

## 2.6 CHAPTER 12 - PUBLIC ADMINISTRATION

*See Annexure 10*

The Commission is of the opinion that a clear distinction should be made between Public Administration, which is a generic term for the activities pertaining to the administrative arm of government, and the Public Service, which includes the body of persons employed by the national government and provincial governments and the structures in which they are employed. Such a distinction should help to give greater precision in the drafting of the relevant text. The Commission supports the inclusion of general guidelines for public administration at all levels of government in the Constitution, provided that the above-mentioned distinction is adhered to.

**Clause 171** - The Commission supports the draft text of paragraphs (a) to (h) but recommends that paragraph (i) be reformulated as follows:

*"171.(1)...*

*(i) Institutions responsible for public administration must be broadly representative of the South African people, and pursue employment and management practices based on ability, objectivity, fairness, and the need to achieve broad representation."*

**Clause 171(2)** - The Commission considers the inclusion of this subclause in the Constitution to be inappropriate. While the Commission finds no problem in the appointment of a limited number of persons in government institutions on the grounds of "policy considerations", such appointments should not be on a permanent basis nor on the fixed establishment of a public institution. Provisions to accommodate such a possibility should be made more appropriately in ordinary laws. The Commission recommends that this sub-clause be deleted from the draft.

**Clause 171(3)** - The use of the term "the public administration" (incorporating the definite article) in this sub-clause [as also in sub-clause (2)] conveys the impression that public administration is a structure of some sort in which persons can be appointed. In any case, the Commission is of the opinion that there is no need to include the subclause in the Constitution. The sub-clause itself does not confer any legislative power, while ordinary legislative powers dealt with elsewhere in the Constitution will suffice. The Commission consequently recommends that the sub-clause be deleted from the draft.

**Clause 172** - Constitutional Principle XXIX stipulates that the independence and impartiality of, *inter alia*, a Public Service Commission shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service. The Commission is of the opinion that the Public Service Commission referred to in the Constitutional Principle, must bear some resemblance to the Commission provided for in Chapter 13 of the interim

Constitution, i.e. be endowed with some powers in respect of the organisation of public service structures, the conditions of service of persons employed by those structures, the personnel practices and ethics applicable to these employees, and the promotion of efficiency and effectiveness in departments and the public service. The functions of such a Commission which must be provided for in the new Constitution need not be restricted to the public service, but should at least include those aspects of the current Commission's functions which are necessary to comply with the objectives described in the above-mentioned Constitutional Principle.

The Commission would prefer the name "Public Service Commission" to be retained. However, as the functions of the proposed Commission are to be extended beyond the public service, the name "Commission for Public Administration" would be acceptable, and is preferable to "Public Administration Commission", where the acronym PAC could be confusing to the general public.

The Commission for Public Administration should be disinterested impartial. It should not be a body on which particular interests represented. The Commission (CPG) therefore is not in favour of such a Commission for Public Administration being composed of, *inter alia*, members nominated by each of the provinces. These members would inevitably be perceived as representing the provinces. To balance s interests, an equivalent number of members from the national level would probably have to be appointed. Since the Commission for Public Administration has a wider jurisdiction, this might also lead to pressure representation of other interested public institutions. This would result in bloated and unwieldy Commission.

In the view of the Commission (CPG), the Constitution should provide for only the institution and broad objectives of a single Commission for Public Administration whose independence and impartiality are safeguarded as required in Constitutional Principle XXIX. Further details should be provided for in national legislation. The constitutional provisions should be contained in Chapter 7 which provides for other institutions supporting constitutional democracy, such as the Public Protector and the Auditor General, who also fall within the ambit of Constitutional Principle XXIX.

From its surveys regarding the functioning of provincial structures, the Commission has concluded that the present system which provides for provincial service commissions is generally not functioning optimally and should be re-examined. The purpose that such commissions may serve could be more efficiently and effectively accomplished by a less elaborate arrangement. This should be provided for in the national legislation referred to above. However, the institution of such commissions presents fails within the legislative power of provinces and it is doubtful whether the omission of this power in the new Constitution would be consistent wit Constitutional Principle XVIII.2.

The Commission recommends that clause 172 be deleted from the working draft, and that the name of the Commission for Public Administration must be inserted in clause 106(1), and the following clause be included after clause 110 in Chapter 7 -

**"COMMISSION FOR PUBLIC ADMINISTRATION**

**" 110A. (1) The Commission for Public Administration must -**

**(a) promote the implementation of the basic values of public administration prescribed in section 171 of this Constitution in all relevant institutions**

**(b) exercise the powers and perform all functions to promote efficient , effective and fair administration and a high standard of professional ethics in the public service prescribed by national legislation; and**

**(c) perform other functions entrusted to it by national legislation."**

**Clause 173** - Sub-clause (1) uses the confusing expression "the public administration" and creates the impression that the public service is part of such a structure. It is not clear why this syntax is considered necessary. The stipulation that the public service must loyally execute the lawful policies of the government of the day needs also to be qualified as the public service will include provincial employees and confusion may arise in regard to which government's policies should be so executed. The Commission recommends that the following text be substituted in clause 173(1):

***"173.(1) There is a public service for the Republic, which must function and be structured in terms of national legislation. Persons in the public service at national and provincial level must loyally execute the lawful policies of the government of the day that employs them."***

**Clause 173(2)** - Supported

**Clause 173(3)** - The use of the word "only" appears to be superfluous and misleading. As it stands, the wording of the clause could be taken to mean that supporting a political party or cause may be grounds for favourable or prejudicial treatment if there are other grounds as well. The Commission recommends that the word "only" be deleted from the draft text.

**ANNEXURE 10**

**COMMISSION ON PROVINCIAL GOVERNMENT**

**RECOMMENDATIONS REGARDING PUBLIC ADMINISTRATION**

**1. INTRODUCTION**

Section 212 (1) of the interim Constitution establishes a single public service for the Republic. The National Defence Force is explicitly excluded from the public service (section 212 (8)). Local government staff are by implication excluded from the public service. Sections 209 and 210 respectively create and stipulate the powers and functions of the Public Service Commission. Section 213 empowers a provincial legislature to provide for a provincial service commission for its province to perform certain functions in respect of public servants employed by the province, subject to the powers of the national Public Service Commission. All provinces have exercised this power to create provincial service commissions.

1.2 The evidence collected regarding the functioning of the public service and the commissions created in terms of the interim Constitution, as well as the occurrence of industrial unrest caused inter alia by dissatisfaction with differences in remuneration between the public service and local government employees, and the lack of local competence to deal effectively with certain urgent staff matters at provincial level, indicate that the continuation of the present dispensation in respect of control over staff matters must be reconsidered.

## **2. DRAFT CONSTITUTIONAL PROVISIONS AND COMMENTS**

### **2.1 DRAFT TEXT PREPARED BY CA:**

#### **BASIC VALUES AND PRINCIPLES GOVERNING PUBLIC ADMINISTRATION:**

171. (1) Public administration at all levels of government, including the administration of institutions that are dependent on government funds or other sources of public money, must be governed by the democratic values and principles enshrined in the Constitution, and the following principles apply:

- (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 appointment in the public administration of a number of persons on policy considerations as regulated by national legislation is not precluded.
- (3) Legislation regulating the public administration may differentiate between different sectors, administrations or institutions in the public administration.

### **PUBLIC ADMINISTRATION COMMISSION**

- 172. (1) There is a single Public Administration Commission for the Republic, which is independent and must be impartial and regulated by national legislation. Each of the provinces may nominate a representative to be appointed to the Commission.
- (2) The object of the Public Administration Commission is to promote the basic values and principles of public administration as prescribed by national legislation.
- (3) Provincial representatives in the Public Administration Commission may exercise the powers and perform the functions of the Commission within the provinces, as prescribed by national legislation.
- (4) The Public Administration Commission must account to Parliament.

### **PUBLIC SERVICE**

- 173. (1) Within the public administration there is a public service for the Republic, which must function, and be structured, in terms of (national) legislation, and which must loyally execute the lawful policies of the government of the day.
- (2) The terms and conditions of employment in the public service must be regulated by national legislation. Employees are entitled to a fair pension as regulated by national legislation.
- (3) No employee or prospective employee of the public service may be favoured or prejudiced only because that person supports a particular political party or cause.

## **2. COMMISSION'S PRELIMINARY RECOMMENDATIONS**

The Commission's preliminary recommendations (Document 6 dated 30 March 1995) include the following:

- (a) In order to ensure the fair and equal treatment of all categories of personnel who are paid largely from nationally collected revenues, national norms and standards should be applied in respect of all relevant practices (paragraph 2.1).
- (b) The new Constitution should expressly include provincial staff as part of the Public Service (paragraph 2.2).
- (c) Broad criteria for the public service should be incorporated into the new Constitution (paragraph 2.3).
- (d) The Public Service Commission (PSC) should continue to exercise the powers and functions enumerated in section 210 of the interim Constitution, also in respect of employees of the provincial administrations. Arrangements are necessary to ensure that provinces will also play a significant role in the determination of norms and standards for the public service and are consulted by the PSC in the process (paragraph 2.7).
- (e) Persons appointed as members of the PSC must also be acceptable to the broad body of public servants. The ratification of their appointments by Parliament should be considered. The PSC should be accountable to Parliament. (Paragraph 2.8)
- (f) The power to legislate on a provincial service commission is ancillary to the general powers in respect of Schedule 6 functional areas and need not be specifically repeated in the new Constitution. (Paragraph 2.10)
- (g) The need for provincial service commissions is doubted. Provincial legislatures should reconsider their decisions to create such commissions. If they are to be retained, consideration should be given to establishing these as part-time bodies, and to reducing the number of commissioners. (Paragraph 2.11)
- (h) The powers and functions of the PSC contained in section 210 should be retained and exercised in respect of the entire public service to ensure uniform fair treatment of all public servants (Paragraph 2.11)

### **2.3 PROVINCIAL VIEWS**

**2.3.1 Western Cape** - Provincial service commissions should be retained and the new Constitution should make provision for the creation of such a commission by a provincial legislature. As functions are devolved to provinces, the need to deliver services at provincial

level increases and consequently the need for a provincial staff commission also increases. The suggestion that the Director General's office could perform the functions for which a provincial service commission is responsible is not supported.

2.3.2 **Northern Cape** - There is a need for a provincial service commission for each province.

## 2.4 COMMENTS

2.4.1 The draft constitutional text provides for certain principles which will be applicable in public administration at all levels of government, including the administration of institutions that are dependent on government funds or other sources of public money. The text also provides for an independent and impartial Public Administration Commission (PAC), regulated by national legislation, and including a representative of each province, whose object is to promote the basic values and principles as prescribed by national legislation. A public service for the Republic is created within the public administration which must function and be structured in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.

2.4.2 The draft text is not altogether clear, nor is the role of the PAC. "Public administration" is a collective term encompassing all the activities performed by public institutions in carrying out government policies. Statements such as contained in 171 and 173, that public administration must be broadly representative of the South African people, that the appointment of certain persons in the public administration is not precluded, and that there is a public service within the public administration are confusing. The differences in meaning between the terms "public administration" and the public administration" must be clarified, preferably by using the former to signify the activities/processes of public institutions (compare with "management") and using "public administration institutions" instead of "the public administration".

2.4.3 The draft text does not give a clear indication of what the role of the PAC will be in personnel administration in the public service nor what the requirements for appointments as commissioners should be. It is therefore not clear whether the requirements of CP XXIX read with CP XXX.1 in respect of a public service commission have been met in the draft text. The provisions obviously are intended to cover a broader spectrum of public institutions than the public service, but need tighter formulation. The ordinary legislation required by the draft text to give content to the relevant provisions is likely to clarify the uncertainties, but the new Constitution should stipulate more precisely what it intends to establish. The PAC should not be regarded as a body of lesser status and importance than, for instance, the institutions provided for in Chapter 7, e.g. the Auditor-General for whose appointment due regard must be given to specialised knowledge of or experience in auditing, state finances and public administration.

#### 2.4.4 The Commission recommends that -

(a) the Public Administration Commission be dealt with in Chapter 7 and that knowledge of or experience in public administration should be a requirement in the appointment of all members;

(b) section 171 should contain only the basic values and principles governing public administration which will regulate the functioning and activities of public institutions. The term "the public administration" should not be used as it conveys the incorrect impression that there is an institution which can be identified by that name. Clause 171 (1)(i) should read "Public administration institutions..." In subclause (3) the word "the" should be deleted where it appears before "public administration". The public service should be provided for as in clause 173, but the words "within the public administration" should be deleted as this phrase once again creates the impression that there is an institution called "the public administration" and that the public service is part of such an institution; and

(c) Clause 171(2) should be deleted as there is no need to provide for the appointment of such persons in the Constitution. Such appointments should be on a temporary basis and not on the fixed establishment of public institutions.

2.4.5 The position of provincial service commissions needs to be clarified in view of their omission from the draft text and the constitution of the PAC as set out in clause 172. Although the new provisions accord with the CPG's recommendation mentioned in paragraph 2.2 (f) above, in terms of CP XVIII.2 the legislative power conferred upon provincial legislatures in section 213 of the interim Constitution may not be substantially diminished. It appears, therefore, that the provincial legislatures may retain their power to create or maintain provincial service commissions, even if it is conferred on them as an ancillary power in terms of clause 158 of the draft text. This may lead to even more confusion and overlapping of functions and powers than exist presently in the provincial administrations in regard to organisational, post establishment and personnel matters. As provincial representatives in the PAC may (in terms of the proposed text) exercise the powers and perform the functions of the PAC within the provinces, they may be responsible for promoting, inter alia, the efficient, economic and effective use of resources, good human resource management and personnel management practices in respect of all public administration institutions in the province (171 (1) (a), (h) and (i)). In order to carry out this task, they may require the assistance of provincial institutions, but it should make the continued existence of provincial service commissions even less necessary than in the present dispensation.

2.4.6 In view of the serious implications that the proposed arrangements for public administration may have for the efficient and effective administration of public institutions, it appears that further investigation may be required in regard to a control system for public administration that would be practicable, cost-effective and accountable and which could be



more clearly described in the new Constitution in order to avoid confusion in the implementation stage. The Commission recommends accordingly.

2.4.7 Further matters in the draft text that need to be noted are :

a) The PAC must account to Parliament (clause 172(4)). Accounting or reporting to other levels of government is not dealt with in the draft text, nor is the accountability of provincial representatives on the PAC clarified.

b) The object of the PAC described in clause 172 (2) refers to the promotion of basic values and principles of public administration as prescribed by national legislation, but does not refer to those prescribed in clause 171 (1). Could this be an oversight?

c) The public service is required by clause 173(1) to "loyally execute the lawful policies of the government of the day". If the public service is to include provincial administrations, some clarity should be given as to which "government of the day's" lawful policies must be executed. It would be intolerable to require provincial employees to execute policies of a national government of the day where they may be in conflict with policies of a particular provincial government.

d) The significance of the word "single" in clause 172(1) is unclear. If its intended significance is to convey that provincial legislatures may not create or maintain provincial service commissions, it may be construed as being in conflict with CP XVIII.2 (see paragraph 2.4.5 above).

e) Clause 172 leaves the constitution of the PAC to be determined by national legislation, except in so far as the provincial representatives are concerned. It also leaves open the question of who will appoint the members of the Commission at national level and the provincial "representatives". No mention is made of inputs in such appointments by staff associations. While it is appreciated that the Constitution should not deal with too much detail in regard to institutions such as the PAC, the Constitution needs to contain some principles to serve as guidelines for the drafting of the national legislation which will deal with the detail of the constitution of the PAC and its powers and functions. Such principles should at least deal with -

i) the size of the Commission;  
ii) the qualifications required for membership;  
iii) the method of selection of members, which should vest in Parliament, and in the case of provincial representatives with provincial legislatures, with inputs from recognised staff associations/unions or bargaining councils.

f) The propriety of the inclusion of "provincial representatives" on an independent commission is questionable. If the PAC is to be a representative body, it will also require

national "representatives" and perhaps representation of other interested bodies. The PAC should be a highly skilled technical body which is independent of, and not representative of, provincial or national governments or any other interested party.