

**PUBLIC SERVICE AMENDMENT ACT 30 OF 2007:**  
**SECTION-BY-SECTION EXPLANATION**

***(Note: The Amendment Act is not in force yet – 3/3/2008)***

*(Prepared by DPSSA's Legal Services)*

**1. OBJECTS OF THE ACT**

1.1 Experience has shown that some organisational and human resource arrangements in Public Service Act (or the lack thereof) directly or indirectly hamper **internal efficiency** and **service delivery**. These areas include the following:

- (a) Currently the Public Service Act, 1994 (Proclamation No. 103 of 1994), “the current Act”, does not adequately regulate the deployment of staff;
- (b) Some government functions are provided via departments, not close to the point of service delivery and without direct accountability and decision-making by the functionaries tasked with such delivery. On the other hand some government functions are provided via entities outside the public service without direct control and influence by the relevant political head;
- (c) The Current Act and its prescripts do not meet the desired standards which weaken human resource management and results in costly legal disputes;
- (d) Employees who are suspected of transgressions sometimes resign and join other departments without being disciplined;
- (e) Employees who are dismissed for misconduct, even related to corruption, may be re-employed by other departments;
- (f) Different interpretations of some provisions resulted in legal disputes, while other are obsolete, overly complex or conflict with other legislation.

1.2 Therefore the overarching object of the Amendment Act is to improve the organisational human resource framework, which in turn will improve service delivery. To this end, the key objectives of the Amendment Act are to—

- (a) improve staff mobility arrangements for the public service;
- (b) enable greater alignment between the conditions of service of the general public service falling under the Current Act and certain sectors which, although part of the public service, have their own employment legislation;
- (c) introduce government components as a new institutional form within the public service as well as specialised service delivery units within departments, to enable

- direct service delivery through a focussed, ring-fenced separate entity under the direct control of a Minister or other executive authority (political head);
- (d) enhance compliance with the current Act through compulsory discipline of transgressors and reporting thereon;
  - (e) address a number of legal difficulties arising from the day-to-day application of the current Act as well as arbitrations and court cases; and
  - (f) simplify the current Act through streamlining several provisions, removing obsolete provisions and aligning the current Act with other legislation in order to facilitate its administration, which in turn will enhance service delivery.

## **2. SECTION-BY-SECTION SUMMARY OF AMENDMENT ACT**

### **2.1 Section 1**

This section provides for the replacement of section 1 in the Act, i.e. definition section, which defines words or phrases used in the current Act because a number of definitions are updated or clarified and certain new definitions are included.

It is important to note the purpose of definitions in legislation, i.e.

- (a) to avoid, by means of abbreviation, tedious repetition of terms or cross-references to provisions (e.g. definitions of department and government component); or
- (b) to avoid ambiguities through delimiting, extending or narrowing the ordinary dictionary meaning of a word or phrase;

The new definitions include “days”, “collective agreement”, “electronic government” “employment practice” (similar to the definition in the Employment Equity Act, 1998), “functionary”, “government component”, “gratification” (for provisions pertaining to corrupt related misconduct by employees), “organ of state” and “principal department”.

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### **2.2 Section 2**

This section amends section 2 of the current Act which deals with the application (scope) of the Act. The current Act provides that in case of conflict between the provisions of the Act and the employment law for educators, members of the South African Police Service, the Regular Force of the South African Defence Force, the Department of

Correctional Services or members of any intelligence service, then that employment law will prevail.

In this section provision is made for the concurrence of a committee of Ministers for determinations on certain conditions of service pertaining to the following sectors: educators and members of the South African Police Service, the Regular Force of the South African Defence Force and the Department of Correctional Services. The conditions of service in question are annual salary adjustments, salary levels and scales, performance bonuses and incentives and pension benefits. This proposal is aimed at obtaining greater alignment in the conditions of service of the general public service and the mentioned sectors.

Provision is also made in this section that where the head of any department is appointed in terms of the Constitution, the provisions of the Act shall only apply to that head to the extent that the subject-matter of these provisions are not provided for in any other law governing his or her employment or his or her contract of employment.

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### 2.3 Section 3

This section replaces section 3 of the current Act which regulates the functions of the Minister for the Public Service and Administration (“the Minister”). Section 3 of the current Act was redrafted to more clearly set out the areas in respect of which the Minister may determine norms and standards by means of regulations, determinations and directives. It also contains a new provision enabling the Minister to appoint a consultative body or an advisory body to assist the Minister on any of the mentioned areas.

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### 2.4 Section 4

This section replaces section 3A of the current Act which deals with the functions of Premier. The changes pertain to the role of a Premier with respect to the creation of the government components in his or her province. It requires a Premier to consult, but not to obtain concurrence from, the Minister and the Minister of Finance, before establishing any such component. The new government component’s organisational form is discussed in more detail in paragraphs 2.9 and 2.10.

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## 2.5 Section 5

Section 3B of the current Act that deals with heads of department and their career incidents is repealed since its content is included in a new section 12.

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## 2.6 Section 6

Section 4 of the current Act provides for the South African Management Development Institute (SAMDI) and a Training Fund. The section provides for the removal of the reference to the name of this training institution to allow for its name to be changed when required by the President by proclamation (i.e. through amending Schedule 1 to the Act). The section also provides for the repeal for a provision for a Training Fund that is not in existence.

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## 2.7 Section 7

Section 5 of the current Act deals with the implementation or limitations of actions affecting the public service or its members. The review of this section entails the clarification of a number of its provisions.

Concerning collective agreements, the State Law Advisers advised that after the conclusion of collective agreements pertaining to conditions of service in relevant bargaining council, these should be implemented by means of Ministerial determinations in terms of section 3(3)(c) of the current Act. To limit this need to cases where additional provisions are required to give effect to a collective agreement and also to assist with the enforcement of collective agreements, collective agreements concluded after the commencement of the Amendment Act pertaining to employees appointed under the Act, are deemed to be ministerial determinations.

In the section provision is also made for the Minister to implement acts retrospectively provided that the circumstances justify it and it is not to the detriment of employees. Provision is made for functionaries to correct any action or omission in terms of the Act if based on an error of law or fact or fraud and if in the public interest.

Furthermore provision is made for the implementation of directives issued by the Public Service Commission in terms of section 196(4)(d) of the Constitution. These directives are aimed at ensuring that personnel procedures relating to recruitment, transfers,

promotions and dismissals comply with values and principles in section 195 of the Constitution. The relevant political or administrative head (e.g. a Minister, MEC or head of department) must implement any such directive within 60 days after receipt thereof.

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## 2.8 Section 8

Section 6 of the current Act deals with access to information by the Minister. The amendment provides that this not be limited to employees providing access to the Minister, but also include political heads (executive authorities). Furthermore it provides for that an employee who wilfully or in a grossly negligent manner fails to comply is guilty of a criminal offence.

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## 2.9 Section 9

Section 7 of the current Act deals with the different kinds of organisational institutions within the public service and how they may be created as well as the functions of an administrative head of department as well as the special functions of the Director-General of the Office of a Premier.

Institutions under the current Act are:

- (i) National departments and Offices of Premier which are listed in Schedule 1 to the current Act
- (ii) Provincial departments listed in Schedule 2 to the current Act
- (iii) Organisational components listed in Schedule 3 to the current Act

The section refines the provisions regarding the specific functions of the Director-General of the Office of a Premier and the creation of national and provincial departments.

In addition the section provides for the replacement of the current provision for the creation of organisational components with provision for the creation of new organisational institutions, namely government components. Like national and provincial departments currently, these components may be established by the President by proclamation in the *Gazette*. Such establishment must, in the case of a national government component, be preceded by a request from the relevant national Minister and advice of the Ministers of Finance and of Public Service and Administration. In the

case of a provincial government component, it must be preceded by a request of the relevant Premier acting after consultation with the Ministers of Finance and of Public Service and Administration.

The current Schedule 3 organisational components is to move to Schedule 1 since apart from different designations no difference exists between Schedule 1 and 3 bodies (see section 41 of the Amendment Act).

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## 2.10 Section 10

This section deals with **government components** as a new organisational form in the public service and **specialised service delivery units** within departments.

The creation of **government components** would enable direct service delivery through a focussed and fully ring-fenced entity. They will be under the direct control of a Minister, Premier or MEC (i.e. an executive authority), with accountability and responsibility vested in the functionaries directly involved with the performance of the functions in question, and in collaboration with that executive authority's department. A government component will be a separate institution in the public service and its head will be the accounting officer in terms of the Public Finance Management Act, 1999. The component model could be used for an institution with a unique identity that has specific measurable functions and that can be logically grouped in terms of a particular service delivery model. Such a component may have original statutory powers or assigned or delegated statutory powers and duties. A government component may however not have functions to provide socio-economic services to give effect to the rights contemplated in sections 26 to 29 of the Constitution. The assignment of statutory functions of the relevant Minister, Premier or MEC in terms of national legislation to the head of the component will be subject to Parliament's approval and the exercise thereof will be subject to specified conditions. Once a function is assigned, the functionary to whom it is assigned become accountable for its performance. A government component is partnered with a principal department (listed in Schedule 1 to the Act) which will assist the relevant Minister, Premier or MEC with oversight of the component on policy implementation, performance, integrated planning, budgeting and service delivery. The advantages of using this organisational form in the public service include—

- (a) administrative and operational arrangements to be customised to suit a particular service delivery environment;
- (b) improved governance through direct accountability and decision-making as close as possible to the point of service delivery;
- (c) direct control and influence by political heads (e.g. a Minister, Premier or MEC over service delivery outcomes without the need to create entities outside the public service (e.g. public entities);
- (d) an institutional mechanism to reincorporate some public entities, if required, into the public service; and
- (e) the establishment, if required, of an advisory board to advise the executive authority on service delivery matters and to accommodate stakeholder interests.

In addition to the government component model, the Act also has an enabling provision for the establishment of **specialised service delivery units** within departments. The features of these units are similar to those of government components, except that (i) these units may, unlike such components, perform services pertaining to the mentioned constitutional socio-economic rights and (ii) these units are to operate within departments while government components would be separate institutions outside departments. Provision is also made that when the executive authority or head of the relevant department delegates functions in terms of the Public Service Act in respect of a unit, it must be delegated to the head of that unit. Subject to the relevant Treasury's approval and special arrangements regarding accountability, provision is made for the compulsory delegation of the accounting officer's functions in terms of the Public Finance Management Act to the head of that unit. Any Minister, Premier or MEC may establish such unit in departments falling under his or her portfolio.

The establishment of a government component or specialised service delivery unit within a department must be preceded by a feasibility study recommending its establishment.

*Please see **Annex A** for a more complete exposition of the government component model as a separate institution within the public service and the model for specialised service delivery units within departments.*

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Section 8 of the current Act deals with the staffing composition of the public service. The section entails a new section to clarify this provision with respect to post establishments and the kind of employment capacities, i.e. permanently or temporarily and full-time or part-time.

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#### 2.12 Section 12

This section provides for a more appropriate heading for Chapter IV of the current Act.

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#### 2.13 Section 13

This section provides for a new section in order to indicate what are the different mechanisms of obtaining the services of persons in terms of the Act by referring to all the relevant provisions elsewhere in the Act. In essence it entails appointments and deployments of current employees in the form of transfers (which is permanent in nature), secondments (which is temporary in nature) and assignments.

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#### 2.14 Section 14

Section 9 of the current Act deals with the vesting of the power to appoint staff in the political head (executive authority). The section entails a new section to streamline its provisions.

All references in the current Act to promotion have been omitted to accord with the principle of open competition (for at least posts in the SMS) and limited open competition (for other posts) and to limit unfair labour practice disputes in this regard. See for example this section and sections 14, 19 and 20 regarding appointments, probation and transfers.

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#### 2.15 Section 15

Section 10 of the current Act deals with the qualifications for appointments. The section entails amendments to align it with a Constitutional Court judgment which entitles permanent residents to permanent appointment and clarify the other requirements for appointment.

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#### 2.16 Section 16

Section 11 of the current Act sets further criteria to be considered when making appointments. An appropriate reference to the Employment Equity Act, 1998, is included in the section.

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#### 2.17 Section 17 (pp 16-17)

The current section 3B has been collapsed into section 12 since both deal with the appointment of heads of department. In addition, the section seeks to enable the President to transfer, subject to the relevant Premier's concurrence, the head of a national department to a province and the head of the Office of a Premier or a provincial department to another province or a national department.

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#### 2.18 Section 18

The amendment to section 12A which deals with the appointment of so-called special advisers, seeks to clarify Cabinet's role in determining which categories of executive authorities may appoint special advisers.

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#### 2.19 Section 19

Section 13 of the current Act deals with the appointment of employees on probation and what is to happen when their probation is not confirmed. The amendments streamline this provision to allow for regulations to determine the periods of probation for different categories of employees and to stipulate that if an employee's probation is not confirmed, the period may be extended or the employee may be dismissed in accordance with the Labour Relations Act, 1995.

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#### 2.20 Sections 20, 21 and 22

Sections 14 and 15 of the current Act deal with transfer within the public service and to the public service as well as secondments to and from the public service.

Section 20 seeks to clarify section 14 of the current Act. Currently this section provides for transfer of employees within the public service without their consent and without due process. The section now provides that an employee may only be transferred without his or her consent if before a decision is made on the transfer, the employee's

representations have been considered and the transfer is in the public interest. The section also provides that when a function is transferred which entails the transfer of staff, consultation in the relevant bargaining council regarding the transfer of staff must first take place.

A new section 14A (section 21) was included to facilitate the mobility of staff within the public service by providing for continued employment despite a transfer or a change in employment capacity. The new section 15(1) (section 21) aims to clarify a similar provision for certain transfers of employees from organs of state to the public service where they successfully apply for posts in the public service. In addition, the new section 15 clarifies secondments to and from the public service and enables secondments within the public service (internal secondments are currently only dealt with in regulations made under the Act). Provision for secondment of employees without their consent, but following due process and acting in the public interest, is also included.

*Please see **Annex B** for a more detailed exposition of the provisions regarding the transfer of staff, including the meaning of the term “**public interest**”.*

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#### 2.21 Section 23

Section 16 of the current Act deals with the retirement of employees. The change entails discretion to allow the employee to give shorter notice of his or her intention to retire early. In addition, provision is made for employees 55 years and older, but younger than 60, to request early retirement on a basis similar to employees younger than 55. Employees 55 years and older, but younger than 60, have the right to retire but are penalised in respect of their pension benefits for every year they retire earlier than 60. The amendment would allow them like employees younger than 55, to request retirement and, if approved, there would be no pension penalisation.

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#### 2.22 Section 24

A new section 16A contains provisions similar to the Public Finance Management Act to assist with the enforcement of the Act, e.g. compelling executive authorities to take disciplinary steps against transgressing heads of department, and heads of department to take such steps against transgressing employees. Provision is also made for reporting

on such transgressions to the Minister and in turn for the Minister to report these to the relevant legislatures.

A new section 16B aims to remove current legal difficulties with the head of department being vested by the current Act with the power to dismiss an employee on the ground of misconduct (section 17(1)(b)) while the chairperson of the disciplinary hearing pronounces the sanction in terms of the relevant collective agreement for employees on levels 1 to 12 and the relevant ministerial determination for SMS members (levels 13 to 16). It provides that all sanctions pronounced by the chair must be implemented by the head of department. Provision is also made for the commencement or continuation of a disciplinary hearing by a new department in respect of alleged misconduct by the employee at his or her former department.

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#### 2.23 Section 25

Section 17(2) of the current Act, which contains the grounds for dismissal, was revisited to align it with the grounds for dismissal recognised by the Labour Relations Act, 1995. Provision is also made for the prohibition on the re-employment of employees dismissed for certain kinds of misconduct. Misconduct regarding corrupt-related actions are emphasised in the provisions. Different periods may be prescribed by regulation for different kinds of misconduct and it could be that for one or more kind of misconduct no period may be so prescribed.

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#### 2.24 Section 26

Section 30 of the current Act regulates outside remunerative work by employees. The section provides, in accordance with the Basic Conditions of Employment Act, 1997, the omission of the requirement that employees must place the whole of their time at the disposal of the State. In addition the criteria to consider when considering a request is stipulated, namely interference with the efficient performance of work or a contravention of the code of conduct (e.g. conflict of interest).

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#### 2.25 Section 27

Section 31 of the current Act deals with the repayment of unauthorised remuneration to employees. The section seeks to simplify the provisions of section 31.

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### 2.26 Section 28

Section 32 of the current Act deals with the assignment of functions other than ordinary functions to employees. The section seeks to clarify these provisions, to regulate acting of employees in other posts and to ensure that such assignments are taken account when conducting performance assessments.

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### 2.27 Section 29

Section 33 of the current Act regulates the cession by employees of their remuneration. The amendment replaces an outdated reference to the Exchequer Act, 1975, with a reference to the Public Finance Management Act.

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### 2.28 Section 30

Section 34 of the current Act deals with the non-reduction of salaries of employees. The section seeks to clarify in which circumstances such reductions would be permissible.

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### 2.29 Section 31

Section 35 of the current Act provides for grievances of employees. Provision is made for an aggrieved employee to first exhaust the grievance procedure within the department before referring a dispute to a bargaining council or instituting court proceedings regarding the subject matter of his or her grievance. If a department does not adhere to the applicable period for dealing with a grievance, the aggrieved employee may take any of the mentioned steps. Heads of department are also enabled to refer their grievances directly to the Public Service Commission in the circumstances determined by the rules of the said Commission.

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### 2.30 Section 32

Section 36 of the current Act deals with the political rights of employees, but not standing for elections as such. The new section 36 does not deal with the political rights of employees because the view is that it is adequately dealt with in the Constitution and the code of conduct for public servants. The new section 36 now seeks to regulate employees' candidatures for election to the National Assembly or provincial legislature or municipal council and their appointment as permanent delegates to the National Council

of Provinces. They are permitted to be candidates but subject to the code of conduct for public servants and such conditions as may be determined by regulation. Upon accepting such election or appointment, the employees are deemed to have resigned. Employees are allowed to be part-time municipal councillors.

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#### 2.31 Section 34

Section 38 of the current Act deals with remuneration wrongly granted to employees. The section seeks to clarify this section and also to vest certain powers with the accounting officer of the department in question (instead of the relevant Treasury) in line with the Public Finance Management Act.

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#### 2.32 Section 35

Section 41 of the current Act, which deals with the areas on which the Minister must or may make regulations, has been revisited as a whole to streamline it by referring to the areas in respect of which the Minister may determine norms and standards (new section 3(1)) and omitting unnecessary detailed provisions dealt with in overarching provisions.

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#### 2.33 Section 36

Section 42 of the current Act provides for a Public Service Staff Code. To limit confusion with prescripts in place immediately before commencement of substantial amendments to the Act on 1 July 1999 (also called the Public Service Staff Code), provision is made for one or more handbooks to include different determinations and directives.

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#### 2.34 Section 37

The new section 42A is a comprehensive delegation provision enabling the Minister, an executive authority and a head of department to delegate their powers or duties in terms of the Act.

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#### 2.35 Sections 38-40

These sections entail the replacement of the current Schedules 1, 2 and 3 to the Act to reflect the current national and provincial departments and Offices of the Premier as well as Schedule 3 for new government components. The first government component is the

Centre for Public Service Innovation with the Department of Public Service and Administration as its principal department.

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2.36 Section 41

This section provides that-

- (a) all references to “officer” be replaced with references to “employees” to align it with labour legislation; and
  - (b) all references to “executing authority” be replaced with references to “executive authority”.
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2.37 Section 42

This section refers to amendments to other Acts listed in the Schedule to the Amendment Act. These amendments includes amendments to-

- (i) the Labour Relations Act and the Public Finance Management Act to provide for government components; and
- (ii) replace outdated references to the Public Service Commission.

**ANNEX A****PUBLIC SERVICE AMENDMENT ACT 30 OF 2007:  
NARRATIVE ON GOVERNMENT COMPONENTS AND SPECIALISED SERVICE  
DELIVERY UNITS WITHIN DEPARTMENTS (SECTION 10 OF THE AMENDMENT  
ACT)****1. NEW ORGANISATIONAL FORMS IN PUBLIC SERVICE**

Two new organisational forms in the public service are provided for to supplement the departmental organisational form, namely a government component and a specialised service delivery unit.

**2. GOVERNMENT COMPONENT****2.1 Background**

The government component organisational form applies predominantly to service delivery institutions, with a unique identity, that has specific measurable functions that can be logically grouped in terms of a particular service delivery model.

It provides an institutional mechanism for the assignment or delegation of government functions to government components within the public service without having to assign functions to a separate juristic person (e.g., public entity) outside the public service.

The head of a government component will be the accounting officer of the component in terms of the Public Finance Management Act (PFMA). Provision is therefore made for original financial powers for the head of such component.

A government component is partnered with a principal department (listed in Schedule 1), which will assist the executive authority with exercising oversight over a government component on policy implementation, performance, integrated planning, budgeting and service delivery (insofar as applicable).

This organisational form is particularly useful to effect service delivery as close as possible to the point of service delivery with customised decision making powers, accountability and reporting arrangements as determined by an executive authority. A government component is an organisational form separate from its principal department, but would still fall under the Vote of the principal department.

**2.2 Establishment**

The President may by proclamation in the *Gazette* at the request of the relevant executive authority and on the advice of the Minister for the Public Service and Administration (MPSA) and the Minister of Finance establish or abolish any national government component.

In the case of a provincial government component, the relevant Premier may establish or abolished it and the President is to make necessary changes to the relevant Schedule by proclamation.

An executive authority may only request the establishment of a government component if the prescribed feasibility study is conducted and its findings recommend the establishment of such a component.

The head of a government component may have any one or more of the following functions -

- (a) functions directly conferred by national or provincial legislation;
- (b) functions assigned in terms of the Public Service Act (see par 2.4) or other legislation; and
- (c) functions delegated in terms of the Public Service Act (see par 2.5); and
- (d) functions allocated or transferred by the MPSA in terms of the Public Service Act.

**NB** Functions regarding the realisation of a right contemplated in section 26, 27, 28 or 29 of the Constitution (so-called socio-economic rights) and other prescribed functions, may not be a function of a government component. The rights referred to in the Constitution involve the following functions:

- (a) Housing;
- (b) health care, food, water and social security;
- (c) children; and
- (d) education.

### **2.3 Notice of Governance and Administrative Measures**

For each government component, the relevant executive authority in consultation with the Minister for the Public Service and Administration and the Minister of Finance, and by notice in the Gazette -

- (a) shall list -
  - the relevant provisions of legislation which confer powers, and impose duties, on the head of the component; and
  - a reference to each notice regarding assigned powers and duties of the head of the component (see par 2.4);
- (b) may list the delegated powers and duties of the head of the component (see par 2.5);
- (c) shall, subject to other legislation, determine the reporting requirements to the head of the principal department to enable that head to advise the relevant executive authority on the oversight of the component on policy implementation, performance, integrated planning, budgeting and service delivery (insofar as applicable);
- (d) may include any administrative or operational matter relating to the component, including the sharing of internal services with the principal department;
- (e) may establish an advisory board without executive functions for the component and determine the board's composition, appointment procedure and remuneration and all matters required for its effective and efficient functioning; and
- (f) may include any other matter necessary for the effective and efficient functioning of the component.

### **2.4 Assignment of Powers and Duties**

The executive authority of a government component may assign to the head of that component any power conferred, or duty imposed, on -



- (a) that executive authority by national legislation; or
- (b) any official of the principal department of that component by national legislation.

Such assignment is subject to -

- (a) the approval of Parliament of the intended notice as contemplated in this subsection; and
- (b) publication by notice in the *Gazette*.

Any assignment would divest the person who was vested with the assigned power or duty.

## **2.5 Delegation of Powers and Duties**

The executive authority of a government component or the head of the principal department of that component may-

- (a) delegate to the head of the component any power conferred on that executive authority or head of the principal department by national legislation; or
- (b) authorise the head of the component to perform any duty imposed on the executive authority or head of the principal department by national legislation.

Any person to whom a function has been so delegated, shall exercise that function subject to the conditions the person who made the delegation considers appropriate.

Any delegation of a function -

- (a) shall be in writing;
- (b) does not prevent the person who made the delegation or granted the authorisation from exercising that power or performing that duty himself or herself; and
- (c) may at any time be withdrawn in writing by that person.

## **3. SPECIALISED SERVICE DELIVERY UNIT WITHIN DEPARTMENT**

### **3.1 Background**

The specialised service delivery unit organisational form applies predominantly to service delivery functions, structured as a unit within a department and within a framework that requires customised decision making powers, accountability and reporting arrangements in order to accommodate a particular service delivery environment/challenge.

It provides a mechanism for the assignment or delegation of government functions to a specialised service delivery unit, with a unique identity, **within** a department.

Such unit would have less autonomy than a government component. Opposed to other units in a department it would however have more direct financial powers.

### **3.2 Establishment**

An executive authority may establish a specialised service delivery unit within a department (other than a government component) and designate any such unit and the

head thereof, or amend any such designation. The MPSA gives effect to such establishment by notice in the Gazette.

An executive authority may only establish a unit if the prescribed feasibility study is conducted and the outcome thereof recommends its establishment.

The head of a government component may have any one or more of the following functions -

- (a) functions directly conferred by national or provincial legislation;
- (b) functions assigned in terms of the Public Service Act (see par 3.4) or other legislation; and
- (c) functions delegated in terms of the Public Service Act (see par 3.5); and
- (d) functions allocated or transferred by the MPSA in terms of the Public Service Act.

Unlike a government component, such unit may have functions regarding socio-economic services (see par. 2.2 above).

### **3.3 Protocol of Governance and Administrative Measures**

The executive authority shall approve a protocol for a unit which includes similar matters as the notice for a government component referred to in paragraph 2.3.

### **3.4 Assignment of Powers and Duties**

As in the case of a government component, a unit may have assigned functions (see par 2.4 above).

### **3.5 Delegation of Powers and Duties**

Subject to the relevant Treasury's approval, the accounting officer of a department must delegate all functions of that accounting officer in respect of the financial management of a unit to the head of that unit. These delegations may only be revoked under such circumstances as determined by treasury regulations or instructions. Accountability for these compulsory financial delegations must also be as determined by treasury regulations or instructions.

The functions of the executive authority or the head of a department in terms of the Public Service Act ("HR functions") in respect of a unit must, if delegated, only be delegated to the head of that unit.

Functions in terms of other legislation (other than PFMA and Public Service Act) may also be delegated to the head of the unit.

## ANNEX B

### **PUBLIC SERVICE AMENDMENT ACT 30 OF 2007]: TRANSFER OF EMPLOYEES WITHIN PUBLIC SERVICE (SECTION 20)**

1. It is important to note that the **current** section 14(1) of the Public Service Act allows the transfer of employees if it is in the public interest. The current section 14 (1) does **not** require the employee's consent and also does not require any due process (considering the views of the employee first) before making a decision to transfer. It also (similar to the new section 14(4)(b)), provides that an employee shall not merely because of his/her transfer to higher post be entitled to a higher salary (s14(3)(c)).

2. The transfer section in the Act now incorporates due process before a decision is made whether or not to transfer an employee in the public interest. It is stipulated that before an employee is transferred in the public interest, his or her representations must be duly considered. This is to align this provision with the Promotion of Administrative Justice Act, 2000. Under both the current Act and the amendment in the Amendment Act, the employee may not suffer a reduction in salary.

3. The current section 14(1) of the Public Service Act has been the subject-matter of court cases. In none of these cases has it been found unconstitutional (e.g. rights to fair administrative justice and fair labour practices) or contrary to the Labour Relations Act. The State has a general discretion (i.e. section 14(1) of the Public Service Act) to transfer employees provided that it adheres to the requirements of fair administrative justice.<sup>1</sup> The Labour Court has held that it will not interfere with transfers unless the decision is irrational, unfair or capricious.<sup>2</sup> The Free State High Court<sup>3</sup> also upheld the decision of the Premier to transfer a head of department in terms of section 3B of the Public Service Act, but in the event that consent cannot be obtained and the transfer will be in the public interest, the head may be transferred in terms of section 14. Section 3B permits a Premier to deploy a provincial head to another post in the same department or another provincial department during his/her term as head, but with his/her consent. According to the Court section 3B transfers are preferred to alleviate possible tensions. A further consideration herein was the purpose of section 14:

*"The legislature had in mind the promotion of co-ordination, better utilization of scarce human resources and the better management of possible conflict situations between HoDs and political office bearers..."*  
(par 41)

The Court re-iterated that the legislature could not have intended that a head, by mere refusal to consent, can be allowed to hamper the smooth running of the government.

4. In *Saloojee v McKensie No & Others* (2005)14 LC, the Labour Court considered various decisions to define the concept of "**public interest**", e.g.:

<sup>1</sup> *Simelela & Others v MEC for Education, Eastern Cape & another* (2001) 22 ILJ 1688 (LC).

<sup>2</sup> *Basson v Provincial Commissioner (Eastern Cape), Department of Correctional Services* [2003] 4 BLLR 341 (LC).

<sup>3</sup> *Rakgoale & Msibi v Premier Free State Province* Case No: 3065/2004.

“a broad common sense view of the position as a whole... the public should be better served if the Applicant were allowed to proceed with its scheme than by the continuation of the existing state of affairs”. *Ex parte President of the Conference of the Methodist Church: In re William Marsh Will Trust* 1993 (2) SA 697 (C)

“... promotes the general welfare of the public which uses the public facility in question.” *Rail Commuter Action Group v Transnet* 2003(3) BCLR 288(c)

“the common welfare” *The New Shorter Oxford English Dictionary*

Reference is also made to the judgment in *Transnet v Minister of Safety and Security* 2003 (12) BCLR 1363 (SCA), where the court observed that “... the phrase by itself is not capable of clear and comprehensive definition. The answer must lie in an analysis of the context provided by the Act ...”.

5. If a department makes an irrational, unfair or capricious decision to transfer, including for an ulterior purpose, e.g. to force the employee to resign, it would clearly not be in the public interest as required by section 14. The affected employee would be able challenge the decision on that basis. If procedurally or substantially unfair, the decision would also be contrary to the Promotion of Administration Justice Act. If the transfer unlawfully affects the benefits of the employee, the employee could also refer an unfair labour practice to the relevant bargaining council.

6. As regards an employee transferred to a higher post not being entitled to the higher salary, this is an existing provision in the Public Service Act as indicated above. The reason for this provision is to prevent departments from using it to appoint employees in higher posts without following normal recruitment process (i.e. open competition).