



MINISTER  
HOME AFFAIRS  
REPUBLIC OF SOUTH AFRICA

Private Bag X741, Pretoria, 0001 Tel: (012) 432 6600 Fax: (012) 432 6675  
Private Bag X9102, Cape Town, 8000 Tel: (021) 469 6500 Fax: (021) 461 4191

Enquiries: Adv L T Sebelemetja; Tel: (012) 406 4271; Cell 082 907 1831; Fax: 0865 144 267  
Email: [Tsietsi.Sebelemetja@dha.gov.za](mailto:Tsietsi.Sebelemetja@dha.gov.za); Our Ref: 1/2/3/1-1/2017

Mr. MS Masango, MP  
Chairperson: Portfolio Committee on International Relations and Cooperation  
Parliament of the Republic of South Africa  
PO Box 15  
**CAPE TOWN**  
8000

Dear colleague,

**COMMENTS BY THE DEPARTMENT OF HOME AFFAIRS ON THE FOREIGN SERVICE BILL, 2015**

1. The above matter refers.
2. On 18 November 2016 I received a letter from you requesting the Department of Home Affairs (the "Department") to submit comments and inputs on the Foreign Service Bill, 2015 (the "Bill"), as one of the Departments that is directly affected by the Bill. A copy of the letter is attached hereto and marked Annexure "A" for your ease of reference.

The comments, as requested, are as follows:

**Ad Preamble**

3. The Preamble provides for the management, administration and functioning of the Foreign Service of the Republic and to provide for the operational requirements that are suitable and supportive of the operations of the Foreign Service in a global

environment. Having had regard to the various provisions of the Bill, it appears that the Preamble is not in line with the spirit, purport and objectives of the Bill.

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## Ad Clause 1

4. Clause 1 deals with definitions to be used in the Bill. Clause 1 contains the definition of “Diplomatic Academy”, which, read with clause 6 of the Bill, seeks to establish the Diplomatic Academy. This is not in line with the spirit, purport and objects of the Bill as the Bill, in my view, seeks to establish and regulate foreign service. It is suggested that the definition of “Diplomatic Academy” be deleted in its entirety.

## Ad Clause 2

5. Clause 2 provides for the establishment of the Foreign Service to “promote and advanced the international relations and cooperation of the Republic by representing the Republic in an effective, coherent and comprehensive manner abroad.”.
6. Clause 2(1)(a): The Department suggests the deletion of the word “shall” after the word “that” and to be replaced by the word “must”. This is in line with the established drafting style in the Republic.
7. Clause 3(d) provides that “[T]he Foreign Service is managed and administered by the Department and to this end the **Department** must ...**render consular services to South African nationals in the Republic** and abroad...”. The “Department” is defined in clause 1 as the Department of International Relations and Cooperation (“DIRCO”). Consular assistance is help and advice provided by the diplomatic agents of a country to citizens of that country who are living or traveling overseas. Such assistance may take the form of provision of replacement travel documents, advice and support in the case of an accident, serious illness or death.<sup>1</sup>
8. According to DIRCO’s website, the Department offers “[H]umanitarian assistance in emergencies (i.e. situations involving destitution or distress of South African nationals abroad).”. This includes the following:

“8.1 providing a support service in hostage cases as well as assistance rendered to South African nationals abroad in cases of political turmoil or natural disasters. In the event of an emergency, we communicate on behalf of South African nationals abroad with the next of kin and/or friends in South Africa. Logistical support and non-financial assistance for South African nationals who are in hospital abroad or who may need

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<sup>1</sup> [https://en.wikipedia.org/wiki/Consular\\_assistance](https://en.wikipedia.org/wiki/Consular_assistance) visited on 23 November 2016.

to be repatriated to SA for urgent medical or professional attention. Communication with the next-of-kin in the event of reported death or life threatening illness or injury.

- 8.2 provide logistical assistance with the importation of mortal remains (including import permit applications) or burials of South African nationals abroad. We do not provide financial assistance arising from the death of a South African national abroad. Provide guidance to next-of-kin and liaison with relevant stakeholders in the search for missing persons abroad and/or determination of the whereabouts of South African nationals abroad under certain circumstances. Assistance to families under certain circumstances in facilitating the transfer of funds to family members in distress/destitute abroad where commercial means is non-existent or limited or where levels of destitution dictate. The family member in South Africa must deposit the funds at a regional office of the Department of Home Affairs.
  - 8.3 advice, guidance and support to a custodial parent/guardian in matters of child abduction or child stealing. Where there is evidence that the health and safety of the child is in jeopardy, the matter is treated as an emergency. Abduction and kidnapping covers forcible restrictions on the freedom of movement of persons for different outcomes. All instances of kidnapping outside of South Africa should be reported to the Operations Room immediately. We provide advice and guidance to the next of kin of affected nationals;
  - 8.9 assistance and guidance to foreign representatives regarding their nationals in South Africa who need Consular assistance.”.
9. Having regard to the provisions of clause 2(3)(d) of the Bill, it presupposes that DIRCO will now be responsible for consular services to South African citizens whether within the Republic or outside of the Republic. This will result in DIRCO being responsible for, for example, issuance of passports, travel documents, Identity documents, *et al.* This cannot be the intention of the Bill as same will mean that the Department of Home Affairs will no longer be responsible for this mandate.
10. Further, DIRCO cannot “render” the said services to South African citizens outside of the Republic but should be able to coordinate as such is not DIRCO’s mandate. This subclause should be reworded to reflect same. Further, the manner in which the section, under consideration, is captured is both erroneous and narrow. It is erroneous because it gives an impression that consular renders service to nationals in the Republic whilst it does the opposite. Secondly, consular does not only services

nationals but grants visas to foreigners who wish to travel to the Republic. The functions of consular are outlined in the Vienna Convention on Consular Relations.

Therefore, we recommend that clause 2(3)(b) of the Bill be reworded as follows:

*“coordinate consular services through issuance of civic documents to South African nationals and visas or appropriate documents to persons wishing to travel to South Africa”.*

### **Ad Clause 3**

11. Clause 3(1) makes mention of the appointment of “locally recruited personnel”. The Department submits that reference must be made to Article 8 of the 1961 Vienna Convention on Diplomatic Relations.
12. Clause 3(1) further seems to suggest that the Minister of DIRCO will be responsible to determining the “prescribed requirements” to be met by an employee for deployment outside the Republic without any consultation with other relevant affected Ministers. This view is propped by having regard also to the wording of clause 12 of the Bill. The Minister must, if granted such powers, do so in consultation with other affected Ministers as not doing so will be usurping the constitutional mandates of other Ministers.
13. The reading of clause 3(2) implies that only Director-General of DIRCO will approve any person to take up a position at a South African Mission. This, in view thereof, seeks to take away approval powers from, for example the Minister of Home Affairs, other Ministers to approve deployment of officials within their respective Departments.

### **Ad Clause 4**

14. This provision seems to be in order.

### **Ad Clause 5**

15. The clause deals with circumstances under which employees deployed at South African Missions may be recalled. However, the clause does not go as far as providing whether such an employee, once recalled, will still be entitled to draw the benefits as if

he or she is still deployed at a Mission. Although in the case of **Minister of Home Affairs & Another v The Public Protector of the Republic of South Africa & Another** (Case No.: 76554/2013, decided on 26/10/2016) the High Court was approached to decide, *inter alia*, whether the remedial action actions of the Public Protector were binding, the Public Protector had found, *inter alia*, that “the Department's decision to withhold the payment of his Cost of Living Allowance (“COLA”) on the basis of his withdrawal was improper and prejudiced him...”. In view of this decision, I am of the considered view that Clause 5 should attempt to provide for this matter, namely whether an employee who has been recalled following the provisions of Clause 5 will, will not, continue to draw his or her cost of living allowances as if he or she is still employed at a Mission whilst in the Republic and pending the finalisation of his or her disciplinary hearing.

16. We further wish to indicate that this provision must be in line with the Determination and Directive on the Foreign Service Dispensation issued by the Minister of Public Service and Administration in terms of sections 3(5)(a) and 5(6)(b) of the Public Service Act, 1994.

#### **Ad Clause 6**

17. Clause 6 provides for the establishment of a Diplomatic Academy. The Bill seeks to establish a foreign service for the Republic of South Africa with its functions as stipulated in clause 2 of the Bill. The establishment of a Diplomatic Academy falls outside of the scope of this Bill and therefore *ultra vires*. We submit that this clause be deleted its entirety. Should DIRCO agree with our input, there will be consequential amendments with regard to clause 1, namely the deletion of the definition of “Diplomatic Academy”.
18. However, Clause 6(2) provides that “[T]he Diplomatic Academy may **cooperate with any institution of higher learning and other experts** in the Republic or elsewhere to achieve its objectives.” [Emphasis added]. This provision, in my view, does not cater for collaboration or cooperation with other Departments and organs of state thereby not recognising the constitutional mandates of the affected Departments and organs of state.

### Ad Clause 7

19. Clause 7 deals with the establishment of coordination and other mechanisms. Clause 7(1) gives the Minister discretion whether to establish “such consultative, coordination and other mechanisms” as he or she deems necessary. This does not go as far as establishing the said mechanisms. I am of the considered view that the provision should simply establish the mechanisms and also detail who will form of the consultative, coordination or other mechanisms. I am further of the view that Clause 7(1) as provided is ambiguous.
20. Clause 7(2) is referenced to the Intergovernmental Relations Framework Act, 2005 (Act No. 13 of 2005) (the “IGRA”). The provision empowers the Minister to determine “guidelines regarding the coordination and alignment of activities relating to international relations between the three spheres of government...”. The Minister does not, as per the provision, does not have to consult or otherwise. This, in my view, is *contra* the spirit, purport and objects of the IGRA and may be found to be unconstitutional.

### Ad Clause 8

21. According to **Merriam-Webster Dictionary** the word “vest” means “to place or give into the possession or discretion of some person or authority especially to give to a person a legally fixed immediate right of present or future enjoyment of an estate”. Clause 8(1) provides therefore that all immovable property, management and accountability “vests” in the Minister of International Relations and Cooperation. We submit that this cannot be the intention of the Bill as all State immovable property is owned by the State and not a Minister. The Minister, or any Department, might have custodial rights over an immovable property but not “ownership” as the clause suggests.
22. Clause 8(2) further provides that “[N]otwithstanding any other law, the Minister may on such terms and conditions as he or she may deem fit **acquire and dispose of** and lease, rent, maintain or construct structures or installations on or refurbish any immovable property **belonging to the Department** for the use of the South African Missions or for any other purpose he or she may deem necessary for the efficient



functioning of the Foreign Service.”. This will not be in line with provisions of other pieces of legislation, for example the Public Finance Management Act, 1999 (Act No. 1 of 1999).

23. In view of the above, it is suggested that clause 8 be reworded as follows:

**“Assets**

8. (1) Subject the provisions of the Government Immovable Assets Management Act, 2007 (Act No. 19 of 2007), the Minister must account for the management and utilisation of all immovable property utilised by the Foreign Service outside the Republic.

(2) The Minister may acquire and dispose of or lease, rent, maintain or construct structures or installations on or refurbish any immovable property belonging to the Department for the use of the South African Missions or for any other purpose he or she may deem necessary for the efficient functioning of the Foreign Service.”.

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**Ad Clause 9**

24. Clause 9 empowers the Minister to “make any policy, code or prescribe any ancillary or incidental administrative or procedural matter that is necessary to prescribe for the proper administration and management of the Foreign Service and its members which is consistent with this Act...”. This gives the Minister wider powers which might encroach on the constitutional mandates of other affected Ministers. It is, therefore, my considered view that the Minister must, at least, make such policies, code or prescribe any ancillary or incidental administrative or procedural matter in consultation with other affected Ministers. Should the provision be retained as is, it might be unconstitutional.

**Ad Clause 10**

25. This provision seems to be in order.

**Ad Clause 11**

26. Clause 11 deals with offences committed by a member of the Foreign Service whilst outside of the Republic and subject same to the provisions of section 110A of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (the “CPA”). Section 110A of the CPA provides as follows:



“110A. (1) Notwithstanding any other law, any South African citizen who commits an offence outside the area of jurisdiction of the courts of the Republic and who cannot be prosecuted by the courts of the country in which the offence was committed, due to the fact that the person is immune from prosecution as a result of the operation of the provisions of—

- (a) the Convention on the Privileges and Immunities of the United Nations, 1946;
- (b) the Convention on the Privileges and Immunities of the Specialised Agencies, 1947;
- (c) the Vienna Convention on Diplomatic Relations, 1961;
- (d) the Vienna Convention on Consular Relations, 1963; or
- (e) any other international convention, treaty or any agreement between the Republic and any other country or international organisation,

and that person is found within the area of jurisdiction of any court in the Republic which would have had jurisdiction to try the offence if it had been committed within its area of jurisdiction, that court shall, subject to subsection (2), have jurisdiction to try that offence.

(2) No prosecution may be instituted against a person under subsection (1), unless—

- (a) the offence is an offence under the laws of the Republic; and
- (b) the National Director of Public Prosecutions instructs that a prosecution be instituted against the person

(3) At the conclusion of the trial against a person under this section, a copy of the proceedings, certified by the clerk of the court or registrar, together with any remarks as the prosecutor may wish to append thereto, must be submitted to the Minister of Foreign Affairs.”.

27. This provision seems to be in order.

### **Ad Clause 12**

28. Clause 12 empowers the Minister to make regulations. However, certain regulations envisaged in this Clause are not subjected to consultation with, for example, Unions and other affected Departments. I am of the considered view that the provision seems to empower the Minister to make regulations contrary to established legal principles which is contrary to the principle of legality.

### **Ad Clause 13**

29. Clause 13 deals with the short title and commencement of the Bill and this provision seems to be in order.

### **Ad Memorandum on the objects of the Bill**

30. Should the suggested inputs be in order, the Memorandum on the objects of the Bill will need to factor the changes suggested.

### **General comment**

31. The Department requests the Portfolio Committee to consider inserting a provision in the Bill to deal with revenue collected by the Missions in respect of Home Affairs-related services. The Department of International Relations and Cooperation (DIRCO) should make deposits (of such revenue) directly to the national revenue and be accounted for by DIRCO, and not by the Department of Home Affairs.

Kind regards,



**MR MKN GIGABA, MP**  
**MINISTER OF HOME AFFAIRS**  
DATE: 2017/02/20