



home affairs

Department:
Home Affairs
REPUBLIC OF SOUTH AFRICA

Draft Responses to the Questions Posed by the Chairperson of the Portfolio Committee on Home Affairs with regard to the Border Management Authority Bill, 2016

- 1. This authority will have issues related to operations, administrations, litigations, consultations, negotiations, public participations etc. I therefore believe that it requires a deputy Commissioner [Section 7].**

Response: The Border Management Authority (the "BMA") Business Case makes provision for two Deputy Commissioners and a number of Assistant Commissioners. The President must only appoint the Commissioner and the Minister can be empowered to appoint Deputy Commissioners or the Commissioner may be empowered to appoint Deputy Commissioners after consultation with the Minister. It should be noted that a process is currently underway to elaborate a detailed organisational structure for the BMA.

- 2. Since the President is the one who appoints the Commissioner, why should the Minister appoint the Acting Commissioner rather than recommend a person to be appointed by the President? [Section 7(2)(a)].**

Response: A key motivation was to assign some of the operational management aspects of the BMA to the Minister. Consideration can be given to making provision for the Minister to recommend an Acting Commissioner to the President. This would be consistent with the original powers given to the President to appoint the Commissioner.

3. **The President to notify the Commissioner at least two months before the expiry of the term, why not at least six months given the time required to recruit the replacement? [Section 8(2)].**

Response: This can be considered, since six (6) months is the period required in terms of the Public Service Act, 1994.

4. **The Commissioner must vacate the office on reaching 65 years. Why do we decide on such age because ordinarily early retirement is around 55 years? To encourage succession and current developments, why not 60 years? [Section 8(3) and section 8(4) depends on the above comment.]**

Response: The age of 65 years is aligned to the Public Service Act, 1994, read together with the Government Employee Pension Law, 1996 (Proclamation 21 of 1996).

5. **The provision for the President to retain the Commissioner beyond 65 years counter the process of succession and employee progression. I think 60 years should be the limit irrespective of any reason. [Section 8(5).]**

Response: See the response above.

Provision is made in the Bill for the President to extend the Commissioner's term of office for a maximum of two (2) years beyond 65 years of age. It should be recalled that the position of the Commissioner is a strategic management position that will require extensive senior executive management experience.

6. **Section 9(5)(b) is accepted and should be the basis for the proposal under section 8(2).**

Response: This can be considered as it will be aligned to question 3 above.

7. **An identification card in the prescribed form must be issued to each officer. Include official uniformed men and women. [Section 13(6).]**

Response: Officers of the Border Guard are intended to be uniformed men and women.

8. **I do have a challenge with the inclusion of any officer in section 14(1).**

Response: Firstly, this discretion is given to the Minister. Secondly, it should be recalled that BMA employees comprise of two groups, namely support staff and officers (who are Border Guard frontline officials). In other words, an officer is defined in the Bill to only refer to members of the Border Guard, not BMA support staff.

9. **The identification card should be returned on cancellation of a commission by the Minister. [Section 14(4).]**

Response: This proposal should be considered, since it points to a gap in the current draft Bill.

10. **The Commissioner should be at the level of Director-General. [Section 10(1).]**

Response: There are specific reasons why the BMA is proposed to be established as a Schedule 3A National Public Entity, which has implications for the status and conditions of employment of the Commissioner. Given the envisaged integration of staff from various organisations into the BMA, including SARS, there are strong advantages to having conditions of employment and remuneration that are more favourable than that of Directors-General.

11. **The Commissioner should ensure that the staff working for the Authority has passed security checks and relevant officers have taken oath of confidentiality. [Section 11(h).]**

Response: Every BMA official and employee will undergo a security clearance process (see Clause 13(3) of the Bill). It can be further considered that this be an explicit responsibility of the Commissioner.

12. **The Commissioner should report to the Minister quarterly instead of annually. [Section 11(b).]**

Response: A reference to quarterly reporting can be considered.

- 13. The section 4 in section 16(1) is not supposed to be Chapter 4 of the Bill? Please check section 16(1).**

Response: Clause 16 deals with the terms and conditions of employment. There is no error regarding the cross-referencing as the clause seeks to reinforce the intention as entrenched in clause 4.

- 14. Why do we exclude clauses 18(e) and 18(f) on the exercise of power without a warrant? [Section 19.]**

Response: The two issues in paragraphs (e) and (f) deal more with criminal aspects than mere movement of persons and passage of goods. These are secondary steps to be undertaken through referral by the officer. However, these exclusions should be reconsidered. Should these changes be made then there will be no need for clause 19 anymore. Furthermore clause 18 can be amended to indicate that addresses instances "with or without a warrant".

- 15. How about including a provision that empowers the Authority to seek the assistance of SAPS and SANDF in case of undue resistance. [Section 21.]**

Response: Clause 21(c) already makes provision for an officer "to be accompanied by any such other person who may be required to assist" and this may be SAPS or SANDF or any other person. Consideration can be given to strengthen this clause making it obligatory for the SANDF or SAPS to assist the BMA under specific circumstances (that will need to be defined).

- 16. Why shouldn't we provide in writing the prohibition of the Authority to fundraise? Or accept donations from private persons, Non-Governmental Organisations or other states. [Section 23.]**

Response: All funding and financial matters of the BMA will be subjected to the Public Finance Management Act, 1999 (Act No. 1 of 1999) (the "PFMA"). The PFMA does not explicitly prohibit fundraising or donations, however, there are procedures stipulated as to how this should be declared and handled. Since the fiscal environment is uncertain, it may be prudent to consider making it more stringent and onerous for the BMA to accept donations or to fundraise, but without an explicit prohibition.

- 17. Provide for norms and standards for BMA accommodation to be established. [Section 24(4).]**

Response: This is implied, but consideration can be given to be more explicit about the responsibility and need to provide norms and standards for BMA accommodation. A provision could be considered wherein the Minister should provide these norms and standards after consultation with other relevant Ministers.

- 18. The Minister must automatically be the Chairperson of the Inter-Ministerial Consultative Committee ("IMCC"). The President to designate the deputy Chairperson. [Section 25(2).]**

Response: Cabinet deliberated on this matter. It was noted that the Minister will be reporting on the BMA and as such it may be wise to have another Minister as the Chairperson. However, it should be noted that the Minister of DHA is not expressly barred from being appointed as the Chairperson of the IMCC. However, it is recognized that there may be advantages to having the Minister as chairperson of the IMCC since the BMA and border management generally would be the responsibility of this Minister.

- 19. The IMCC is huge and include the Ministers who have an interest but not affected by the Authority. I will suggest exclusion of Agriculture, Cooperative Governance, Environmental Affairs, Health and Economic Development. They may be invited to the meeting if there is a matter that affects their portfolio directly. [Section 25(3)(b).]**

Response: All the Departments were consulted and they expressly supported their membership in the IMCC given the impact that the BMA will have on various functions and mandates of Departments. It is recognized that this structure could be large and cumbersome. Consideration can be given to keeping this IMCC limited to the core principal Departments, with others included as and when the need arises.

- 20. The IMCC meetings should be held at least quarterly. [Section 25(4)(b).]**

Response: This can be considered.

- 21. Provide for the IMCC to have a right to invite any person to its meetings to assist on any matter. [Section 25(5).]**

Response: This is implied in section 25(5), but it can be made more explicit.

- 22. The Border Technical Committee should advise the Minister on a quarterly basis. [Section 26(3).]**

Response: As a structure comprising of various organs of state, the Border Technical Committee ("BTC") performs an advisory role to the IMCC. The Commissioner is the Chair of the BTC, who can be requested to submit reports to the Minister, as and when required. A further obligation for the BTC to provide quarterly reports to the Minister can be considered.

- 23. Provide that disputes of BTC shall be referred to the IMCC (Dispute resolution mechanism) [Section 26(6)].**

Response: The BTC is consensus-based and advisory in nature and not a decision-making structure. It is not envisaged for disputes to be formalised in the BTC. It is further assumed that all recommendations of the BTC will reflect on the merits and demerits of various recommendations. However, consideration can be given to the scenario of possible BTC disputes to be referred to the IMCC.

- 24. The Minister should initiate the process for the conclusion of implementation after advice of BTC. [Section 28(2).]**

Response: This can be considered, although it is implied. It is envisaged that IMCC resolutions will be informed by the advice of the BTC.

- 25. The Minister should delegate to any official of the Authority in consultation with the Commissioner. The Minister to ordinarily enter the Authority through the Commissioner to enhance governance. [Section 29(1)]**

Response: Care should be taken not to limit the powers and discretion of the Executive Authority. It is recognized that the Commissioner should be consulted on matters that will affect the duties and powers of the Commissioner.

- 26. To insert the following at the end of these subsections:**

- a) **on request. [Section 30(1)];**

Response: Section 33(2) of the Constitution, as well as the Promotion of Administrative Justice Act, 2000, guarantees the right to be provided with written reason. Departing from a constitutional legislation will render the Bill unconstitutional.

b) after consultation with the official concerned [Section 30(3)];

Response: This can be considered, however, this is implied and further that this is more operational than legislative. For any review or appeal by the Commissioner or Minister, the Commissioner or Minister must form an independent mind in relation to the review or appeal taking into account the decision, as well as the steps, taken by the officer. Should we explicitly legislate that the Commissioner or Minister must decide on the review or appeal “after consultation with the officer” this would have the effect that they must meet with the officer which might be impossible. In effect, we will be adding a beauracratic layer to the system.

c) after consultation with the official concerned. [Section 30(5).]

Response: This can be considered, however it is implied. The same issues as raised above apply here.

27. Include the report of the IMCC on these reports. [Section 32.]

Response: IMCC reports are generally internal to the executive arm of Government. However, reporting to Parliament can be strengthened by considering the submission of quarterly BMA performance reports.

28. Provide for the taking oath of confidentiality of the BTC members and any other person expected to receive confidential information from officials of the Authority. [Section 34.]

Response: This is implied since Accounting Officers and senior officials are bound by confidentiality requirements in their conditions of employment. However, this proposal can be considered to strengthen the current provisions.

29. Include the issuing of illegal instructions to official or officer. [Section 36(1)]

Response: This can be considered, although it is implied.

- 30. Insert 'exit' at the end of this sentence – "...detention in respect of the entry, exit or use..." --- [Section 36(3).]**

Response: This can be considered.

- 31. Why not use organised labour rather than trade unions? [Section 37(3) and 41.]**

Response: The Labour Relations Act, 1995 and the Basic Conditions of Employment Act, 1997 use the term trade unions. The use of this term should be retained for consistency.

- 32. Provide for Parliament to be involved in the regulations making process, [Section 37(4).]**

Response: All regulations will be submitted to Parliament for comment, but not for approval.

- 33. Provide for acceptance in writing by transfers. [Section 38(1)(d).]**

Response: This can be considered, subject to existing provisions of the Public Service Act, 1994 and in terms of the collective bargaining.

- 34. Transferred assets should be in working conditions. [Section 39(2).]**

Response: This can be considered. However, it should be noted that by providing for the transfer to only be done if the asset is in working conditions might affect the full BMA operations.

A handwritten signature in black ink, appearing to be 'D. Green', with a large, stylized loop at the end.