

NATIONAL EDUCATION HEALTH AND ALLIED WORKERS' UNION



SUBMISSION ON THE PUBLIC ADMINISTRATION MANAGEMENT AMENDMENT BILL

Department of Public Service and Administration

July 2023

1. INTRODUCTION

The National Education Health and Allied Workers' Union (NEHAWU) wishes to make the following submission on the Public Administration Management Amendment Bill (PAMA). The bill was tabled in parliament in May 2023 and gazetted in April 2023.

This submission by the National Union is largely informed by the consolidated approach and comments developed by organised labour through the Public Service Co-Ordinating Bargaining Council (PSCBC). NEHAWU has developed our perspectives on the PAMA bill by locating it within the principles set out in Chapter 10 of the Constitution, in particular; Sections 195, 196 and 197. Moreover, the PAMA bill is meant to find legislative synthesis with Chapter 13 of the National Development Plan (NDP), which speaks to building a capable and developmental state. NEHAWU therefore tested the bill with the principles outlined in the Constitution and NDP. NEHAWU has further developed our perspective on the notion characterised as “professionalisation” of which the bill purports as a key objective.

NEHAWU fully supports the strengthening and capacitation of the public service through progressive reform, however we are not convinced that the restructuring proposed in the amendment will in any way correlate to building a capable and developmental state. The comments below on specific amendments provide context to our rejection of the bill in its current form.

2. CONTEXT

Since the 1994 political and juridical breakthrough the public service apparatus of the state has been radically transformed from an oppressive arm of a racist regime, serving solely the interests and needs of the minority white population, to the current dispensational structure of our public service. As a transformational union, NEHAWU has been at the forefront in the struggle to overhaul existing systemic and structural challenges within our public service. This goes beyond ensuring that workers we represent in the public service are protected and that the principles contained in the Labour Relations Act (Act No 66 of 1995), the Basic Conditions of Employment Act (Act no 75 of 1997) and the Employment Equity Act (Act No 55 of 1998) are adhered to.

Chapter 10 of the Constitution outlines the core principles attached to public administration in South Africa. Section 195, Subsection 1, further sets out the basic values and principles governing public administration. These provisions are buttressed by Section 196, which prescribes the establishment of a public service commission and Section 197, which characterises the public service and sets out the following provision: *“Within public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.”*

Chapter 13 of the NDP is dedicated to “Building a capable and developmental state”, it outlines key tenets to this characterisation, and these include:

- South Africa needs to build a state that is capable of playing a developmental and transformative role.
- The public service needs to be immersed in the development agenda but insulated from undue political interference.
- Staff at all levels must have the authority, experience and support they need to do their jobs. This will require a more long-term approach to skills development.

- Improving relations between national, provincial and local government requires a proactive approach to resolving coordination problems.
- The governance structures for state-owned enterprises (SOEs) should be simplified to ensure clear lines of accountability and stable leadership.

The NDP's 2030 Vision further asserts that in order to address the twin challenges of poverty and inequality, the state must play a transformative and developmental role. For this to be undertaken, the NDP stipulates the requirements of ensuring well-run and effectively coordinated state institutions with skilled public servants who are committed to the public good and capable of delivering consistently high quality services, while prioritising the nation's developmental objectives.

The principles outlined above, according to the NDP, rely on key performance measures which seek to strengthen state capacity by promoting:

- Improved leadership, governance and accountability for a functional, efficient and integrated state;
- Professional, meritocratic and ethical public administration and social compacts and engagements with stakeholders and;
- Enhancing confidence and trust in the state.

The PAMA bill seeks to amend the Public Administration Management Act, 2014. The Department of Public Service and Administration (DPSA) indicates that the amendment to the bill is a necessary legislative step that would lead to the establishment of a "single public administration project". Moreover, that PAMA bill will seek to create a cohesive and synergised public administration. In addition, DPSA has proposed the following amendments to the bill:

- National School of Government – To create the National School of Government as a national department instead of establishing it as a higher education institution (amendment of section 11 of the Principal Act).
- Minimum norms and standards – To repeal section 16(2) of the Principal Act, clauses 12-13 will allow the Minister for the Public Service and Administration to issue norms and standards in respect of the promotion of values and principles contemplated in section 195 of the Constitution to be done through regulations following the processes considered in section 18 of the Principal Act.
- Clause 13- Office of Standards and Compliance – Section 17(7) of the Principal Act requires the Minister responsible for the Public Service and Administration to prescribe the powers of the Office and its members. The Principal Act does not provide for the functions of individual members; therefore, it is proposed that it is not necessary for the powers of members to be prescribed.
- New provisions 17A and 17B – The proposed section 17A seeks to address the removal of unjustifiable disparities across the public administration, including public entities.
- Section 17A provides a process for the Minister to, after consultation with the relevant Minister responsible, prescribe norms and standards to establish the upper limits of remuneration and conditions of service for employees who do not fall within the scope of the relevant bargaining council. The above section also empowers the Minister to prescribe steps to remove unjustifiable

disparities among employees in and across institutions and public entities, provided that such measures must not reduce an employee's salary unless provided for in an Act of Parliament or collective agreement.

- Section 17B seeks to regulate the determination of conditions of service with financial implications and provides for the coordination of mandating processes for collective bargaining in the public administration, including public entities.

3. THE NOTION OF PROFESSIONALISATION

The concept on the professionalization of the public service stems from our prior interactions and participation at the level of the Public Service Co-Ordinating Bargaining Council (PSCBC). The notion also finds resonance in the key performance measures of the NDP, which speaks to a "Professional, meritocratic and ethical public administration and social compacts and engagements with stakeholders..." The concept of meritocracy relates to the selection and recruitment of candidates based on their skills and qualification for the job. This approach is mainly practiced in Western, European and certain Asian countries. It is a system that claims to strengthen the prioritisation and maximisation of performance. It is also claimed to promote equal grounds for people without recognizing race, gender, affiliation or class preference. China, Singapore, Germany, and the United States of America make use of variations of the meritocratic approach.

NEHAWU fully supports the strengthening of the capacity of the public service and is in agreement that a complete overhaul is required. However, as evident in our comments on particular amendments in the bill, any overhaul must be undertaken within the context of strengthening the public service through the building of a developmental state. Unfortunately, the PAMA bill does not do this, instead DPSA has presented a cosmetic legal framework void of any synthesis with the principles contained in the Constitution and the NDP prioritisation of building a developmental state. NEHAWU firmly believes that politicians should not appoint public servants and that public servants' employment tenure should not be determined by a politician.

The bill is being used to appease incoherence within the governing party's ability to appoint capable and competent public servants. The fixation with meritocracy also falls short of fully comprehending the history and nature of South Africa's political landscape. Notwithstanding, so-called cadre deployment occurs across all political lines, it is farcical to believe that a public servant is not political and should be a neutral bureaucrat. The current challenges facing the public service are largely as a result of the nature of our tenderised state, the influence of corruption and corporate capture of state apparatus.

It is also erroneous to place qualifications of a potential employee in the same light as competence. Academic qualifications are positive indicators but competency is based on practice. The notion of professionalization is in direct contradiction with building a developmental and capable state, it places a prioritisation of operating the public service as if it is a private company, making use of the New Public Management framework.

4. COMMENTS ON THE PUBLIC ADMINISTRATION MANAGEMENT AMENDMENT BILL

Proposed Amendment

To amend section 5(2)(c) of the PAMA.

Section 5 of the PAMA regulates individual transfers provides that any employee of the transferring institution may be transferred within an institution or transferred to another institution in a manner and on such conditions as prescribed.

Section 5(2) currently provides as follows:

“(2) An employee may only be transferred:

- (a) where reasonable grounds exist;*
- (b) if the employee is suitably qualified, as envisaged in section 20(3) to (5) of the Employment Equity Act, 1998, for the intended position upon transfer;*
- (c) if the employee requests or consents in writing to the transfer; and*
- (d) within that institution by the relevant authority, or to another institution with the concurrence of the relevant executive authorities of the transferring and recipient institutions.”*

The PAMAB seeks to amend section 5(2)(c) to provide as follows:

“(c) if the employee requests or consents in writing to the transfer or in the absence of consent, after due consideration of any representations made by the employee, if the transfer is operationally justified; and..”

NEHAWU Comments

- NEHAWU notes that amendment is to provide for the transfer of employees across spheres of government without the employee’s consent if it is operationally justified and after consideration of representations by the affected employee concerned. The alleged purpose of the amendment is to ensure mobility of employees across spheres of government to where human resource deficiencies exist or where operational requirements necessitate.
- The proposed amendment is prejudicial to employees within the public service and there may be compelling personal reasons as to why an employee may not be able to be transferred.
- Further, Section 5(2)(C) posits the responsibility and onus on the employee in terms of transference, this is illogical, the onus must rest on the employer and not the employee.
- NEHAWU therefore rejects the suggested amendment in its entirety and for employee consent to be required for any proposed transfer.
- If this is not feasible, it is proposed that the proposed amendment be expanded to make provision for principles of fairness and equity. In this regard, and in accordance with developed employment principles, the test as to whether an employee should be transferred should be both objective and subjective. Objectively, an employee may need to be transferred if it is operationally justified, however, subjectively, there may be personal reasons as to why the employee cannot be transferred.
- In the circumstances, labour propose that the subsection be amended to provide for where the employee requests or consents in writing to the transfer or where the transfer is operationally justified and the employee’s refusal to consent is unreasonable taking in account, amongst other things, the representations made by the employee and the personal circumstances of the employee concerned.
- In addition, NEHAWU proposes that a mechanism be developed and included to ensure that the employee’s representations and personal circumstances were in fact taken into account when determining the reasonableness of the employee’s refusal. The state should have the onus of

demonstrating that the employee's refusal was unreasonable having due regard to any representations made and personal circumstances of the employee.

- Lastly, NEHAWU understands that certain employees may not be able to be transferred given the particular role they perform or having regard to their skills and expertise. Labour would accordingly suggest that any such excluded roles or positions be clearly set out in the PAMA.
- In addition, Section 4 further states that (a) subject to paragraph (m), any appointment, promotion or transfer to any post on the educator establishment of a public school may only be made on the recommendation of the governing body of the public school and, if there are educators in the provincial school due to operational requirements, that recommendation may only be made from candidates identified by the Head of Department, who are in excess and suitable for the post concerned.
- Further note (Chapter B of the PAM, which provides for transfer of serving educators in terms of operational requirements (ELRC Collective Agreement 2 of 2003/ 4 of 2016 (Annexure A).
- NEHAWU is of the view that any transfer without consent may be open to abuse and in some instances may result in constructive dismissals.

This amendment is opposed.

Proposed Amendment

To amend section 6(2)(c) of the PAMA.

Section 6 of the PAMA regulates secondments and provides that any employee of an institution may be seconded to another institution or to any other organ of state in such manner, and on such terms and conditions as may be prescribed.

Section 6(2) currently provides as follows:

“(2) An employee may be seconded:

- (a) if the employee possesses the necessary skills and knowledge for the intended position at the time of the secondment; and*
- (b) if the employee requests or consents to the secondment; or*
- (c) in the absence of consent, after due consideration of any representations by the employee, if the secondment is justified.”*

The PAMAB seeks to amend section 6(2)(c) to provide as follows:

“(c) in the absence of consent, after due consideration of any representations by the employee, if the secondment is operationally justified.”

NEHAWU Comments

- Section 5, in its current form, is prejudicial to employees within the public service on the basis that it allows for the secondment of employees in the absence of consent where such secondment is justified. The proposed amendment merely seeks to insert the term “*operationally*” to ensure that any justification of a secondment is based on the State's operational requirements.
- The proposed amendment accordingly limits the circumstances in which the state may second employees to circumstances where it is “*operationally*” required. On this basis, we would support the proposed amendment. We would, however, suggest a mechanism be developed and included to ensure that the employee's representations were in fact taken into account when determining whether to second the employee concerned. The state should have the onus of demonstrating that the representations made by the employee were taken into account and that the secondment is factually operationally justified.

- Whilst we appreciate that it may not be feasible having regard to the current wording of section 6, it would be in the interests of employees to amend section 6 to align with section 5 regulating transfers and to accordingly suggest that the proposed wording we have set out above also be incorporated for purposes of section 6(c).
- Lastly, if there are certain employees that cannot be considered for secondment given the particular role they perform or having regard to their skills and expertise, we would suggest that such excluded employees or roles be clearly set out in the PAMA.

The suggested amendment is rejected.

Proposed Amendments

To substitute section 8 of the PAMA.

Section 8 regulates employees conducting business with the State and provides that, subject to the Minister's determination of the transaction, an employee may not conduct business with the State or be a director of a company incorporated in terms of the Companies Act, 2008 that conducts business with the State.

NEHAWU comments

- NEHAWU welcomes the principle of restricting an employee's ability to conduct business with the state. Moreover, NEHAWU is averse to Government services are being outsourced, these are functions which are core to be conducted and delivered by Government. NEHAWU further rejects the notion merely amending the Act to prevent public servants from conducting business with the state is not adequately addressing the concerns or elements which give rise to corruption and malfeasance.

Proposed Amendment

To amend section 10(2) of the PAMA.

The proposed amendment seeks to require an institution to ensure that it makes appropriate provision in its budget for the compulsory training of employees and within its available resources for the education and training of its employees.

NEHAWU Comments

- The outcome of the compulsory training should not be a prerequisite for appointment or transfers.

NEHAWU rejects the amendment.

Proposed Amendment

To substitute section 11 of the PAMA.

The proposed amendment seeks to establish the National School of Government and requires the School to: (i) provide training and education courses in the public administration; (ii) to collaborate and enter into agreement with training institutes; (iii) to conduct tests in respect of training and education course; and (iv) to issue diplomas or certificates.

NEHAWU Comments

- There is no need to create another Department, especially noting that Government is claiming a lack of funds. This function should rather be allocated under Higher Education and Training.

NEHAWU rejects the amendment.

Proposed Amendment

To repeal section 12 of the PAMA in its entirety.

Section 12 provides that the Minister, in consultation with the Minister responsible for higher education and training, may direct the School to provide qualifications, part-qualifications and non-formal education as recognised by the National Qualifications Framework or the South African Qualifications Authority.

NEHAWU Comments

- NEHAWU rejects the amendment to sections 9, 11 and 12 in its entirety.

Proposed Amendment

To amend section 13(1) and section 13(2) of the PAMA.

In terms of section 13, the Minister may, after approval by the Cabinet, direct that the successful completion of specified education or training is a prerequisite for specified appointments or transfers and is compulsory in order to meet development needs of any category of employees. The proposed amendment seeks to remove reference to any approval required by the Cabinet.

NEHAWU Comments

NEHAWU rejects the amendment.

Proposed Amendment

To delete section 16(2) of the PAMA.

Section 16 of PAMA regulates minimum norms and standards. In this regard, section 16(1) provides that the Minister may prescribe minimum norms and standards regarding:

- a) the promotion of values and principles referred to in section 195(1) of the Constitution;
- b) capacity development and training;
- c) information and communication technologies in the public administration;
- d) integrity, ethics and discipline;
- e) the disclosure of financial interests;
- f) measures to improve the effectiveness and efficiency of institutions;
- g) disclosure of information relating to pending disciplinary action and concluded disciplinary proceedings where the employee was found guilty; and
- h) any other matter necessary to give effect to the administration or implementation of this Act.

Section 16(2) currently provides that “the Minister must prescribe minimum norms and standards in terms of subsection (1)(a) in consultation with the relevant executive authority.” The proposed amendment seeks to delete subsection (2) in its entirety.

NEHAWU Comments

- NEHAWU notes that the alleged consequence of this proposed amendment is that “*if the Minister were to issue norms and standards in respect of the promotion of values and principles contemplated in section 195 of the Constitution, same will be done through regulations following the processes set out in section 18 of PAMA.*” This is not, however, made clear in terms of the proposed amendment.
- As it stands, the proposed amendment seeks to remove the obligation on the Minister to consult with the relevant executive authority when prescribing minimum norms and standards regarding the promotion of values and principles referred to in section 195(1) of the Constitution. This will afford the Minister with extensive powers that will not be subject to scrutiny by the relevant executive authority.
- NEHAWU rejects the proposed amendment and require that the Minister be required to at least still consult with the relevant executive authority. We propose that clause 16(2) be amended further to provide that the prescription of minimum norms and standards by the Minister be subject to any collective bargaining process or that consultation takes place with both the executive authority and labour.
- Given that this would place an additional burden on the Minister, we note that this may not be feasible. In the circumstances, we would suggest that, at minimum, section 16(2) be amended to make it clear that the Minister will be required to comply with the processes set out in section 18 of PAMA when seeking to prescribe minimum norms and standards. This will at least afford labour, with the opportunity to provide comments on any proposed minimum norms and standards.

Proposed Amendment

To provide for the insertion of new sections 17A and 17B in the PAMA.

The proposed new section 17A seeks to regulate the removal of disparities in public administration. Section 17A provides that:

“In order to remove unjustifiable disparities in relation to remuneration and conditions of employment in the public administration, the Minister may, subject to applicable labour legislation and legislation governing the employment of employees in the public administration and after consultation with the committee of Ministers contemplated in section 17B, prescribe the factors that institutions and public entities must take into account in determining remuneration and conditions of service for employees or any category of employees in the public administration.”

The proposed new section 17B seeks to regulate the mandate for the determination of conditions of service with financial implications. Section 17B provides that:

“(a) Subject to the Labour Relations Act, the laws governing the employment of employees and any collective agreement, the determination of any conditions of service for employees in the public administration must be made in accordance with the factors prescribed in section 17A and with the concurrence of a committee of Ministers.

(b) For purposes of paragraph (a) –

(i) ‘conditions of service’ include annual salary adjustments, salary scales or levels, performance bonuses, pay incentives, pension benefits and any other benefits with financial implications;

(ii) the committee of Ministers must consist of the Minister, the Ministers responsible for finance, local government, educators, public enterprises, defence, police, correctional services and such other Ministers as the Cabinet may designate (if any), and must function the same as a committee of the Cabinet.”

NEHAWU Comments

On Section 17A

- NEHAWU notes that section 17A seeks to allow the Minister to prescribe factors to be taken into account by institutions in the public administration “to remove unjustifiable disparities in the determination of remuneration and conditions of service for employees in the public administration”.
- In short, we understand that the Minister may, after consultation with the newly established committee of Ministers (dealt with in further detail below), prescribe the factors that determine levels of remuneration and terms and conditions of service for certain categories of employees. Whilst section 17A provides that the Minister’s determination is subject to “applicable labour legislation and legislation governing the employment of employees in the public administration”, it is not clear what legislation this refers to.
- Although the proposed section 17A refers to the determination of factors to be taken into account as opposed to the actual determination of remuneration and conditions of service, the consequence of section 17A will be to undermine the collective bargaining process and on this basis is unlikely to pass constitutional muster.

NEHAWU rejects the insertion of section 17A in its entirety. If this is not feasible, the following alternative is proposed:

- The collective bargaining process should be sufficiently carved out under section 17A. In this regard, the section should be amended to not only provide that it is subject to any collective bargaining process but that the factors will be prescribed after due consultation with labour and should there be a conflict between the factors so determined and any collective bargaining process or agreement, the collective bargaining process or agreement will prevail.
- The reference to consultation with the committee of Ministers should be removed. This is unworkable and undermines the power of the employer and recognised trade unions to determine and negotiate terms and conditions of service.
- It should be made clear that whilst the Minister may seek to prescribe the factors that are to be taken into account to determine remuneration and conditions of service, the Minister is not granted the power to prescribe employees’ levels of remuneration and/or conditions of service.

On Section 17B

- NEHAWU notes that the claimed purpose of the insertion of section 17B is to provide for the coordination of mandating processes for collective bargaining in the public administration, “...without eroding existing collective bargaining structures and processes...”. We are of the view, however, that section 17B will in fact erode existing collective bargaining structures.
- Section 17B provides that the determination of conditions of service, which is widely defined to include remuneration and all benefits, must be made in accordance with the factors prescribed in section 17A and with the agreement of a committee of Ministers. The collective bargaining process is, however, a process that takes place between an employer and representative trade unions. The requirement to obtain approval from a newly established committee of Ministers will accordingly undermine the collective bargaining process and is unlikely to pass constitutional muster.
- Even if section 17B is subject to the Labour Relations Act and collective bargaining, it is completely unworkable in its present form. This is because it will be significantly difficult, if not possible, for labour to obtain agreement from the committee of Ministers.

NEHAWU therefore rejects the insertion of section 17B in its entirety. If it appears that section 17B is still likely to be inserted notwithstanding the above, the legislature will need to consider the following:

- It is not sufficient for the determination to be subject to a concluded collective agreement. The collective bargaining process as a whole should be sufficiently carved out.
- As regards the committee of Ministers, what would be regarded as a quorum? How will “concurrence” be determined? Will a unanimous decision be required or would majority be sufficient?

Proposed Amendment

To insert a new section 18A in the PAMA.

Section 18A provides that if there is any conflict relating to the matters dealt with in the PAMA arises between the PAMA and the provisions of any other law save the Constitution or any Act expressly amending the PAMA, the provisions of the PAMA will prevail.

NEHAWU Comments

- NEHAWU notes that the purpose of this proposed amendment is to create a mechanism to manage the conflicts that may arise with other legislation by providing that the provisions of PAMA will prevail in the event of conflict with other Acts in relation to matters dealt with in PAMA.
- This proposed amendment is important when one has regard to the above-mentioned proposed amendments on the basis that the provisions of PAMA will prevail over any other Act, including the Labour Relations Act which regulates processes relating to collective bargaining. It will accordingly be important to ensure that the proposed amendments sufficiently carve out the collective bargaining process in order to avoid a conflict between the provisions of PAMA and the Labour Relations Act.
- The scope of this Act is contradicting the Constitution of South Africa, including other Acts in the Public Service which regulates employment. This includes, but are not limited to, the Educators Employment Act, the Labour Relations Act, the South African Police Act, the Basic Conditions of Employment Act and the Correctional Services Act and applicable Sectoral Collective Agreements. This PAMAB cannot supersede the above-mentioned Acts and has no authority to amend it.

NEHAWU rejects the amendment.

Proposed Amendment

Amendment to Section 38(3)(a) on termination of service.

NEHAWU Comments

- Termination of service should be dealt with in terms of applicable legislation, collective agreements and relevant prescripts.

NEHAWU rejects the amendment.

5. CONCLUSION

NEHAWU has studied the proposed amendments contained in the bill and tested its veracity with the claimed objectives stated by the DPSA. In this regard the bill falls very short of comprehensively and substantively addressing deficiencies within the public service. The bill is delinked from principles contained in Chapter 10 of the Constitution and is clearly very far from encompassing aspects in the NDP, in particular building a developmental and capable state.

This bill is a piece-meal attempt at reforming the public service through benchmarking corporate management practices that are completely contradictory to what is required in building a developmental state. The notion of professionalisation is an abstract concept used to bolster the image of the bill, whilst not addressing the current challenges within the public service. NEHAWU further aligns itself with the perspectives of organised labour through the PSCBC, we reject any attempts at the commissioning of the CCMA on the jurisdiction of Public Sector Collective Bargaining Councils.



Zola Sapetha
General Secretary