroduction.

II NEW ANTI-CORRUPTION BUREAU

(Section 45 to 48 of the previous version of the Bill)

Summary of this Section that was included in a previous draft of the PAM Bill and CW'S views:

24. This section:

    1. Provided for the establishment of an anti-corruption bureau ("the Bureau") within the public administration;
    2. Was novel in our law;
    3. Corruption Watch endorsed, and still endorses the establishment of an anti-corruption Bureau;
    4. Corruption Watch submitted last year that greater clarity was required in the section of the Bill creating the bureau to avoid doubt; and
    5. Corruption Watch proposed last year that this provision be amended to strengthen this section as regards the Bureau's powers in relation to the second and third tier of government.

CW's detailed view:

25. The June 2013 version of the PAM Bill provided for the establishment of an anti-corruption bureau within the Department of Public Service and Administration.

26. Corruption Watch welcomed its establishment to deal with 'corruption-related misconduct'[3]. CW viewed and still views this as a necessary and positive step in ensuring that corruption in the public sector is effectively tackled.

27. In particular, the Bureau went a long way to addressing the Constitutional Court's unequivocal and unanimous ruling in the judgment of *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) (hereinafter referred to as 'Glenister') that the government is constitutionally required to establish effective mechanisms to tackle corruption.[4]

28. Both the majority and minority judgments of Glenister recognised that corruption is a scourge that must be effectively tackled. In particular, the majority held[5]:

"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. ..."

(Our emphasis)

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[3] Which was not defined in the Bill

[4] In this regard, the majority judgment held that: *"The Constitution is the primal source for the duty of the state to fight corruption. It does not in express terms command that a corruption-fighting unit should be established. Nor does it prescribe operational and other attributes, should one be established. There is however no doubt that its scheme taken as a whole imposes a pressing duty on the state to set up a concrete and effective mechanism to prevent and root out corruption and cognate corrupt practices."* And the minority judgment, authored by Ngcobo CJ, held that: *"...(T)his judgment recognizes an obligation arising out of the Constitution for the government to establish effective mechanisms for battling corruption ... I am prepared to hold that there is a constitutional obligation for the state to take effective measures to fight corruption..."*

[5] Majority judgment at paragraph 166; see Minority judgment at paragraph 83

29. In addition, Corruption Watch submits that there is a positive duty[6] on the state to take effective measures to combat corruption which derives from section 7(2) of the Constitution, which creates a duty on the state *"to respect, protect, promote and fulfil the rights in the Bill of Rights"*.

30. The proposed establishment of an anti-corruption Bureau was thus a laudable part of government's efforts to establish effective mechanisms to tackle corruption.

31. In light of the unanimous findings of the Constitutional Court in Glenister, CW submits that anti-corruption mechanisms are required to be effective.

32. Corruption Watch submits that this can be achieved in part through the establishment of an anti-corruption bureau (Which found expression in the previous draft of the Bill but has now been excised*)*.

33. Corruption Watch notes the introduction into the PAM Bill as before Parliament of a Public Administration Ethics, Integrity and Disciplinary Technical Assistance Unit. CW however views its powers as watered down in comparison to those of the previously proposed anti-corruption bureau. CW thus submits that this Unit will not be effective in tackling corruption-related misconduct in the public service.

Problems with the provisions that created the anti-corruption bureau:

34. The starting point for Corruption Watch is that the provisions creating the anti-corruption bureau must be reintroduced.

35. Once this has happened, CW submits that the provisions (as expressed in the June 2013 PAM Bill) require amendment.

36. In Corruption Watch's view, aspects of the Bureau's powers as conceived in the June 2013 draft of the PAM Bill unnecessarily curtailed its effectiveness as a corruption-fighting institution and Corruption Watch submitted last year that they should be

[6] Expressed in majority judgment at paragraph 177, 189; Minority judgment at paragraph 105 and 106

reconsidered. (Corruption Watch also viewed aspects of the PAM Bill as regards the Bureau as unclear and in need of reformulation to avoid doubt).

37. We are however gravely disappointed that instead of re-thinking the formulation of the provisions that created the anti-corruption bureau; the Anti-corruption bureau has been scrapped altogether and replaced with a Unit that in essence is responsible for technical support.

38. Corruption Watch's view on effective public administration is supported by section 195 of the Constitution, which sets out the basic values and principles governing public administration, and expressly states that they apply to the administration in every sphere of government. Sections 195(1) and (2) of the Constitution provide:

(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) A high standard of professional ethics must be promoted and maintained.

(b) Efficient, economic and effective use of resources must be promoted.

(c) Public administration must be development-oriented.

(d) Services must be provided impartially, fairly, equitably and without bias.

(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability,

objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

(2) The above principles apply to-

(a) administration in every sphere of government;

(b) organs of state; and

(c) public enterprises."

39. Effective measures to combat corruption are a necessary condition for the realisation of the principles set out in section 195(1). Section 195(2) makes clear that the principles apply to the administration in every sphere of government, and accordingly, that such measures will be required in respect of all three spheres of government.

40. Section 45 of the June 2013 version of the PAM Bill provided for the establishment of an anti-corruption bureau, in particular:

45 "Anti-corruption measures

(1) There is hereby established within the public administration the Anti-corruption Bureau.

(2) The Minister may, by notice in the Gazette, determine—

(a) the Bureau's organisational structure and staff complement;

(b) the categories of corruption-related misconduct; and

(c) the procedure to be followed by the Bureau in conducting its investigations.

(3) A head of an institution—

(a)may, if satisfied that there is a prima facie case of corruption-related misconduct, request the Bureau to investigate or institute disciplinary proceedings; or

(b) must, <u>if a report of an investigation by the Bureau finds that there is a prima facie case of corruption-related misconduct and the head of an institution fails to institute disciplinary proceedings against the relevant employee within 90 days of receipt of the report, refer the matter to the Bureau to institute disciplinary proceedings</u>.

(Our emphasis)

(4) In respect of disciplinary proceedings against a head of an institution, this section applies, with the changes required by the context, and any reference to the head of institution means the relevant executive authority.

(5) Disciplinary proceedings may be instituted by Bureau in respect of conduct contemplated in section 38."

41. The effect of section 45(3) was to give the head of an institution:[7] the power to request the Bureau to investigate or institute disciplinary proceedings if he or she is satisfied that there is a prima facie case of corruption-related misconduct; and the obligation to refer a matter to the Bureau to institute disciplinary proceedings if:

    1 A report of an investigation of the Bureau finds that there is a prima facie case of corruption-related misconduct; and

    2 The head of the institution has failed to institute disciplinary proceedings within 90 days of receipt of the report.

42. It was not clear to Corruption Watch whether, <u>as regards national departments</u>, Section 45 (3) (b) of the PAM Bill intended to convey that the power of the Bureau to investigate corruption-related misconduct and institute disciplinary proceedings may be undertaken without the requirement of a request by the Head of such national Department.

[7] The head of an institution is defined in section 1 as "the head of a national department, the Office of a Premier, a provincial department, a municipality or a head of a national, provincial or municipal government component and includes any employee acting in such post."

43. Corruption's Watch confusion was compounded by the 'Explanatory Memorandum' on the earlier draft of the PAM Bill which seemed to suggest[8] that the Bureau was empowered to investigate and institute disciplinary proceedings in respect of corruption-related misconduct only <u>if requested to do</u> so by the Head of an institution.

44. Corruption Watch submitted that at national level, the Bureau should be empowered to investigate and institute disciplinary proceedings without a request from the Head of an institution.

45. On this score, CW submitted that greater clarity should be provided as to what or who can trigger an investigation by the Bureau. That is, the PAM Bill should make it clear that in addition to requests from heads of institutions, the Bureau can conduct investigations for example, based on information received from the public through *inter alia* the Public Service Commission's Anti-Corruption Hotline.

46. Section 46 of the PAM Bill provided:

46 "Powers and functions of Bureau

The Bureau—

(a) notwithstanding section 11(1)(g)(v) is responsible for the investigation and institution of disciplinary proceedings in respect of corruption-related misconduct matters in the public service;

(b) must coordinate the conduct of disciplinary hearings in respect of corruption-related misconduct matters in the public administration, including the appointment of presiding officers and employer representatives in such hearings;

(c) <u>may only exercise a power under paragraph (a) and (b) in respect of a provincial department, provincial government component, municipality or municipal government component with the concurrence of the Premier or the Municipal Council respectively;</u>

(Our emphasis)

[8] At paragraph 41 of the Memorandum

(d) must provide specialised technical assistance and advisory support to deal with disciplinary matters in the public administration;

(e) must manage, coordinate and protect information and sources relating to corruption-related misconduct matters in the public administration;

(f) must facilitate the protection of whistle-blowers in the public administration;

(h) must build capacity within institutions to conduct misconduct investigations and disciplinary hearings;

(i) must facilitate the enforcement of disciplinary sanctions;

(j) must refer evidence discovered by the Bureau's investigations regarding or which points to the commission of corruption-related misconduct to the relevant executing authority or head of an institution;

(k) must refer evidence discovered by the Bureau's investigations regarding or which points to the commission of an offence to the relevant prosecuting authority;

(l) must report in writing—

(i) at least once every quarter to the Director-General and the Minister on the performance of the Bureau's functions; or

(ii) as directed by the Minister, on the progress made in the investigation and finalisation of matters brought before the Bureau; and 74

(m) may in the execution of its functions, subject to the approval of the Minister, be assisted by or conclude service level agreements with—

(i) other organs of state; or

(ii) other persons."

47. The following aspects of this provision are significant: Notwithstanding the fact that section 11(1)(g)(v) of the PAM Bill (June 2013 Bill) provided that the head of an institution is responsible for the discipline of staff, the Bureau is responsible for the

investigation and institution of corruption-related misconduct matters in the public service.[9]

48. The Bureau was required to co-ordinate the conduct of disciplinary proceedings in respect of corruption-related misconduct matters in the public administration, including appointing presiding officers and employer representatives in such hearings.[10]

49. The Bureau's powers to investigate and institute such disciplinary proceedings in respect of a provincial department, provincial government component, municipality or municipal government component were only however be exercised with the concurrence of the Premier or the Municipal Council respectively.[11]

50. Section 47 of the PAM Bill provided, in relevant part:

> ***47 "Conduct of investigations***
>
> *(1) The Bureau's investigation, contemplated in section 54(3),[12] is initiated on the date that it accepts a request to investigate or the date on which the head of an institution refers a matter to it.*
>
> *(2) The decision to accept a request to investigate or to conduct an investigation as contemplated in subsection (1) must be in writing.*
>
> *(3) The Bureau may only conduct an investigation in respect of a provincial or municipal institution with the concurrence of the Premier and the Municipal Council."*
>
> (Our emphasis)

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[9] Section 46(a)

[10] Section 46(b)

[11] Section 46(c)

[12] The reference to section 54(3) appears to be an error. It should refer to section 45(3).

51. Section 47(3) accordingly required the concurrence of the Premier or Municipal Council in order for the ACB to conduct an investigation in respect of a provincial or municipal institution.

52. The effect of these sections was that the powers of the Bureau to investigate and initiate proceedings in respect of corruption-related misconduct in the local or provincial government sphere could only be exercised with the concurrence of the relevant Municipal Council or Premier.

53. The PAM Bill (June 2013 draft) rightly recognised that the provincial and local spheres of government have a significant role to play in the public administration.

54. Section 40 of the Constitution provides that government is constituted as national, provincial and local spheres of government which are distinctive, inter-dependent and interrelated. The Constitution accords a degree of autonomy to the local government sphere in respect of the management of the public administration within its domain.

55. Chapter 7 of the Constitution spells out in detail the importance and role of local government.

56. In particular, Section 151 (3) and (4) of the Constitution provide:

"(3) A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.

(4) The national or a provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions."

57. Section 156 of the Constitution provides:

"A municipality has executive authority in respect of, and has the right to administer-

(a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and

(b) any other matter assigned to it by national or provincial legislation." [13]

58. The Constitutional Court[14] has stressed that the local government sphere is given autonomy within its sphere, subject to the requirements of co-operative governance, and the limits imposed by the Constitution, or national and provincial legislation. The Constitution also makes clear that provincial government has a significant degree of autonomy within its domain.

59. Chapter 6 of the Constitution sets out the importance and role of the provincial sphere of government. In particular, Section 125 of the Constitution provides for the executive authority of provinces.

60. Section 197 of the Constitution makes provincial governments responsible for aspects of the management of members of the public service within their jurisdiction.[15]

61. The Constitutional Court addressed the power of the provinces to structure the provincial public service in *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC)[16].

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[13] From a reading of Part B of Schedule 4 and Part A of Schedule 5 it is clear that the administration of many of the matters listed in these schedules will involve members of the public administration and will fall into the area of the Bureau's operation. For example, included are building regulations, local tourism, municipal airports, municipal health services, certain municipal public works (Part B of Schedule 4); and control of public nuisance, local amenities and sports facilities, municipal roads, refuse removal, and traffic and parking (Part B of Schedule 5).

[14] See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC)* at paragraphs 373 – 374; *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at paragraph 126; *City of Cape Town and Another v Robertson and Another 2005 (2) SA 323 (CC)* at paragraphs 59 - 60

[15] In particular, Section 197 (4) of the Constitution provides that Provincial governments are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administrations and within a framework of uniform norms and standards applying to the public service

[16] In a judgment of Chaskalson P (as he then was) The case dealt with a challenge to certain amendments to the Public Service Act that aimed at the structural transformation of the public service. The provincial government challenged the provisions on the ground that they infringed the executive power vested in and detracted from

62. It was held in this judgment that the Constitution vests the competence to make laws for the structure and functioning of the public service as a whole in the national sphere of government. The Constitution provides for the framework for the public service to be set by national legislation and for the incidents of employment to be the responsibility of the various administrations (including provincial administrations) of which the public service was composed (paragraphs 44-46 of the judgment). (The main attack on the constitutionality of the amendments therefore failed (paragraph 48).

63. One of the amendments, which permitted the Minister to direct that the administration of provincial laws be transferred from a provincial department to a national department or other body, clearly infringed the executive authority of the province to administer its own laws, and was struck down (paragraphs 86-88).

64. Chaskalson P however held[17] that the constitutional power of Parliament to structure the public service is required to be exercised in the context of section 41(1)(g) of the Constitution:

"Although the circumstances in which s 41(1)(g) can be invoked to defeat the exercise of a lawful power are not entirely clear, the purpose of the section seems to be to prevent one sphere of government using its powers in ways which would undermine other spheres of government, and prevent them from functioning effectively. The functional and institutional integrity of the different spheres of government must, however, be determined with due regard to their place in the constitutional order, their powers and

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the legitimate autonomy granted to the provinces by the Constitution (paragraph 4). The province argued that section 197(1) of the Constitution had to be narrowly construed as giving the national government the power to regulate or structure the public service corps, but not to structure the provincial administration within which the corps was to function.

[17] *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC) at paragraph 58

functions under the Constitution, and the countervailing powers of other spheres of government."

(Our emphasis)

65. The powers conferred on Parliament to legislate in certain areas have to be exercised carefully to ensure that the national legislature does not encroach on the ability of the provinces to carry out the functions entrusted to them by the Constitution (see paragraph 60 of the judgment).

66. The Constitutional Court held that the bulk of the amendments did not detract from the executive power of the provinces or infringe on their functional institutional integrity (paragraph 94).

67. While the judgment dealt primarily with the powers of the provincial and national spheres of government to structure the public service within their domains, and not directly with the power to conduct investigations and disciplinary proceedings in respect of misconduct by members of the public administration, it establishes the following principles which are relevant to the powers to be given to the Bureau (if established) by Parliament:

68. Parliament is competent to prescribe, to a significant degree, how provincial administrations in the provincial sphere are structured.

69. In CW's view, it follows that it is also competent to prescribe measures to combat corruption in the public service in the provincial sphere. That competence however must be exercised consistent with the co-operative government principles in section 41 of the Constitution. The power may not be exercised in a way that encroaches on the provinces' ability to carry out the functions conferred on them by the Constitution.

70. In CW's view, it is therefore clear that the Bureau could not conduct disciplinary proceedings and investigations of corruption-related misconduct without having regard to the views of the relevant local government and provincial government authorities. That would constitute an impermissible intrusion into the autonomy of these two spheres of government.

71. However, in CW'S view it does not follow that the Constitution requires the Bureau to obtain the concurrence of the Premier or Municipal Council in order to proceed.

72. The requirement of concurrence of the relevant authority is thus in CW's view an unnecessary constraint on the ability of the Bureau to effectively investigate and institute disciplinary procedures. By essentially giving the Premier or Municipal Council a power of veto over the ability of the Bureau to investigate or institute proceedings in respect of a provincial or municipal institution, a provincial department, provincial government component, municipality or municipal government component, the Bureau's ability to be effective is significantly watered down. The Bureau's ability to effectively combat corruption, particularly if senior members of the provincial executive or Municipal Council are involved, would be hampered by this provision. If allegations of corruption are made against well-connected or senior members of these parts of government, the ability of the Bureau to perform its function may very well be constrained by the exercise of this power of veto.

72 In CW's view, the principles of co-operative governance and autonomy of the different spheres of government do not require Municipal Councils and Premiers to be able to veto the Bureau's investigations or the institution of disciplinary proceedings. Requiring the Bureau to consult with the relevant Premier or Municipal Council before initiating an investigation or disciplinary proceedings would in CW's view satisfy the requirements of the Constitution.

73 The requirement that the decision to initiate an investigation or proceedings be taken *"after consultation with"*[18] the Premier or Municipal Council would require the Bureau

[18] *"[A] decision 'in consultation with' another functionary requires the concurrence of that functionary while a decision 'after consultation with' another functionary requires no more than that the decision must be taken in good faith, after consulting and giving serious consideration to the views of the other functionary (see eg Premier, Western Cape v President of the Republic of South Africa 1999 (3) SA 657 (CC) (1999 (4) BCLR 382) paragraph [85] n 94 and President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999 (4) SA 147 (CC) (1999 (7) BCLR 725) paragraph [63])" Unlawful Occupiers, School Site v City of Johannesburg 2005 (4) SA 199 (SCA)* at paragraph 13

to consult with the Premier or Municipal Council, but would not allow them to veto the investigation or proceedings if they disagree with the Bureau's wish to proceed.

74 In CW's view, such a requirement gives the appropriate weight to the views of the Premier and Municipal Council. It allows them to be heard and participate in the Bureau's decision whether to proceed without affording them the power of veto. This in CW's view cannot be said to encroach on their ability to carry out their functions in terms of the Constitution.

75 It might be argued that this is inconsistent with section 197(4) of the Constitution, which makes provincial governments responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administrations, and the power of Municipal Councils to appoint, direct and dismiss their own employees.[19]

76 However, in CW's view, this argument is not supportable. The June 2013 PAM Bill did not empower the Bureau to appoint, promote, direct, transfer or dismiss employees. Its power is limited to the ability to conduct investigations and disciplinary proceedings. The Bureau was only empowered to "facilitate" disciplinary sanctions, but does not enforce them itself.[20] Ultimate control over, for example, the dismissal of employees remains with the heads of institutions.[21]

77 CW submitted in 2013 that that this should be made expressly clear in the PAM Bill: the Bureau is empowered to investigate and initiate investigations, and to make recommendations to the relevant head of institution, Premier or Municipal Council regarding what sanctions are to be imposed (such as suspension or dismissal); but the final decision in this regard remains with the relevant head of institution, Premier or Municipal Council. The relevant head of institution, Premier or Municipal Council thus retains the final decision on whether to implement the Bureau's

[19] This appears to be one of the primary concerns of the drafters of the PAM Bill – see paragraphs 11-12 of the Explanatory Note.

[20] Section 46(k).

[21] Section 21

recommendations. In CW's view, this would comply with the requirements of section 197(4) of the Constitution.

78 If so, the power to institute disciplinary proceedings and investigations conferred on the Bureau would not encroach on the provincial and municipal authorities' responsibilities for their employees.

In summary:

The government is constitutionally required to establish effective anti-corruption mechanisms. The Bureau was a laudable attempt of its effort to do so.

79 The PAM Bill should contain provisions establishing an anti-corruption bureau. The excise of the provisions creating the anti-corruption bureau and replacing it with a technical assistance Unit with far fewer powers was unnecessary.

The PAM Bill should give the Bureau the power to conduct investigations and disciplinary proceedings in respect of corruption-related misconduct of its own initiative at national level and after consultation at provincial and local level - which should be made expressly clear in the PAM Bill for the avoidance of doubt.

80 The Constitution does not require the Bureau to act with the concurrence of a Premier or Municipal Council when conducting investigations or disciplinary proceedings into corruption-related misconduct.

81 The PAM Bill should thus be amended to reintroduce the anti-corruption bureau. It should also ensure that the Bureau can initiate investigations and disciplinary proceedings in respect of corruption-related misconduct "after consultation with" the Premier or Municipal Council in the relevant government sphere would suffice to meet the requirements of section 197(4) of the Constitution and would make the Bureau a more effective mechanism in the fight against corruption. This conclusion is premised on CW's reading of the Bureau's powers, which is that the Bureau does not itself take the final decision regarding the sanction to be imposed in regard to

corruption-related misconduct, but that it is empowered to make recommendations to the relevant head of institution, Premier or Municipal Council. It is the relevant head of institution, Premier or Municipal Council which takes the final decision regarding the appropriate sanction. This CW submits should also be made clear in the PAM Bill.

3 COMMENTS ON THE BILL BEFORE PARLIAMENT

- PROHIBITION ON PUBLIC OFFICIALS CONDUCTING BUSINESS WITH THE STATE

(Section 8 of the PAM Bill)

Summary of this Section of the PAM Bill before Parliament and CW's views:

82. This section:

    a. Introduces an outright ban on public officials from conducting business with the State;

    b. Is novel in our law;

    c. Corruption Watch endorses this new provision;

    d. Corruption Watch highlights the importance of increased capacity in enforcing this provision.

CW's detailed view:

83. Section 8 of the PAM Bill before Parliament provides that an employee may not conduct business with the state; or be a director of a public or private company conducting business with the state.

84. This outright ban on public officials doing business with the State does not exist in our current legal framework and is thus in Corruption Watch's view, a positive step.

85. CW lauds the DPSA's proposal to institute a blanket ban on all contracting by public officials with the State. The proposed ban sends a strong signal about enriching oneself through exposure to the State in the employment context.

86. Corruption Watch supports this proposed ban in light of amongst other things the constitutional guarantee of fair and competitive public procurement. In particular, Section 217 of the Constitution requires that when an organ of State contracts for goods or services it must do so in a manner that is fair, equitable, transparent, competitive and cost-effective. In order to give effect to this system, it is at the very least necessary to require disclosure of financial interests and in Corruption Watch's view, completely supportable to impose restrictions on public officials' ability to contract with the state.[22]

87. CW also submits that this proposed outright ban is constitutionally supportable in light of the right contained in the Bill of Rights to choose one's trade, occupation and profession.[23]

88. The introduction of this outright ban also appears appropriate in light of the apparent inability to manage the disclosure system[24] at present. Other jurisdictions[25] have, or are trying to introduce similar provisions in attempts to ensure the system of public procurement is not continually corrupted.

89. Corruption Watch, in addition to its overall support for this provision, calls for increased institutional capacity to monitor and enforce this ban effectively.

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[22] The Auditor General's report on the public service and the number of public officials contracting with the state provides weighty evidence for the need for an outright ban

[23] The 'freedom of occupation' right was 'watered down' from the Interim to the Final Constitution. The right to economic freedom in the Final Constitution is a much narrower right than the right in the Interim Constitution and is now limited (similar to the case in other jurisdictions, such as Germany) to the right to choose one's trade or occupation

[24] See note 1 above

[25] For example, a new draft law in Russia aims to prevent civil servants from signing contracts with companies in which their relatives have an interest. In Serbia, civil servants are not permitted to 'establish commercial entities or perform entrepreneurial activities' nor are they allowed 'to be a director of a legal person'

CONCLUSION

90. Corruption Watch expresses its general support to the Department of Public Service and Administration for its move to provide for better organisation, management, functioning as well as personnel-related matters in the public administration, in all three spheres of government.

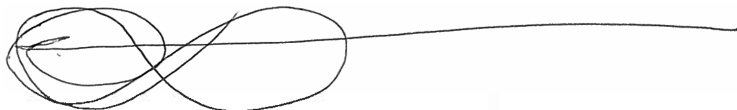
91. Corruption Watch in particular, welcomes the ban on public officials doing business with the State. CW in this regard highlights the need for increased capacity and resources to monitor this new provision.

92. Corruption Watch is deeply concerned and disappointed that two key provisions that were initially introduced in an earlier version of the PAM Bill have now been excised.

    a. Corruption Watch views the introduction of a 'cooling-off' period before public officials can enter the private sector as necessary and appropriate. CW hereby calls for the reintroduction of this section into the PAM Bill.

    b. Corruption Watch views the establishment of an anti-corruption bureau as necessary in the fight against corruption. It calls for a re-thinking of the provisions creating this bureau and a reintroduction of the bureau into the PAM Bill. Corruption Watch views the establishment of a Technical Assistance Unit as not going far enough in the fight against corruption.

Sincerely,



Nicola Whittaker

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CORRUPTION WATCH