

**DRAFT PUBLIC ADMINISTRATION MANAGEMENT BILL (known as
draft legislation for a single public service):
INVITATION FOR PUBLIC COMMENT**

1. The draft Public Administration Management Bill (also known as draft legislation for a single public service), and an explanatory memorandum are hereby made available for public comment

The draft Bill proposes to regulate the organisation, management, functioning and staffing matters concerning departments in the national and provincial spheres of government, municipalities, and government components within all three spheres.

See **Annexure A** for the memorandum and **Annexure B** for the draft Bill

Electronic copies of the draft Bill and memorandum may be requested by/at:

Tel: 012-336 1106/1218/1248

Email: Rosen@dpsa.gov.za or DanieM@dpsa.gov.za

Hard copies may be collected at:

Legal Services

3rd floor

Department of Public Service and Administration

Batho Pele House

116 Proes Street

Pretoria

2.1 All interested persons and organisations are invited to submit written comments on the draft Bill not later than 30 April 2008 by-

- (a) emailing the comment to:
Rosen@dpsa.gov.za **and** DanieM@dpsa.gov.za
- (b) faxing the comment to:
Legal Services
Department of Public Service and Administration
012 336 1807 or 086 613 8589 or
- (c) by posting the comments to:
Director-General: Public Service and Administration
Attention: Legal Services
Private Bag X916
Pretoria
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2.2 Kindly provide the name, address, telephone and fax number and email address of the person or organisation submitting the comments.

ANNEXURE A
EXPLANATORY MEMORANDUM
ON THE DRAFT
PUBLIC ADMINISTRATION MANAGEMENT BILL

BACKGROUND

1. The Constitution requires cooperative and effective government while recognising that government in the national, provincial and local spheres is “distinctive, interdependent and interrelated” (section 40(1)). Together the three spheres of government are required to provide effective, transparent, accountable and coherent government for the country. This requires that the spheres respect each other’s territory and powers and functions while striving to work together in a meaningful way to maximise service delivery impact for the citizens.
2. The drive towards coordinated government has been at the heart of government’s transformation and reform programmes for the last ten years. In 1998, the Presidential Review Commission advised government that coordination at the centre of government was weak, and that intergovernmental relations needed to be improved. As a result Government reconfigured its Cabinet committees to facilitate coordination in particular sectors, namely the governance, economic, social, justice and international clusters. Similar clusters of Directors-General were created. These measures supported a horizontal integration among national departments.
3. To complement this horizontal integration, a system of vertical integration was developed taking the form of the Intergovernmental Relations Framework Act 13 of 2005 which established forums to promote and facilitate intergovernmental relations between the President and Premiers, Premiers and Mayors, and Ministers and provincial Members of Executive Councils responsible for concurrent portfolios.
4. Despite the positive changes that have been introduced over the last ten years, there is room for improvement in public service delivery. Government does not present itself as a coordinated front, but as a myriad of national, regional, provincial and municipal offices each with a separate identity, each operating in its own silo. The lack of coordination between the different spheres of government has not only hindered service delivery with citizens often being forced to visit more than one office or make multiple visits in respect of a single service. Citizens are often expected to travel great distances to obtain the services they need. Most services are available only in office hours, forcing people to interact with government during their productive time. It is not just a burden on the citizen it is a duplication and bureaucratisation of resources.
5. Integration of government services, systems and personnel would assist in addressing these challenges. This is a massive task, requiring extensive change throughout public administration and encompassing a change in mindset as much as legislative and

institutional change. A people-centred administration is envisaged that permits, or may require, public service employees from different branches of the administration to work together to find creative solutions to the service delivery challenges facing the country. In order to better coordinate service delivery and to motivate staff, it is essential to remove the unjustifiable disparities that continue to exist between employees in the public administration.

SINGLE PUBLIC SERVICE INITIATIVE

6. In responding to the service delivery challenges described above, Government has prepared legislation enabling a coordinated public administration of the national, provincial and local spheres. A coordinating Single Public Service Task Team under the auspices of the Governance and Administration Cluster of Directors-General and a Single Public Service Programme Management Office have been established. Five workstreams, which focus on legislation, enhanced access to services, information and communication technologies (ICT) enablement of integrated service delivery, human resource management norms and standards for an integrated public administration and a public sector anti-corruption strategy, carry forward the work of the task team.
7. An initial draft of the Public Administration Management Bill was completed in June 2007 and in July of that year Cabinet approved a process of consultation on the draft Bill (the first Bill). Information sharing and engagements with provincial Intergovernmental Relations (IGR) forums, municipalities through South African Local Government Association (SALGA), trade unions, NEDLAC and the Public Service Commission took place. The first Bill has been reworked to take into account input received during those engagements as well as legal advice. The draft Bill at *Annexure B* is now published for public comment.

BASIC VALUES AND PRINCIPLES GOVERNING PUBLIC ADMINISTRATION

8. The Constitution of the Republic of South Africa, 1996 (the Constitution) provides the framework for intergovernmental relations and prescribes basic values and principles for public administration (section 195(1)):
 - (a) A high standard of professional ethics must be promoted and maintained.
 - (b) Efficient, economic and effective use of resources must be promoted.
 - (c) Public administration must be development-oriented.
 - (d) Services must be provided impartially, fairly, equitably and without bias.
 - (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.
 - (f) Public administration must be accountable.

- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
 - (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
 - (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.
9. The Constitution explicitly requires public administration to be developmental and participatory. Citizens' rights, including socio-economic rights, are enshrined. The Constitution requires that the state take "reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights". (Section 27(2)) The Constitutional Court has interpreted these provisions in various cases, in a manner which has placed pressure on government to improve the performance of organs of state responsible for delivering services.
10. In order to respond to the challenges of poverty and inequality, and to respond to the requirements of the Constitution, South Africa has strived to become a developmental state. The emerging South African developmental state is democratic, non-racial, interventionist, redistributive, pro-poor, people-centred and participatory. The Accelerated and Shared Growth Initiative for South Africa (ASGISA) and subsequent initiatives including the Apex Priorities have placed the South African government on a "business unusual" footing for the last year of the third term of democratic governance.

CONSTITUTIONAL ISSUES

11. The draft Public Administration Management Bill (the draft Bill) respects the powers vested by the Constitution in municipalities, particularly their power to appoint, direct and dismiss their own employees. While the draft Bill does contain provisions that, in carefully circumscribed circumstances, empower the Minister for the Public Service and Administration, to set limits on terms and conditions of employment of municipal employees, these provisions do not compromise or impede municipalities in exercising their rights or performing the functions conferred on them by the Constitution.
12. The draft Bill empowers municipal councils to appoint municipal managers and those reporting directly to them and to appoint their other staff. Municipal Councils are empowered to decide on all career incidents – which include discipline, performance management, transfers, etc – of their staff. They, and they alone, have the power to dismiss their employees. Employees may only be transferred or seconded to or from a municipality with the concurrence of its municipal council. (In this regard see clauses 10, 11, 13, 21, 24, 25 and 38 of the draft Bill).

13. The draft Bill permits employers and trade unions in the local government sphere to negotiate terms and conditions of employment in their bargaining council. This is, however, constrained by provisions that enable the Minister, over time, to address unjustifiable disparities within the public administration, including unjustifiable disparities between the local government and other spheres of government. The rationale is that the draft Bill is intended to enable and facilitate the harmonisation of the systems, practices and conditions of service within public administration over time and employer proposals that fail to address or exacerbate disparities in respect of conditions of service would need to be addressed.
14. Like other public administration employers, local government employers may not conclude collective agreements concerning certain prescribed matters without the prior authorisation of the Minister, which authorisation may only be refused if the Minister believes that the agreement maintains or introduces unjustifiable disparities. The Minister is also empowered, for the purpose of removing or preventing unjustified disparities, to propose terms and conditions of employment for negotiation in a bargaining council. If there is agreement, the agreement will be made binding by a determination made by the Minister. If no agreement is reached, the Minister may make a determination. Such a determination would require the consent of SALGA, the organisation currently recognised in terms of the Organised Local Government Act, 1997, as representing the majority of provincial organisations contemplated in that Act. The legal consequence of SALGA's consent is that the Minister's intervention does not obtrude on municipal autonomy. (See clauses 29 and 30 of the draft Bill in this regard.)
15. Other provisions of the Bill require consultation with SALGA where the interests of municipalities are affected. These include consultation on norms and standards for terms and conditions of service of members of the Senior Management Service as well as on regulations insofar as they apply to municipalities (clauses 15 and 44 of the draft Bill).

CENTRALISATION VERSUS DECENTRALISATION

16. Critics of the policy and the first Bill have argued that it constitutes the centralisation of public administration, and is aimed at concentrating power in the hands of national government. In fact the draft Bill continues a tradition of decentralisation of power established in 1999. The state machinery inherited in 1994 was highly centralised and executive powers over public service personnel and organisational matters were vested in the Public Service Commission as it was then constituted. The mandate of the Commission changed to monitoring and evaluation following the adoption of the Constitution in 1996 and the passing of amendments to the Public Service Act in 1997 and 1998 vested regulatory powers in the Minister for the Public Service and Administration (the Minister) and powers over internal organisation and personnel matters in individual executive authorities.

17. New Public Service Regulations were issued in 1999, which repealed the Public Service Staff Code and substantially simplified the prescripts regulating the public service. The approach taken in the Public Service Act as amended and the new Regulations was for the Minister as regulator to set a *framework of norms and standards* within which executive authorities and their delegates could make policies suited to their own unique circumstances. This approach is decentralisation (or devolution) rather than centralisation of power; indeed this approach has in some instances given rise to failures to comply with the generally applicable norms and standards, which have been addressed in the latest Public Service Amendment Act, 2007 and the draft Bill.
18. The decentralised approach adopted in 1996 and implemented in stages culminating in the promulgation of the Regulations in 1999 remains the approach for the draft Bill. The Minister is empowered to create a framework of generally applicable norms and standards within which government institutions in the national, provincial and local spheres may determine their own policies and practices. At the same time, however, efforts will be made to harmonise systems, structures and conditions of service in order to reduce unjustifiable disparities, duplication and lack of interoperability between institutions, and to promote integration and coordination for improved service delivery.

SCOPE OF THE DRAFT BILL (clause 2)

19. Under the current legislative framework, the law regulating the structure and staffing of the public administration are dealt with under different statutes. One of the primary objects of the draft Bill is to have one basic statute to do so. It is for this reason that the Public Service Act, 1994 (PSA) and those provisions of the Municipal Systems Act, 2000, dealing with staffing are to be repealed and integrated into one statute. Accordingly, the draft Bill will apply to all government institutions: departments in the national and provincial spheres of government, municipalities, and government components within all three spheres.
20. Although there are exceptions in respect of certain provisions insofar as security and intelligence services and educators are concerned, the draft Bill applies to the public administration as a whole. It is because of the special nature of these sectors that the draft Bill (like the PSA) applies to the extent that its provisions are not contrary to specific legislation regulating these sectors.

EXTENDING THE SCOPE OF THE PUBLIC SERVICE COMMISSION'S MANDATE (clause 43 and Schedule 3, Part A)

21. Since 1996 the Public Service Commission has monitored and evaluated the performance of the public service in relation to the administration of personnel practices and service delivery and submitted its reports to the National Assembly.

The draft Bill envisages an expanded role for the Public Service Commission. It is proposed that the oversight mandate of the Public Service Commission include national, provincial and local spheres of government. Part A of Schedule 3 of the draft Bill amends the Public Service Commission Act to extend the Commission's oversight powers (contained in section 196(4) of the Constitution) to include local government.

VESTING OF HUMAN RESOURCE POWERS (clauses 13 and 21)

22. The draft Bill effects a significant change to the current public service legislation in that it vests human resource powers in relation to the career incidents of national and provincial employees (other than heads of institutions and employees reporting to them) in the head of the relevant institution. Currently, these powers are vested in executive authorities. This is intended to enhance the accountability of heads of institutions by locating both human resource and financial management powers in him or her. In relation to top management (heads of institutions and the next layer of management), the appointment powers are vested in the President (with concurrence of Cabinet) for national departments and components, the Premier (with concurrence of the relevant Executive Council) for provincial departments and components.
23. In the case of municipalities, powers concerning appointments and other career incidents of both top management and other staff are vested in the Municipal Council (see section 160(1)(d) of the Constitution).

GOVERNMENT COMPONENTS (clause 8)

24. Government components are intended to provide a specific-purpose vehicle for service delivery, regulatory functions and other purposes in instances where it is desirable to ring-fence the particular activity, provide it with a designated budget and administrative head, while ensuring that the precepts of sound corporate governance within a public sector setting are adhered to. The head of a government component will report to the head of the principal institution. Government components may have advisory boards, which are accountable to the Minister of the parent department.
25. An executive authority in the national, provincial or local sphere may create or abolish a government component, provided a feasibility study has been conducted and the creation or abolition has been recommended. In addition, executive authorities in the different spheres must consult with the relevant authorities: in the case of national departments, they must exercise their powers in consultation with the Minister and the Minister of Finance; in other spheres, executive authorities must do so after consultation with the Minister.

SENIOR MANAGEMENT SERVICE (clauses 12-17)

26. Improved service delivery cannot be achieved without capable, committed, loyal and strong leadership. Public administration requires dynamic leaders with an array of skills to manage and drive the implementation of government policy priorities. The public service has established a Senior Management Service (SMS) and the draft Bill intends to extend the SMS to municipal managers and the next level of management. The regulatory framework is intended to achieve alignment, where appropriate, in recruitment and selection, remuneration and conditions of service, performance management and development, a competency framework, standards of ethics and conduct, misconduct and incapacity procedures, financial disclosure requirements and procedures for transfer, secondment and deployment.
27. The object of the envisaged Senior Management Service is to create a cadre of senior managers and senior professionals across institutions for the purpose of (a) developing a public management culture based on the values and principles in section 195(1) of the Constitution and the provisions of the draft Bill; (b) facilitating co-operation among management structures of institutions; (c) transmitting organisational, managerial, professional and strategic expertise across institutions; and (d) providing an organised network for the dissemination of policy, strategy and expertise.
28. The draft Bill empowers the Minister to establish a framework of minimum and maximum remuneration and benefits and also norms and standards on conditions of service applicable to SMS members for national, provincial and local government. In relation to local government, the MPSA must act after consultation with national organised local government. For national and provincial SMS members (including sectors), the Minister may determine specific terms and conditions of service.

TERMS AND CONDITIONS OF EMPLOYMENT (clauses 29 and 30)

29. The draft Bill envisages the continuation of the current structure of collective bargaining in the public administration. The existing bargaining councils in the public administration will remain as separate bargaining councils each with their own jurisdiction. It is intended though to institute a process for the bargaining councils in the public administration to agree on arrangements to coordinate the mandating, negotiation and conclusion of collective agreements. That process will be initiated and facilitated by the Commission for Conciliation, Mediation and Arbitration.
30. Negotiations on terms and conditions of service will be negotiated in the respective bargaining councils in accordance with their constitutions. If agreement is reached in a council, the agreement may be binding on all parties to that council and non-parties within the jurisdiction of that council by way of a Ministerial determination. This determination fulfils a similar function to an extension of an agreement under section 32 of the Labour Relations Act. If no agreement is reached and the negotiation procedures of the bargaining council have been exhausted, the Minister may, as she

may do currently under section 5(5) of the Public Service Act, make a determination giving effect to the government's final proposals. The trade unions however retain their right to strike and if as a result of any settlement flowing from a strike, the determination must be amended to give effect to that settlement.

31. In order to prevent and eradicate unjustifiable discrepancies in terms and conditions of employment in the public administration, the draft Bill provides for proposals to be mandated by the Minister in respect of the national and provincial spheres and to authorise employer proposals in the municipal sphere. In order to properly meet the requirements of municipal autonomy, the Minister may only refuse to authorise proposals if they retain or introduce unjustifiable discrepancies. That decision is subject to judicial scrutiny. Provision is also made for the Minister to table proposals to eradicate unjustifiable discrepancies in the bargaining councils.

DEPLOYMENT OF STAFF (clauses 24 to 27)

32. Greater mobility of staff facilitates the transfer of functions from one sphere to another, which is desirable in certain instances to allow services to be delivered at the most appropriate level and to enable the deployment of managers to where they are most needed in government. The draft Bill contains provisions to enable transfers, secondments and transfers of staff linked to a transfer of functions. Transfers may be made without the consent of the employee concerned provided that the transfer satisfies an operational requirement of the recipient department and is fair to the employee. In the case of transfers or secondments to or from a provincial department or municipality, the sending and recipient provincial and municipal institutions must consent to transfer or secondment of staff. Conditions of service may on the whole not be less favourable. The draft Bill also contains special provisions regulating disputes about transfers.

CAPACITY DEVELOPMENT (clauses 31 to 34)

33. The provisions relating to capacity development require public administration institutions to develop their human resource capacity through the education and training of their employees. Minimum requirements regarding compliance with the Skills Development Act are stipulated, and institutions are empowered to make additional provision for training and education on their budgets and to seek outside funding. The draft Bill recognises the Academy, currently called the South African Management Development Institute, as trainer and facilitator of training for the public administration. It also provides for compulsory training and accreditation of training.

PARTICIPATION OF EMPLOYEES IN ELECTIONS (clause 36)

34. The draft Bill allows employees to stand in national, provincial or local elections, subject to prescribed limitations and conditions. The employment contract of a successful candidate terminates automatically on assumption of political office.

COOLING OFF PERIOD FOR EMPLOYEES INVOLVED IN PROCUREMENT (clause 37)

35. A provision has been included in the Bill that imposes a 12 month ‘cooling off’ period for employees involved in the procurement of services of service providers. It provides for a prohibition from accepting employment or appointment to the board of the provider, the performance of remunerated work or the receipt of any other gratification. Service providers or employees who contravene this provision are guilty of an offence and on conviction liable to a fine of R1 million. An additional fine of an amount up to the monetary value of the proceeds of the prohibited transactions may be levied against the transgressing employee. A contravention by a service provider also constitutes good cause for the cancellation of the contract in question and, if the contract is cancelled, may result in a court declaring the monetary value of the proceeds derived from the contract forfeit.

CONTINUATION OF DISCIPLINARY STEPS (clause 39)

36. The draft Bill provides for the continuation of disciplinary steps and other measures when an employee leaves an institution while an investigation regarding misconduct, poor performance or ill-health is pending and joins another institution. The aim is to ensure that an employee cannot evade the outcome of procedures by moving between public administration institutions. The ‘new’ institution may on its own initiative continue steps, or if the ‘previous’ institution requests it, must continue such steps. The clause also requires employees to disclose prior actions on the grounds of misconduct, ill-health or poor performance and any such known pending or incomplete actions when applying for a position.

PROHIBITION ON RE-EMPLOYMENT IF DISMISSED FOR MISCONDUCT (clause 40)

37. The Minister may in regulations prescribe a term within which re-employment of an employee found guilty of misconduct is prohibited. Decision makers are guided to consider the nature of the misconduct when considering re-employment outside such period.

REGULATION-MAKING POWERS OF MINISTER (clauses 44-46)

38. The draft Bill empowers the Minister to set norms and standards on a wide range of personnel and public administration practices, procedures and systems. A norm and standard is intended to guide employers and employees in the public administration and to set parameters within which important procedures (such as grievance procedures and disciplinary procedures) or practices (such as recruitment) are established. It will include codes of good practice, default procedures, principles and factors to be taken into account in decision making. In other words, what is intended is not centralised uniformity but a harmonisation that properly allows for specialised differentiation and autonomy.
39. The Minister is required to consult organised local government in relation to regulations affecting municipal institutions. It is also important to note that the regulations require a notice and comment procedure before promulgation.
40. If a draft regulation concerns a matter of mutual interest, the Bill makes provision for the Minister or a party to the bargaining council to table it for negotiation. If there is a dispute over whether a matter constitutes a matter of mutual interest, provision is made for it to be resolved on an expedited basis by the Labour Court.

FAILURES TO COMPLY WITH ACT (clause 49)

41. This clause seeks to introduce measures to ensure compliance with the draft Bill, by requiring executive authorities to take disciplinary measures against the heads of the institutions over which they have authority, and for heads of institutions to take action against employees who contravene the provisions of the draft Bill. The clause requires that a record of instances of non-compliance be kept.

DELEGATION (clause 53)

42. The clause provides for delegations: from the Minister to the head of the institutions reporting to the Minister and from them to employees within those institutions; from the Premier to the head of the Office of the Premier; from the President to Deputy President and Ministers; from the Premier to Members of the Executive Council; from an executing authority to the head of institution; and from the head of institution to employees within that institution. The performance of a duty may also be delegated. The Minister may not delegate certain powers in relation to collective bargaining or the powers to make regulations.

JURISDICTION OF THE LABOUR COURT (clause 54)

43. In a recent decision of the Constitutional Court, the Court held that public service employees were not entitled to remedies under both labour law and administrative law. It criticised the formulation of section 157(2) of the Labour Relations Act, which gives concurrent jurisdiction to both the Labour Court and the High Court. In order to give effect to that decision, the draft Bill proposes to give the Labour Court exclusive jurisdiction in respect of all employment or labour matters in respect of employers

and employees in the public administration. In line with the thinking that motivates both the Labour Relations Act and this draft Bill, there should be only one institutional framework for giving effect to employee rights to challenge employer decisions and to supervise that operation of that framework.

AMENDMENTS TO OTHER LEGISLATION (clause 55 and Schedule 3, Part A)

44. The draft Bill repeals or amends the Public Service Act, 1994 (repeals the whole Act), the Public Service Commission Act, 1997 (amends to extend mandate to local government), the State Information Technology Agency Act, 1998 (amends to extend measures to enhance interoperability of information systems to local government), the Municipal Structures Act, 1998 (amends to align with human resource arrangements of the draft Bill), the Municipal Systems Act (amends to align with organisational and human resource arrangements).

TRANSITIONAL ARRANGEMENTS (clause 55 and Schedule 3, Part B)

45. The saving and transitional arrangements provide for the continued employment of employees employed in terms of the Public Service Act or by municipalities, and that anything done in terms of a repealed provision that may be done in terms of the draft Bill will be deemed to have been done in terms of the draft Bill.

COMMENCEMENT (clause 56)

46. Clause 56 allows for the provisions of the draft Bill to be brought into operation on different dates and also on different dates for different categories of employees or institutions.

CONCLUDING REMARKS

47. The Single Public Service initiative does not aim to centralise power in the hands of national government. Rather it forms part of a concerted effort, which commenced in 1994, to improve coordination and integration in government. It continues the decentralised approach adopted in 1996 and launched in 1999, in which the regulatory framework provides institutions within public administration with the management autonomy to develop policies and practices suited to local conditions. It builds on intergovernmental processes, systems and structures created since 1999.
48. The draft Bill provides for administration in the three spheres and for related personnel matters. It seeks to bring about the harmonisation of public administration personnel practices, systems and conditions of service over time, in order to facilitate efficient and effective delivery of services. Ultimately the success of the Single Public Service initiative will be measured by the extent to which it succeeds in

bringing about significant improvements in service delivery by national, provincial and local government, and gives effect to the basic values and principles contained in section 195(1) of the Constitution.