

THE PUBLIC ADMINISTRATION MANAGEMENT AMENDMENT BILL

Department of Public Service and Administration



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CONSTITUTIONALITY OF THE PUBLIC ADMINISTRATION MANAGEMENT AMENDMENT BILL

- The Bill respects-
 - ✓ section 40(1) of the Constitution which provides that the government is constituted as national, provincial and local sphere which are distinctive, interdependent and interrelated.
 - ✓ section 164 of the Constitution however provides that any matter concerning local government not dealt with in the Constitution may be prescribed by national legislation or by provincial legislation
- The matters concerning local government dealt with in the Constitution are set out in Parts B to Schedules 4 and 5. Labour relations, in particular collective bargaining, and employment matters are not included in the Schedules.
- Accordingly, labour relations, collective bargaining and employment conditions are a national legislative competency as the existing legislative framework governing local government labour and employment relations demonstrates:
 - ✓ Labour Relations Act, Basic Conditions Act, Employment Equity Act, and the staff matters in the Municipal Systems Act
 - ✓ No one has ever raised the constitutionality of these laws applying to local government
- The Bill therefore seeks to enable and strengthen the public administration to promote effectiveness, efficiency and good governance with a common purpose and better coordination across Government without encroaching on the constitutionally identified roles of the different spheres of government.



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CONFLICTING LEGISLATION

- The Bill does not seek erode existing laws but rather to leverage on the existing frameworks and to strengthen same to ensure that there an integrated public administration system that is accompanied by a strengthened legislative, governance and implementation framework.
- The Bill has been scrutinised to avoid duplication or conflict.



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DEFINITIONS (CLAUSE 1)

□ Proposal to insert a definition of “second”

Response: The Act does not refer to “second” but uses words ‘secondments’ in the heading of section 6 and thereafter “seconded” and “seconding”. In this context, the ordinary meaning of the words within the context of secondments (the temporary transfer of an official or worker to another position or employment) is used and therefore it is not necessary for a definition to be inserted.

□ Proposal that the definition of “organ of state” be aligned to section 239 of the Constitution

The definition in the Bill aligns to the Constitution but does not provide for the exclusion of a court or judicial officer who will fall within the scope of the prohibition contemplated in section 8 of the principal Act.

The definition refers to departments, public schools, municipalities, public entities and institutions performing Constitutional powers or public functions for ease of interpretation.



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INDIVIDUAL TRANSFERS (CLAUSE 2)

☐ Rationale for transfers

- ✓ The transfer provision enables transfers between municipalities and between the public and municipalities. To allow for mobility of people and skills to where they may be required without requiring termination of employment (loss of benefits) and reemployment elsewhere.

☐ Abuse by employers

- ✓ The transfer is subject to the consent of employees therefore employees must be willing to transfer. There is no need to require representations where consent is a prerequisite.
- ✓ The provision ensures that the transfer does not interrupt the employee's continuity of employment and that no employee may suffer any reduction in remuneration and conditions of service, unless the employee consents.



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INDIVIDUAL TRANSFERS (Cont...)

- Practicality of transfer of employees between local government and national and provincial government due to its different mandates
- ✓ The transfer of an employee is conditional on the employee being suitably qualified (sec 5(2)(b))
- Employees will be imposed on other institutions
- ✓ The relevant executive authorities must agree to the transfer (sec 5(2)(d))
- Relocation and other concomitant costs
- ✓ The relocation costs are provided for in separate existing collective agreements. Where gaps exist, these matters will be addressed through relevant processes or regulations.



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SECONDMENTS (CLAUSE 3)

Operationally justified should be defined

- ✓ The principal Act already provides that an employee may be seconded without consent, after due consideration of any representation by the employee, if the secondment is justified. The Bill seeks to insert the word “operationally” to ensure that secondment is justified in a way that relates to the work of the affected Department.
- ✓ The word “operationally” which is inserted seeks to avoid arbitrary secondments.
- ✓ The ordinary meaning of the word “operationally” (in a way that relates to the work or activities of the institution) applies.

NB: It must therefore be noted that it is not necessary to define words that take the normal dictionary meaning as this will limit its interpretation.



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CONDUCTING BUSINESS WITH ORGAN OF STATE (CLAUSE 5)(1)

❑ Definition of *ex officio* should be inserted

- ✓ It is proposed that a definition for “*ex-officio*” be inserted after the definition of “*employee*” in clause 5 of the Bill as follows-
“*ex officio*” relates to an employee who holds office as a director of a public entity solely as a consequence of that employee’s employment in the public administration.

❑ It is proposed that the section 8(4) of the Bill might be open to abuse and should be deleted.

The blanket prohibition on employees not doing business with an organ of state has unintended consequences for employees who are required to perform certain functions that are necessary for the functioning of the State. Examples are-

- (a) Participation in marking, training, teaching or lecturing at public educational institutions
- (b) Activities undertaken as part of continued professional development
- (c) Supporting the IEC as voting staff during elections

In the event that the list of activities is inconsistent with the intention of the law or undermines the primary law, the determination can be reviewed by the court.



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CONDUCTING BUSINESS WITH ORGAN OF STATE (2)

□ section 8(4)-

- Meaning of the term “**remunerative but not for profit**” be clarified and examples be provided of instances which would be considered “remunerative but not for profit” is provided.

The intention was to acknowledge that an employee may be excluded from the provision to the extent that the employee may receive remuneration for the performance of that transaction, but the employee may not profit from that activity.

A possible further amendment to clause 8(4) could be as follows-

(4) The Minister may prescribe that certain transactions between an employee and an organ of state, which are remunerative but not for profit and which are necessary for the functioning of an organ of state, do not constitute conducting business with an organ of state for the purposes of this section.

- The proposed amendment should be revised and redrafted to the extent that it still enables employees to be directors of not-for-profit companies but with limitations imposed.

Employees who are directors of non-profit companies may not conduct any business with the State as this has been abused in some cases.



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□ Section 8(4)-

- The issue of beneficial owners of companies that do business with the state should also be taken into consideration and included in the amendment of the PAMA Bill. The Proposed that Section 8 is finalised with reference to the Public Procurement Bill. Clause 13 of the current Public Procurement Bill automatically excludes persons related (including spouses) to public office bearers, party leaders, public servants, municipal employees, etc. from making bids in procurement in the institution in which such relatives serve.

Beneficial ownership is currently managed through the financial disclosure process and consequent lifestyle audits to determine whether there is unexplained wealth. If the lifestyle audit reveals unexplained wealth, the matter is referred to the relevant law enforcement agencies for investigation. National Treasury is considering this matter more extensively.

- It is also proposed that section 8 should also made applicable to employees of public entities.

This proposal will require research and policy direction.



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- ❑ Sections 17A and 17B constitute an impermissible infringement of the right to collective bargaining
 - The proposed new section 17A and B does not infringe on the right to collective bargaining.
 - The wording of both sections clearly indicates that the removal of unjustifiable disparities is subject to the LRA and collective agreements
 - The purpose of section 17B is to ensure co-ordination between the different spheres and organs of state. It does not infringe on collective bargaining, if labour does not agree to SALGA's mandated offer, the unions are free to go on strike or refer the dispute to arbitration in respect of essential services.



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- ❑ Section 17A and 17B of the Bill seeks to regulate local government matters which infringes on the mandate, scope and jurisdiction of the Minister of Cooperative Governance and Traditional Affairs (MCOGTA).

The Bill does not encroach on the jurisdiction of the MCOGTA. Any Regulations issued will be done with the concurrence of the MCOGTA.

The Minister of Finance and the MPSA have a role to play in the management of finances and the coordination of the public administration. In any event, section 71 of the Municipal Systems Act allows other parties to be consulted. This provision will require that the MOF and MPSA are consulted as a norm across the public administration.



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REMOVING UNJUSTIFIABLE DISPARITIES (CLAUSE 14)

- It is recommended that clarity for the term “unjustifiable disparities” be defined

The term “unjustifiable disparities in remuneration and conditions of service” is capable of aligning to the ordinary meaning of the words. The interpretation thereof is simply a difference in remuneration and conditions of service that cannot be justified. This concept takes its cue from the Employment Equity Act.

- Organised labour recommended that further consultation be facilitated with all affected parties before the proposed sections 17A and 17B are brought into operation. Following discussions, it was suggested that the steps for the removal of unfair disparities should not reduce remuneration and conditions of service of an employee except in terms of an Act of Parliament or a collective agreement.

Conditions of service of employees (for employees falling within the scope of a bargaining council) are usually determined through collective bargaining processes and therefore any amendments will be subject to collective bargaining processes. In the event that the Portfolio Committee disagrees, the alternative proposal to section 17A(b) is to limit the provision to employees who fall outside the scope of the relevant bargaining council and be redrafted as follows-

17A. In order to remove unjustifiable disparities in relation to remuneration and conditions of service for employees who do not fall within the scope of the relevant bargaining council, the Minister may, subject to applicable labour legislation, any collective agreement and legislation governing the employment of employees in the public administration and after consultation with the relevant Minister responsible, prescribe—

(a) norms and standards to establish the upper limits of remuneration and conditions of service; and

(b) steps to remove unjustifiable disparities in remuneration and conditions of service provided that these steps may not reduce any employee’s remuneration.



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MANDATE FOR DETERMINATION OF CONDITIONS OF SERVICE WITH FINANCIAL IMPLICATIONS (CLAUSE 14)

- ❑ Concerns raised that the provision impedes the collective bargaining authority of local government. The DPSA is of the view that the provision does not offend the Constitution. In the event that the Portfolio Committee requires an alternative provision the following is proposed around the following principles-
 - Section 17B is redrafted to distinguish between the public service, local government and public entities.
 - The Committee of Ministers is retained for the public service and the employer is required to obtain a mandate from the COM before a collective agreement with financial implications is entered into.
 - In respect of local government and public entities it is required that the Minister of Finance and the MPSA be consulted before collective agreements with financial implications are entered into.
 - In determining a mandate, before entering into any agreement or before determining conditions of service, employers must take into account affordability and any other factor prescribed by the Minister in consultation with the Minister of Finance.



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