

Inputs by the National Treasury to the Portfolio Committee on International Relations and Cooperation on the Foreign Service Bill [Bill 35-2015]

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national treasury

Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

Inputs on the Foreign Service Bill

Clause 1: Definitions

- **“national department”** - this definition must also refer to section 7(2)(c) of the Public Service Act since that provision deals with national government components.
- **“prescribed”** - propose that this definition be amended to mean “prescribed by regulation in terms of section 12”.
- **“this Act”** - delete the words “all its subordinate” and add after word “directives” the words “issued in terms of this Act”. However, see comment in respect of clause 9 regarding the need for instruments such as policies and codes.

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Clause 2: Foreign Service

- Members of the Foreign Service are first and foremost, employees of the Government of the Republic of South Africa, as provided for under the Public Service Act (PSA), 103 of 1994. The conditions of employment are therefore primarily prescribed and defined in terms of the PSA. Therefore, the definition of such employees in the Foreign Service should encompass the definition as envisaged in the PSA
- In clause 2(1)(a) “shall” should be replaced with “must”
- Alignment with existing legislative and policy frameworks of Government.

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Clause 3: Requirements for members of Foreign Service

Clause 3.(2) A member of the Foreign Service ...transfer must be approved by the Director-General of the Department of International Relations and Cooperation.

- 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.
- Notwithstanding the security and other eligibility requirements, deployment of officials other than those ordinarily employed by the Department of International Relations and Cooperation is a prerogative of the respective line departments, therefore individuals who are transferred or seconded to a South African mission, multilateral institution serve at the full discretion of their respective Executive Authority. To confer such responsibility to the Director-General of International Relations and Cooperation relegates the responsibility of constitutional mandated portfolios.

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Continuation of **Clause 3...**

- Such provision carries a potential conflict with the Public Finance Management Act on matters relating to accountability and management of resources. Officials posted in missions abroad remain the responsibility of the accounting officer of the relevant national department.
- The concept of “**transfer**” in an employment environment is associated with a permanent arrangement where a person is moved from one position to another in the same Department or to another Department or from SARS to a Department while that is not the case when a person takes up a position at a SA Mission. For example a member of Department of Defence is not transferred to DIRCO when they become a member of the Foreign Service and takes up a position at a SA Mission. He/she remains an employee of DOD. It is therefore advised that the proviso be omitted and that following be added to cl 3(2) after “competent authority”:
 - ...*“A member of the Foreign Service may not take up a position at a South African Mission until such time as he or she has met the prescribed requirements and has obtained a security clearance as issued by a competent authority...”*

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Clause 4: Head of Mission. This provision seems to be in order.

Clause 5: Recall of member of Foreign Service

- It should be emphasised that the disciplinary codes and processes of dealing with alleged misconduct should be coherent and consistent with existing statutory frameworks, prescripts and regulations generally applicable in the South African public service.
- In addition, the recall of a member of the Foreign Service should follow a consultative process that includes the respective Executive Authority responsible for the original posting of official.

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Clause 6: Diplomatic Academy

- Diplomatic training material and curriculum development should be done in a collaborative manner, with “expert input” by the affected departments, and in consultation with the Department of Higher Education and Training
- Clarification is required on the training of national department officials on specialised, highly technical areas of competencies such as negotiation skills at bilateral, regional or multilateral structures and processes.

Clause 7: Establishment of coordination and other mechanisms

- The section is purports such coordination mechanisms are discretionary upon the Minister of International Relations and Cooperation.
- In National Treasury’s view, such coordination structure is a necessity considering the complexities and functional requirements of foreign services. Furthermore, the Bill needs to incorporate the provisions as a critical element in the administration and management of Foreign Service. It should further outline how these structures will be constituted.

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Clause 8: Assets

- Clause 8(1) of the Bill states “Notwithstanding the provisions of the Government Immovable Asset Management Act , 2007 or any other law, all immovable property utilised by the Foreign Service outside of the Republic, any right in respect of such property and the management and accountability thereof must vest in the Minister....”
- The word to “vest” is assumed to have the same meaning as “ownership”, therefore a misrepresentation to suggest that the Minister of International Relations and Cooperation “owns” foreign immovable properties. The Department, not the Minister has *custodial responsibility* with relations to assets as these remain under the ownership of the State.
- Functions pertaining to management of immovable properties outside of South Africa came about as a result of devolution of function by the Department of Public Works.

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Continuation of Clause 8: Assets ...

- The specific provision regarding assets, (movable and immovable assets) should be consistent with existing provisions of the Public Finance Management Act (PFMA) and in accordance with Treasury Regulations and specific instructions prescribed in terms of 42; 66 and 70 and 71, and 76 of the PFMA and adhere to procurement procedures in terms of the alienation, letting, acquisition and disposal of State assets.
- Most critically, the provisions of the Bill, provided that they assign custodianship, should not create superseding powers over the PFMA and should be exercised and applied within the context of existing legislative and policy frameworks, for example, GIAMA.

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Clause 9: Policies, codes or directives

- This Act should not create a parallel public service regime. For members of the Foreign Service who are already employed in the public service, it should be noted that matters relating to their conditions of service (personnel and employment related) are currently regulated in terms of the Public Service Act and all its prescripts or sectoral employment legislation (e.g. for SAPS, Defence and Intelligence Services).
- It is proposed that where Minister issues any instrument concerning conditions of service or personnel or employment related matters, the Minister must do this in consultation with the Minister for the Public Service and Administration.
- While *consultation with Minister of Finance* is mentioned, the provision does not create binding effects on matters of fiscal prudence. As a result, this may give rise to fiscal risks as DIRCO could unilaterally decide on generous conditions for those posted abroad.

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Continuation of Clause 9: Policies, codes or directives ...

- In addition, this introduces fragmentation in the remuneration framework and may set precedence, incite other sectors to unilaterally decide on conditions of service thereby leading to a 'race-to-the top'.
- The National Treasury submits therefore that policies, codes and directives in so as far as they have an implication for pay (remunerative) structures or an adjustment of existing foreign allowances, should be with the *concurrence* of the Minister of Finance.
- The National Treasury wishes to submit to the Portfolio Committee that the Minister must, at least make such policies, codes or prescribe any ancillary or incidental administrative and or procedural matter in consultation with other affected Ministers, to avoid encroaching on the constitutional mandates of the respective Ministers.

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Continuation of Clause 9: Policies, codes or directives ...

- In terms of the standard operating procedures, conditions of service for employees generally or categories of employees, have historically been determined at the Public Service Coordinating Bargaining Council (PSCBC). The provisions of the Bill effectively wrestle this responsibility away from the Mandating Committee to one Minister who will decide on these. The rationale behind giving the powers to the MIRCOC is not clear as well.
- Currently, the Foreign Service Dispensation is pursuant to the collective bargaining process issued as a determination under the Public Service Act by the Minister of Public Service and Administration. The Bill seems to create concurrent powers with relations to related matters.

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Clause 10: Delegation of powers. This provision seems to be in order.

Clause 11: Offences. This provision seems to be in order.

Clause 12: Regulations

- (See also comments on Clause 9).
- Clause 12(1) empowers the Minister to make regulations regarding the transfer of a member of the Foreign Service, conditions of service applicable to members of the Foreign Service, categories of members of the Foreign Service, disciplinary matters, adjustment of allowances of members of the Foreign Services transferred to South African Missions, training requirements and secondment.
- Many of the issues dealt with in clause 12(1) are matters already regulated in the public service in terms of the Public Service Act and also in terms of the various sector employment legislation. This clause seems to enable the creation of a special regime.

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Continuation of Clause 12: Regulations ...

- It is advised that the provisions of this clause should be made subject to any collective agreement applicable to the Foreign Service and, to avoid conflicting regimes, in consultation with the Minister for the Public Service and Administration.
- The use of term “employee” in clause 12(1)(b) and (f) which is defined in clause 1 to include DIRCO employees, employees of other national departments and a member of the Foreign Service should be clarified. Can the Minister determine training requirements for employees of other national departments? Clause 12(1)(b) does not limit it to training requirements relating to the Foreign Service. Secondments of employees are regulated in detail in section 15 of the Public Service Act and also in the regulations under that Act.
- Please see comment regarding the use of the term “transfer” in clause 3 which also applies to clause 12(1)(a)

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Continuation of Clause 12: Regulations...

- Clause 12(2) - This clause is problematic. What is the justification for not requiring the regulations made in terms of this Act to be published in the Gazette? The only regulation for which there may be justification is regulation 12(1)(d) which deals with security requirements.

Inputs on the Foreign Service Bill

General comment

- The Bill is silent on the budgeting and financial governance arrangements. Treatment of revenue collection in foreign missions, repatriation of funds from the department of International Relations and Cooperation, treatment of foreign exchange fluctuations (gains and losses).