

LOCAL GOVERNMENT PROJECT



Chairperson: Portfolio Committee on
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Bellville, 7 March 2002

Dear Ms Hogan,

**RE: SUBMISSION LOCAL GOVERNMENT: MUNICIPAL FINANCE
MANAGEMENT BILL 1 OF 2002**

The above matter refers.

The Community Law Centre (UWC) hereby submits the following comments:

It is submitted that the Bill does not promote democratic and developmental local government as entrenched in the Constitution. While sound financial administration is essential, the Bill overreaches its goal.

1. WHY STRONG LOCAL GOVERNMENT

The Constitution creates strong local government as one of the spheres of government alongside national and provincial government. This has been done in order to strengthen democracy and promote development.

1.1 Democracy

Democracy entails an opportunity to participate and be part of government decisions. Decentralising development matters to local government is a critical element thereof because it strengthens community participation. Strong local government holds considerable promise for deepening democracy. The

opportunity for residents to influence decision-making at local level through voting and participating in government affairs is enhanced when local government is given real powers and responsibility.

1.2 Development

People should have a say in government's development initiatives. It is a given fact that peoples' preferences can be matched much better at local level than at national level. Critical is the element of accountability towards the local citizenry. Local governments that are given responsibility over their own affairs and resources become more prudent managers of their affairs and more prudent users of those resources. Accountability to senior governments creates dependency and a skewed accountability: local governments don't have to justify to the local population how moneys were spent and a commitment to national government as opposed to the local citizenry is created.

If local government is forever treated as an infant sphere of government and not given the latitude to govern, make mistakes and learn from its mistakes it will not rise to the occasion that the Constitution envisages.

The Bill must be assessed in light of these two goals.

2. THE BILL UNDERCUTS DEMOCRATIC ACCOUNTABLE LOCAL GOVERNMENT

The Bill does not strengthen democratic government at local level because it undermines local accountability, initiative and self-reliance.

First, the Bill prescribes how the council should be structured by creating, for example, the position of "councillor for financial matters". This interferes with the notion of self-governance about internal structures (s 160 of the Constitution).

Second, the Bill imposes numerous reporting duties to the National Treasury which may tend to undercut the principle of primary responsibility and accountability to the municipal council. See for example clause 36(o)): before establishing a new entity, the municipal manager must inform the National Treasury and the provincial treasury. Why? While it is simply a reporting duty, it may easily lapse in an informal permission seeking exercise.

Third, the municipal manager must promptly report to the MEC any interference by a councillor in the staffing or financial management responsibilities of the municipal manager (clause 36(l)). The first responsibility is to report such a matter to the entire council so as to enhance local self-reliance to solve own problems, rather than create a culture for running to "big daddy".

Fourth, clause 41(2)(b) provides that the National Treasury may impose limitations and conditions to a *specific delegation* made to an official by a municipal manager. This clause is unconstitutional for want of compliance with section 160 of the Constitution. Section 160, in particular subsections (1) and (6) protect the right of municipalities to regulate their internal affairs. The role of national departments is to provide the framework for delegations, which may include minimum requirements or standards. However, if national departments were allowed to determine conditions for *individual delegations*, this would amount to interfering with that municipality's institutional integrity and it would harm the notion of accountability towards the municipal council.

3. BILL UNDERCUTS SYSTEM OF INTERGOVERNMENTAL RELATIONS

Accountable democratic local government does not mean that local government is autonomous. It functions within a system of intergovernmental relations and cooperative government, which includes a system of regulation and supervision of local government by both the national and provincial governments. The Bill is, however, at odds with the system that the Constitution establishes.

3.1 Provinces' supervisory role is compromised

The municipal reporting duties to both the National Treasury and the provincial treasuries may result in the situation that one sphere, probably the provinces, may regard their monitoring duties as a duplication of the national effort rendering their own thus superfluous. Moreover, with intervention powers shifted to a national body in terms of chapter 11, the incentive for provinces to perform their monitoring and support duties is taken away.

3.2 NCOP's supervisory role is eclipsed

Chapter 11 creates the institution and procedure for intervening in a municipality in case of financial emergency. Without the accompanying constitutional amendment, which would authorize such an intervention, it is not possible to judge its constitutionality. On the face of the document, the procedure prescribed in chapter 11 excludes the supervisory role of the NCOP. Section 139 of the Constitution creates the necessary political checks and balances to maintain the distinctiveness of local government which is absent from chapter 11.

3.3 National government in the guise of the National Treasury overregulates local government

The national government has the constitutional mandate to **regulate** the exercise by municipalities of their executive authority (section 155(7) Constitution). The essence of regulation is that it provides a framework within which local government must function without prescribing outcomes. If outcomes are

prescribed, it is not longer regulation but control. This not only exceeds the constitutional mandate of national government, but also takes away local government's responsibility to manage it own affair in an accountable and self-reliant manner.

Examples of overregulation are:

- A municipality may change a bank account during a financial year only with Treasury approval (clause 8(2)(b)).
- Treasury prescribes the annual budget growth factor (clause 5(2)(d)).
- In general, the National Treasury may "issue instructions" in terms of clause 106(1). While there are sound reasons to provide "guidelines" and frameworks, the issuing of instructions is by definition the exercise of supervisory control.
- The range of issues on which regulations can be issued embraces any conceivable area of financial management. Extensive regulation may stifle local initiative.
- The delegation of powers by a municipal manager can be prescribed by the National Treasury (clause 41(2)(b)).
- A municipality may establish a municipal entity only for the provision of services "and such other purposes as may be prescribed [by the National Treasury]" (clause 46(1)(b)).
- The National Treasury prescribes the limit of councilors and officials on a governing board of a municipal entity (clause 53(4)).
- The Bill overregulates the selection process of the governing board (clause 54).
- The National Treasury may in exceptional circumstances designate the accounting authority of a municipal entity (clause 58(3)).

The overregulation of local government is also explicitly recognized in the Bill: The national Treasury may on good grounds approve a departure from a treasury regulation or instruction or any conditions imposed in terms of the Bill (clause 109). Such a provision can only lead to legal uncertainty and ad hoc decisionmaking.

3.4 Stopping of funds

Clause 5(2)(h) authorises the stopping of funds by the National Treasury, in terms of section 216(2) of the Constitution, to a municipality if it commits a serious or persistent material breach *of this Act*.

The Constitution limits the stopping of funds in terms of section 216(2) to breaches of generally recognised accounting practice, uniform expenditure classifications and uniform treasury norms and standards.

Clause 5(2)(h) of the Bill appears to broaden the scope of the stopping of funds substantially by linking it to a breach *of the Act*. Even though the Bill implements section 216(1), there are provisions in the Bill that do not constitute generally recognised accounting practice, uniform expenditure classifications or uniform treasury norms and standards.

The non-compliance with those provisions, as problematic as it might be, does not warrant the stopping of funds. An example of such provision is the selection process for appointing a governing board (s 54).

It is submitted that, in order to preserve the system of intergovernmental fiscal relations, the stopping of funds in terms of clause 5(2)(h) should be clearly linked to serious and persistent breaches of the three types of measures, mentioned in section 216(1)(a)-(c) of the Constitution.

4 OVERLAP AND CONFLICT WITH OTHER LOCAL GOVERNMENT LEGISLATION

Serious consideration must be given to the areas where the Bill overlaps other local government legislation, in particular the Local Government: Municipal Systems Act 32 of 2000. There are instances where the Bill contradicts the Systems Act. An example is the subdelegation to contractors.

Clause 45(1)(c)(ii) empowers the chief financial officer to subdelegate to a contractor. This is in conflict with section 59(1)(a) of the Municipal Systems Act where the recipients of delegated powers are limited to political structures, political office bearers, councillors and staff members.

(In any event, the delegation of powers to a municipality's contractors seems undesirable. Contractors are not part of the municipality's staff-establishment, they do not fall within the realm of a municipality's human resources policies, including the Code of Conduct for officials in the Systems Act. They are bound only by the contract that stipulates the service they provide and the conditions thereto.)

Another example is the contradicting definitions of 'basic municipal services' in the Systems Act (includes environmental services) and 'minimum essential municipal service' in the Bill (excludes environmental services).

Prof Nico Steytler
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