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The Chairperson
Portfolio Committee on Public Service & Administration
Parliament

Per email: ~~psa~~pamb@parliament.gov.za

SUBMISSION OF COMMENTS ON DRAFT PUBLIC ADMINISTRATION BILL, 2023

I refer to the invitation to comment on the draft Public Administration Bill, 2023 ("the Bill"), as published in Government Gazette 48449 dated 21 April 2023, and would like to submit the following comments on behalf of the City of Cape Town ("the City").

1 GENERAL COMMENTS

Although this iteration of the Bill tabled in Parliament is an improvement on previous iterations that sought to create a single public service, the City remains concerned that this version remains a case of legislative over-reach, although this can only truly be tested when draft Regulations are issued in terms of, in particular, the inserted Section 17.

It is our view that it is at least implicit in Chapter 7 of the Constitution – more specifically in municipalities' executive authority and right to administer local government matters described in section 156 – that municipal councils have the power to determine the structure and size of their municipalities' administrations, and terms and conditions of employees. In the First Certification case the Constitutional Court dealt with a similar implied power for provincial governments, i.e. the power to appoint their own employees:

> *"What is important to [provinces'] autonomy ... is the ability of the provinces to employ their own public servants ... Although there is no specific provision dealing with this, it is a power implicit in the executive authority of the provinces which is vested in the Premiers by NT125(1), and in the other provisions of NT125 which*

presuppose that the provinces will have an administrative infrastructure necessary for the implementation and administration of laws. The IC does not specifically empower the provinces to set up their own administrations and to employ their own servants, but this has been done by all the provinces, and it has never been doubted that the power to do this is inherent in their executive authority to implement laws." [1]

Further, section 153 of the Constitution requires every municipality to "***structure and manage its administration*** *... to give priority to the basic needs of the community, and to promote the social and economic development of the community*" (emphasis added).

Based on these sections, the City believes that wide-ranging regulation by national legislation of the setting up, structuring and management by municipalities of their administrations, and their employment of municipal officials, is not covered by residual legislative power in section 164 of the Constitution. The fact that municipal administration and employees are excluded from the public service, and hence the national legislation regulating the public service, is another indication that the Constitution intends that these are matters to be determined by the municipalities themselves.

The City thus believes that the Constitution provides that municipalities are the primary repositories of the powers to determine the structure of their administrations and staff establishments; and, among other powers, to determine the terms and conditions of employment, subject to collective bargaining arrangements and the terms of existing employment contracts. Therefore, national legislation concerning these matters must conform to the provisions in question. Regarding regulation by national legislation, national (and provincial) powers of interference are effectively confined to supervision, monitoring and support of local government. National and provincial governments must foster the autonomy and integrity of local government.

Section 155(7) in particular provides that the national government (and provincial governments) have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of local government matters by regulating the exercise by municipalities of their executive authority. However, as the Constitutional Court recently ruled, the National Legislature may not confer powers on a Minister to prescribe to municipalities how they should exercise their powers; it can only confer powers to set minimum norms and standards.[2]

[1] First Certification para 276
[2] Outdoor Advertising, Constitutional Court Order, 2023

Similarly, section 195(3) of the Constitution envisages legislation to "*ensure the* ***promotion*** *of*" the values and principles enshrined in section 195(1). It does not empower the national legislature to control the structure and functioning of the entire public administration, or to control the terms and conditions of employment of all employees in the public administration. Those are matters dealt with by sections 197(1) and (2) in relation to the public service, which comprises only national and provincial components of the public administration, and not municipalities.

This means that powers to confer contained in section 14 of this Bill, which seek to remove disparities in public administration and provide for a national mandate for determination of conditions of service with financial implications, may only be exercised to promote the principles of section 195, and to supervise, monitor and support municipalities. As a consequence, regulations issued in terms of the new section 17A must be broad enough to allow municipalities to exercise their powers.

This is only rational, as there are 257 metropolitan, district and local municipalities across the country, with vastly wide-ranging characteristics – in financial means, geographic size, urban or rural character, cost of living, etc. – and it would be impossible to define a single set of conditions of employment that meets all of their needs – hence the powers conferred on them to administer and manage themselves.

An important word in the proposed section 17A is '***unjustifiable***'. Implicit in this word is that a municipality has the power to implement terms and conditions that are 'disparate' from the national standard, but must provide a rational justification for doing so.

In addition to the above general comments focused primarily on the constitutionality of section 14, the following specific comments are offered:

2 SPECIFIC COMMENTS

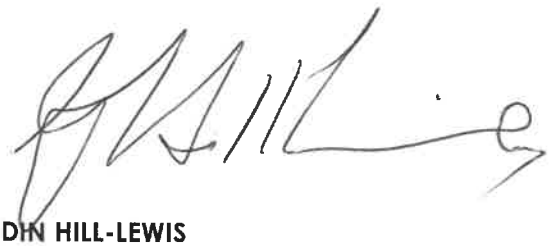
#	Reference	Title	Relevant text	Comment
1.	1(e)	**Amendment of section 1 of Act 11 of 2014**	by the insertion after the definition of ''Office'' of the following definitions: '' 'organ of state' means— (a) a national department, a provincial department, a national government component or a provincial government component; (b) a public school as contemplated in Chapter 3 of the South African Schools Act, 1996 (Act No. 84 of 1996); (c) a municipality; (d) a public entity; or (e) any institution performing a function in terms of the Constitution or a provincial constitution or performing a public function in terms of any legislation;	The Constitution offers the following definition: "organ of state" means - (a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer; The Systems Act follows the constitutional definition, and so the MFMA by implication – "*'organ of state' means an organ of state as defined in section 239 of the Constitution;*"

				The reason for using a more restrictive definition in this Bill is not explained. Consider using the definition in the Constitution, or including a reason for a more restrictive definition in the Objects of the Bill.
2.	6. (8A.(1))	**Insertion of section 8A in Act 11 of 2014** **''Conduct of employee or former employee participating in award of** **work to service providers"**	8A. (1) If a contract is concluded with a person (the ''service provider'') to provide services or goods (the ''work'') to an institution against remuneration exceeding a prescribed amount, an employee who— (a) set criteria for the award of the work to the service provider; or (b) evaluated or adjudicated the providers for the award of the work; or (c) recommended or approved the awarding of the work, may not within 12 months after the conclusion of the contract (the ''12-month period'')— (i) accept employment with that provider or appointment to a board of the provider or provide any service to the provider for payment in money or in kind; or (ii) receive any other gratification from the provider.	The Supply Chain Management Regulations provide for committees of officials, i.e. a bid specification committee, a bid evaluation committee; and a bid adjudication committee. Singular employees do not 'set criteria', or "evaluate or adjudicate'. It is suggested that this clause is amended to refer to 'an employee who is a member of, or provides administrative support to, a committee that—'

3 CONCLUSION

The City welcomes the opportunity to comment on the draft Bill, and trusts that the comments as provided will be duly considered, and that the Portfolio Committee will ensure that final Bill does not impinge unlawfully on the powers and functions of municipalities as a distinct sphere of the public administration.

Yours faithfully,



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EXECUTIVE MAYOR