



**The Director- General**

**Department of Public Service and Administration**

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**WRITTEN COMMENTS FROM CORRUPTION WATCH ON THE DRAFT  
PUBLIC ADMINISTRATION MANAGEMENT BILL, 2013**

1. Corruption Watch (“Corruption Watch / CW”) makes this submission on the draft Public Administration Management Bill, 2013 (“the PAM Bill”) , in response to the call for written comments, issued on 30 May 2013, by the Minister of Public Service and Administration, Mrs Lindiwe Sisulu.
2. CW has considered the PAM Bill in the time available to it. We welcome further engagement on the PAM Bill in due course.
3. Our submissions are structured into the following sections:
  - 1 **Introduction;**
  - 2 **Prohibition on public officials conducting business with the State;**
  - 3 **Restrictions on outside remunerative work;**
  - 4 **Introduction of a ‘Cooling –off’ period;**

- 5 **Continuation of proceedings against public officials;**
- 6 **Prohibition of re-employment if dismissed for misconduct;**
- 7 **The new anti-corruption bureau; and**
- 8 **Conclusion.**

## **1 INTRODUCTION**

4. Corruption Watch is a civil society organisation. CW is independent, and has no political or business alignment. CW exposes corruption and the abuse of public funds in South Africa, and promotes transparency and accountability to protect the beneficiaries of public goods and services.
5. CW believes that confronting corruption requires an active and engaged citizenry that is prepared to hold leaders to account. CW aims to ensure that the custodians of public resources, including public officials, act responsibly to advance the interests of the public.
6. It is on the basis of this mandate that CW's activities include monitoring and responding to legislative developments which impact on public goods and services and the custodians thereof. Given the importance of the PAM Bill in setting standards and introducing systems for improved public administration, CW welcomes the opportunity to respond to this important piece of legislation.
7. Corruption Watch expresses its general support to the Department of Public Service and Administration (DPSA) for this move to provide for the organisation, management, functioning as well as personnel-related matters in the public administration, in all three spheres of government.
8. Our submission focuses on sections of the PAM Bill that CW has a keen interest and experience in, and given its mandate as an organisation that exposes corruption involving the abuse of public resources and public power. CW herein provides its views and advances proposals aimed at strengthening selected provisions of the PAM Bill.

## **2 PROHIBITION ON PUBLIC OFFICIALS CONDUCTING BUSINESS WITH THE STATE**

(Section 35 of the PAM Bill)

### Summary of Section and CW's views:

9. This section:

- 1 Introduces an outright ban on public officials from conducting business with the State;
- 2 Is novel in our law;
- 3 Corruption Watch endorses this new provision;
- 4 Corruption Watch proposes that the prohibition be extended from state employees to include immediate family members, as regards family members contracting with the employee's institution; and
- 5 Corruption Watch highlights the importance of increased capacity in enforcing this provision.

### CW's detailed view:

10. Section 35 of the PAM Bill provides that notwithstanding anything contained in any other law, with effect from the date of commencement of this section, an employee may not conduct business with the state; hold an equity interest in any entity conducting business with the State or be a director of a public or private company conducting business with the State.
11. As regards family members of state employees, the employee must disclose in the prescribed manner, to the relevant head of the institution, any financial interest that the employee and any family member of the employee has in any entity conducting business with the state.
12. This outright ban on public officials doing business with the State does not exist in our current legal framework and is thus in Corruption Watch's view, a positive step.

13. CW lauds the DPSA's proposal to institute a blanket ban on all contracting by public officials with the State. The proposed ban only extends to individual employees (and not to family members, where disclosures of interests are required) but still sends a strong signal about enriching oneself through exposure to the State in the employment context.
14. Corruption Watch supports this proposed ban in light of amongst other things the constitutional guarantee of fair and competitive public procurement. In particular, Section 217 of the Constitution requires that when an organ of State contracts for goods or services it must do so in a manner that is fair, equitable, transparent, competitive and cost-effective. In order to give effect to this system, it is at the very least necessary to require disclosure of financial interests and in Corruption Watch's view, completely supportable to impose restrictions on public officials' ability to contract with the state.<sup>1</sup>
15. CW also submits that this proposed outright ban is constitutionally supportable in light of the right contained in the Bill of Rights to choose one's trade, occupation and profession.<sup>2</sup>
16. The introduction of this outright ban also appears appropriate in light of the apparent inability to manage the disclosure system<sup>3</sup> at present. Other jurisdictions<sup>4</sup> have, or are trying to introduce similar provisions in attempts to ensure the system of public procurement is not continually corrupted.

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<sup>1</sup> The Auditor General's report on the public service and the number of public officials contracting with the state provides weighty evidence for the need for an outright ban

<sup>2</sup> The 'freedom of occupation' right was 'watered down' from the Interim to the Final Constitution. The right to economic freedom in the Final Constitution is a much narrower right than the right in the Interim Constitution and is now limited (similar to the case in other jurisdictions, such as Germany) to the right to choose one's trade or occupation

<sup>3</sup> See note 1 above

<sup>4</sup> For example, a new draft law in Russia aims to prevent civil servants from signing contracts with companies in which their relatives have an interest. In Serbia, civil servants are not permitted to 'establish commercial entities or perform entrepreneurial activities' nor are they allowed 'to be a director of a legal person'

17. Corruption Watch, in addition to its overall support for this provision, calls for:

- 1 The extension of the ban on contracting with the state to include the immediate family members of the public official – as regards the immediate family contracting with the state employee’s institution (not as regards the public sector as a whole); and
- 2 Increased institutional capacity to monitor and enforce this ban effectively.

### **3 RESTRICTIONS ON OUTSIDE REMUNERATIVE WORK**

(Section 36 of the PAM Bill)

Summary of Section and CW’s view:

18. This section:

- 1 Requires state employees to obtain written approval prior to undertaking outside remunerative work;
- 2 Exists in our law already in our current Public Service Act (to be repealed by the PAM Bill);
- 3 Corruption Watch endorses the necessity to obtain prior written approval before engaging in outside remunerative work; and
- 4 Corruption Watch proposes that the provision be tightened through the insertion of ‘a deemed refusal’ clause into the provision.

19. Section 36 of the PAM Bill provides for and regulates outside remunerative work by public servants. This section is similar to section 30 of the Public Service Act of 1994 (our current legal framework governing public servants).

20. Corruption Watch views Section 36 of the PAM Bill as a legitimate and reasonable limitation on the right of government employees to engage in outside remunerative work. We do this in light of the number of reports that we have received evidencing

conflicts of interest and abuse of the system of outside work by public officials, as well as the abuse of public resources in this context.<sup>5</sup>

21. Corruption Watch however submits that the section in the PAM Bill does not take the position further than the existing Section 30 of the Public Service Act. In this regard, and due to the vulnerabilities in the existing framework on monitoring outside work, Corruption Watch proposes that a 'deemed refusal' clause be built into the clause on outside remunerative work.
22. Corruption Watch is concerned that Section 36 of the PAM Bill does not speak to the reality of a relevant authority failing to take a decision in respect of an employee's request for permission to engage in outside work within the requisite 30 day period. The Section in the PAM Bill fails to set out in clear terms what happens should the relevant authority fail to respond to a request for permission to engage in outside remunerative work. Corruption Watch submits that this provision should be sufficiently clear to prevent government employees from falling foul of the law.
23. Section 30 (b) of the Public Service Act expressly provides that *'if the executive authority fails to make a decision within the 30 day period, it would be deemed that such permission was given.'*
24. Corruption Watch submits that this provision should be tightened in the PAM Bill and stipulate that if no response is forthcoming from the relevant authority to the request for permission to do outside work, it should be construed as a deemed refusal.<sup>6</sup>

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<sup>5</sup> See in this regard a recent story that we published on outside work in the medical profession: <http://www.corruptionwatch.org.za/content/doctors-who-cheat-state-surgeon-speaks-out>

<sup>6</sup> A state employee in this context would still have recourse under our Promotion of Administrative Justice Act to access reasons for the decision and to challenge the decision and therefore it is Corruption Watch's submission that he/she would not suffer prejudice as a consequence of a deemed refusal

25. Section 36(2) of the PAM Bill sets out factors that a relevant authority must take into account when considering whether or not to grant approval for outside work.<sup>7</sup>

26. Corruption Watch also proposes that a more stringent test be applied when assessing whether or not to allow public servants to engage in outside work.

27. In this regard, CW proposes the following amendments to section 36 of the draft Bill (which are underlined for ease of reference):

*Section 36*

- i. No employee shall perform or engage to perform remunerative work outside the institution concerned without the written approval of the relevant authority*
- ii. For the purposes of subsection (i), when considering whether or not to grant the approval, the relevant authority must take into account whether the outside work is likely to interfere with or impede the efficient performance of the employee's functions, or conflict with an employee's duties*
- iii. For the purposes of subsection (ii), an activity conflicts with an employee's duties*

  - a. If it is prohibited by a statute, a regulation or any prescribed code of conduct*
  - b. If the activity would require the employee's disqualification from matters so central or critical to the performance of his official duties that the employees ability to perform the duties of his position would be materially impaired.*

- iv. The relevant authority must decide whether or not to grant approval within 30 days after the receipt of the request for approval from the employee*

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<sup>7</sup> In particular, Section 36 (2) of the PAM Bill states that the relevant authority must consider "whether the outside work is likely to interfere with or impede the efficient performance of the employee's functions or constitute a contravention of any prescribed code of conduct."

- v. *If the request refused, the relevant authority must within 30 days after receipt of the request for reasons, furnish written reasons to the employee for the refusal to approval outside work*
- vi. *If the relevant authority fails to give the decision on a request to engage in outside work to the employee within the period contemplated in section 36 (4), the relevant authority is, for purposes of this Act, regarded as having refused the request.*
- vii. *Approval for an employee to perform remunerative work prohibited by section 38 may not be granted in terms of this section.*

28. The ability of the public service to compete for the best talent in the marketplace is a challenge that Corruption Watch recognises. We thus view the permitting of outside remunerative work by state employees as appropriate, as long as it is well regulated.<sup>8</sup>

#### **4 INTRODUCTION OF COOLING-OFF PERIOD**

(Section 38 of the PAM Bill)

##### Summary of Section and CW's views:

29. This section:

- 1 Introduces a 'cooling-off' period before public officials can move from government jobs to the private sector;
- 2 Is novel in our law;
- 3 Corruption Watch endorses this provision;

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<sup>8</sup> The Australian model of regulation of outside work by public officials appears to be a useful 'best practise' model in this regard



- 4 Corruption Watch views this provision as striking the correct balance between preventing corruption and allowing freedom of choice in one's profession.

CW's detailed view:

30. Corruption Watch welcomes Section 38 of the PAM Bill that provides for a 'cooling off period' for any employee directly involved in the awarding of a contract<sup>9</sup> before he/she may take up work in the private sector. That is, on introduction of this section, an employee involved in contract awards may not take up work with a 'service provider' (that is a private entity) within 12 months of the award of the contract to the private entity by the State.
31. This clause also prohibits appointment by a former state employee to the Board of the service provider (in cases where the employee has been directly involved with the private entity while working for the state); as well as prohibits the receipt of any gratification by a state employee from the service provider.
32. The relevant authority in terms of this Section may approve a shorter 'cooling-off' period than 12 months (in accordance with prescribed criteria).
33. Section 38 of the PAM Bill provides in particular that a service provider may not, within a 12 month period, employ an employee or appoint an employee to the board of the provider, or engage the employee to provide any service to the provider for payment in money or kind or grant any other gratification to the employee if:
  - 1 The employee set the criteria for the award of the work to the service provider;
  - 2 Evaluated or adjudicated the providers for the award of the work; or
  - 3 Recommended or approved the awarding of the work.
34. This restriction applies irrespective of whether the employee's employment in the relevant institution is terminated at any time during the 12-month period.

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<sup>9</sup> See paragraph 33 of this submission for an explanation of what constitutes 'direct involvement'

35. On contravention of this proposed provision, the contract with the service provider may be cancelled. In addition, as against the individual state employee, any person who contravenes this section will be liable on prosecution to a fine not exceeding R1 million (or such other amount as determined by the appropriate Minister in the Government Gazette).

36. Corruption Watch welcomes the proposed introduction of a 'cooling-off period'.

37. The phenomenon of people moving between government and the business sector is known as the 'revolving door' syndrome. This syndrome can be problematic for many reasons, including undermining the integrity of the State. Public officials are required to make decisions that benefit the public good, without taking into account possible personal gain, such as, for example, the prospect of a future lucrative employment opportunity in a private company. Public officials are also required to make decisions in a fair and impartial manner that does not favour any particular interest.

38. Three clear reasons have been advanced for the enactment of 'revolving door' laws<sup>10</sup>:

- 1 These laws are necessary to protect the Government from use against it of proprietary information by former employees who leave Government and take with them such information and then use it on behalf of a private party in an adversarial proceeding against the Government;
- 2 These laws are necessary to limit the potential influence and allure of a lucrative private arrangement or the prospect of such arrangement may have on current public officials when dealing with private entities while still in government;
- 3 These laws are necessary to prevent corruption and prevent the appearance of corruption of government processes.

39. CW lauds the DPSA for introducing an anti- 'revolving door' provision into our law. CW is mindful of the balance that must be struck between eradicating conflicts of interest on

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<sup>10</sup> These reasons have been advanced in the United States (which laws have been on the statute books in the US since as far back as 1872) but are also relevant in Corruption Watch's view to the South African context

the one hand and unduly curtailing career movement and advancement on the other. In this regard, CW supports the 12 month period proposed in the PAM Bill, and views it as a reasonable and balanced approach.

40. CW however calls upon the DPSA to ensure that appropriate systems are in place for the monitoring and enforcement of this provision so as its intended purpose is achievable.
41. In this regard, CW aligns itself with the policy proposals of the Public Service Commission<sup>11</sup> that suggest that clauses should be included in contracts between service providers and the State that prohibit the service providers from recruiting and appointing public officials who they have encountered in Government. (Thus shifting some of the compliance burden to the private sector).

## **5 CONTINUATION OF PROCEEDINGS AGAINST PUBLIC OFFICIALS**

(Section 40 of the PAM Bill)

### Summary of Section and CW's views:

42. This section:

- 1 Provides that employees are required to disclose previous actions taken against them in the workplace and provides for current employers to continue disciplinary proceedings;
- 2 Exists in our law in the Public Service Act (to be repealed by the PAM Bill);
- 3 Corruption Watch endorses this provision;
- 4 Corruption Watch proposes that the provision be tightened in order to make it more effective.

### CW's detailed view:

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<sup>11</sup> See: <http://www.psc.gov.za/newsletters/docs/2010/PSC%20NEWS.pdf>

43. Section 40 of the PAM Bill requires an employee to disclose previous actions instituted against him or her in the employment context when applying for a position within the public service.
44. This provision also provides that if an employee of a new institution is alleged to have committed misconduct in a former institution, the executive authority of the new institution must institute or continue proceedings against the employee, if requested to do so by the former institution.
45. Corruption Watch is concerned with aspects of this provision in that the mandatory institution or continuation of proceedings depends on the former state employer requesting the continuation of proceedings.
46. In Corruption Watch's view, the positive nature of this provision is substantially watered down by this requirement of a request, which in turn requires political will on the part of the employee's former employer.
47. In this regard, Corruption Watch proposes the exploration of an amendment to this section that makes the institution or continuation of proceedings mandatory in all cases.
48. Corruption Watch submits too that the DPSA should carefully consider whether the resignation of an employee<sup>12</sup> precludes the institution or continuation of disciplinary proceedings by the former employer. Here, Corruption Watch submits that the State should act swiftly in disciplining employees who resign in the face of disciplinary charges – which action can be taken while the employee serves his/her notice period.
49. Alternatively and should it not be possible to discipline the employee while he/she is still subject to the employment relationship, Corruption Watch submits that it may indeed be possible to bring the disciplinary action after the employment relationship has ended which possibility should be explored.<sup>13</sup>

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<sup>12</sup> The resignation of state employees in the face of disciplinary charges and re-surfacing in a new public position is a common complaint received by Corruption Watch

<sup>13</sup> On this score, the judgment of *Muthusamy v Nedbank Limited* (J2211/09) [2010] ZALC 216; (2010) 31 ILJ 1453 (LC) (16 April 2010) and in particular paragraph 9 may be useful (even though the overall finding of the judgment was that there was a lack of jurisdiction on the part of the employer)

## **6 PROHIBITION ON RE-EMPLOYMENT IF DISMISSED FOR MISCONDUCT**

(Section 41 of the PAM Bill)

### Summary of Section and CW'S views:

50. This section:

- 1 Prohibits re-employment in the public sector within a prescribed period by a person who has been dismissed for misconduct;
- 2 Exists in our law in the Public Service Act;
- 3 Corruption Watch endorses this provision;
- 4 Corruption Watch proposes an amendment to this provision as regards 'corruption-related' misconduct.

### CW's detailed view:

51. This section of the PAM Bill is similar to section 17 of the Public Service Act and places a time frame within which public servants who have been dismissed for misconduct may not be re-employed by the State.

52. CW fully supports this prohibition for a time period, however, proposes that in the case of 'corruption-related misconduct', an absolute ban on re-employment should be introduced. In our view, this type of dismissal for 'corruption-related misconduct' warrants this severe sanction of an absolute prohibition on re-employment by the state.

53. Accordingly, we propose the following amendments to section 41:

54. *Section 41*

*A person dismissed for misconduct by an institution may only be re-employed by the same or any institution after the expiry of a prescribed period.*

*For purposes of this section, if a person is dismissed for corruption-related misconduct, he or she may not be re-employed by the State.*

*Different periods may be so prescribed for different categories of misconduct.*

*(continue as section is drafted in PAM Bill)*

## **7 NEW ANTI-CORRUPTION BUREAU**

(Section 45 to 48 of the PAM Bill)

### Summary of Section and CW'S views:

55. This section:

- 1 Provides for the establishment of an anti-corruption bureau ("the Bureau") within the public administration;
- 2 Is novel;
- 3 Corruption Watch endorses the new anti-corruption Bureau;
- 5 Corruption Watch submits that greater clarity is required in this section to avoid doubt;
- 6 Corruption Watch proposes an amendment to strengthen this section as regards the Bureau's powers as against the second and third tier of government.

CW's detailed view:

56. Corruption Watch welcomes the establishment of an anti-corruption bureau within the public administration to deal with 'corruption-related misconduct'<sup>14</sup>. CW views this as a necessary and positive step in ensuring that corruption in the public sector is effectively tackled.

57. In particular, the Bureau goes a long way to addressing the Constitutional Court's unequivocal and unanimous ruling in the judgment of *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) (hereinafter referred to as 'Glenister') that the government is constitutionally required to establish effective mechanisms to tackle corruption.<sup>15</sup>

58. Both the majority and minority judgments of *Glenister* recognise that corruption is a scourge that must be effectively tackled. In particular, the majority held<sup>16</sup>:

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<sup>14</sup> Which is still to be defined

<sup>15</sup> In this regard, the majority judgment held that: "*The Constitution is the primal source for the duty of the state to fight corruption. It does not in express terms command that a corruption-fighting unit should be established. Nor does it prescribe operational and other attributes, should one be established. There is however no doubt that its scheme taken as a whole imposes a pressing duty on the state to set up a concrete and effective mechanism to prevent and root out corruption and cognate corrupt practices.*" And the minority judgment, authored by Ngcobo CJ, held that: "*...(T)his judgment recognizes an obligation arising out of the Constitution for the government to establish effective mechanisms for battling corruption ... I am prepared to hold that there is a constitutional obligation for the state to take effective measures to fight corruption...*"

<sup>16</sup> Majority judgment at paragraph 166; see Minority judgment at paragraph 83

59. *“There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. ...”*

(Our emphasis)

60. Second, both judgments recognise<sup>17</sup> that corruption undermines the ability of the state to deliver on many of its obligations in the Bill of Rights, notably but not limited to those relating to social and economic rights.

61. Third, the positive duty<sup>18</sup> on the state to take effective measures to combat corruption derives from section 7(2) of the Constitution, which creates a duty on the state *“to respect, protect, promote and fulfil the rights in the Bill of Rights”*.

62. The proposed establishment of the Bureau is thus a laudable part of government’s efforts to establish effective mechanisms to tackle corruption.

63. In light of the unanimous findings of the Constitutional Court in *Glenister*, anti-corruption mechanisms are required to be effective. In CW’s view, for the reasons set out below, aspects of the Bureau’s powers as currently conceived in the PAM Bill unnecessarily curtail its effectiveness as a corruption-fighting institution and CW submits should be reconsidered. Corruption Watch also views aspects of the PAM Bill as regards the Bureau as unclear and in need of reformulation to avoid doubt.

64. Our view on effective public administration is supported by section 195 of the Constitution, which sets out the basic values and principles governing public administration, and expressly states that they apply to the administration in every sphere of government. Sections 195(1) and (2) of the Constitution provide:

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<sup>17</sup> Ibid

<sup>18</sup> Expressed in majority judgment at paragraph 177, 189; Minority judgment at paragraph 105 and 106



*(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*

*(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.*

*(2) The above principles apply to-*

*(a) administration in every sphere of government;*

*(b) organs of state; and*

*(c) public enterprises."*

65. Effective measures to combat corruption are a necessary condition for the realisation of the principles set out in section 195(1). Section 195(2) makes clear that the principles apply to the administration in every sphere of government, and

accordingly, that such measures will be required in respect of all three spheres of government.

#### LACK OF CLARITY AS REGARDS NECESSITY FOR A REQUEST IN ORDER FOR BUREAU TO ACT AT NATIONAL LEVEL AND TRIGGER OF REQUEST:

66. Section 45 of the PAM Bill provides:

##### **45 “Anti-corruption measures**

(1) *There is hereby established within the public administration the Anti-corruption Bureau.*

(2) *The Minister may, by notice in the Gazette, determine—*

(a) *the Bureau’s organisational structure and staff compliment;*

(b) *the categories of corruption-related misconduct; and*

(c) *the procedure to be followed by the Bureau in conducting its investigations.*

(3) *A head of an institution—*

*(a) may, if satisfied that there is a prima facie case of corruption-related misconduct, request the Bureau to investigate or institute disciplinary proceedings; or*

*(b) must, if a report of an investigation by the Bureau finds that there is a prima facie case of corruption-related misconduct and the head of an institution fails to institute disciplinary proceedings against the relevant employee within 90 days of receipt of the report, refer the matter to the Bureau to institute disciplinary proceedings.*

(Our emphasis)

(4) *In respect of disciplinary proceedings against a head of an institution, this section applies, with the changes required by the context, and any reference to the head of institution means the relevant executive authority.*

*(5) Disciplinary proceedings may be instituted by Bureau in respect of conduct contemplated in section 38."*

68 The effect of section 45(3) is to give the head of an institution:<sup>19</sup> the power to request the Bureau to investigate or institute disciplinary proceedings if he or she is satisfied that there is a prima facie case of corruption-related misconduct; and the obligation to refer a matter to the Bureau to institute disciplinary proceedings if:

- a. A report of an investigation of the Bureau finds that there is a prima facie case of corruption-related misconduct; and
- b. The head of the institution has failed to institute disciplinary proceedings within 90 days of receipt of the report.

69 It is not clear to Corruption Watch whether, as regards national departments, Section 45 (3) (b) of the PAM Bill intends to convey that the power of the Bureau to investigate corruption-related misconduct and institute disciplinary proceedings may be undertaken without the requirement of a request by the Head of such national Department.

70 Corruption's Watch confusion is compounded by the 'Explanatory Memorandum' on the PAM Bill which seems to suggest<sup>20</sup> that the Bureau is empowered to investigate and institute disciplinary proceedings in respect of corruption-related misconduct only if requested to do so by the Head of an institution.

(Our emphasis)

71 As regards conduct contemplated in Section 38<sup>21</sup> of the PAM Bill, Section 45(5) confers on the Bureau the power to institute disciplinary proceedings with no

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<sup>19</sup> The head of an institution is defined in section 1 as "the head of a national department, the Office of a Premier, a provincial department, a municipality or a head of a national, provincial or municipal government component and includes any employee acting in such post."

<sup>20</sup> At paragraph 41 of the Memorandum

<sup>21</sup> Section 38 deals with conduct of employees or former employees of the public service resulting in the award of work to service providers.

mention of any request on the part of the head of an institution. It therefore appears that, in respect of section 38 misconduct, the Bureau is expressly empowered to initiate its own investigation or disciplinary proceedings.

- 72 Corruption Watch submits that at national level, the Bureau should be empowered to investigate and institute disciplinary proceedings without a request from the Head of an institution. This may indeed be the intention of Section 45 (3) (b) but CW submits that for the avoidance of doubt, it should be made expressly clear in the PAM Bill.
- 73 On this score, CW submits that greater clarity should be provided as to what or who can trigger an investigation by the Bureau. That is, the PAM Bill should make it clear that in addition to requests from heads of institutions, the Bureau can conduct investigations for example, based on information received from the public through *inter alia* the Public Service Commission’s Anti-Corruption Hotline.

#### REQUIREMENT OF CONCURRENCE OF PREMIER AND MUNICIPAL COUNCIL FOR BUREAU TO ACT AT PROVINCIAL AND LOCAL LEVEL

74 Section 46 of the PAM Bill provides:

##### **46 “Powers and functions of Bureau**

*The Bureau—*

*(a) notwithstanding section 11(1)(g)(v) is responsible for the investigation and institution of disciplinary proceedings in respect of corruption-related misconduct matters in the public service;*

*(b) must coordinate the conduct of disciplinary hearings in respect of corruption-related misconduct matters in the public administration, including the appointment of presiding officers and employer representatives in such hearings;*

*(c) may only exercise a power under paragraph (a) and (b) in respect of a provincial department, provincial government component, municipality or municipal government component with the concurrence of the Premier or the Municipal Council respectively;*

(Our emphasis)

- (d) must provide specialised technical assistance and advisory support to deal with disciplinary matters in the public administration;*
- (e) must manage, coordinate and protect information and sources relating to corruption-related misconduct matters in the public administration;*
- (f) must facilitate the protection of whistle-blowers in the public administration;*
- (h) must build capacity within institutions to conduct misconduct investigations and disciplinary hearings;*
- (i) must facilitate the enforcement of disciplinary sanctions;*
- (j) must refer evidence discovered by the Bureau's investigations regarding or which points to the commission of corruption-related misconduct to the relevant executing authority or head of an institution;*
- (k) must refer evidence discovered by the Bureau's investigations regarding or which points to the commission of an offence to the relevant prosecuting authority;*
- (l) must report in writing—*
  - (i) at least once every quarter to the Director-General and the Minister on the performance of the Bureau's functions; or*
  - (ii) as directed by the Minister, on the progress made in the investigation and finalisation of matters brought before the Bureau; and 74*
- (m) may in the execution of its functions, subject to the approval of the Minister, be assisted by or conclude service level agreements with—*
  - (i) other organs of state; or*
  - (ii) other persons."*

75 The following aspects of this provision are significant: Notwithstanding the fact that section 11(1)(g)(v) of the PAM Bill provides that the head of an institution is

responsible for the discipline of staff, the Bureau is responsible for the investigation and institution of corruption-related misconduct matters in the public service.<sup>22</sup>

76 The Bureau is required to co-ordinate the conduct of disciplinary proceedings in respect of corruption-related misconduct matters in the public administration, including appointing presiding officers and employer representatives in such hearings.<sup>23</sup>

77 The Bureau's powers to investigate and institute such disciplinary proceedings in respect of a provincial department, provincial government component, municipality or municipal government component may only however be exercised with the concurrence of the Premier or the Municipal Council respectively.<sup>24</sup>

78 Section 47 of the PAM Bill provides, in relevant part:

**47     “*Conduct of investigations*”**

*(1) The Bureau's investigation, contemplated in section 54(3),<sup>25</sup> is initiated on the date that it accepts a request to investigate or the date on which the head of an institution refers a matter to it.*

*(2) The decision to accept a request to investigate or to conduct an investigation as contemplated in subsection (1) must be in writing.*

*(3) The Bureau may only conduct an investigation in respect of a provincial or municipal institution with the concurrence of the Premier and the Municipal Council.*

(Our emphasis)

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<sup>22</sup> Section 46(a)

<sup>23</sup> Section 46(b)

<sup>24</sup> Section 46(c)

<sup>25</sup> The reference to section 54(3) appears to be an error. It should refer to section 45(3).

- 79 Section 47(3) accordingly requires the concurrence of the Premier or Municipal Council in order for the ACB to conduct an investigation in respect of a provincial or municipal institution.
- 80 The effect of these sections is that the powers of the Bureau to investigate and initiate proceedings in respect of corruption-related misconduct in the local or provincial government sphere can only be exercised with the concurrence of the relevant Municipal Council or Premier.
- 81 The PAM Bill rightly recognises that the provincial and local spheres of government have a significant role to play in the public administration.
- 82 Section 40 of the Constitution provides that government is constituted as national, provincial and local spheres of government which are distinctive, inter-dependent and interrelated. The Constitution accords a degree of autonomy to the local government sphere in respect of the management of the public administration within its domain.
- 83 Chapter 7 of the Constitution spells out in detail the importance and role of local government.
- 84 In particular, Section 151 (3) and (4) of the Constitution provide:
- “(3) A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.*
- (4) The national or a provincial government may not compromise or impede a municipality’s ability or right to exercise its powers or perform its functions.”*
- 85 Section 156 of the Constitution provides:
- “A municipality has executive authority in respect of, and has the right to administer-*
- (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and*

*(b) any other matter assigned to it by national or provincial legislation.”*<sup>26</sup>

86 The Constitutional Court<sup>27</sup> has stressed that the local government sphere is given autonomy within its sphere, subject to the requirements of co-operative governance, and the limits imposed by the Constitution, or national and provincial legislation. The Constitution also makes clear that provincial government has a significant degree of autonomy within its domain.

87 Chapter 6 of the Constitution sets out the importance and role of the provincial sphere of government. In particular, Section 125 of the Constitution provides for the executive authority of provinces.

88 Section 197 of the Constitution makes provincial governments responsible for aspects of the management of members of the public service within their jurisdiction.<sup>28</sup>

89 The Constitutional Court addressed the power of the provinces to structure the provincial public service in *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC)<sup>29</sup>.

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<sup>26</sup> From a reading of Part B of Schedule 4 and Part A of Schedule 5 it is clear that the administration of many of the matters listed in these schedules will involve members of the public administration and will fall into the area of the Bureau's operation. For example, included are building regulations, local tourism, municipal airports, municipal health services, certain municipal public works (Part B of Schedule 4); and control of public nuisance, local amenities and sports facilities, municipal roads, refuse removal, and traffic and parking (Part B of Schedule 5).

<sup>27</sup> See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) at paragraphs 373 - 374; *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at paragraph 126; *City of Cape Town and Another v Robertson and Another* 2005 (2) SA 323 (CC) at paragraphs 59 - 60

<sup>28</sup> In particular, Section 197 (4) of the Constitution provides that Provincial governments are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administrations and within a framework of uniform norms and standards applying to the public service

<sup>29</sup> In a judgment of Chaskalson P (as he then was) The case dealt with a challenge to certain amendments to the Public Service Act that aimed at the structural transformation of the public service. The provincial government challenged the provisions on the ground that they infringed the executive power vested in and detracted from



90 It was held in this judgment that the Constitution vests the competence to make laws for the structure and functioning of the public service as a whole in the national sphere of government. The Constitution provides for the framework for the public service to be set by national legislation and for the incidents of employment to be the responsibility of the various administrations (including provincial administrations) of which the public service was composed (paragraphs 44-46 of the judgment). (The main attack on the constitutionality of the amendments therefore failed (paragraph 48).

91 One of the amendments, which permitted the Minister to direct that the administration of provincial laws be transferred from a provincial department to a national department or other body, clearly infringed the executive authority of the province to administer its own laws, and was struck down (paragraphs 86-88).

92 Chaskalson P however held<sup>30</sup> that the constitutional power of Parliament to structure the public service is required to be exercised in the context of section 41(1)(g) of the Constitution:

*“Although the circumstances in which s 41(1)(g) can be invoked to defeat the exercise of a lawful power are not entirely clear, the purpose of the section seems to be to prevent one sphere of government using its powers in ways which would undermine other spheres of government, and prevent them from functioning effectively. The functional and institutional integrity of the different spheres of government must, however, be determined with due regard to their place in the constitutional order, their powers and*

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the legitimate autonomy granted to the provinces by the Constitution (paragraph 4). The province argued that section 197(1) of the Constitution had to be narrowly construed as giving the national government the power to regulate or structure the public service corps, but not to structure the provincial administration within which the corps was to function.

<sup>30</sup> *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC) at paragraph 58

functions under the Constitution, and the countervailing powers of other spheres of government.”

(Our emphasis)

- 93 The powers conferred on Parliament to legislate in certain areas have to be exercised carefully to ensure that the national legislature does not encroach on the ability of the provinces to carry out the functions entrusted to them by the Constitution (see paragraph 60 of the judgment).
- 94 The Constitutional Court held that the bulk of the amendments did not detract from the executive power of the provinces or infringe on their functional institutional integrity (paragraph 94).
- 95 While the judgment dealt primarily with the powers of the provincial and national spheres of government to structure the public service within their domains, and not directly with the power to conduct investigations and disciplinary proceedings in respect of misconduct by members of the public administration, it establishes the following principles which are relevant to the powers given to the Bureau by Parliament:
- 96 Parliament is competent to prescribe, to a significant degree, how provincial administrations in the provincial sphere are structured.
- 97 In CW’s view, it follows that it is also competent to prescribe measures to combat corruption in the public service in the provincial sphere. That competence however must be exercised consistent with the co-operative government principles in section 41 of the Constitution. The power may not be exercised in a way that encroaches on the provinces’ ability to carry out the functions conferred on them by the Constitution.
- 98 In CW’s view, it is therefore clear that the Bureau could not conduct disciplinary proceedings and investigations of corruption-related misconduct without having regard to the views of the relevant local government and provincial government authorities. That would constitute an impermissible intrusion onto the autonomy of these two spheres of government.

- 99 However, in CW'S view it does not follow that the Constitution requires the Bureau to obtain the concurrence of the Premier or Municipal Council in order to proceed.
- 100 The requirement of concurrence of the relevant authority is thus in CW's view an unnecessary constraint on the ability of the Bureau to effectively investigate and institute disciplinary procedures. By essentially giving the Premier or Municipal Council a power of veto over the ability of the Bureau to investigate or institute proceedings in respect of a provincial or municipal institution, a provincial department, provincial government component, municipality or municipal government component, the Bureau's ability to be effective is significantly watered down. Were this provision to remain in the PAM Bill, the Bureau's ability to effectively combat corruption, particularly if senior members of the provincial executive or Municipal Council are involved, would be hampered. If allegations of corruption are made against well-connected or senior members of these parts of government, the ability of the Bureau to perform its function may very well be constrained by the exercise of this power of veto.
- 100 In CW's view, the principles of co-operative governance and autonomy of the different spheres of government do not require Municipal Councils and Premiers to be able to veto the Bureau's investigations or the institution of disciplinary proceedings. Requiring the Bureau to consult with the relevant Premier or Municipal Council before initiating an investigation or disciplinary proceedings would in CW's view satisfy the requirements of the Constitution.
- 101 The requirement that the decision to initiate an investigation or proceedings be taken "*after consultation with*"<sup>31</sup> the Premier or Municipal Council would require the Bureau

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<sup>31</sup> "[A] decision 'in consultation with' another functionary requires the concurrence of that functionary while a decision 'after consultation with' another functionary requires no more than that the decision must be taken in good faith, after consulting and giving serious consideration to the views of the other functionary (see eg *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC) (1999 (4) BCLR 382) paragraph [85] n 94 and *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) (1999 (7) BCLR 725) paragraph [63])" *Unlawful Occupiers, School Site v City of Johannesburg* 2005 (4) SA 199 (SCA) at paragraph 13

to consult with the Premier or Municipal Council, but would not allow them to veto the investigation or proceedings if they disagree with the Bureau's wish to proceed.

- 102 In CW's view, such a requirement gives the appropriate weight to the views of the Premier and Municipal Council. It allows them to be heard and participate in the Bureau's decision whether to proceed without affording them the power of veto. This in CW's view cannot be said to encroach on their ability to carry out their functions in terms of the Constitution.
- 103 It might be argued that this is inconsistent with section 197(4) of the Constitution, which makes provincial governments responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administrations, and the power of Municipal Councils to appoint, direct and dismiss their own employees.<sup>32</sup>
- 104 However, in CW's view, this argument is not supportable. The PAM Bill does not empower the Bureau to appoint, promote, direct, transfer or dismiss employees. Its power is limited to the ability to conduct investigations and disciplinary proceedings. The Bureau is only empowered to "facilitate" disciplinary sanctions, but does not enforce them itself.<sup>33</sup> Ultimate control over, for example, the dismissal of employees remains with the heads of institutions.<sup>34</sup>
- 105 CW submits that that this should be made expressly clear in the PAM Bill: the Bureau is empowered to investigate and initiate investigations, and to make recommendations to the relevant head of institution, Premier or Municipal Council regarding what sanctions are to be imposed (such as suspension or dismissal); but the final decision in this regard remains with the relevant head of institution, Premier or Municipal Council. The relevant head of institution, Premier or Municipal Council thus retains the final decision on whether to implement the Bureau's

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<sup>32</sup> This appears to be one of the primary concerns of the drafters of the PAM Bill – see paragraphs 11-12 of the Explanatory Note.

<sup>33</sup> Section 46(k).

<sup>34</sup> Section 21

recommendations. In CW's view, this would comply with the requirements of section 197(4) of the Constitution.

- 106 If so, the power to institute disciplinary proceedings and investigations conferred on the Bureau does not encroach on the provincial and municipal authorities' responsibilities for their employees.

In summary:

The government is constitutionally required to establish effective anti-corruption mechanisms. The Bureau is a laudable part of its effort to do so.

- 107 The PAM Bill should give the Bureau the power to conduct investigations and disciplinary proceedings in respect of corruption-related misconduct of its own initiative at national level and after consultation at provincial and local level - which should be made expressly clear in the PAM Bill for the avoidance of doubt.
- 108 The Constitution does not require the Bureau to act with the concurrence of a Premier or Municipal Council when conducting investigations or disciplinary proceedings into corruption-related misconduct.
- 109 Amending the PAM Bill to require the Bureau to initiate investigations and disciplinary proceedings in respect of corruption-related misconduct "after consultation with" the Premier or Municipal Council in the relevant government sphere would suffice to meet the requirements of section 197(4) of the Constitution and would make the Bureau a more effective mechanism in the fight against corruption. This conclusion is premised on CW's reading of the Bureau's powers, which is that the Bureau does not itself take the final decision regarding the sanction to be imposed in regard to corruption-related misconduct, but that it is empowered to make recommendations to the relevant head of institution, Premier or Municipal Council. It is the relevant head of institution, Premier or Municipal Council which takes the final decision regarding the appropriate sanction. This CW submits should also be made clear in the PAM Bill.

## 8 CONCLUSION

- 110 Corruption Watch expresses its general support to the Department of Public Service and Administration for its timely move to provide for the organisation, management, functioning as well as personnel-related matters in the public administration, in all three spheres of government.
- 111 Corruption Watch in particular, welcomes the ban on public officials doing business with the State. CW however proposes the extension of this ban to include immediate family members of public officials, as regards family members contracting with the employee's institution.
- 112 Corruption Watch welcomes the imposition of restrictions on a public official's ability to conduct outside work. CW cautions that effective monitoring of this provision is required in order to ensure its effectiveness.
- 113 Corruption Watch views the introduction of a 'cooling-off' period before public officials can enter the private sector as necessary and appropriate. CW proposes the insertion of clauses into contracts with private entities that require private entities to comply with these provisions too.
- 113 Corruption Watch supports the continuation of proceedings against state employees who have been charged with disciplinary offences. Corruption Watch proposes the exploration of an amendment to this section that makes the institution or continuation of proceedings mandatory in all cases.
- 114 Corruption Watch support the prohibition on re-employment of those public officials that have been dismissed for misconduct, within a set time frame. CW proposes that as regards convictions for 'corruption-related misconduct' this prohibition should be permanent.
- 115 Corruption Watch welcomes the establishment of a new anti-corruption bureau within the Department of Public Service and Administration. CW calls for clarity in the provisions that establish the Bureau. CW also calls for an amendment to the provision to omit the requirement of 'concurrence' and insert a requirement of consultation.

116 Kindly contact us should further opportunities arise to give input into the PAM Bill in due course.

Sincerely,

(Unsigned as sent electronically)

**Nicola Whittaker and Kabelo Sedupane**

**Legal and Investigations' Team**

**CORRUPTION WATCH**