



ANNOTATED REVIEW OF THE CONSTITUTIONAL AND LEGISLATIVE MANDATE OF THE PUBLIC SERVICE COMMISSION

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1. INTRODUCTION

The Public Service Commission (PSC) is the only institution established in Chapter 10 of the Constitution with specific focus on the Public Service and oversight of public administration. The prominence given to the PSC in Chapter 10 of the Constitution, 1996, illustrates its importance as an institution supporting democracy as well as the importance of an institution to provide oversight over public administration.

In the 2012/13 financial year, the PSC established an Institution Development Task Team (IDTT) to look at amongst others, governance matters pertaining to the organization. The IDTT identified a need for the development of an annotated list of definitions in relation to the mandate of the PSC.

This document comprehensively sets out the Constitutional and legislative mandate of the PSC and includes relevant opinions and advice sourced from the PSC throughout the years. The document should be augmented on a regular basis to include legislative amendments and any future advice regarding its mandate.

2. WHAT ARE THE SOURCES OF THE PSC'S MANDATE?

2.1 Public Service Commission Act

Apart from the Constitution, the PSC Act, 1997¹, provides for the regulation of the PSC.

The **Public Service Commission Act**, 1997, provides for the regulation of the Public Service Commission with regard to:

- a. the constitution of the Public Service Commission;
- b. appointment of Commissioners;
- c. designation of the Chairperson and Deputy Chairperson;
- d. conditions of appointment of Commissioners;
- e. removal from office of Commissioners;
- f. functions of the Commission (inspections, inquiries, etc.);
- g. rules according to which the PSC should operate;
- h. the Office of the Public Service Commission; and
- i. transitional arrangements with regard to service commissions (created under the Interim Constitution).

In terms of this Act the PSC may-

- a. inspect departments and other organisational components in the Public Service and have access to official documents and information as may be necessary for the performance of its functions;
- b. conduct an inquiry into any matter that it is authorised by the Constitution and for purpose of the inquiry it may summons any person who may be able to give information of material importance to

¹ Public Service Commission Act, 1997 (promulgated by Proclamation No. 46 of 1997).

the inquiry;

- c. make rules as to the investigation, monitoring and evaluation of those matters to which section 196(4) of the Constitution relate, the powers and duties of Commissioners including delegations to Commissioners and the manner in which meetings of the Commission shall be convened.

2.2 Public Service Act, 1994 (as amended)

Section 5(8) of the Public Service Act, 1994 (as amended)², reiterates the PSC's constitutional power to issue directions as contemplated in section 196(4)(d) of the Constitution, 1996. Amongst others, it stipulates that an executive authority of head of department has to implement a direction as soon as possible after receipt of the written communication conveying the direction but, in any event, within 60 days after the date of such receipt.

Section 35 provides for the Commission to investigate and consider the grievances of employees and Heads of Departments under certain circumstances.

2.3 Public Finance Management Act (PFMA), 1999

In line with the PSC's mandate to promote and monitor the efficient, economic and effective use of resources, section 85(1)(a) and (e) of the PFMA, 1999³, read with Treasury Regulation 4.3, determines that the accounting officer must, as soon as the disciplinary proceedings are completed, report to, amongst others, the PSC on the outcome, including-

- (a) the name and rank of the official against whom the proceedings were instituted;
- (b) the charges, indicating the financial misconduct the official is alleged to have committed;
- (c) the findings;
- (d) any sanction imposed on the official; and
- (e) any further action to be taken against the official, including criminal charges or civil proceedings.

2.4 Rules of the PSC issued in terms of the PSC Act and protocols

The following rules and protocols have been put in place by the PSC in terms of section 11 of the PSC Act, in order to facilitate its operational functioning:

- a) *Rules for Dealing with Grievances of Employees in the Public Service, published in Government Gazette No.25209 dated 25 July 2003*

The Grievance Rules, 2003, is one of the sets of prescripts that gives effect to the mandate of the PSC as provided in the Constitution of the Republic of South Africa, section 196(4)(f)(ii), as well as the provisions of section 35 of the Public Service Act, 1994 (as amended). Both laws provide the PSC with powers to investigate grievances of employees in the Public Service and make recommendations on appropriate remedies. The Grievance Rules, 2003, apply to employees on salary levels 1 to 12 and determine the

² Republic of South Africa. Public Service Act, Act 1994 (promulgated by Proclamation No. 103 of 1994), as amended

³ Republic of South Africa. The Public Finance Management Act, 1999. (promulgated by Proclamation No. 1 of 1999), as amended

process that should be followed by a department in investigating grievances, and the circumstances under which grievances should be referred to the PSC. Once the PSC has finalised its investigation, the relevant Executive Authority (EA) is informed of its findings and recommendations. The latter is expected to inform the PSC and aggrieved employees about his or her decision based on the PSC's recommendations. The PSC also reports on the outcome of its investigations in respect of grievances to the National Assembly and Provincial Legislatures on at least an annual basis.

b) Rules for the summoning of witnesses in connection with inquiries and investigations of the Public Service Commission, published in Government Gazette No.23267 dated 28 March 2002

The mandate of the PSC to issue summonses, is contained in section 10 read with section 11 of the Public Service Commission Act, 1997, as well as section 196 (3) of the Constitution of the Republic of South Africa. In order to manage the process in terms of which witnesses can be summonsed, the PSC published Rules for the summoning of witnesses during 2002. The Rules provide for the process that should be followed when a person is summonsed to appear before an inquiry of the PSC.

c) Rules of the Public Service Commission: Lodging of complaints regarding the Public Service, published in Government Gazette No 23635 dated 19 July 2003

The PSC may investigate complaints lodged with it and report to the Executive Authorities. To give effect to this mandate, the PSC has developed Rules for the lodging of complaints. In terms of the Rules, public servants and members of the public can lodge complaints by making use of a prescribed complaints form. Upon receipt of complaints lodged in terms of the Complaints Rules, such complaints are investigated and reported on by the PSC in terms of its constitutional mandate.

d) Rules for dealing with grievances of members of the Senior Management Service, including Heads of Department, published in Government Gazette No 33540 of 17 September 2010

In order to comply with its constitutional mandate to deal with grievances of all employees in the Public Service, as well as the provisions of section 35 of the Public Service Act, 1994 (as amended), the PSC published Grievance Rules for dealing with grievances of members of the SMS as well as Heads of Department. The Grievance Rules are included in Chapter Ten of the Senior Management Service (SMS) Handbook. The Grievance Rules provide for the procedure to be followed by a department as well as the PSC in dealing with grievances of SMS members. These Rules also provide for the direct lodging of grievances with the PSC by Heads of Department. The PSC makes recommendations in respect of its findings to the Executive Authority.

e) Rules of the Public Service Commission: Managing Conflicts of Interest identified through the Financial Disclosure Framework for Senior Managers, published in Government Gazette No 32298 of 12 June 2009

These Rules provide for a procedure to identify and manage potential conflicts of interest disclosed through the Financial Disclosure Framework for the SMS as prescribed in Chapter 3 of the Public Service Regulations, 1999, as amended. This Chapter requires of the PSC to verify that Financial Disclosure Forms

submitted are correctly completed and to scrutinize the contents of the Forms in order to establish whether potential conflicts of interest exist and to alert Executive Authorities accordingly.

f) Policy mandates emanating from Cabinet decisions

In addition to the above-mentioned Rules, the PSC also performs the following functions, emanating from Cabinet decisions:

- Management of the National Anti-Corruption Hotline; and
- Evaluation of HoDs.

It should be noted that additional powers and functions can only be assigned to it through an Act of Parliament, as contemplated in section 196(4)(g) of the Constitution, 1996⁴.

3. UNPACKING THE MANDATE OF THE PUBLIC SERVICE COMMISSION

The PSC derives its mandate from sections 195 and 196 of the Constitution, 1996⁵, which sets out the values and principles governing public administration which should be promoted by the PSC, as well as the powers and functions of the PSC.

3.1 Public administration as reflected in the Constitution

The Constitution distinguishes between public “administration” (section 195) and public “service” (section 196 and 197). In respect of public administration, section 195(2) makes it explicitly clear that the principles of public administration apply to administration in “every sphere of government”.⁶

Henry⁷ defines public administration as a broad ranging combination of theory and practice whose purpose is to promote a superior understanding of government and its relationship with the society it governs. Safritz & Hyde⁸ define public administration as the management of men and women and materials in the accomplishment of the goals of the state. With reference to Safritz and Hyde, public administration should make sure that the goals of the state are accomplished through the provision of services to people. Henry⁹ in support, views this discipline as seeking to institute managerial practice attuned to efficiency, effectiveness and the fulfilment of the deeper human requisites of the citizenry.

Cloete¹⁰ views public administration as “*The collection of functions or activities performed by officials employed in public institutions such as state and provincial departments or*

⁴ The Constitution of the Republic of South Africa, 1996 (promulgated by Proclamation No. 108 of 1996).

⁵ The Constitution of the Republic of South Africa, 1996 (promulgated by Proclamation No. 108 of 1996).

⁶ Legal Opinion obtained from Advocate Nasreen Rajab-Budlender, representing Advocate Gilbert Marcus SC

⁷ Henry N. 1989. *Public Administration and Public Affairs* (4th Ed). Englewood Cliffs, NJ. Prentice Hall.

⁸ Shafritz, JM. & Hyde, A.C. 1992. *Classics of public administration*. California: Brooks/Cole (p 58)

⁹ Henry N 1989. *Public Administration and Public Affairs* (4th Ed). Englewood Cliffs, NJ. Prentice Hall.

¹⁰ Cloete, JN.1995. *Public Administration Glossary*. JL van Schaik Publishers (p 61)

administrations. This collection of function is what Dwight Waldo¹¹ crisis of identity since this makes public administration a collection of professions, sub-professions and occupational specialisation whose justification and direction is provided by the broad social purpose.

According to the United Nations Development Programme¹², public administration has two closely related meanings:

- (a) The aggregate machinery (policies, rules, procedures, systems, organizational structures, personnel and so forth) funded by the State budget and in charge of the management and direction of the affairs of the executive government, and its interaction with other stakeholders in the State, society and external environment;
- (b) The management and implementation of the whole set of government activities dealing with the implementation of laws, regulations and decisions of the Government and the management related to the provision of public services.

Similar to the above, Burns Y¹³ indicates that –

“There is no definition of ‘public administration’ in the 1996 Constitution. However, the term ‘public administration’ or ‘state administration’ is generally understood to mean those government departments, officials, administrators, organs of state, functionaries and institutions which are involved in the day-to-day running of the state – in other words, involved in the implementation of legislation and application of policy. The term ‘public administration’ also includes public enterprises, entities and organisations such as Telkom, Eskom and the South African Broadcasting Corporation, which are controlled by the government (whether partially or totally).”

In a legal opinion, obtained from the Chief State Law Advisors on 22 October 2008¹⁴, it is indicated that *“the concept “public administration” is generally understood to mean the organs and functionaries of the executive branch of the State that are concerned with the day-to-day business of implementing law and administering policy, but does usually not include the Cabinet. It generally includes all the government departments, whether at national or provincial level. It also includes local government administrations, the security forces and the many “parastatal” or “fringe” organisations to be found in modern state. These consist of public enterprises, regulatory boards, cultural bodies and other organisations wholly or partly controlled by government. The Constitution makes it absolutely clear that the public administration encompasses the public service, or the employees of government departments....”*

Outside the Constitution, Public Service Act and the Public Service Commission Act the term “Public Administration” has no legal significance. The term is used as a reference to the machinery of executive government as a whole.

¹¹ Waldo D. 1968. Scope of the theory of public administration. *American Academy of Political and Social Science*. October 1968, pp 5

¹² United Nations. Economic and Social Council. 2006. *Definition of basic concepts and terminologies in governance and public administration* (p 5)

¹³ Burns Y, “Administrative Law under the 1996 Constitution” Second edition 2003 (pp 8)

¹⁴ Department of Justice and Constitutional Development. Office of the Chief State Law Advisor, 447/2008, dated 22 October 2008, page 3.

Currently the PSC's understanding of public administration **in the manner that it implements its mandate** aligns with the first part of the opinion by the Chief State Law Adviser where it states that *"It generally includes all the government departments, whether at national or provincial level"*.

3.2 To promote the values and principles, as set out in section 195, throughout the Public Service (S 196 (4)(a))

According to the Oxford Dictionary the term **"promote"** can be defined as *"help forward; encourage; support actively (a cause, process, desired result) etc."*

Of interest, in the certification of the amended text of the Constitution of the Republic of South Africa, 1996, it was held that *"The PSC's primary function is to promote 'a high standard of professional ethics in the public service'"*¹⁵. Although there was emphasis on professional ethics in the certification case, the PSC's promotional role extends to all the constitutional values and principles.

The PSC promotes the values and principles as set out in section 195 is through its reports on areas of public administration in which findings and recommendations are contained for improvement, roundtable discussions, workshops, etc. In particular, in respect of all the values and principles, the PSC annually publishes the State of the Public Service Report.

In particular, section 195 (1) (h) of the Constitution states that *"good human-resource management and career development practices, to maximize human potential, must be cultivated"*. The PSC has promoted this principle through the findings and recommendations contained in the following reports:

- Report on the Evaluation of the Training Needs for Senior Managers in the Public Sector
- Report on the Management of Poor Performance in the Public Service
- Gender Mainstreaming Initiatives in the Public Service
- Career management in the public service

3.3 To investigate, monitor and evaluate the organisation and administration, and the personnel practices of the Public Service (S 196 (4)(b))

3.3.1 Expanding on the meaning of the term "investigate"

The term **"investigate"** can be defined as *"to examine, study, or inquire into systematically; search or examine into the particulars of; examine in detail"* and *"to search out and examine the particulars of in an attempt to learn the facts about something hidden, unique, or complex,*

¹⁵ Certification of the amended text of the Constitution of the Republic of South Africa, 1996 (Case CCT 37/96, para 142).

*especially in an attempt to find a motive, cause, or culprit*¹⁶:

Considering what a proper investigation entails, the Supreme Court of Appeal held as follows¹⁷:

“...I think there is nonetheless at least one feature of an investigation that must always exist – because it is one that is universal and indispensable to an investigation of any kind – which is that the investigation must have been conducted with an open and enquiring mind. An investigation that is not conducted with an open and enquiring mind is no investigation at all. That is the benchmark against which I have assessed the investigation in this case. I think that it is necessary to say something about what I mean by an open and enquiring mind. That state of mind is one that is open to all possibilities and reflects upon whether the truth has been told. It is not one that is unduly suspicious but it is also not one that is unduly believing. It asks whether the pieces that have been presented fit into place. If at first they do not then it asks questions and seeks out information until they do. It is also not a state of mind that remains static. If the pieces remain out of place after further enquiry then it might progress to being a suspicious mind. And if the pieces still do not fit then it might progress to conviction that there is deceit. How it progresses will vary with the exigencies of the particular case. One question might lead to another and that question to yet another, and so it might go on. But whatever the state of mind that is finally reached, it must always start out as one that is open and enquiring.”

In an opinion obtained from senior counsel¹⁸ it was confirmed that the scope and meaning of “an investigation” as defined above applies equally to an investigation carried out by the PSC. The PSC was cautioned that any interpretation of the investigatory powers of the PSC must be done in light of the dictum in the Certification judgment (referred to above) that the main powers of the PSC are *supervisory and advisory* in nature. And, of course, investigations of the PSC are limited to the specific contexts referred to in the Constitution, unlike the Public Protector who has a much broader field of possible investigations.

In practice the PSC investigates complaints submitted to it through the PSC’s Complaint’s Rules regarding alleged maladministration or corruption. The investigation is conducted by obtaining factual information from the department involved, evaluating the information against prevailing legislation and sub-ordinate legislation and compiling a report or letter with findings and recommendations. The findings and recommendations are generally advisory of nature. However, if the findings relate to any of the personnel practices mentioned in section 196 (4) (d) of the Constitution the PSC may issue directions. In this regard the Public Service Act provides in section 5(8)(b) that the directions of the PSC are binding on the executive authority (the Minister or the MEC) or the HoD which is required to implement the directions as soon as possible and within 60 days.

3.3.2 ***Expanding on the terms “monitor and evaluate”***

¹⁶ <http://dictionary.reference.com/browse/investigate>

¹⁷ *Public Protector v Mail & Guardian Ltd and Others* 2011 (4) SA 420 (SCA) at paras 21-22

¹⁸ Opinion on the Status and Functions of the PSC, Gilbert Marcus SC and Nasreen Rajab-Budlender, dated 28 March 2012

The PSC has defined **monitoring and evaluation** in its document “*Basic Concepts in Monitoring and Evaluation*” published in 2008:

Monitoring

“A continuing function that uses systematic collection of data on specified indicators to provide management and the main stakeholders of an ongoing development intervention with indications of the extent of progress and achievement of objectives and progress in the use of allocated funds.”¹⁹

Evaluation

“The systematic and objective assessment of an on-going or completed project, programme or policy, its design, implementation and results. The aim is to determine the relevance and fulfillment of objectives, development efficiency, effectiveness, impact and sustainability. An evaluation should provide information that is credible and useful, enabling the incorporation of lessons learned into the decision-making process of both recipients and donors.

Evaluation also refers to the process of determining the worth or significance of an activity, policy or programme. An assessment, as systematic and objective as possible, of a planned, on-going, or completed development intervention.

Note: Evaluation in some instances involves the definition of appropriate standards, the examination of performance against those standards, an assessment of actual and expected results and the identification of relevant lessons.”²⁰

The above definitions are widely used by the development assistance community. The definitions proposed by the *Policy Framework for the Government-wide Monitoring and Evaluation System*²¹ also broadly accord with the above definitions.

Evaluation is the determination of merit or shortcoming. To make the judgement one needs a standard of what is regarded as meritorious to compare with. Evaluation is thus a process of comparison to a standard (which can also be referred to as an indicator). For instance, the statement “a high quality service has been delivered that met the needs of clients and improved their circumstances” is an evaluation. The evaluation will be better if “quality”, “needs” and “improvement in circumstances” have been quantified.

The manner in which the PSC has applied monitoring and evaluation can best be illustrated through the State of the Public Service Reports which the PSC used to publish annually. The

¹⁹ Organisation for Economic Cooperation and Development (OECD). *Glossary of Key Terms in Evaluation and Results Based Management*. 2002.

²⁰ Ibid.

²¹ Presidency (Policy Coordination and Advisory Services). 2007.

reports were based on the monitoring and evaluation of selected departments against the nine Constitutional values and principles governing public administration. The instruments applied in this regard included indicators to measure performance against each principle. The reports contained findings and recommendations which were advisory of nature.

3.3.3 *Expanding on the word “organisation”*

Organisation mainly refers to how an organization is structured. Hood and Dunsire²² view organization as specialization, formalization, centralization/ level of decentralization and standardization all of which are determined by the environment or situational contingencies such as size, technology and dependence. The fit between the structure and environment determines the organizational performance.

In terms of section 196 (4)(b) of the Constitution, the powers and functions of the PSC are, to investigate, monitor and evaluate the **organization** of the public service. The term “organisation” is not defined in the Constitution.

However, Chapter III of the Public Service Act, 1994, as amended, deals with “**Organisation and Staff**”. In essence, this Chapter sets out how the Public Service, established by section 197 (1) of the Constitution, shall be structured and organised²³ and the composition of the Public Service²⁴.

In order to have an understanding of the term “organisation” within the context of the PSC’s mandate, section 3(7) of the Public Service Act, 1994 (as amended) sets out the powers of an Executive Authority. It determines as follows:

“An executive authority has all those powers and duties necessary for-

- (a) the internal organisation of the department concerned, including its organisational structure and establishment, the transfer of functions within that department, human resources planning, the creation and abolition of posts and provision for the employment of persons additional to the fixed establishment” (own emphasis).

Although the Public Service Act does not define the word “organisation”, section 3(7) provides guidance by summarizing what the term includes. In as far as the PSC’s mandate contained in Section 196(4)(b) of the Constitution 1996, is concerned, the word “organization” is interpreted to refer to the structural arrangements of departments in the Public Service and the Public Service as a whole as summarized by section 3(7) of the Public Service Act, 1994 (as amended).

The term is therefore wide, but in essence refers to the structural setup of the Public Service.

The PSC can for example investigate and evaluate whether the structure of a department (the organizational components) is correctly created and aligned for the service delivery purposes that

²² Hood C. and Dunsire A. 1981. *Bureaumetrics*. Farnborough, Gower.

²³ Public Service Act, 1994, as amended. Section 7

²⁴ Public Service Act, 1994, as amended. Section 8

they have been designed. The PSC's report in such instance will contain findings and recommendations that are advisory of nature.

3.3.4 Expanding on the word "administration"

The Public Service Act, 1994 (as amended) provides for the organisation and administration of the Public Service. It does, however, not define these two words. Chapter II of the Act deals with the administration of the Public Service. It deals with the functions of the Minister for Public Service and Administration and Executive Authorities.

If the intent of Section 196 of the Constitution is considered, however, an opinion that may rightfully be held is that section 196 (4)(b) deliberately makes the connection between "organization" and "administration". As "organization" refers to the structural arrangements of the Public Service, "administration" refers to all the systems, procedures, codes, policy frameworks, accountability mechanisms, management controls etc. that ensures the functioning of the "organisation" as defined.

An example of how the PSC has investigated and evaluated the administration of the Public Service is the Audit on vacancies in the Public Service conducted on instruction of SCOPA. The report contained findings and recommendations that were of an advisory nature. However, according to Chapter II of the Public Service Act, the "administration" of the PSC also includes the following:

- Organisational structures and establishments
- Conditions of service and other employment practices
- Labour relations
- Health and wellness
- Information management
- Electronic government
- Integrity, ethics, conduct, and anti-corruption
- Transformation, reform and innovation and any other matter to improve the effectiveness and efficiency of the public service.

3.4 To propose measures to ensure effective and efficient performance within the Public Service (S 196 (4)(c))

3.4.1 Expanding on the word "measures"

The Longman Dictionary of Contemporary English²⁵ defines "measure" as *"an action, especially an official one, that is intended to deal with a particular problem"*.

The PSC would therefore propose measures to executive authorities, heads of department and

²⁵ Longman Dictionary of Contemporary English II. Summers, Della. Tenth Impression, 2007

Parliament to deal with particular problems that the PSC has identified that inhibits effective and efficient performance in the Public Service. The measures must be consistent with the values and principles listed in section 195 of the Constitution. It may, for instance, promote efficiency, professionalism and good service delivery in the Public Service.

3.4.2 ***Expanding on the words “effective and efficient”***

The PSC has defined the terms “*Effectiveness*” and “*Efficiency*” in its document “*Basic Concepts in Monitoring and Evaluation*” published in 2008:

Effectiveness is how well the output and outcome objectives of the department or programme are achieved and how well the outputs produce the desired outcomes. Effectiveness also has to do with alternative strategies to produce the same outcome – that is, which of the available alternative strategies will work best and will cost less.

Efficiency is the relationship between inputs and outputs, that is, to deliver more output for the same amount of input or the same output for a decreased amount of input.

3.5 **To give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195 (S 196 (4)(d))**

In the PSC’s Protocol Document on the issuing of Directions, the definition of “Direction” is set out as follows:

- According to the Oxford Dictionary, the word "direction" is defined as “*the act or process of directing; supervision; an order or instruction; the course or line along which a person or things moves or looks, or which must be taken to reach a destination*”.
- The Thesaurus indicates that the word "direction" is similar to “way (course, track, route, path, bearing, road); trend (course, route, focus, aim, target, objective, tendency) and management (control, government, guidance, leadership, administration, command, supervision)”.

In this regard, it is important to note the following extracts from the second certification judgment:

“The functions of the PSC are now defined in the AT. Its main functions are to ... to give directions relating to recruitment and related matters; and to advise national and provincial organs of State in regard thereto. It is required to monitor adherence to applicable procedures and to investigate and report on grievances of employees in the public service.”²⁶

²⁶ At para 135

“The role of the single PSC under the AT is therefore far less significant than it is under the IC. Under the IC the directions and recommendations of the PSC are effectively peremptory. Under the AT its powers, while important, are largely concerned with investigation and reporting. The hands-on control of the public service has been removed from the PSC and given, effectively, to the national and provincial executives. The exercise of those powers by each executive is now subject to monitoring by the single PSC. In relation to provincial government AT 197(4) makes it clear that it is the provincial governments that are responsible for the recruitment, appointment, promotion, transfer and dismissal of members of the public service in their administration, all within a framework of uniform norms and standards applying to the public service”²⁷.

The power under the IC to give directions to promote efficiency and effectiveness will, under the AT, vest in the single PSC. The PSC may give directions aimed at ensuring that personnel practices relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in AT 195. It follows that a provincial service commission's power to give directions in regard to 'the promotion of efficiency and effectiveness in departments of the provinces' has been replaced by a single PSC power to give directions in regard to personnel practices of a general nature, which would include efficiency and effectiveness. It is not clear whether the directions will be binding on the administrations to which they are given. That may depend on the regulatory legislation referred to in AT 196(2). For the purposes of the certification proceedings we assume them to be binding.²⁸

Subsequently to the Certification of the AT, the Constitutional Court held as follows in **Premier, Western Cape v President of the Republic of South Africa 1999 (3) SA 657 (CC)**:

“The powers of the Public Service Commission are different to the powers of the commissions which existed under the interim Constitution. The new Public Service Commission has less control over the public service than its predecessors. It is empowered to conduct investigations, make reports and generally to promote those values and principles of the public service identified in the Constitution. It has to report to the National Assembly and also to provincial legislatures in respect of its activities in a province. It is entitled to investigate complaints and to monitor the performance of the public service, but it is only empowered to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195 [of the Constitution].The Constitution does not say how such directions are to be implemented but as that issue does not arise in the present proceedings, there is no need to deal with it.

Weight is given to the functioning of the PSC by section 196(3) of the Constitution which provides:

'Other organs of State, through legislative and other measures, must assist and protect the Commission to ensure the independence, impartiality, dignity and effectiveness of the Commission. No person or organ of State may interfere with the functioning of the

²⁷ At para 188

²⁸ At para 194

Commission.”²⁹

The PSC Act is silent in relation to the binding effect of the PSC’s directives. However, the Public Service Act provides in section 5(8)(b) that the directions of the PSC are binding on the executive authority (the Minister or the MEC) or the HoD which is required to implement the directions as soon as possible and within 60 days of receiving the written directions. The directions contemplated in section 5(8)(b) of the Public Service Act are of course limited to those directions of the PSC that relate to compliance with that Act and to provide advice to promote sound public administration.

In an opinion obtained from senior counsel, it was found that the directions of the PSC, other than those aimed at ensuring that personnel practices relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in AT 195, and those relating to compliance with the Public Service Act, are not binding on administrators.³⁰

3.6 To report in respect of its activities and the performance of its functions, including any finding it may make and directions and advice it may give, and to provide an evaluation of the extent to which the values and principles set out in section 195 are complied with (S 196 (4)(d))

The PSC reports on its activities and the performance of its functions on an annual basis through the publication of its Annual Report. The format for Annual Reports is prescribed by National Treasury.

The PSC annually published a report on the extent to which the values and principles set out in section 195 of the Constitution are complied with in the form the State of the Public Service Report (SOPS). The PSC published a SOPS report 2014, focusing three areas, the integrity system, the performance of the Public Service and the human resource system.

The Constitution requires the PSC to promote the values in Section 195 (Section 196(4)(a)). Therefore, the performance expectations with regard to the values and the indicators against which departments are evaluated should first be promoted and clarified before the evaluations can continue. The PSC has finalised a document that defines each value, sets out the scope and content of each value and proposes a set of indicators against which compliance with each of the values will be measured. The PSC will engage its stakeholders on the document. It will also conduct three pilot assessments of departments in the 2016/17 financial year during which its indicators will be tested. As soon as there is broad agreement on the set of indicators, the PSC will resume with assessments of departments against the agreed set of indicators and the production of the State of the Public Service report.

In the 2015/16 financial year, the PSC has also developed a framework to report on the

²⁹ At para 24

³⁰ Opinion on the Status and Functions of the PSC, Gilbert Marcus SC and Nasreen Rajab-Budlender, dated 28 March 2012, paragraph 62

performance of its functions, including any finding it may make and directions and advice it may give, in line with section 196 (4)(d) of the Constitution.

3.7 Either of its own accord, or on receipt of any complaint to investigate and evaluate the application of personnel and public administration practices and to report to the relevant executive authority and legislature (S 196 (4)(f)(i))

3.7.1 Expanding on the word “complaint”

The word “complaint” is defined in the Rules of the Public Service Commission: Lodging of Complaints regarding the Public Service **as follows:**

“complaint means any dissatisfaction regarding an act or omission within the Public Service which adversely affects a person, or may be detrimental to public administration”

3.7.2 Expanding on the phrase “personnel practice”

The term “personnel practices” is not defined in the Constitution, nor does the Public Service Act or the Public Service Commission Act, define the term. The Public Service Act, 1994, as amended, however, defines the term “*employment practice*” to include-

- (a) recruitment procedures, advertising and selection criteria;
- (b) appointment and the appointment process;
- (c) job and occupational classification and grading;
- (d) remuneration and other conditions of service;
- (e) job assignments;
- (f) the working environment;
- (g) work facilities;
- (h) training and development;
- (i) employee performance management systems and practices;
- (j) transfer and secondment;
- (k) discipline;
- (l) management of poor performance and ill health;
- (m) termination of employment;

It is the view that the term “personnel practice” encompasses all methods, procedures, processes, or rules applicable to the elements mentioned in the definition of “employment practice”.

3.7.3 The phrase “public administration practices”

In terms of section 196 (4)(f)(i) of the Constitution, the powers and functions of the PSC are, to investigate **public administration practices**. The term “public administration practices” is not defined in the Constitution, nor does the Public Service Act or the Public Service Commission Act, define the term.

The definitions of the term “public administration” are extensively discussed in paragraph 2.1 above. The word “practice” is defined as “*Repeated or customary action; habitual performance; a succession of acts of similar kind; custom; usage. The exercise of any profession.*”³¹. The Oxford Dictionary defines “practice” as “*the doing of something repeatedly or continuously by way of study for the purpose or with the result of attaining proficiency*”.

Although there is no clear definition for public administration practices, given the discussion and the definitions above, the term covers all the functions and activities executed to provide a service to the people, e.g. financial management, personnel provisioning and administration, supply chain management processes (including demand management, procurement, disposal management), service delivery, application of policies and procedures to attain proficiency, etc.

3.8 Either of its own accord, or on receipt of any complaint, to investigate grievances of employees in the Public Service concerning official acts or omissions and to recommend appropriate remedies (S 196 (4)(f)(ii))

3.8.1 Expanding on the word “grievance”

Grievance is defined in terms of the PSC’s Grievance Rules as “a dissatisfaction regarding an official act or omission by the employer which adversely affects an employee in the employment relationship, excluding an alleged unfair dismissal”.

3.8.2 Expanding on the PSC’s legislative mandate in terms of grievances

This aspect of the PSC’s mandate has been given effect through legislation as well as Rules issued in terms of legislation. Section 35 of the Public Service Act, 1994 (as amended) provides as follows:

- “(1) For the purposes of asserting the right to have a grievance concerning an official act or omission investigated and considered by the Commission-
- (a) an employee may lodge that grievance with the relevant executive authority under the prescribed circumstances, on the prescribed conditions and in the prescribed manner; and
 - (b) if that grievance is not resolved to the satisfaction of the employee, that executive authority shall submit the grievance to the Commission in the prescribed manner and within the prescribed period.
- (2) After the Commission has investigated and considered any such grievance, the Commission may recommend that the relevant executive authority acts in terms of a particular provision or particular provisions of this Act or any other law if, having regard to the circumstances of the case, the Commission considers it appropriate to make such a

³¹ <http://legal-dictionary.thefreedictionary.com/practice>

recommendation.

(3) *A head of department may lodge any such grievance with-*

(a) *the relevant executive authority in terms of subsection (1); or*

(b) *directly with the Commission under the prescribed circumstances, on the prescribed conditions and in the prescribed manner.”*

The PSC has also issued Grievance Rules in Government Gazette No 25209 dated 25 July 2003 in terms of Section 11 of the Public Service Commission Act, 1997.

3.9 Either of its own accord, or on receipt of any complaint, to monitor and investigate adherence to applicable procedures in the Public Service (S 196 (4)(f)(iii))

3.9.1 Expanding on the word “adherence”

In the context of this section adherence in legal terms refers to **compliance** with the letter and law of prescribed rules / policies / procedures.

3.9.2 Expanding on the words “applicable procedures”

Applicable procedures in the context of this section of the Constitution refer to all procedures issued in terms of legislation and all forms of sub-ordinate legislation that regulates public administration practices in the Public Service.

3.10 Either of its own accord, or on receipt of any complaint, to advise national and provincial organs of state regarding personnel practices in the Public Service, including those relating to the recruitment, appointment, transfer, discharge and other aspects of the careers of employees in the Public Service (S 196 (4)(f)(iv))

According to the Oxford Dictionary, the word "**advice**" is defined as "Words given or offered as an opinion or recommendation about future action or behaviour". The Thesaurus indicates that the word "advice" is similar to that of "recommendation (counsel, suggestion, guidance, opinion and warning) and information (guidance, instruction and assistance)".

4. STATUS OF THE PSC RECOMMENDATIONS, ADVISORIES AND DIRECTIONS

4.1 Recommendations

The Constitution makes reference to **recommendations** in the context of grievances (S 196(4)(f)(ii)) and determines as follows:

The PSC either of its own accord, or on receipt of any complaint-

- ii. *to investigate grievances of employees in the Public Service concerning official acts or omissions and to recommend appropriate remedies;*

In addition, section 35 of the Public Service Act, 1994 (as amended) determines the following:

- “(1) For the purposes of asserting his or her right to have his or her complaint or grievance concerning an official act or omission investigated and considered by the Commission, an employee may lodge that complaint or grievance with the relevant executive authority under the prescribed circumstances, on the prescribed conditions and in the prescribed manner, and if that complaint or grievance is not resolved to the satisfaction of such an employee, that executive authority shall submit the complaint or grievance to the Commission in the prescribed manner and at the prescribed time or within the prescribed period.*
- (2) After the Commission has investigated and considered any such complaint or grievance, the Commission may **recommend** that the relevant executive authority acts in terms of a particular provision or particular provisions of this Act or any other law if, having regard to the circumstances of the case, the Commission considers it appropriate to make such a **recommendation**.*

The word “recommendation” is not defined in the Constitution, 1996, the Public Service Commission Act, 1997, the Public Service Act 1994 or the Grievance Rules, 2003. In terms of the Collins Dictionary, “*recommendations of a person or a committee are their suggestions or advice on what is the best thing to do*”. The words suggestions and advice suggest that recommendations by nature are not enforceable.

According to the Oxford Dictionary, the word "recommend" is defined as “suggest as fit for some purpose or use” and “advise as a course of action, etc.” The Thesaurus indicates that the word "recommendation" is similar to that of “advice (proposal, suggestion and counsel) and reference (commendation, blessing, approval, sanction and good word)”.

Given the above definitions it can be concluded that there is a similarity between recommendations and advice. However, given the constitutional mandate the PSC’s Protocol Document on the Issuing of Directions indicates that the following principles should apply:

- (i) Recommendations can be made regarding a wide spectrum of public administration and personnel issues which can range from providing guidance for public administration and service delivery improvement to instances of addressing non-adherence to prevailing prescripts;
- (ii) A distinction needs to be drawn between generic and specific recommendations. Generic recommendations provide guidance on how public administration or service delivery can be improved. Specific recommendations, on the other hand, require very specific

administrative action from departments especially regarding non-adherence to prescripts.

- (iii) Whether generic or specific, departments can either implement the recommendations or disagree with the recommendations, but reasons need to be furnished to the PSC for non-implementation of specific recommendations. The PSC needs to monitor the implementation of its recommendations by departments. The monitoring of the implementation of PSC's recommendations is guided by a Protocol for Monitoring Implementation of the Recommendations of the PSC.
- (iv) Where recommendations are not implemented and valid reasons are not provided by the relevant department, the PSC will advise the Portfolio Committee for Public Service and Administration accordingly.
- (v) Where it concerns non-compliance with the *PSA, 1994* (as amended), regarding the personnel practices of recruitment, transfers, promotions and dismissals, preference should be given to the issuing of directions rather than making recommendations.

Given the above and for the purposes of this Protocol, a recommendation can therefore be defined as a measure taken by the PSC of its own accord or on receipt of a complaint regarding the organisation, administration and application of personnel practices in the Public Service, with the aim of either providing guidance (generic recommendation) or requiring very specific administrative action (specific recommendation) from departments with reasons having to be furnished by the recipient for not implementing a specific recommendation.

4.2 Advisories

The Constitution makes reference to rendering **advice** in the following:

- “to report in respect of its activities and the performance of its functions, including any finding it may make and directions and **advice** it may give, and to provide an evaluation of the extent to which the values and principles set out in section 195 are complied with;” (S 194(4))
- “to advise national and provincial organs of state regarding personnel practices in the Public Service, including those relating to the recruitment, appointment, transfer, discharge and other aspects of the careers of employees in the Public Service” (S 196(4)(f)(iv))

According to the Oxford Dictionary, the word "advice" is defined as “Words given or offered as an opinion or recommendation about future action or behaviour”. The Thesaurus indicates that the word "advice" is similar to that of “recommendation (counsel, suggestion, guidance, opinion and warning) and information (guidance, instruction and assistance)”.

Given the above definitions it can be concluded that there is a similarity between advice and a recommendation. However, given the constitutional mandate the PSC's Protocol Document on the Issuing of Directions, indicates that the following principles should apply:

- (i) Advice can be proffered regarding a wide spectrum of public administration and personnel issues, but should ideally be limited to those matters that require public administration and service delivery improvement, and which do not necessarily represent a non-adherence to prevailing prescripts;
- (ii) Advice proffered by the PSC should represent an opinion and provide guidance on how public administration or service delivery can be improved; and
- (iii) There should be no obligation on the recipient of advice to follow such advice and to necessarily implement what is being proposed. Flowing from this there will then be no obligation on the PSC to follow up on advice proffered and to report to the legislature thereon.

Given the above, advice can therefore be defined as a measure taken by the PSC of its own accord, on receipt of a complaint or as requested regarding the organisation, administration and application of personnel practices in the Public Service, with the aim of expressing an opinion and providing guidance in general on improving public administration or service delivery without any obligation on the recipient to follow the advice provided.

In addition, section 5 of the Public Service Act, 1994 (as amended) determines the following:

“(8)(a) The Commission may investigate compliance with this Act and may issue directions contemplated in section 196 (4) (d) of the Constitution in order to ensure compliance with this Act and in order to provide advice to promote sound public administration.”

4.3 Directions

The Constitution makes reference to **directions** in the following:

“to give directions aimed at ensuring that personnel procedures relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in section 195” (S 196(4)(d).

Section 5(8) of the Public Service Act, 1994 (as amended), reiterates the PSC’s constitutional power to issue directions as contemplated in section 196(4)(d) of the Constitution, 1996 and section 35 provides for the PSC to deal with grievances of employees. It stipulates as follows:

“(8)(a) The Commission may investigate compliance with this Act and may issue directions contemplated in section 196 (4) (d) of the Constitution in order to ensure compliance with this Act and in order to provide advice to promote sound public administration.

(b) If the Commission issues a direction contemplated in paragraph (a), the relevant executive authority or head of department, as the case may be, shall implement the direction as soon as possible after receipt of the written communication conveying the direction but,

in any event, within 60 days after the date of such receipt.”

The Supreme Court of Appeal judgment of *SABC and Others vs Democratic Alliance and Others*³², in which the Court dealt with the powers of the Public Protector, being an impartial and independent constitutional institution established in terms of Chapter 9 of the Constitution. The Court found that the SABC was obliged to implement the Public Protector’s findings and remedial measures and if it was aggrieved by any aspect of the Public Protector’s report, its remedy was to challenge same by way of a review application in a competent court. Similarly, the PSC, established as an independent and impartial constitutional institution, must perform its functions accordingly. As demonstrated in the SABC judgment, the directions issued by the PSC may not simply be ignored. The PSC’s directions must be implemented in accordance with section 5 (8(b) of the Public Service Act and should a functionary be aggrieved by any directions issued by the PSC, the only remedy available to the functionary would be to challenge the directions by way of a judicial review application. The directions of the PSC is therefore legally binding.

The PSC’s Protocol on the Issuing of Directions provides that the following principles should apply regarding Directions of the PSC:

- (i) As opposed to the proffering of advice and the making of a recommendation and in line with the constitutional mandate of the PSC, the issuing of directions by the PSC is limited to personnel procedures in the Public Service relating to recruitment, transfers, promotions and dismissals. It should be noted, however, that the issuing of directions will be broadly applicable to all areas of the PSC’s mandate in respect of the four areas mentioned above.
- (ii) The aim of a direction issued by the PSC is to give effect to the PSC’s Constitutional mandate and to ensure compliance with the *PSA, 1994* (as amended), and the acts governing, *inter alia*, the services and the educators. The aim is also to provide advice to promote sound public administration. To ensure sound public administration it is of critical importance that the issuing of directions should be accompanied by proper advice regarding the implementation of the directions. It will ensure much needed two way communication on the matter, address the administrative law requirement regarding consultation, avoid any misinterpretation regarding the direction issued and will ultimately ensure that directions are implemented in the most effective and efficient manner.
- (iii) The issuing of directions by the PSC will apply to all sectors within the Public Service and will not be confined to staff appointed in terms of the *PSA, 1994* (as amended). This is seen within the broad execution of the PSC’s mandate that in terms of section 196(4)(d) of the *Constitution, 1996*, the powers and functions of the PSC are to give directions aimed at ensuring that personnel procedures in the Public Service relating to recruitment, transfers, promotions and dismissals comply with the values and principles set out in

³² (393/2015)[2015] ZASCA 156 (8 October 2015)

section 195 (of the *Constitution, 1996*).

- (iv) EAs and HoDs are compelled to implement a direction issued by the PSC. Whereas advice may not be heeded and recommendations may not be accepted, albeit with reasons required in the case of a recommendation, EAs and HoDs are compelled to implement a direction within a prescribed period of 60 days. As part of monitoring the implementation of the directions issued by the PSC, the EA/HoD, as the case may be, must be requested to provide feedback to the PSC on the implementation of the directions at the expiry of the 60 day period referred to in the Act;
- (v) EAs are compelled to take disciplinary action against HoDs for not implementing directions issued by the PSC; and
- (vi) in instances where a direction is not implemented by an EA, the PSC will advise the Portfolio Committee for Public Service and Administration or other relevant parliamentary committee or committee of the relevant provincial legislature accordingly.
- (vii) Since acts such as, *inter alia*, the *National Education Policy Act, 1996*, the *Correctional Services Act, 2007*, the *South African Police Service Act, 1995* and the *New Defence Act, 2002*, are silent on the issuing of directions, the principles and processes spelt out in the PSC's Protocol will also apply to employees employed under these Acts.

Given the above, a direction can therefore be defined as a measure taken by the PSC of its own accord or on receipt of a complaint regarding personnel procedures relating to recruitment, transfers, promotions and dismissals. The measure is taken with the aim of giving effect to the PSC's constitutional mandate, ensuring compliance with the PSA, 1994 (as amended), and the acts governing, *inter alia*, the services and the educators. The aim is also to provide advice on the implementation of the direction to promote sound public administration. EAs and HoDs are compelled to implement the direction within a prescribed period of 60 days and disciplinary action is to be taken against HoDs for non-implementation. EAs are to be reported to Parliament for non-implementation.

5. MEANING OF A SINGLE COMMISSION FOR THE REPUBLIC

Section 196(1) of the Constitution, 1996, determines that there is a single Public Service Commission for the Republic. The notion of a single PSC emanates from the dismantling of all provincial commissions (done via the repeal of their founding Acts by the PSC Act, 1997) and having one PSC with jurisdiction over the whole of the Republic.

During the certification of the amended text of the Constitution of the Republic of South Africa, 1996, it was held that-

- IC 213 gives the provinces the power to establish provincial service commissions. This power was not given to them in the NT, which provided only for a single Public Service Commission

(“PSC”) for the Republic...³³

- The arrangement under the AT is quite different. It establishes a single PSC for the whole Republic but no provincial service commissions. The powers of the single PSC are set out in the AT 196(4) which provides that...³⁴.
- Under the AT, provinces lose the power to establish provincial service commissions but gain powers and functions in respect of the single PSC. Under the IC the provinces are not represented on the national PSC. Its functions are therefore to be carried out independently of the provinces. Under the AT the provinces have greater powers in respect of the single PSC. AT 196(7) provides that the single PSC shall consist of fourteen commissioners, five approved by the NA and one from each of the nine provinces, nominated by each Premier. This gives the provinces a majority of the commissioners. The single PSC is therefore an important site of collective provincial power. Another factor is that in terms of AT 196(13) the commissioners appointed by the provinces “may exercise the powers and perform the functions of the Commission in their provinces as prescribed by national legislation”. The meaning of this provision is not entirely clear. But even if it does confer a power on such commissioners, the nature of this power is dependent upon prescription in national legislation. The extent, if any, to which it may confer powers upon the provinces remains uncertain.³⁵
- The new PSC arrangements compensate provinces for the loss of the power to establish provincial service commissions by affording them collective power on the PSC. However, there remains a conceptual and residual difference between an autonomous power of a province to create its own commission, on the one hand, and on the other hand the power of such a province to participate in the collective power of the provinces in that they appoint a majority of the members of the PSC.³⁶

In an opinion obtained from senior counsel³⁷ it was confirmed that the Constitution also envisages that there will be national and provincial commissioners, approved by the National Assembly and each of the Provincial Legislatures. Senior counsel opined that although Commissioners are appointed with a national or provincial “portfolio”, they are envisaged to form part of a single PSC, and required to follow the same policies and decision making processes of the PSC. This is supported by the following extract from the second *Certification* judgment:

“AT 196(1) provides that there shall be a single PSC for the Republic. As a commission it will have joint responsibility for the work that it does. . .

. . . Counsel for the DP drew attention to the fact that AT 196(13) provides that a commissioner appointed by a province may perform the functions of the commission in that province 'as prescribed by national legislation'. That is so, but it will not relieve the PSC of joint responsibility for the work that it does, nor prevent the 13 remaining commissioners from coming to the support of an individual commissioner wrongly accused of misconduct, incompetence or incapacity.” (emphasis added)

³³ Certification of the amended text of the Constitution of the Republic of South Africa, 1996 (Case CCT 37/96, para 183).

³⁴ Certification of the amended text of the Constitution of the Republic of South Africa, 1996 (Case CCT 37/96, para 186).

³⁵ Certification of the amended text of the Constitution of the Republic of South Africa, 1996 (Case CCT 37/96, para 190).

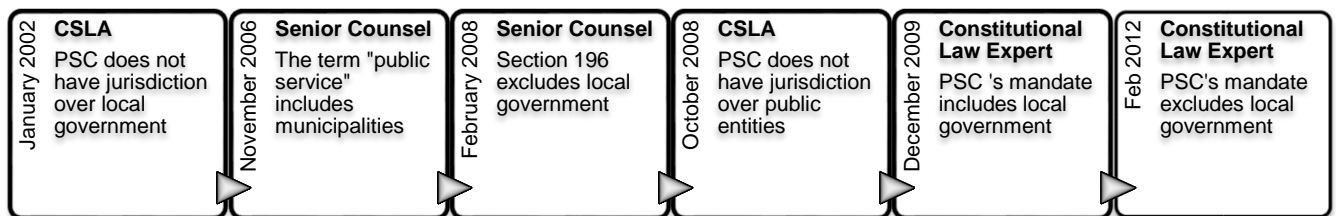
³⁶ Certification of the amended text of the Constitution of the Republic of South Africa, 1996 (Case CCT 37/96, para 191).

³⁷ Opinion on the Status and Functions of the PSC, Gilbert Marcus SC and Nasreen Rajab-Budlender, dated 28 March 2012

6. EXTENSION OF MANDATE TO LOCAL GOVERNMENT

Following receipt of complaints in relation to the local sphere of government, the PSC started interrogating its mandate to investigate such complaints and the definition of the word “public service” as referred to in the Constitution, 1996.

This resulted in a process of the PSC obtaining legal opinions from various sources on the interpretation of its mandate relating to, amongst others, local government, and is summarized as follows:



The above figure summarised the various legal opinions obtained by the PSC since 2002, providing differing interpretations of the PSC’s mandate regarding local government. The following salient points of the legal opinions are highlighted:

- (i) In 2002 the PSC contacted the Chief State Law Advisor (CSLA) seeking a legal opinion on the **“Locus standi [sic] of the Commission to deal with Local Government Structures”**). The CSLA came to the conclusion that, in terms of section 2 of the *Public Service Commission Act, 1997*, the PSC has a mandate to perform its powers and functions with regard to national and provincial levels of government and not with regard to local government structures.
- (ii) Previously during the drafting of the amendment to the *Public Service Act, 1994*, the Department of Public Service and Administration (DPSA) requested independent advocates Maleka, SC and Bokaba to give an opinion regarding the constitutionality of the Public Administration Management Bill. Amongst others, the independent advocates concluded that the Constitution does not limit the term **“Public Service”** to national and provincial government. According to their legal opinion provided to the DPSA, section 197 of the Constitution establishes a single Public Service for all spheres of government, including local government.
- (iii) The DPSA also approached advocate AJ Freund SC for a legal opinion on whether the jurisdiction of the PSC, as provided for in section 196 of the Constitution, 1996, includes local government and, if not, whether it is constitutionally permissible to extend its powers by statute to the local sphere of government. The SC opined that no express reference is made anywhere in section 196 of the Constitution, 1996, to the PSC having powers in respect of local government employees or having to report to local government. In his view, this

demonstrates that, when the drafters of the Constitution referred to the “Public Service” in section 196, they had in mind a Public Service comprising departments of national and provincial government, but not local government.

- (iv) In 2009, the PSC procured a legal opinion on its mandate from SC Advocate Lebala³⁸. The SC opined that the mandate of the PSC “....is to evaluate, administer the conduct/practices of bureaucrats.....Equally important is the fact that there is no basis in law and in fact to limit the mandate of Consultant in national and provincial government only. This is so given the fact that national, provincial and local components of government structures perform bureaucratic activities in carrying out the daily functions of the State.” He concluded that –

“Given the fact that section 195(2) of the Constitution in precise language and terms spells out that the basic values and principles governing public administration apply to administration in every sphere of government, it is therefore implied that the Constitution, the Public Service Act, 1994 and the Service Commission Act (sic) do not expressly exclude local government structures from the jurisdiction of the PSC.”

Issues of public administration and human resources at local government level are dealt with in the Local Government: Municipal Systems Act 32 of 2000 (The Systems Act). In this legislation it is indicated that a municipality exercises legislative and executive authority (within its jurisdiction) through a municipal council. Section 2 of the Systems Act, describes the juridical nature of a Municipality. It provides, in that regard that a municipality –

- “(a) is an organ of state within the local sphere of government exercising legislative and executive authority within an area determined in terms of the Local Government: Municipal Demarcation Act, 1998;*
- (b) consists of –*
- (i) the political structures and administration of the municipality; and*
- (ii) the community of the municipality;*
- (c) functions in its area in accordance with the political, statutory and other relationships between its political structures, political office bearers and administration and its community; and*
- (d) has a separate legal personality which excludes liability on the part of its community for the actions of the municipality.”*

It is therefore clear that a municipality is not a mere structural arrangement of political institution, but also comprises political office bearers and a public administration. Chapter 7 of the Systems Act deals, in some detail, with the public administration and human resource elements of municipalities. It provides, amongst others for the establishment of local public administration for municipalities. It requires that the principles of public administration prescribed in section 195(1) of the Constitution should apply to local administration that is established for municipalities.³⁹

³⁸ SM Lebala SC. BM Matlejoane. High Court Chambers. “Opinion on the mandate and power(s) of the Public Service Commission” 6862/Z22/KC

³⁹ Section 50 of the Systems Act

Chapter 7 of *the Systems Act* also provides for the employment of municipal managers and other managers accountable to them, and as well as the employment of members of staff of municipalities.⁴⁰ A municipal manager of a municipality is required to determine, with the approval of a municipal council, and within the framework of applicable legislation, a staff establishment for municipality, job description for posts established within a staff establishment, and conditions of service applicable to such posts.⁴¹ A municipality is also required to establish a human resource development policy which must deal with the labour relations issues that are prescribed in section 67(1) (a) to (k) of *the Systems Act*.

SC Maleka and Bokaba opined that the above exposition shows that there is a public service within local government. The structure of such a public service and political office bearers and staff establishment are described in chapter 7 of *the Systems Act*. SC Maleka and Bokaba also indicated that sections 195 to 197 of the Constitution cannot sensibly be interpreted to exclude the public service established in terms of *the Systems Act*.

In December 2011, Plenary resolved that a comprehensive legal opinion should be sought which will address the interpretation of the mandate holistically, as well as all related matters. Senior counsel (Adv Gilbert Marcus (SC) and Adv Nasreen Rajab-Budlender) subsequently delivered their first opinion, dated 28 February 2012. The opinion provided a general overview of the role and functions of the PSC with particular reference to its constitutional mandate. The opinion did not contain new information that was not previously contained in the opinions already obtained on the role and functions of the PSC. Of importance, is that in relation to what is meant by the single public service, it was found that if the PSC's mandate was intended to extend to local government, they "would have expected" this to be set out explicitly in the Constitution. It was thus concluded that the PSC's mandate does not extend to local government. The opinion was replaced with an opinion, dated 28 March 2012, which was more comprehensive and included recent case law, but came to the same conclusions as the original opinion.

The Public Administration Management (PAM) Bill was published for public comment on 31 May 2013. Clause 4 of Schedule 3 provided for the amendment of the PSC Act to, amongst others, extend its mandate to the local sphere of government.

However, the PAMA signed into law by the President in December 2014 did not include the any reference to the PSC. Therefore the PSC's mandate has not been extended to the local sphere of government.

7. FUNDING OF THE PSC MANDATE

The funds for the PSC are appropriated from the national budget by vote. The PSC's funds are determined by National Treasury and approved by the National Assembly. Through the years

⁴⁰ Sections 56 and 57 of *the Systems Act*

⁴¹ Sections 66 (1) of *the Systems Act*

several attempts have been made to strengthen the PSC's capacity through policy options submitted to National Treasury. Unfortunately the outcome of interactions with National Treasury has been, by and large, very restrictive in terms of real enhancement of the PSC's human resource capacity.

The PSC does not have the political autonomy concerning its budget as preferred by the Court in *New National Party*, as its budget is appropriated by the MPSA.

The PSC's budget is insufficient to cover its wide mandate. In particular, the Regional Offices are not adequately capacitated to fulfil the mandate of the PSC at the respective provinces. It should also be noted that the structural arrangements of the Office of the Public Service Commission (OPSC) have a historical context dating back to the unbundling of the Department of Public Service and Administration (DPSA) and the OPSC in 1996/97. The size and composition of regional offices in particular were determined by a Ministerial directive. As such the Public Service Commission (PSC) has been to a large extent limited in relation to the optimal execution of its mandate at provincial level.

8. MEANING OF ITS INDEPENDENCE

Section 196(2) guarantees the independence of the PSC and provides as follows:

"The Commission is independent and must be impartial, and must exercise its powers and perform its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the public service. The Commission must be regulated by national legislation."

The Constitutional Court has pronounced on at least five occasions on the meaning of a requirement of "**independence**" contained in the Constitution and what safeguards are necessary to achieve it⁴². Senior Counsel⁴³ opined that the decisions of the Constitutional Court make it clear that for an institution to meet the constitutional requirement of independence, it is not sufficient merely that a statute directs an institution to act independently and be independent. Rather, an institution will only be considered sufficiently independent if it enjoys a sufficient degree of structural protection from governmental control. Thus the critical question is whether there are indeed sufficient structural protections of the PSC to ensure its independence, particularly with regards to appointment, security of tenure and financial security of its Commissioners. In the view of Senior Counsel, the PSC Act satisfies the requirement that the PSC be independent, because the provisions of the PSC Act which deal with the appointment and removal of

⁴² Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC) at paras 163 and 165

Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa 1997 (2) SA 97 (CC) at para 134

De Lange v Smuts NO and Others 1998 (3) SA 785 (CC) at paras 69 – 73

Van Rooyen and Others v The State and Others 2002 (5) SA 246 (CC) at paras 29 – 34

South African National Defence Union and Others v Minister of Defence and Others 2007 (5) SA 400 at paras 99 – 103

Glenister v President of the Republic of South Africa and Others 2011 (3) SA 347 (CC) at para 117

⁴³ Opinion on the Status and Functions of the PSC, Gilbert Marcus SC and Nasreen Rajab-Budlender, dated 28 March 2012, p 20

Commissioners is required to take place with the approval of the National Assembly or the Provincial Legislature concerned, rather than the President, for example. This is in line with the provisions of section 196.

Lastly, Senior Counsel⁴⁴ opined that in order to meet the constitutional requirement of independence, the PSC must be financially independent of the Department of Public Service and Administration (“the DPSA”) and be able to defend its budgetary requirements before Parliament.

In view of the above, the Constitution links the PSC’s independence firmly with its impartiality and no organ of state may interfere with the functioning of the PSC.

The only issue that may have an impact on the independence of the PSC is the question of how its funding is determined and provided. The PSC forms part of the Forum of Institutions Supporting Democracy, where the location of the budgets of all Institutions Supporting Democracy is being addressed.

9. MEANING OF ITS IMPARTIALITY

The independence and impartiality of the PSC was discussed during the Constitutional negotiations and was encapsulated in Constitutional principle (CP) XXIX. These principles were adopted as a guide to the drafting of the 1996 Constitution.

CP XXIX reads:

“The independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector 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.”

During the first certification case, an objection was taken to the 1996 Constitution Text (NT) “on the ground that the independence and impartiality of these four institutions has not been “provided for and safeguarded” as required by the CP. A decision as to whether this direction has been met can be made only by considering each institution separately. The functions and powers of each institution need to be understood to determine whether the particular provisions governing its independence and impartiality meet the test in CP XXIX. Factors that may be relevant to independence and impartiality, depending on the nature of the institution concerned, include provisions governing appointment, tenure and removal as well as those concerning institutional independence. Against the background of the nature of the particular institution, these factors must, when considered together, ensure independence and impartiality”⁴⁵.

The Constitutional Court held that CP XXIX “requires at least that there be an independent and

⁴⁴ Opinion on the Status and Functions of the PSC, Gilbert Marcus SC and Nasreen Rajab-Budlender, dated 15 May 2012, p 2

⁴⁵ Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996) (para 160)

*impartial PSC. Implicit in the insistence upon independence and impartiality is that the PSC will constitute a check upon political executive power in the administration of the public service. Without knowing what the functions and powers of the PSC will be and what protection it will have in order to ensure that it is able to discharge its constitutional duties independently and impartially, we are unable to certify that this requirement has been complied with*⁴⁶. It therefore refused to certify the provisions relating to the independence and impartiality of the PSC.

In the second certification case⁴⁷, the Court was then presented with the full Constitutional provisions relating to the PSC, including its powers and functions.

The Court had to deal with the contention that “the role of the PSC is similar to the roles of the Public Protector and the Auditor-General, and that the procedures laid down for the protection of the independence of public service commissioners should be no less stringent than those for the removal from office of the Public Protector and the Auditor-General, which require a resolution of at least two-thirds of the members of the NA”.

The Court decided that Section 196(1) “provides that there shall be a single PSC for the Republic. As a commission it will have joint responsibility for the work that it does. This, and the fact that it consists of 14 members appointed by 10 different legislatures, enhances its independence and makes any individual commissioner less vulnerable to unfair dismissal than the Public Protector and the Auditor-General might be. The dismissal of one of 14 commissioners will not necessarily have a significant impact on the work of the PSC; the removal of the Public Protector or the Auditor-General could have a profound impact on the functioning of that office.”

During the proceedings, the Court also dealt with the argument that Section 196(13) provides that a commissioner appointed by a province may perform the functions of the commission in that province 'as prescribed by national legislation'. The Court found that “that is so, but it will not relieve the PSC of joint responsibility for the work that it does, nor prevent the 13 remaining commissioners from coming to the support of an individual commissioner wrongly accused of misconduct, incompetence or incapacity.”

The Court also held that “The functions of the PSC are materially different to those of the Public Protector and the Auditor-General. Inherent in the functions of the Public Protector is the 'investigation of sensitive and potentially embarrassing affairs of government', whilst the Auditor-General has a crucial role in 'ensuring that there is openness, accountability and propriety in the use of public funds'. They perform sensitive functions which require their independence and impartiality to be beyond question, and to be protected by stringent provisions in the Constitution. The PSC's primary function is to promote 'a high standard of professional ethics in the public service'. While it has important supervisory and watchdog functions, a good deal of its work will be of a routine or advisory nature. As an institution it cannot be equated with the Public Protector or the Auditor-General. A similar distinction is to be found in the IC which affords a lesser

⁴⁶ Ibid (para 176)

⁴⁷ Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Amended Text of the Constitution of the Republic Of South Africa, 1996 1997 (2) SA 97 (CC)

protection to the PSC than it does to the Public Protector and the Auditor-General...”

In addition, the Court found that “ ‘Misconduct, incapacity or incompetence’, the only grounds on which a commissioner can be removed from office in terms of AT, are legitimate grounds for dismissal. The removal of a commissioner from office depends upon the passing of a resolution by the relevant legislature that the commissioner has been guilty of such conduct. In the view that we take of this issue it is not necessary to decide whether a finding to that effect by the committee of the relevant legislature could be challenged in the Courts. If it can, that is an added protection. If it cannot, and if there is any suspicion that the vote has been taken on other grounds, and that the removal is not justified, the decision could be made the subject of a complaint to the Public Protector. The political consequences attaching to an unfounded attempt to remove a commissioner, and an adverse finding by the Public Protector, are likely to be considerable.”

In conclusion, the Court found that “The protection afforded to the PSC has been substantially strengthened by the AT, and is of a much higher standard than that provided by the NT or the IC. If due regard is had to the functions of the PSC, and the ambit of the protection given to commissioners by the provisions of the AT to which we have referred, the requirements of CP XXIX have clearly been complied with.”

Given the above, the Court in the Certification case⁴⁸ highlighted the difference between the Public Protector and the PSC. In relation to the Public Protector, the Court found that *“The purpose of the office of Public Protector is to ensure that there is an effective public service which maintains a high standard of professional ethics. NT 182(1) provides that the Public Protector has the power “to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice”. NT 182(4) provides that the Public Protector must be “accessible to all persons and communities”. The Public Protector is an office modelled on the institution of the ombudsman, whose function is to ensure that government officials carry out their tasks effectively, fairly and without corruption or prejudice. The NT clearly envisages that members of the public aggrieved by the conduct of government officials should be able to lodge their complaints with the Public Protector, who will investigate them and take appropriate remedial action.”*

On the other hand, as already indicated above the Court decided that **“the PSC *will constitute a check upon political executive power in the administration of the public service...*”** (own emphasis).

Consequently the difference institutions’ constitutional functions and the necessary protections were outlined in the Constitution and reflect as follows:

CHAPTER 9, SECTIONS 181 - 194		CHAPTER 10, SECTION 196	
181(2)	“These institutions are independent, and subject only to the Constitution and the	196(1)	“there is a single Public Service Commission for the Republic.

⁴⁸ Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996)

CHAPTER 9, SECTIONS 181 - 194		CHAPTER 10, SECTION 196	
	law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice.	196(2)	<p>The Commission is independent and must be impartial, and must exercise its powers and perform its functions without fear, favour or prejudice in the interest of the maintenance of effective and efficient public administration and a high standard of professional ethics in the Public Service.”</p> <p>There is no indication that it is subject only to the Constitution.</p>
181(3)	“Other organs of state, through legislative and other measures, must assist and protect these institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions.”	196(3)	“Other organs of state, through legislative and other measures, must assist and protect the Commission to ensure the independence, impartiality, dignity and effectiveness of the Commission. “
181(4)	“No person or organ of state may interfere with the functioning of these institutions.”	196(3)	“No person or organ of state may interfere with the functioning of the Commission.”
181(5)	“These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.”	196(5)	<p>The Commission is accountable to the National Assembly.</p> <p>The Commission must report at least once a year in terms of subsection (4) (e)-</p> <p>(a) to the National Assembly; and</p> <p>(b) in respect of its activities in a province, to the legislature of that province.</p>
183 & 189	The Public Protector and Auditor General are appointed for a fixed non-renewable term.	196(10)	A Commissioner is appointed for a term of five years, which is renewable for one additional term only.
193(5) (b)	<p>Appointment</p> <p>The National Assembly must recommend persons approved by the Assembly by a resolution adopted with a supporting vote-</p> <p>(i) of at least 60 per cent of the members of the Assembly, if the recommendation concerns the appointment of the Public Protector or the Auditor-General; or</p> <p>(ii) of a majority of the members of the Assembly, if the recommendation concerns the appointment of a member of a Commission.</p>	196(8)	<p>(a) A commissioner appointed in terms of subsection (7) (a) must be-</p> <p>(i) recommended by a committee of the National Assembly that is proportionally composed of members of all parties represented in the Assembly; and</p> <p>(ii) approved by the Assembly by a resolution adopted with a supporting vote of a majority of its members.</p> <p>(b) A commissioner nominated by the Premier of a province must be-</p> <p>(i) recommended by a committee of the provincial legislature that is proportionally composed of members of all parties represented in the</p>

CHAPTER 9, SECTIONS 181 - 194		CHAPTER 10, SECTION 196	
			legislature; and (ii) approved by the legislature
194(2)	<p>Removal</p> <p>A resolution of the National Assembly concerning the removal from office of-</p> <p>(a) the Public Protector or the Auditor-General must be adopted with a supporting vote of at least two thirds of the members of the Assembly; or</p> <p>(b) a member of a Commission must be adopted with a supporting vote of a majority of the members of the Assembly.</p>	196(11)	<p>A commissioner may be removed from office only on-</p> <p>(a) the ground of misconduct, incapacity or incompetence;</p> <p>(b) a finding to that effect by a committee of the National Assembly or, in the case of a commissioner nominated by the Premier of a province, by a committee of the legislature of that province; and</p> <p>(c) the adoption by the Assembly or the provincial legislature concerned, of a resolution with a supporting vote of a majority of its members calling for the commissioner's removal from office.</p>

10. PSC ACCOUNTABILITY AND REPORTING

The Constitution in section 196 (4)(d), requires of the PSC to report in respect of its activities and the performance of its functions, including any finding it may make and directions and advice it may give, and to provide an evaluation of the extent to which the values and principles set out in section 195 are complied with. These reporting requirements are discussed extensively in paragraph 1.6 above.

The PSC is accountable to the National Assembly in terms of the constitutional provisions and is expected to report at least once a year. The PSC has performed well in terms of this obligation through the multiple reports it had presented and published regarding its work and its activities. The key problem with the reporting and accountability of the PSC was that it lacked the authority to enforce its recommendations and its reporting arrangements did not provide for a mechanism to enforce recommendations. Thus the PSC is severely constraint in accounting to Parliament on the actual impact that it makes in promoting the Constitutional values and principles of public administration and other aspects of its mandate.

11. TERMS AND CONDITIONS OF APPOINTMENT OF PSC COMMISSIONERS

Section 219(5) of the Constitution, 1994, determines that “*National legislation must establish frameworks for determining the salaries, allowances and benefits of judges, the Public Protector, the Auditor-General, and members of any commission provided for in the Constitution, including the broadcasting authority referred to in section 192*”.

Section 6 of the PSC Act, 1997, deals with the conditions of appointment of commissioners.

Section 6(1), amongst others, determines as follows:

- “(a) The President may from time to time determine the remuneration and other conditions of appointment of the chairperson, the deputy chairperson and any other commissioner, and such remuneration and conditions of appointment shall not be altered to his or her detriment during his or her term of office.*
- (b) The other conditions of appointment as determined by the President shall not be less favourable than the conditions of service of a head of a department.”*

In 1998, Cabinet approved the linking of the salaries of the chairperson, deputy chairperson and other commissioners with comparable positions in the Public Service. These were as follows:

Table 1: Salary levels of the Commissioners

POSITION	SALARY LEVEL
Chairperson	Director-General (second notch)
Deputy Chairperson	Director-General (minimum notch)
Member	Deputy Director-General (minimum notch)

The above-mentioned inclusive flexible remuneration packages of the PSC are provided for in the *Conditions of Appointment (including remuneration and other conditions of service)* applicable to members of the PSC, as determined by the President.

These Conditions furthermore determine that the conditions of service are derived from (or linked to) the salaries and conditions of service which apply to comparable (identified) Senior Management positions in the Public Service. The conditions of service of Senior Managers in the Public Service are determined by the Minister for the Public Service and Administration.

The Constitution also determines that a commissioner is appointed for a term of five years, which is renewable for one additional term only. However, in practice the posts become vacant at the expiry of the term of five years, the recruitment process is initiated and commissioners have to apply for the vacancy.

12. EXECUTIVE AUTHORITY WITHIN THE CONTEXT OF THE OFFICE OF THE PSC

Burns Y⁴⁹ indicates that –

“Executive authority is the power to give effect to rules of law. The Constitution does not draw a clear line between the functions of the executive branch of government and those of the administration. The main task of the executive branch is the formulation of policy and the task of the public or state administration is the implementation of policy.

⁴⁹ Burns Y, 2003. *Administrative Law under the 1996. Constitution*. LexisNexis Butterworths. Second edition (p 8)

In terms of section 1 of the Public Service Act, 1994, the Chairperson of the PSC is the executive authority of the Office of the PSC and as such has all the powers vested with executive authorities in terms of section 3 of the Public Service Act, 1994⁵⁰ and the Public Service Regulations, 2001⁵¹. A summary of these powers is attached as **Annexure B**.

The budget of the PSC is located within the budget appropriation of the Department of Public Service and Administration (DPSA). However, the DPSA does not have any authority to adjust the allocation to the PSC, and merely acts as a conduit for the transfer of monies to the PSC. Although the PSC has an executive authority in the form of the Chairperson, it does not have direct representation on MINCOM and is represented by the Minister for Public Service and Administration (MPSA). The PSC is therefore dependent on the MPSA to lobby for its needs.

This said, because the budget of the PSC is appropriated by the MPSA for formal reasons, it may lead to wrong perceptions regarding the independence of the PSC.

⁵⁰ Public Service Act, 1994, as amended, Section 3

⁵¹ Public Service Regulations, 2001, as amended