

REPUBLIC OF SOUTH AFRICA

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# **PUBLIC ADMINISTRATION LAWS GENERAL AMENDMENT BILL**

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*(As introduced in the National Assembly (proposed section 76); Explanatory summary of  
Bill and prior notice of its introduction published in Government Gazette No. 44383 of  
1 April 2021)  
(The English text is the official text of the Bill)*

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(DR. LA SCHREIBER, MP)

**[B 16—2021]**

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**GENERAL EXPLANATORY NOTE:**

[                    ]     Words in bold type in square brackets indicate omissions from existing enactments.

                         Words underlined with a solid line indicate insertions in existing enactments.

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## **BILL**

To amend—

- the Public Service Act, 1994, so as to insert and delete definitions; to provide for the duty to report to the Commission when an executive authority or head of department acts on a direction of the Commission; to provide that special service benefits to heads of departments are not permissible on dismissal of a head of department; to provide for clarity in respect of directions and recommendations made by the Commission; to provide for the limitation of political rights under certain circumstances; to remove the Commission from the ambit of the Public Service Act, 1994 (Proclamation No. 103 of 1994);
- the Public Service Commission Act, 1997, so as to insert and amend definitions; to elucidate the power of the Commission to give directions related to recruitment, transfers, promotions and dismissals; to grant the Commission the power to take remedial action; to provide for the Office of the Commission, its human resources, administration and management; to provide for delegations by the executive authority; and
- the Public Administration Management Act, 2014, so as to require the Minister to obtain the concurrence of the executive authority of the Public Service Commission in respect of a directive to be applicable to the Office of the Public Service Commission,

and to provide for matters connected therewith.

**B**E IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

**Amendment of section 1 of Act promulgated under Proclamation 103 of 1994, as substituted by section 1 of Act 30 of 2007 and amended by section 53 of Act 11 of 2013**

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1. Section 1 of the Public Service Act, 1994, is hereby amended—
  - (a) by the deletion in the definition of “executive authority” of paragraph (c); and
  - (b) by the insertion after the definition of “organ of state” of the following definition:

“**‘political office’**, in relation to a political party, political organisation or structure of either, means—

- (a) the position of chairperson, deputy chairperson, secretary, deputy secretary or treasurer of the party organisation nationally or in any province, region or other area in which the party operates;
- (b) any position in the party or organisation equivalent to a position referred to in paragraph (a), irrespective of the title designated to the position; or
- (c) any position of authority in that party, organisation or structure;”.

**Amendment of section 5 of Act promulgated under Proclamation 103 of 1994, as substituted by section 3 of Act 47 of 1997 and amended by section 7 of Act 30 of 2007**

2. Section 5 of the Public Service Act, 1994, is hereby amended by the substitution in subsection (8) for paragraph (b) of the following paragraph:

“(b) If the Commission issues a direction contemplated in paragraph (a), the relevant executive authority or head of department, as the case may be, shall implement the direction as soon as possible after receipt of the written communication conveying the direction [**but, in any event, within 60 days after the date of such receipt**] and shall duly report thereon in accordance with section 10A of the Commission Act.”.

**Amendment of section 12 of Act promulgated under Proclamation 103 of 1994, as substituted by section 17 of Act 30 of 2007**

3. Section 12 of the Public Service Act, 1994, is hereby amended by the substitution for subsection (4) of the following subsection:

“(4) If it is in the public interest and it is allowed by a determination made in terms of section 3(5), an executive authority may, on the conditions provided for in such determination, grant a special service benefit to the head of the relevant department before or at the expiry of his or her term of office or an extended term, or at the time of retirement [**or dismissal**] from the public service.”.

**Amendment of section 31 of Act promulgated under Proclamation 103 of 1994, as amended by section 26 of Act 47 of 1997 and section 27 of Act 30 of 2007**

4. Section 31 of the Public Service Act, 1994, is hereby amended by the substitution in subsection (3) for paragraph (b) of the following paragraph:

“(b) ‘determination of the Minister’ includes any [**recommendation**] direction of the Public Service Commission established by section [209(1)] 196 of the Constitution [**of the Republic of South Africa, 1993 (Act No. 200 of 1993)**], or a recommendation of any commission for administration, public service commission or other like institution established by or under, or which functioned in accordance with, any such law; and”.

**Amendment of section 35 of Act promulgated under Proclamation 103 of 1994, as substituted by section 31 of Act 30 of 2007**

5. Section 35 of the Public Service Act, 1994, is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) After the Commission has investigated and considered any such grievance, the Commission [**may recommend that**] must direct the relevant executive authority [**acts**] to act in terms of a particular provision or particular provisions of this Act or any other law if, having regard to the circumstances of the case, the Commission considers it appropriate to make such a [**recommendation**] direction.”.

**Insertion of section 35A in Act promulgated under Proclamation 103 of 1994**

6. The following section is hereby inserted in the Public Service Act, 1994, after section 35:

**“Limitation of political rights**

**35A.** (1) An employee may not hold political office in a political party or political organisation, whether in a permanent, temporary or acting capacity.

(2) A person who is an employee when subsection (1) becomes operational, and who holds political office as contemplated in subsection (1)—

(a) must comply with subsection (1) within one year of the commencement of that subsection; and

(b) must resign from any political office before accepting a promotion, transfer or secondment.

(3) Except for the limitation to hold political office, subsection (1) may not be construed as prohibiting an employee from exercising their other political rights as contemplated in section 19 of the Constitution.”.

**Amendment of Schedule 1 to Act promulgated under Proclamation No. 103 of 1994, as substituted by Proclamation 43 of 2014, and amended by Proclamation 52 of 2016, Proclamation 56 of 2016 and Proclamation 25 of 2019**

7. Schedule 1 to the Public Service Act, 1994, is hereby amended by the deletion in column 1 thereof, of the phrase “Office of the Public Service Commission” and the deletion in column 2 thereof, of the phrase “Director General: Office of the Public Service Commission”.

**Amendment of section 1 of Act 46 of 1997**

8. Section 1 of the Public Service Commission Act, 1997, is hereby amended—

(a) by the insertion before the definition of “Commission” of the following definition:

“**‘chief executive officer’** means the head of the Office of the Commission as contemplated in section 13B;”;

(b) by the substitution for the definition of “Constitution” of the following definition:

“**‘Constitution’** means the Constitution of the Republic of South Africa, 1996 [(Act No. 108 of 1996)];

(c) by the insertion after the definition of “Constitution” of the following definitions:

“**‘employee’** means the staff of the Commission as contemplated in section 13E, and includes the chief executive officer of the Commission contemplated in section 13B;

**‘executive authority’** means the chairperson of the Commission;”;

(d) by the substitution for the definition of “officer” of the following definition:

“**‘officer’** means [an officer as defined in section 1(1) of the Public Service Act, and includes] an employee [contemplated] defined in section 1[(1)(a)] of the Public Service [Amendment] Act, 1996 (Act No. 13 of 1996);”;

(e) by the insertion after the definition of “officer” of the following definition: “**‘political office’**, in relation to a political party, political organisation or structure of either, means—

(a) the position of chairperson, deputy chairperson, secretary, deputy secretary or treasurer of the party or organisation nationally or in any province, region or other area in which the party operates;

(b) any position in the party or organisation equivalent to a position referred to in paragraph (a), irrespective of the title designated to the position; or

(c) any position of authority in that party, organisation or structure;”;

(f) by the insertion after the definition of “Public Service Act” of the following definition:

“**‘relevant authority’** means the executive authority or the head of department as contemplated in the Public Service Act, or such other authority to whom the measure, direction, recommendation, advice or other deliverable contemplated in section 10A was directed;” and

- (g) by the insertion after the definition of “rule” of the following definition:  
 “**‘staff of the Commission’** means the persons appointed in terms of section 13E;”.

**Insertion of section 8A in Act 46 of 1997**

9. The following section is hereby inserted in the Public Service Commission Act, 1997, after section 8: 5

**“Directions on recruitment, transfers, promotions, and dismissals**

**8A.** (1) The Commission must give directions contemplated in section 196(4)(d) of the Constitution, to every sector, administration and institution of the public administration, including the Commission itself. 10

(2) The directions contemplated in subsection (1) must, amongst others, require that any decision relating to recruitment, transfer or promotion is consistent with the values and principles set out in section 195(1) of the Constitution and, as contemplated in section 195(1)(i), is based on, amongst others— 15

(a) ability, demonstrated by proficiency, including training or other qualification, and skill that is required for the relevant area in which the recruitment, transfer or promotion is being done; and

(b) objectivity and fairness, so that any recruitment, transfer or promotion— 20

(i) is done on merit alone; and

(ii) does not favour or prejudice any person because that person supports, or does not support, a particular political party or cause.

(3) The directions contemplated in subsection (1) must, in order to ensure that employment and personnel management practices are based on objectivity and fairness, include a prohibition on any recruitment, transfer, promotion or dismissal being effected based on, in part or in whole, a particular person’s support of, or opposition to, a particular political party or cause. 25

(4) The directions contemplated in subsection (1) must be published in the *Gazette* within one year of the commencement of the Public Administration Laws General Amendment Act, 2021. 30

(5) (a) Every sector, administration and institution of the public administration must annually, within one month of the end of its financial year, submit a written report to the Commission on steps taken to comply, and the extent to which they complied, with the directions contemplated in subsection (1), for that financial year. 35

(b) The written report contemplated in paragraph (a) must also set out all incidents of non-compliance with the directions contemplated in subsection (1), provide reasons for such non-compliance and indicate steps taken to ensure future compliance. 40

(6) Where the Commission has any concern with the compliance or non-compliance as reported under subsection (5), the Commission may take remedial action in respect of that sector, administration and institution of the public administration, as contemplated in section 10A. 45

(7) Any person who fails to comply with a direction under this section shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months or to both a fine and such imprisonment.” 50

**Insertion of section 10A in Act 46 of 1997**

10. The following section is hereby inserted in the Public Service Commission Act, 1997, after section 10:

**“Taking remedial action**

**10A.** (1) The Commission must, when—

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| <ul style="list-style-type: none"> <li>(a) proposing measures;</li> <li>(b) giving directions, other than the directions contemplated in section 8A;</li> <li>(c) making a report to an executive authority;</li> <li>(d) recommending appropriate remedies;</li> <li>(e) providing advice to national and provincial organs of state; or</li> <li>(f) exercising or performing an additional function or power prescribed by an Act of Parliament that involves a deliverable that is either a direction or that is guiding in nature,</li> </ul>   | <p>5</p> <p>10</p> <p>15</p>            |
| <p>stipulate a time-frame, of no more than 60 days, within which the relevant authority must in writing report to the Commission on what it did, or planned to do, in respect of that measure, direction, recommendation in a report, recommendation of a remedy, advice or other deliverable.</p>   |   |
| <p>(2) The relevant authority must include the following in the written report contemplated in subsection (1):</p>   |   |
| <ul style="list-style-type: none"> <li>(a) Actions already taken to give effect to that measure, direction, recommendation in a report, recommendation of a remedy, advice or other deliverable;</li> <li>(b) planned actions to give further effect to that measure, direction, recommendation in a report, recommendation of a remedy, advice or the other deliverable and—               <ul style="list-style-type: none"> <li>(i) the person responsible for the implementation of such actions; and</li> <li>(ii) the time-frames within which these actions are to be implemented; and</li> </ul> </li> <li>(c) where the relevant authority disagrees with that proposed measure, recommendation in a report, recommendation of a remedy, advice or the deliverable that is guiding in nature, whether in whole or in part—               <ul style="list-style-type: none"> <li>(i) the information contemplated in paragraphs (a) and (b) in respect of the part that the relevant authority agrees with;</li> <li>(ii) the reasons why the relevant authority so disagrees; and</li> <li>(iii) the actions that the relevant authority is following, and plans to follow, to resolve the relevant issue, as well as the person responsible, and the time-frames applicable, to implement such actions.</li> </ul> </li> </ul> | <p>20</p> <p>25</p> <p>30</p> <p>35</p> |
| <p>(3) Where the Commission has a material concern with the reasons provided by the relevant authority for disagreeing with the Commission, or with any of the actions implemented, or planned, by the relevant authority, the Commission—</p>   |   |
| <ul style="list-style-type: none"> <li>(a) may summons the relevant authority to appear before the Commission in the same manner as is contemplated in section 10, read with the necessary changes; and</li> <li>(b) must table its concern in the relevant national or provincial legislature within 60 days of receipt of the written report contemplated in subsection (1), or the date of the appearance contemplated in paragraph (a), whichever date is the latest.</li> </ul>   | <p>40</p> <p>45</p>                     |
| <p>(4) The Commission must, within a reasonable time taking into account the time-frames contemplated in subsection (2)(b)(ii) and (c)(iii), investigate whether the relevant authority has implemented the planned actions.</p>   |   |
| <p>(5) The Commission must, where its findings on the investigation contemplated in subsection (4) are that the relevant authority—</p>  |   |
| <ul style="list-style-type: none"> <li>(a) failed to implement the planned actions, prepare a report on its investigation providing directions to remedy the failure and must within 60 days of completion of its investigation—               <ul style="list-style-type: none"> <li>(i) submit that report to the relevant authority; and</li> <li>(ii) table that report in the relevant national or provincial legislature; or</li> </ul> </li> <li>(b) duly implemented the planned actions, include the investigation and outcome of the investigation in the report contemplated in subsection (7).</li> </ul>  | <p>55</p> <p>60</p>                     |

(6) Where the Commission, during its investigation contemplated in subsection (4), found an indication of—

- (a) financial irregularities, the Commission must without delay refer the matter and any relevant evidence to the Auditor-General for further action;
- (b) an action contemplated in section 2(2) of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), having been committed, the Commission must without delay refer the matter and any relevant evidence to the President, for the President to act in terms of section 2(1) of that Act; or
- (c) an irregularity that does not fall within the powers and functions of the Commission, the Commission must without delay refer such evidence to the appropriate body for further action.

(7) The Commission must table a report on its actions in terms of this section, and on reports received and developed in terms of this section, twice a year during February and August—

- (a) in the National Assembly in respect of actions and reports that are relevant to national government; and
- (b) in each provincial legislature in respect of actions and reports relevant to that provincial government.

(8) Any relevant authority who fails to submit a written report within the stipulated time-frame as contemplated in subsection (1), shall be guilty of the offence of obstruction of the Commission contemplated in section 12.”.

#### **Repeal of section 13 of Act 46 of 1997**

11. Section 13 of the Public Service Commission Act, 1997, is hereby repealed.

#### **Insertion of Part IIIA in Act 46 of 1997**

12. The following Part is hereby inserted in the Public Service Commission Act, 1997, after section 13:

### **“PART IIIA**

#### **OFFICE OF COMMISSION**

##### **Executive Authority**

**13A.** (1) The chairperson of the Commission is the executive authority of the Commission.

(2) The executive authority, after consultation with the Commission, has the power and duties necessary for—

- (a) determining how the Office of the Commission is organised or structured;
- (b) approving the organogram supporting the organisation or structure of the Office of the Commission, the establishment and the posts on the establishment that informs that organogram;
- (c) approving the creation and abolition of posts on the establishment, provision for the employment of persons additional to the fixed establishment and secondments to and from other organs of state;
- (d) approving the transfer of functions within the Office of the Commission;
- (e) approving the job description associated with each post on the establishment;
- (f) approving human resources planning, the recruitment, appointment, performance management, transfer, dismissal and other career incidents of employees of the Commission, including any other matter which relates to such employees in their individual capacities;
- (g) after consultation with the Minister of Finance, determining the remuneration scales, allowances and other employment benefits associated with each post on the establishment; and

(h) determining the general terms and conditions of employment, including whether appointments will include a probation period, applicable to staff of the Commission.

(3) The Commission, acting through the executive authority, may in the exercise of its powers or the performance of its functions by or under the Constitution, this Act or any other law, for specific projects, enter into contracts for the services of persons having technical or specialised knowledge of any matter relating to the work of the Commission, and determine the remuneration, including reimbursement for travelling, subsistence and other expenses, of such persons.

### **Chief Executive Officer**

**13B.** (1) The Office of the Commission performs the financial, administrative and clerical functions of the Commission.

(2) The chief executive officer is the head of the Office of the Commission and is, subject to the control and directions of the Commission, responsible to coordinate and manage the Commission's financial, administrative and clerical functions.

(3) The chief executive officer is, in accordance with section 36 of the Public Finance Management Act, 1999 (Act No. 1 of 1999), the accounting officer of the Commission and is charged with the responsibilities referred to in that Act.

### **Appointment of Chief Executive Officer**

**13C.** (1) A suitably qualified and experienced person must be appointed as the chief executive officer of the Office of the Commission.

(2) (a) The Commission must constitute a panel, consisting of the deputy chairperson of the Commission and four other commissioners to facilitate the process to recruit a chief executive officer.

(b) The panel must, within a reasonable time after receipt of the required details of candidates for the post of chief executive officer, meet to determine a shortlist of candidates to be interviewed.

(c) The panel must, within 21 days of determining the shortlist of candidates—

- (i) conduct interviews with the short-listed candidates; and
- (ii) where a candidate was considered suitable for appointment as chief executive officer, recommend that candidate to the executive authority for appointment.

(3) The chief executive officer is appointed by the executive authority—

(a) for an agreed term not exceeding five years, but which term may be renewed based on consistent high quality performance;

(b) on such terms and conditions as the Commission may determine;

(c) on such remuneration package, including allowances and other employment benefits, as the Commission may determine;

(d) subject to a written performance agreement setting out the performance standards expected of the chief executive officer for a financial year, or part thereof; and

(e) subject to the terms and conditions applicable generally to employees of the Commission.

(4) The executive authority is responsible for the management of the chief executive officer's performance, as well as the maintenance of discipline and good labour relations in respect of the chief executive officer.

### **Functions of chief executive officer**

**13D.** (1) The chief executive officer is in overall control of, and accountable for, the Office of the Commission and in this regard is specifically responsible for—

(a) the administration and management of the affairs and operations of the Commission;

(b) the formation and development of an efficient administration;

- (c) the employment and management of the staff of the Commission, including all matters related to the employment and management of persons;
- (d) organisation of the Office of the Commission;
- (e) the maintenance of discipline and good labour relations in respect of the staff of the Commission; and
- (f) the carrying out of the decisions of the Commission.
- (2) The chief executive officer may exercise the powers and must perform the functions, which the executive authority may from time to time confer upon or assign to the chief executive officer to achieve the objects of the Commission.
- (3) The chief executive officer is responsible for the procurement of services contemplated in section 13A(3) and for the management of services so procured.
- (4) The chief executive officer must report to the executive authority on the execution of the functions contemplated in this section at such intervals as the executive authority may determine.

### Staff of Commission

- 13E.** (1) (a) The chief executive officer is assisted by suitably qualified staff in the performance of their functions under this Act and the Constitution.
- (b) The chief executive officer must, subject to section 13A(2), appoint such persons as may be necessary to assist the chief executive officer with the work incidental to the performance by the Commission of its functions.
- (2) Staff of the Commission must be appointed on such terms and conditions, remuneration, allowances and other employment benefits—
- (a) that comply with the basic values and principles set out in section 195 of the Constitution; and
- (b) as the chief executive officer may, subject to the approval of the Commission contemplated in section 13A(2), determine.
- (3) The provisions of the Government Employees' Pension Law, 1996 (Proclamation No. 21 of 1996), regulate the pension benefits of employees.
- (4) (a) A member of staff performs such functions and is granted such powers as the chief executive officer may determine and specific functions and powers may be allocated to one member of staff or a group within the body of staff according to their skills and experience.
- (b) The chief executive officer may direct a member of staff to temporarily perform any functions other than those ordinarily assigned to the member of staff or appropriate to their grade or post.
- (c) A member of staff may be directed in writing to act in a post subject to such conditions as the chief executive officer may determine.
- (d) The performance evaluation of the relevant member of staff shall take place with due regard to a direction in terms of paragraphs (b) or (c).
- (5) (a) A member of staff may lodge a grievance with the chief executive officer under the prescribed circumstances, on the prescribed conditions and in the prescribed manner.
- (b) A member of staff may only refer a dispute to the relevant bargaining council in the public service or the Commission for Conciliation, Mediation and Arbitration established by the Labour Relations Act, 1995 (Act No. 66 of 1995), or institute court proceedings, if—
- (i) the member has lodged a grievance in terms of paragraph (a); and
- (ii) the chief executive officer failed to resolve the grievance to the satisfaction of that member of staff within the period prescribed or the period for referring such dispute or instituting such court proceedings, whichever period is the shorter.

### Conflict of interest

- 13F.** (1) Employees must exercise their powers and perform their functions conferred upon them by or under this Act or any other law

impartially and independently, in good faith and without fear, favour, bias or prejudice.

(2) An employee may not hold political office in a political party or political organisation, whether in a permanent, temporary or acting capacity.

(3) A person who is an employee when subsection (2) becomes operational, and who holds political office as contemplated in subsection (2)—

(a) must comply with subsection (2) within one year of the commencement of that subsection; and

(b) must resign from any political office before accepting a promotion, transfer or secondment.

(4) Except for the limitation to hold public office, subsection (2) may not be construed as prohibiting an employee from exercising their other political rights as contemplated in section 19 of the Constitution.

### Delegation

**13G.** (1) The executive authority may, subject to subsection (2), in writing delegate any power, function or duty of the Commission, including those conferred upon the Commission by or under this Act, the Constitution or the Public Service Act, to—

(a) the deputy chairperson of the Commission;

(b) any commissioner;

(c) the chief executive officer; or

(d) any member of staff.

(2) The following may not be delegated:

(a) The power to make rules contemplated in section 11;

(b) the power to make regulations contemplated in section 14A; and

(c) the duty to report contemplated in section 196(6) of the Constitution.

(3) A power, function or duty delegated to the chief executive officer may be performed by any other member of staff authorised by the chief executive officer, except where precluded by the terms of such delegation.

(4) A delegation in terms of subsection (1)—

(a) is subject to such conditions as may be determined by the executive authority;

(b) may include the power to further delegate that power, function or duty, in the event of a delegation, to—

(i) the deputy chairperson of the Commission, to a person contemplated in subsection (1)(b), (c) or (d);

(ii) a commissioner, to a person contemplated in subsection (1)(c) or (d); or

(iii) the chief executive officer, to a person contemplated in subsection (1)(d); and

(c) may at any time be amended or revoked by the executive authority and a further delegation contemplated in paragraph (b), by the person who so delegated.

(5) The person who delegates, is not divested of any power, function or duty or relieved of any duty which that person may have delegated in terms of subsection (1) or (4)(b).

### Liability

**13H.** (1) The State Liability Act, 1957 (Act No. 20 of 1957), applies, with the necessary changes, in respect of the Commission, and in such application a reference in that Act to the Minister of a department concerned must be construed as a reference to the chairperson of the Commission.

(2) No employee or commissioner, including the chairperson and deputy chairperson of the Commission, is liable for any loss suffered or damage done as a result of an action or omission in good faith while performing a function or exercising a power or duty in terms of this Act.

(3) (a) An employee must correct any action or omission purportedly made by that employee in terms of this Act, if the action or omission was based on an error of fact or law or fraud and it is in the public interest to correct the action or omission.

(b) The chief executive officer must keep record of and report any correction contemplated in paragraph (a) to the executive authority. 5

### **Application of law**

**13I.** (1) Any matter related to the organisation and administration of the Office of the Commission, the regulation of the conditions of employment, terms of office, discipline, retirement and discharge of employees, not specifically dealt with in this Chapter, is regulated by the Public Service Act, with the necessary changes. 10

(2) The application of the provisions of the Public Service Act contemplated in subsection (1) may not affect the independence of the Commission. 15

(3) For purposes of applying the Public Service Act as contemplated in this subsection, the executive authority of the Office of the Commission is the chairperson of the Commission.”.

### **Repeal of section 14 of Act 46 of 1997**

**13.** Section 14 of the Public Service Commission Act, 1997, is hereby repealed. 20

### **Insertion of section 14A in Act 46 of 1997**

**14.** The following section is hereby inserted in the Public Service Commission Act, 1997, after section 14:

#### **“Regulations**

**14A.** (1) The chairperson of the Commission may, after consultation with the Commission, make regulations regarding the following matters in relation to employees: 25

- (a) The organisation of and creation of posts on the establishment of the Commission;
- (b) the powers and duties of employees; 30
- (c) the legal liability of any employee in respect of any act done in terms of this Act or any other law, and the legal liability emanating from the use of official transport;
- (d) a code of conduct to be complied with by all employees;
- (e) the procedure and manner of, and criteria for, evaluation when a prospective employee is shortlisted and interviewed; 35
- (f) the requirements, conditions and procedure applicable when an employee is considered for promotion;
- (g) the membership or conditions of membership of a particular medical aid scheme or medical aid society and the manner in, and the conditions on, which membership fees and other monies that are payable or owing by or in respect of employees or their dependants, to a medical aid scheme or medical aid society, may be recovered from the salaries of such employees and paid to such medical aid scheme or medical aid society; 40
- (h) the contributions to and the rights, privileges and obligations of employees or their dependants with regard to a medical aid scheme or medical aid society;
- (i) the training of employees, including financial assistance for such training; 50
- (j) the requirements and process for disciplinary steps and sanctions, including discharge;
- (k) the circumstances under which, and the conditions and manner in which, an employee may be found to be guilty of misconduct, or to be

- suffering from continued ill-health, or of incapacity to carry out their duties of the office efficiently;
- (l) the procedure for dealing with complaints and grievances of employees, and the manner in which and time by when, or period wherein, and person to whom, documents in connection with requests and communications of such employees must be submitted; 5
  - (m) the procedure for disciplinary hearings and grievances after the internal process of the Commission has been finalised, that will ensure that its employees can access an independent structure to consider any appeal or review; and 10
  - (n) in general, any matter, other than a matter relating to the regulation of the terms and conditions of service of employees, which is not in conflict with the Constitution or this Act and which the Commission considers reasonably necessary or expedient to prescribe in order to achieve an efficient administration. 15
- (2) Any regulation made under this section—
- (a) relating to state expenditure, must be made in consultation with the Minister of Finance; and
  - (b) must be tabled in the National Assembly before publication thereof in the *Gazette*.”. 20

#### **Amendment of section 15 of Act 46 of 1997**

15. Section 15 of the Public Service Commission Act, 1997, is hereby amended by the substitution in subsection (2) for paragraph (b) of the following paragraph:

- “(b) any [**officer**] employee who was immediately prior to the commencement of this Act employed by any such Public Service Commission or provincial service commission shall be deemed to have been transferred to the service of the Commission under the Public Service Act, and he or she shall perform such functions as the Commission may determine.”. 25

#### **Amendment of section 13 of Act 11 of 2014**

16. Section 13 of the Public Administration Management Act, 2014, is hereby amended by the substitution for subsection (2) of the following subsection: 30

- “(2) The Minister must—
- (a) consult organised local government and obtain the concurrence of the Minister responsible for local government before seeking the approval of the Cabinet contemplated in subsection (1) in respect of a directive to be applicable to municipalities; and 35
  - (b) obtain the concurrence of the executive authority of the Public Service Commission before seeking the approval of the Cabinet contemplated in subsection (1) in respect of a directive to be applicable to the Office of the Public Service Commission.”. 40

#### **Amendment of laws**

17. The laws mentioned in the Schedule are hereby amended or validated to the extent indicated in the third column thereof.

#### **Transitional provisions**

18. (1) In this section, unless the context indicates otherwise— 45
- (a) “**Commission**” means the Public Service Commission contemplated in section 196 of the Constitution of the Republic of South Africa, 1996; and
  - (b) “**Office of the Commission**” means the Office of the Public Service Commission contemplated in part IIIA of the Public Service Commission Act, 1997 (Act No. 46 of 1997), as inserted by section 12 of the Public Administration Laws General Amendment Act, 2021. 50
- (2) Any person who was immediately prior to the commencement of the Public Administration Laws General Amendment Act, 2021, employed by the Commission continues to be an employee within the Office of the Commission.

(3) The Director-General: Office of the Commission, who was immediately prior to the commencement of the Public Administration Laws General Amendment Act, 2021, employed as such, is deemed to have duly been appointed in the post of chief executive officer in accordance with section 13C of the Public Service Commission Act, 1997 (Act No. 46 of 1997), as inserted by section 12 of the Public Administration Laws General Amendment Act, 2021. 5

(4) The executive authority of the Commission must within 12 months of commencement of the Public Administration Laws General Amendment Act, 2021, and after consultation with the Commission and the persons contemplated in subsections (2) and (3)— 10

- (a) approve a new organisation or structure for the Office of the Commission, or confirm the existing organisation or structure;
- (b) approve a new organogram and establishment, or confirm the existing organogram and establishment, supporting the organisation or structure contemplated in paragraph (a); 15
- (c) approve or confirm the job description associated with each post on the establishment contemplated in paragraph (b);
- (d) after consultation with the Minister of Finance, approve or confirm the remuneration, allowances and other employment benefits associated with each post on the establishment contemplated in paragraph (b); and 20
- (e) approve or confirm the general terms and conditions of employment applicable to staff of the Commission.

(5) (a) The terms and conditions of employment of all employees of the Commission must be renegotiated within 18 months of the commencement of the Public Administration Laws General Amendment Act, 2021, to be aligned with that Act. 25

(b) Any benefit that accrued to an employee of the Commission under the Public Service Act, 1994, or any other law and that is not specifically excluded by the Public Administration Laws General Amendment Act, 2021, shall remain applicable to that employee.

(c) Any difference in terms and conditions of employment envisaged by the Public Administration Laws General Amendment Act, 2021, or a change to the organisation or structure, organogram, job descriptions, or remuneration, allowances and other employment benefits, is hereby deemed to be necessary in order make the Commission more effective and efficient and is thus required for operational reasons. 30

(d) Where the Commission and an employee of the Commission have not been able to agree on new terms and conditions of employment, within 12 months of the commencement of the Public Administration Laws General Amendment Act, 2021, the Commission must proceed with the relevant proceedings under the Labour Relations Act, 1995 (Act No. 66 of 1995), related to a change in operational requirements. 35

(e) The date of commencement of the period contemplated in section 13C of the Public Service Commission Act, 1997, as inserted by section 12 of the Public Administration Laws General Amendment Act, 2021, related to the five-year period for which the chief executive officer is employed, shall commence on the date of signing of the amended employment agreement contemplated in paragraph (a). 40

**Short title** 45

**19.** This Act is called the Public Administration Laws General Amendment Act, 2021.

## Schedule

## Laws amended

No. and year of Act	Short title	Extent of repeal or amendment
66 of 1995	Labour Relations Act, 1995	<p><b>1.</b> The amendment in Schedule 3 by the insertion in item 9 of the following sub-item after sub-item (1):</p> <p><u>“(1A) The report contemplated in sub-item (1) must include a statement indicating the outcome of every dispute submitted by employees of the Public Service Commission, contemplated in section 196 of the Constitution of the Republic of South Africa, 1996, during that previous financial year.”</u>.</p>
1 of 1999	Public Finance Management Act, 1999	<p><b>1.</b> Notwithstanding sections 4 and 47 of the Public Finance Management, 1999 (Act No. 1 of 1999), the following are deemed to have duly amended Schedule 1 in the following manner and with all consequences adhering to such an amendment from the respective effective dates, as if they were duly effected* in terms of said section 4:</p> <p>(a) General Notice No. 1863 of 2001, published in <i>Government Gazette</i> 22577 of 24 August 2001, amended Schedule 1 effective from 24 August 2001, by the addition after item 10 of the following item:</p> <p><u>“11. Independent Communications Authority of South Africa.”</u>;</p> <p>(b) General Notice No. 2302 of 2001, published in <i>Government Gazette</i> 22860 of 30 November 2001, amended Schedule 1 effective from 30 November 2001, by the deletion in item 6, of the words “The Independent Broadcasting Authority.”; and</p>

\* The Minister, acting in terms of section 47(1)(b) of the Public Finance Management, 1999 (Act No. 1 of 1999) (“the principal Act”), included amendments to Schedule 1 of the principal Act in the notices listed in this clause. These notices were published in the respective *Government Gazettes*. Section 47 of the principal Act however only allows amendments by way of notice to Schedule 3 of the principal Act. The amendments to Schedule 1 should thus have been effected by way of an Amendment Act in accordance with section 4 of the principal Act. The affected notices have to date not been legally challenged and accordingly is validated from the date of publication in the respective *Government Gazettes*. This note is explanatory in nature and does not form part of the Amendment Act.

No. and year of Act	Short title	Extent of repeal or amendment
		<p>(c) Government Notice No. 1396, published in <i>Government Gazette</i> 24042 of 15 November 2002, amended Schedule 1 effective from 15 November 2002, by the deletion in item 8 of the words “The Commission on the Remuneration of Persons Holding Public Office.”.</p> <p>2. The following Schedule is hereby substituted for Schedule 1:</p> <p style="text-align: center;"><b>“Schedule 1</b></p> <p style="text-align: center;"><b>CONSTITUTIONAL INSTITUTIONS</b></p> <ol style="list-style-type: none"> <li>1. The Public Protector.</li> <li>2. The Human Rights Commission.</li> <li>3. Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.</li> <li>4. The Commission for Gender Equality.</li> <li>5. The Independent Electoral Commission.</li> <li>6. . . .</li> <li>7. The Financial and Fiscal Commission.</li> <li>8. . . .</li> <li>9. The Pan South African Language Board.</li> <li>10. The Municipal Demarcation Board.</li> <li>11. Independent Communications Authority of South Africa.</li> <li>12. <u>The Public Service Commission.</u>”.</li> </ol>

## **MEMORANDUM ON THE OBJECTS OF THE PUBLIC ADMINISTRATION LAWS GENERAL AMENDMENT BILL, 2021**

### **1. INTRODUCTION**

- 1.1 The testimony delivered before the Commission of Inquiry into Allegations of State Capture since 21 August 2018 has revealed that political interference in the public administration, which has effectively erased the line of separation between party and state, is the foundation of state capture and systemic corruption in South Africa.
- 1.2 As a result of this political interference, which led to the appointment of public servants and other officials on the basis of political loyalty rather than on the basis of demonstrated merit, South Africa's public service is collapsing under the weight of corruption and a lack of skills. Governance failures and widespread corruption, including in the form of systemic state capture, also occupy a central place in our country's public discourse.
- 1.3 While the Constitution of the Republic of South Africa, 1996 ("Constitution"), created a Public Service Commission ("Commission") for a democratic South Africa, the powers expressly granted to the Commission are mainly advisory in nature. Although the Constitution allows for further powers and functions to be granted to the Commission, none of the Acts governing the public administration, namely the Public Service Act, 1994 (Proclamation No. 103 of 1994), the Public Service Commission Act, 1997 (Act No. 46 of 1997), the Public Finance Management Act, 1999 (Act No. 1 of 1999) (PFMA), or the Public Administration Management Act, 2014 (Act No. 11 of 2014), does so.
- 1.4 The type of destructive political interference exposed by the Commission of Inquiry into Allegations of State Capture is possible because the Public Service Act, 1994 (Proclamation 103 of 1994), provides for the President, Ministers, Premiers and Members of the Executive Council to be closely involved in the career incidents of public service servants, including appointment, promotion and dismissal, without enforcing the need for appointments to be based on demonstrated merit.
- 1.5 Most developed countries and many of South Africa's developing country peers have long since made it impossible and unlawful for politicians to interfere with appointments to an independent bureaucracy. This is the only way to ensure that merit trumps political patronage in the appointment of public servants. From Germany to the United Kingdom and Japan to Botswana, Brazil, South Korea, Malaysia and Mauritius — all have ensured merit-based recruitment by removing politicians from appointment decisions.
- 1.6 It is therefore necessary to introduce legislative amendments that make it illegal for political office-bearers to be employed as public servants.
- 1.7 In order to further ensure that South Africa's public service is a capable body consisting of professionals with the necessary and appropriate experience and skills, it is necessary that the Commission is given the powers and human resources that will enable it to undertake merit-based recruitment. It is after all this body that is tasked by the Constitution with the maintenance of an effective and efficient public administration, and a high standard of professional ethics in the public service.
- 1.8 It is also necessary to review the powers and functions given to the Commission by the other Acts governing the public administration, namely the Public Service Act, 1994 (Proclamation 103 of 1994), the PFMA and the Public Administration Management Act, 2014 (Act No. 11 of 2014).

- 1.9 The Commission is established in Chapter 10 of the Constitution, and is independent and impartial. However, it is not listed as a Constitutional Institution in Schedule 1 to the PFMA and therefore the provisions of the PFMA are not directly applicable to it. This amendment seeks to rectify this omission in order ensure that the Commission is rightfully included as one of the independent commissions which are listed under Schedule 1 to the PFMA.

When considering this amendment, it was noted that Schedule 1 has previously been incorrectly amended. It is necessary for these amendments to first be validated before the Commission may be included in the Schedule: Section 4 of the PFMA provides that any draft legislation that amends the PFMA, must be introduced in Parliament by the Minister of Finance only after the Minister has been consulted on the contents of the draft legislation. In terms of section 47 of the PFMA, Schedule 3 may be amended through a notice by the Minister in the *Government Gazette*. Schedule 1 to the PFMA had previously been amended by two General Notices and one Government Notice, which therefore did not comply with section 4 of the PFMA. It appears that these amendments were mistakenly done in terms of section 47 of the PFMA. However, as these notices have not been legally challenged and thus to allow for legal certainty, this Bill seeks to validate those amendments from the date on which the Minister intended the amendments to be effective — with all the consequences that would normally adhere to such an amendment if it was done in terms of section 4.

## 2. OBJECTS OF THE BILL

- 2.1 The purpose of the Public Administration Laws General Amendment Bill (“the Bill”) is to amend the—
- 2.1.1 Public Service Act, 1994 (Proclamation 103 of 1994) (“Public Service Act”), to provide for the duty to report to the Public Service Commission when an executive authority or head of department acts on a direction of the Public Service Commission. This is to align the Public Service Act with the new remedial action powers of the Public Service Commission. The Bill further removes the possibility of providing special service benefits to heads of departments who are dismissed. The Bill further provides clarity in respect of directions and recommendations made by the Public Service Commission. The amendments also include the limitation of political rights under certain circumstances, and removes the Public Service Commission from the ambit of the Public Service Act;
- 2.1.2 Public Service Commission Act, 1997 (Act No. 46 of 1997) (“the Public Service Commission Act”), so as to elucidate the powers of the Public Service Commission (“Commission”) to give directions related to recruitment, transfers, promotions and dismissals, and to grant the Commission the power to take remedial action. The Bill also creates a chapter dedicated to the human resources necessary to ensure the effective and efficient functioning of the Commission. Transitional provisions are provided in this regard. The Bill clarifies that delegations of the powers, functions and duties of the Commission are to be made by the executive authority of the Commission and sets out the matters related to such delegation; and
- 2.1.3 Public Administration Management Act, 2014 (Act No. 11 of 2014) (“Public Administration Management Act”), so as to require the Minister to obtain the concurrence of the executive authority of the Commission in respect of a directive to be applicable to the Office of the Public Service Commission.

- 2.2 The Bill also requires that the Commission for Conciliation, Mediation and Arbitration includes information on disputes submitted by employees of the Commission in its annual report and provides for the Commission to be added to Schedule 1 to the PFMA as a Constitutional Institution to which the PFMA applies. In order to do the latter, the Bill also validates previous amendments that had been made to Schedule 1 to the PFMA, which amendments were incorrectly effected through a notice in the *Government Gazette*.

### 3. CONTENTS OF THE BILL

- 3.1 Clause 1 amends the Public Service Act by the deletion of the reference to the Commission in the definition of “executive authority” and the insertion of the definition of “political office”.
- 3.2 Clause 2 amends section 5 of the Public Service Act to provide for the written report that the relevant authority must submit following a direction of the Commission.
- 3.3 Clause 3 amends section 12 of the Public Service Act to remove the special service benefit in respect of persons who have been dismissed from service.
- 3.4 Clause 4 amends section 31 of the Public Service Act by redefining the “determination of the Minister” to include directions of the Commission. The citation of the Constitution is also corrected.
- 3.5 Clause 5 amends section 35 of the Public Service Act by providing for the Commission to give directions instead of mere recommendations.
- 3.6 Clause 6 inserts a new section 35A into the Public Service Act, which provides for a limitation requiring that employees may not hold political office in a political party, political organisation or structure of either.
- 3.7 Clause 7 amends Schedule 1 to the Public Service Act by the deletion of the reference to the Commission as a Department and the Director-General as its head.
- 3.8 Clause 8 amends section 1 of the Public Service Commission Act by inserting definitions for “chief executive officer”, “employee”, “executive authority”, “political office”, “relevant authority” and “staff of the Commission”. Clause 1 also substitutes the definition of “officer” in that Act.
- 3.9 Clause 9 inserts section 8A in the Public Service Commission Act. This new section 8A provides that the Commission must give directions contemplated in section 196(4)(d) of the Constitution, to every sector, administration and institution of the public administration related to recruitment, transfers, promotions and dismissals. It further clarifies that these directions must also be given to the Commission itself. The new section 8A provides for factors, aimed at minimising political interference, that must be included in these directions. The new section 8A also makes failure to comply with a direction under this section an offence.
- 3.10 Clause 10 inserts section 10A in the Public Service Commission Act. This new section 10A provides that the Commission must, when proposing measures, giving directions, making recommendations, providing advice, or exercising an additional power or function that is a direction or is guiding in nature, stipulate a time-frame for relevant authorities to submit a written report with actions and plans in respect thereof. The new section 10A prescribes what a relevant authority must report and requires the Commission to, within a reasonable time, investigate whether such actions and plans have been implemented. The Commission may summon the relevant authority to appear before it where the Commission has material concerns with the report of the relevant authority and must table its concerns in the relevant legislature. The Commission is further required to table a report on whether the relevant

authority has implemented the planned actions as reported to the Commission, in the relevant legislature. The Commission is also required to report irregularities to the relevant authorities. Failure by a relevant authority to submit the written report is made an offence.

- 3.11 Clause 11 repeals section 13 of the Public Service Commission Act, as delegations are now dealt with in the new part IIIA inserted by clause 12.
- 3.12 Clause 12 inserts a new part IIIA into the Public Service Commission Act that deals with the Office of the Commission. Provision is made for an executive authority, a chief executive officer and staff of the Commission. This new part IIIA also includes the organisation of the Office of the Commission, appointment processes, powers, duties and functions, employment terms and conditions and related matters, as well as procurement of services. This new part IIIA also specifically provides for measures to mitigate conflicts of interest, including a limitation on the holding of political office, delegation, liability under the State Liability Act, 1957 (Act No. 20 of 1957), and limitation of liability. The new part IIIA lastly provides for the application of the Public Service Act under certain circumstances.
- 3.13 Clause 13 repeals section 14 of the Public Service Commission Act, which deals with the Director-General. The equivalent of this post is now provided for in clause 12.
- 3.14 Clause 14 inserts a new section 14A into the Public Service Commission Act, which provides for regulations that the chairperson of the Public Service Commission may make. These regulations are in relation to the human resource aspect of the Office of the Commission.
- 3.15 Clause 15 amends section 15 of the Public Service Commission Act so as to substitute the reference to “officer” with “employee” in order to align the Public Service Commission Act with the new definitions.
- 3.16 Clause 16 amends section 13 of the Public Administration Management Act to require the Minister, when considering a requirement for specific education or training as a prerequisite for specified appointments or transfers in the Commission, or for development needs of employees of the Commission, to consult with the chairperson of the Commission before seeking the approval of Cabinet on the matter.
- 3.17 Clause 17 provides for the amendment of laws:
- 3.17.1 The Labour Relations Act, 1995 (Act No. 66 of 1995), is amended to require that the annual report of the Commission for Conciliation, Mediation and Arbitration established in terms of that Act includes information on disputes submitted by employees of the Public Service Commission; and
- 3.17.2 The Public Finance Management Act, 1999 (Act No. 1 of 1999), is amended as follows:
- 3.17.2.1 The *ultra vires* amendments to Schedule 1 are retrospectively validated; and
- 3.17.2.2 Schedule 1 is substituted to include the Public Service Commission as a Constitutional Institution.
- 3.18 Clause 18 deals with transitional provisions related to the Office of the Public Service Commission.
- 3.19 Clause 19 provides for the short title.

**4. ORGANISATIONAL AND PERSONNEL IMPLICATIONS**

4.1 The Bill proposes an additional power for the Commission to take remedial action. The effective execution of this power may require additional personnel. The Office of the Commission has already been established and it is not foreseen that this Bill will result in any additional costs in that regard.

**5. FINANCIAL IMPLICATIONS FOR THE STATE**

5.1 Additional personnel for the Commission, if required in respect of the newly-created remedial action powers, will have financial implications for the State.

**6. DEPARTMENTS, BODIES OR PERSONS CONSULTED**

6.1 The following stakeholders were consulted:

- Minister of Finance, as required by section 4 of the PFMA; and
- The National Economic Development and Labour Council, as required by section 5 of the National Economic Development and Labour Council Act, 1994 (Act No. 35 of 1994).

**7. PARLIAMENTARY PROCEDURE**

7.1 The Member proposes that the Bill must be dealt with in accordance with the procedure established by section 76 of the Constitution since it deals with legislation envisaged in section 196 of the Constitution and thus sections 76(3)(d), (e) and (f) apply to it.

7.2 The Member is of the opinion that it is not necessary to refer this Bill to the National House of Traditional and Khoi-San Leaders in terms of section 39(1)(a) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since it does not contain provisions pertaining to customary law or customs of traditional communities.