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Ms T Mgweba
Portfolio Committee on Public Service and Administration

Attention: Mr Masixole Zibeko

Per e-mail:

pamab@parliament.gov.za (regarding the Public Administration Management Amendment Bill); and
psab@parliament.gov.za (regarding the Public Service Amendment Bill)

Dear Chairperson

PUBLIC SERVICE AMENDMENT BILL [B 13—2023] and PUBLIC ADMINISTRATION MANAGEMENT AMENDMENT BILL [B 10—2023]

1. Thank you for the opportunity to comment on the above Amendment Bills.
2. Please find attached the comments of the Western Cape government (WCG) on both Amendment Bills, marked as Annexure A. Please note that in the attached comments, both Amendment Bills are referred to as “the Amendment Bill” and the Public Service Act, 1994 (Proclamation 103 of 1994) and the Public Administration Amendment Act, 2014 (Act 11 of 2014), are both referred to as the “principal Act”. Please also note that in the attached comments, the terms “executive authority” and “head of department” are referred to as “EA” and “HOD”, respectively.

3. Devolution of certain powers from executive authorities to heads of department:

The WCG does not support the proposal to devolve powers relating to human resource management from executive authorities to heads of department.

- 3.1 Executive authorities are responsible and accountable for delivery on their portfolios via their respective departments. This has always been the position. The Public Service Amendment Bill in clause 2 now expressly provides that an executive authority is accountable for the department in his or her functional area.
- 3.2 The Public Service Amendment Bill proposes to devolve the administrative powers that relate to human resource management, which are currently conferred on executive authorities, to heads of department. The stated rationale is that executive authorities should not be burdened with administrative functions, but should focus on their strategic and policy functions.
- 3.3 The proposed shift of the human resource-related powers (e.g., appointment, secondment, transfer, and dismissal of employees) limits the role of an executive authority to that of oversight and accountability. Oversight is in and of itself narrow. Removing executive authorities' participation and decision-making powers will detract from their ability to account for delivery, via their departments, on their respective portfolios. For example, in the context of the Public Finance Management Act, 1999 (Act 1 of 1999) (the PFMA), oversight is exercised through reporting by the head of department to the executive authority. This mechanism is fundamentally flawed in that it renders oversight reliant on the flow of information from the head of department to the executive authority. The flaw stems from the fact that the information may not be forthcoming or may be incorrect.
- 3.4 *Masuku v Special Investigation Unit* 2021 JDR 0720 (GP) shows an instance in which information was indeed shared with the executive authority, but where it was reported by the SIU (and the court held that the report of the SIU was rational) that the executive authority did not act appropriately or timeously upon receipt of the information and consequently that the executive authority did not discharge his duties.
- 3.5 Following on from the example above, section 84 of the PFMA provides that a charge of financial misconduct against a head of department must be investigated and disposed of in terms of the statutory or other conditions of employment that relate to the head of department.

- 3.6 The Public Service Amendment Bill follows the scheme of the PFMA i.e., clause 2(c) of the Amendment Bill provides that the executive authority is accountable for the department and in clause 4 it is provided that the head of department must assist the executive authority to fulfil the latter's accountability and responsibility obligations. This support, although not specified in the Amendment Bill, will presumably also take the form of reporting, which may not be sufficient to empower and enable executive authorities to perform their oversight role.
- 3.7 Many would argue that the extent to which executive authorities were largely excluded from the scope and provisions of the PFMA warrants reconsideration. The reality is that executive authorities are given a wide margin to avoid accountability and being sanctioned on the ground that they have not been enabled by their heads of department to perform their oversight and accountability role adequately. The Public Service Amendment Bill appears to adopt the same approach, creating potential for executive authorities to avoid taking responsibility for poor human resource management decisions (and resultant adverse impacts on service delivery) on the ground that they have no say in the administration of human resources and that it is the head of department that should be held accountable.
- 3.8 The Public Service Amendment Bill in clause 11 removes the power of an executive authority to dismiss an employee. The specific comments on this clause in the attached template of comments points out that this includes a head of department. The President or a Premier, as the case may be, holds the power to dismiss a head of department, given that it involves a career incident as contemplated in section 12(1) of the Act. In fact, all disciplinary action against a head of department falls within the purview of the President or a Premier, as the case may be. Effectively, it means that the Public Service Amendment Bill proposes to limit an executive authority to exercising oversight and being accountable, and even imposes a duty on the executive authority to hold his or her head of department accountable for the administration of the department. However, in the absence of a delegation by the President or a Premier, as the case may be, an executive authority would not have any power to take disciplinary action against his or her head of department. Likewise, conduct that does not constitute misconduct is not within the purview of the executive authority to deal with but will, in terms of section 12(1) of the Public Service Act, 1994, stay within the purview of the President or a Premier to deal with as a career incident of a head of department.
- 3.9 All of this shows that an executive authority, given the proposed amendments, will have no authority to effectively manage a head of department who transgresses and in respect of whom disciplinary or corrective action is required. Clearly, an executive authority who is accountable for the performance of a department, must be given or

retain their participatory and decision-making powers that relate to human resource management, particularly, the power to dismiss employees. Without these powers, an executive authority is ill-equipped to manage a non-performing or poor performing head of department or one who transgresses and who is allocated all decision-making power in as far as human resource functions are concerned. The potential implications for departments could be disastrous, also considering the length of time that it normally takes to remove a head of department who commits misconduct or performs poorly.

- 3.10 The current power of executive authorities to delegate powers and functions under the Public Service Act, 1994, allows flexibility in relation to decision-making pertaining to human resource management, with executive authorities being able to delegate powers to heads of department, which can be further delegated to other levels of staff. It is practice for executive authorities to retain only such powers as are considered necessary for them to ensure that the department manages its human resources in a way that promotes delivery on the policy, strategic and operational objectives of their departments. It is therefore not as if executive authorities are burdened by administrative matters under the Act, but rather a case of conferring on them the necessary power to be able to properly account for the administration of the department, which is vital to delivery on their executive portfolios.

4. Elimination of unjustifiable disparities in the public administration:

- 4.1 On a policy level, the change proposed in clause 14 of the Public Administration Management Bill is problematic in so far as it extends to public entities as well. The concern is that clause 14 may have far-reaching or unintended consequences for provincial public entities. In this regard it is enquired whether a Socio-Economic Impact Assessment was conducted. If so, it is requested that the WCG be furnished with a copy thereof.
- 4.2 Whilst it is understood that there might be a need to regulate the employment conditions of employees at entities to a greater extent, it may mean that the current legislation governing these entities may need to concomitantly be amended. This would apply particularly to entities with independent boards where the board determines salary levels and conditions of employment. This could create disparities (pending the amendment of such legislation) and potentially deteriorate board independence.

These general comments are amplified in the clause-by-clause commentary (attached hereto) on the two Amendment Bills.

Please also note that the WCG submitted comments on the Public Administration Management Act, 2014, when it was in Bill form. Whilst some comments were addressed, several comments were not. The remaining outstanding concerns with regard to the Public Administration Management Act, 2014, are important to note again because the law reform process being undertaken by the Department of Public Service and Administration is an apt opportunity to reconsider these remaining issues. Accordingly, the remaining outstanding concerns bear repetition, and these have also been captured in the attached comments for the Portfolio Committee's consideration.

In the interests of facilitating co-operative government and intergovernmental relations, the WCG requests that the Portfolio Committee kindly provides a response to the WCG comments submitted herewith.

Yours faithfully,

ALAN WINDE
PREMIER: WESTERN CAPE