

Director-General: Public Service and Administration
Attention: Legal Services
Private Bag X916
Pretoria 001



University of Western Cape
Private Bag X17 Bellville 7535 RSA
Tel: (+27 21) 959-2950/1
F : (+27 21) 959- 2411
Web: communitylawcentre.org.za

Bellville, 30 April 2008

Dear Sir:

RE: COMMENTS PUBLIC ADMINISTRATION MANAGEMENT BILL

The Local Government Project of the Community Law Centre (University of the Western Cape) hereby thanks the Department of Public Service and Administration for the opportunity to comment on the Draft Public Administration Management Bill.

The comments offered by the submission deal with the impact of the Bill on local government. The concerns of the Centre fall in two categories. Firstly, the Bill contains provisions that encroach on the institutional status of local government and, in so doing, violates section 41(1)(e) of the Constitution. The Preamble recognises a municipality's right to govern, on its own initiative, the local government affairs of its community. However, it is submitted that, in many respects, the Bill in fact does not recognise a municipality's right to govern. The notion of self-government for municipalities is a fundamental right entrenched in the Constitution. It was never meant to be an unbounded right; municipalities must exercise their constitutional powers within national and provincial supervisory frameworks. These frameworks may extend, in particular, to the provision of public services by municipalities. However, the ability and discretion to organise an administration that is suited to respond to the needs and aspirations of local communities and the particularities of that specific locality is fundamental to the notion of municipal self-governance.

The second category of concerns relates to the disruptive effects that this Bill will have. In its drive to harmonise a single public service, the Bill seeks to force municipalities in the same mould as the public service at national and provincial level even when the institutional design of a municipality presents an absolute barrier to a municipality complying with the instructions of the Bill. At times, it appears as if the Bill has been drafted with insufficient knowledge of the manner in which municipalities are composed, the manner in which they operate and the framework for their strategic planning and performance management. The disruptive effects of some of the poorly informed provisions of the Bill on a sphere of government that is slowly emerging from more than a decade of fundamental transition are expected to be substantial.



UNIVERSITY *of the*
WESTERN CAPE

Comments on preamble

The Preamble does not mention section 160(1)(a) and (d) that have an important bearing on the content and the interpretation of the Act,

Section 160(1)(a) provides: “A Municipal Council makes decisions concerning the exercise of all the powers and the performance of all the functions of the municipality.”

Section 160(1)(d) provides: “A Municipal Council may employ personnel that are necessary for the effective performance of its functions.”

It is suggested that these two constitutional provisions give content to a municipality’s right to self-governance and should therefore be acknowledged and adhered to in the Act.

There are serious concerns surrounding the constitutionality of the single public service concept as put forward in the Bill. The structure and text of section 197 of the Constitution strongly suggests that the Constitution intends a single public service for national and provincial governments but that local government occupies a separate space, particularly in light of the abovementioned section 160(1)(a) and (d), for which no provincial equivalent exists.

Section 197 envisages a public service that functions in terms of national legislation. Subsection 197(4) specifically mentions that provincial governments are responsible for recruiting, appointing, promoting, transferring and dismissing staff within the national framework. If this provision is set off against section 160 which make a municipality responsible for all decision making concerning the exercise of its powers and for employing personnel it is clear that provincial governments are in a different position from municipalities. Had the Constitution intended to include local government in single public service, section 197 would have contained a provision dealing with local government. However, the Constitution does not mention local government in section 197. Instead, the Constitution grants municipalities specific decision making powers surrounding its personnel in a specific provision that has no equivalent with respect to provincial government. Yet, the Bill assumes that the Constitution treats municipal public service powers in the same way as it treat provincial public service powers. This assumption, it is suggested, ignores the structure and text of the Constitution as well as the intention of the drafters.

From the perspective of national supervisory powers, the Bill ignores section 155(7) of the Constitution, which is essential for the objectives that government seeks to achieve with this Act. It equips national government with important regulatory powers over local government’s original competencies. Yet, it is not mentioned.

The Preamble points towards section 164 of the Constitution, which provides that any matter concerning local government not dealt with in the Constitution, may be prescribed by national legislation or by provincial legislation within the framework of national legislation. It is important to point out that this is not a blanket, residual

competency for Parliament to regulate on anything pertaining municipalities that is not covered in the Constitution. This provision must be read together with the instruction on national and provincial government to not compromise or impede a municipality's ability or right to exercise its powers or perform its functions. The residual regulatory power of national government should thus be exercised in such a way that the functioning of municipalities is not compromised, mindful of the rights to govern, granted to municipalities in the Constitution. The Constitutional Court pointed out: "The Constitution therefore protects the role of local government, and places certain constraints upon the powers of Parliament to interfere with local government decisions. (...) [I]f an Act of Parliament is inconsistent with such constraints it would to that extent be invalid."¹

Municipal Managers

Appointment

The Bill repeals all the provisions in the Municipal Structures Act and the Municipal Systems Act that deal with the appointment of municipal managers and managers reporting to a municipal manager. The recently promulgated Municipal performance regulations for Municipal managers and managers directly accountable to Municipal Managers, 2006, dealing with the performance management and assessment of senior municipal managers, will also lose their legal standing as a result of this.

The appointment of senior municipal management (as all other municipal staff) will take place in terms of the new Act. It is not clear whether the Bill retains the position that the municipal manager and the section 56 managers are appointed and dismissed by the council. While the Bill provides that the council makes such appointments, it also provides that the council may delegate any power or duty assigned in terms of the Act to a political structure, political office-bearer, councillor or employee. The current dispensation in the Municipal Systems Act is being interpreted by the Courts to mean that a municipal council may not delegate its power to appoint a municipal manager (or a manager reporting to a municipal manager). See for example, *Mgoqi v City of Cape Town and Another; In re: City of Cape Town v Mgoqi and Another* [2006] JOL 17349 (C) at paras 104–107. The Bill repeals the legal framework that formed the basis for these and other similar judgments. This will undoubtedly open up new interpretations to the effect that the council may in fact delegate this power to, for example, the (executive) mayor. The policy position that formed the basis for the provisions of the Municipal Systems Act, which will be repealed, is a sound one. It essentially argued that the decision to appoint the two top layers of municipal administration should be the subject of a political process that may be conducted only in the municipal council. There is no reason why the Bill should make it possible for the municipal council to delegate these processes to the (executive) mayor and thus avoid an open process of appointment.

The maximum term of office of a municipal manager will change from seven years (as is currently provided in the Systems Act) to five years. There are no provisions for a fixed term for section 56 managers. A first-time municipal manager may only be

¹ *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development et al* 1999 (12) BCLR 1360 (CC) at para 29.

appointed for a term of five years, unless a shorter term is decided upon in accordance with the Minister's regulations.

Remuneration and performance assessment

The Bill deals with the question as to who decides on remuneration and performance assessment of national and provincial senior management. However, it is silent when it comes to municipal senior management. Coupled with the repeal of all relevant provisions on this in the Systems Act and Structures Act, this means that there will be no rules for who decides on remuneration and performance assessments of senior municipal management. It is submitted that the country cannot possibly afford legal uncertainty on this matter, which is already a contested terrain and the arena for bitter contestation in too many municipalities.

The Bill vests the power to decide on 'career incidents' of senior managers in the council. It is unfortunate that the Bill does not define what constitutes a 'career incident' other than providing that it does not refer to appointment and dismissal. It may be assumed to at least refer to incidents such as suspension and promotion. The current dispensation for the appointment of senior managers is being interpreted by the courts to mean that the council does not have the authority to delegate the suspension of a municipal manager (see, for example, the Labour Court's judgment in *Mbatha v Ehlanzeni District Municipality* Case No. J1392/2007). The Bill causes uncertainty in this area by making it possible for the council to delegate any power or duty assigned to in the Bill to a political structure, political office-bearer, councillor or employee. The limits on the council's power to delegate are in the Municipal Systems Act, which the Bill states is applicable (s 53(4)(e)) to the extent not contrary to the Bill. In the event, the framework for appointment of senior municipal staff will be lifted out of the Municipal Systems Act. Therefore, it is not clear whether the constraints on delegation, found in the Municipal Systems Act, apply.

In terms of the Bill, municipal managers must conclude an employment contract and, on a yearly basis, enter into a performance agreement. The content of both contracts will be prescribed by the Minister. Municipalities will thus no longer be compelled (as they are now in terms of the Systems Act) to enter into performance agreements with their section 56 managers. Secondly, it is not clear what happens with the framework for performance agreements in the Systems Act and the regulations in terms of the Act. This current framework envisages that the municipal IDP and the budget will inform, via the annual goals and targets of the Service Delivery and Budget Implementation Plan, the municipal manager's performance agreement. This framework, albeit not perfect and certainly not adhered to by all municipalities, at least represented a coherent view on how a performance agreement should be put together. The framework will now disappear less than two years after its emergence and be replaced with a provision that the Minister may prescribe the content of the employment and the performance agreement.

Senior Management Service

Municipal managers and managers reporting to a municipal manager (so-called 'section 56 managers') will be part of the Senior Management Service.

The Minister may prescribe minimum and maximum remuneration and benefits for senior municipal management. A senior manager cannot be entitled to any remuneration or benefit that goes beyond this framework. Furthermore, the Minister may prescribe norms and standards for terms and conditions of service. The Minister for local government and organised local government must be consulted.

The Minister may instruct all or any category of members of the Senior Management Service to teach at a higher education institution, further education and training institution or at the Academy established by the Act. Should the Minister, therefore prescribe that all municipal managers or all Chief Financial Officers should avail themselves for such teaching duties, municipalities will have to make provision for this. The Bill does not provide anything on whether and how municipalities or managers will be compensated for these teaching duties. It is suggested that, particularly in light of the absence of any restrictions on this power or guarantees for municipalities for compensation, this provision is unconstitutional. It deprives a municipality of the control over its key personnel, which may be summonsed to dedicate considerable amounts of time to teaching. A municipality's right to govern and its right to employ and use its personnel is thereby infringed.

Service centres

Government is promoting the concept of 'one stop shops' for public services, offered by various spheres of government. The ideal is that a citizen should be able to, for argument's sake, query a water bill, apply for a driver's licence, collect a pension and apply for an ID in the same building. The realisation of this ideal requires close cooperation between the responsible spheres of government. The Intergovernmental Relations Framework Act 13 of 2005 provides a framework for this in the form of Implementation Protocols in which organs of state in different spheres of government can organise their participation in a joint service delivery plan.

The Bill abandons this approach and demands the establishment of at least one "service centre" in each municipality. It does not clarify whether this applies to district and/or local municipalities, even though it is assumed that each local municipality should have a service centre.

The Bill equips the Minister with an impressive array of powers in respect of these service centres. The Minister determines by when the centres must be established and operational, albeit subject to the approval of the municipality. Furthermore, the Minister determines which institutions must participate in the service centre and which services they must provide. For example, the Minister may direct that the municipality's communication on water accounts and its traffic services be housed at the service centre, that the Department of Social Development uses the service centre for the distribution of pensions and that Home Affairs uses it for its public interface on ID applications. The Minister will also determine the management and governance arrangements for the centre and will decide what the powers and duties of participating municipalities are in respect of the centres. Staffing arrangements for the centres, including the utilisation of municipal employees will be dealt with by the Minister's determination. Therefore, once a service centre is established, the extent and manner in which the municipality participates, which municipal staff is used and for what, will be at the behest of the Minister. Should the Minister determine that municipal employees will assist in the processing of IDs and the distribution of

pension grants, municipalities will have to oblige. Financial arrangements for the centres will be determined by the Minister in accordance with legislation.

It is suggested that this configuration is, firstly, in conflict with the Constitution and, secondly, reneges on the recently erected statutory framework for intergovernmental relations.

In its preamble, the Act reiterates a municipality's constitutional right to govern, on its own initiative, the local government affairs of its community. The Constitution provides that a municipality has the right to administer and make rules regarding its original powers (such as, for example, water and electricity reticulation). The Bill proposes that these constitutional rights do not apply when a service centre is established. Once a service centre is established, the municipality will have to adhere to the Minister's instructions regarding management, governance, power, duties, staffing and financial arrangements. The Bill does not limit the Minister's power in any way. These instructions may determine in detail how a particular municipality participates in a service centre. There is no constitutional basis for this. The Constitution does not permit national government to issue individual instructions to municipalities regarding the exercise of their original powers. The only avenue for these types of instructions is section 139 of the Constitution, which opens up intervention by provincial government in an ailing municipality. Only, if a provincial government fails to perform certain compulsory (financial) interventions may national government intervene on behalf of a provincial government. There is certainly room for national government to regulate a municipality's participation in service centres. This power exists on the basis of section 155(7) of the Constitution. The Constitutional Court has interpreted this regulatory power to be a "broad managing, rather than direct authorisation" power. In terms of the Bill, the Minister does not 'broadly manage' but takes over aspects of a municipality's administration. The consultation with national organised local government does little to remedy the unconstitutionality, contrary to what the explanatory memorandum suggests. Such consultation is apposite for the establishment of a national framework. However, it does not serve to ameliorate the violation of an individual municipality's institutional integrity when the Minister determines how that municipality must participate in a service centre.

The only legal protection offered by the Bill to municipalities is the approval of the establishment of the service centre. Thus, the approval of the service centre is the permission for the 'trojan horse' to enter the municipality as the municipality effectively relinquishes control over whatever municipal services the Minister may decide to house in the service centre. In practice, this may mean that municipalities will refuse permission, thereby undermining the objectives of streamlining service delivery.

In the explanatory memorandum the Bill, the Department acknowledges the Intergovernmental Relations Framework Act (IRFA). Apart from being unconstitutional, the approach towards the service centres is at odds with the recently adopted IRFA. The IRFA contains a framework for Implementation Protocols that is designed to address the same objective of streamlining service delivery across the three spheres of government. The obvious difference is that the Implementation Protocol is an intergovernmental instrument, i.e. a joint venture between the

participating organs of state whereby all parties have an equal say. The service centre will be an instruction from the national government coupled with a blue print for services, management, governance, staffing and finances. It is not clear how detailed the blue print will be but, as reiterated above, the Bill certainly does not encourage restraint on the part of the Minister.

Government components

The Bill introduces the concept of a “government component” which may be established by the council of a municipality. Such a component may only be established or abolished after-

- a feasibility study has been conducted in the manner prescribed by the Minister; and
- consultation with the Minister for public administration and the MEC for finance.

The Bill suggests that the council may, in accordance with a by-law, assign or delegate powers and duties to the head of its government component. The council must issue a directive to the government component that deals with powers and duties, reporting requirements and administrative matters. This directive may also establish an advisory board for the government component.

The absence of any definition or clarification in the Bill as to what a “government component” is makes it impossible to assess the ramifications of this provision. Municipal departments and municipal entities (including service utilities and private companies) are common municipal constructions that may or may not be covered by the term “government component”. It is hard to conceive of the establishment of a municipal finance department being subject to this framework. However, the text of the Bill is sufficiently unclear to allow for this interpretation. It is more likely that the Bill aims at municipal entities. A detailed framework for municipal entities has recently been laid down in the Municipal Finance Management Act and the Municipal Systems Act. The establishment of a municipality entity for the delivery of municipal service is subject to a rigorous legal framework.

For example, if a municipality considers establishing a service utility for the delivery of a municipal service, it is subject to a detailed set of provisions that instruct the municipality to assess a series of aspects, including a cost/benefit analysis, capacity, impact on development and employment etc.

The Bill overlaps with and, at times, contradicts this framework. It is not clear where and how the feasibility study fits into this existing framework. If adopted in its current form, the Bill will give rise to more confusion in an already complex legal environment for municipal entities.

Staff appointments

All appointments by municipalities of persons in their administration must be made in terms of the Act. Furthermore, any appointment must be “in such manner and on such conditions as may be prescribed” by the Minister in regulations. The appointment itself remains the prerogative of the municipality. However, the appointment procedure and the conditions under which the appointment takes place will no longer be the municipality’s choice but will be determined by national law.

The Bill provides that the power to appoint, dismiss and decide on career incidents of a municipal employee (other than senior management) vests in the council. This provision removes these powers from the municipal manager (where it currently resides in terms of the Municipal Systems Act) and makes the council responsible. The council may, of course, delegate such power to the municipal manager. However, it is certainly not guaranteed that councils may do so considering the appetite in many municipal councils for a ‘hands-on approach’ to staff matters. It is suggested that this provision will significantly undermine the position of the municipal manager

There is a very good policy reason that underlies the current position in the Municipal Systems Act that the municipal manager appoints all staff (other than the staff reporting to him or her). The location of all human resource decision making in the council will perpetuate the politicisation of staff appointments. It is prone to profoundly distract municipal councils from their core mandate. Their core mandate is to represent communities, oversee the municipal executive and determine municipal laws, policies and programmes. It is certainly not to appoint municipal staff below the level of senior management. In its current format, the Bill further confuses an area that, all too often, already is the scene of grim battles between municipal managers and local politicians.

The Code of Conduct for staff matters in the Systems Act will be repealed and stands to be replaced by regulations of the Minister.

Special advisors

The Bill suggests that the council may appoint in its office one or more persons for a fixed period not exceeding the council’s term. This provision is aimed at enabling office-bearers to appoint staff to their offices. The fact that this power attaches to the municipal council, and not to executive office-bearers, renders the provision problematic. It is an example of the Bill forcing upon local government a framework that suits national and provincial government but not local government.

Staff that supports the functioning of the council should be appointed by the municipal manager. In any event, as a result of the provision in the Bill that renders the council responsible for all staff appointments (see above), the rationale for this provision in the local government context is unclear.

In local government, it may be appropriate for mayors, executive mayors and speakers to have the authority to appoint staff to their offices. In its current form, the Bill does not assist these office-bearers.

Performance management

The Bill is radical in its repeal of all provisions in the Municipal Systems Act that deal with performance management. The provisions dealing with the objectives and components of a performance management system, responsibilities of the executive, responsibilities of the municipal manager and community involvement in performance management will disappear. The provisions on both the internal key performance indicators as well as those set by the Minister for local government will be repealed. All provisions on the auditing of performance by the municipality and the Auditor-General will be repealed. The provisions of the Municipal Planning and

Performance Management Regulations that have given further content to the internal auditing of performance management measurements will no longer have a basis in the Systems Act and will therefore be repealed. In short, the entire legal framework for performance management in local government will be removed. In future, performance management in local government will be done according to the procedures and norms and standards prescribed by the Minister of Public Administration.

The risk is that the synergy between the IDP and budgeting framework and performance management will be lost. The current performance management framework is premised on the notion that the municipal politicians, the administration and the employees are held accountable for the performance on the targets and objectives of the IDP and the budget. This must be achieved through, amongst other things, the linking of performance agreements, via the Service Delivery and Budget Implementation Plan to the IDP and the budget. The successful implementation by a municipality of this framework results in a 'golden thread' of management accountability from the IDP and budget, via the SDBIP to performance agreements. As tenuous as the link may be in the infant stages of the existence of this framework, it is instrumental in achieving local accountability for municipal plans and budgets. The instruction on municipalities to facilitate community involvement in performance management renders it an important accountability tool for communities and community organisation to hold their municipalities accountable for realising the promises of the IDP.

There is no similar legal framework that currently applies to national and provincial departments which will fill the gap that the abolition of the performance management scheme will leave. There may be administrative policies and procedures regarding performance agreements but these are limited to the performance management of individuals. They comprise only a small component of the performance management framework that the Bill so radically abolishes.

The performance management framework in the Municipal Systems Act extends beyond the performance of individuals and provides the municipality and the municipal community with important instruments to hold the entire municipality, its office-bearers and administrative components accountable. In addition, the framework provides for an intergovernmental avenue for monitoring of municipalities through the prescription of national key performance indicators and the reporting obligations at provincial and national level pertaining to those national key performance indicators.

A standardised procedure and protocol for performance management may not necessarily be at odds with local democracy, provided that the substance of what is measured remains dominated by local priorities. However, if performance management is conducted on the basis of national templates and national procedures and driven by national concerns, this stimulates 'upward accountability' instead of accountability between the municipality and its community. It will drive a wedge between communities and their municipalities and frustrate the already contentious relationship between local communities and their municipality. It is clear that the Bill, in abolishing community participation in performance management, is not intent on strengthening the ability of communities to use performance management to hold

their municipalities accountable. The lack of local accountability and the distrust between communities and their municipality is an area of grave concern and is disrupting service delivery and development. The removal of this potentially powerful accountability tool by the Bill in the interest of standardisation of employees' protocols may contribute to a further deterioration of

If anything, the plans for the repeal of the framework for performance management will cause deep uncertainty in local government management for as long as there is no clarity on the system that will be in its place.

Moving of staff

Transfers

A municipal employee may be transferred to another national, provincial or local government institution. In principle, this may only be done upon the request or with the consent of the employee. However, it is possible for a transfer to take place without the consent of the employee. The Bill then requires that the transfer is "fair", which depends on the operational requirements of both institutions and the views of the employee. The two institutions must agree on the conditions of service of the employee. These conditions may, on the whole, not be less favourable than the conditions that applied before the transfer.

Transfers between institutions may be done by the two affected institutions. However, the Minister may also transfer a municipal employee from the municipality to another national, provincial or local government institution. In this instance, the affected municipality or municipalities must agree to the transfer.

Deployment

When his or her term expires, a Municipal Manager can be deployed by the President to a national or provincial institution or to another municipality. The agreement of any affected municipality is required. If the manager is deployed to a provincial institution, the relevant Premier must agree. Such a deployment may only be done with the consent of the municipal manager. The remuneration and conditions of service of the new position will apply after deployment.

Secondment

Municipal employees may be seconded to other national, provincial or local government institutions. Again, the consent of the employee is required. In the absence of consent, the secondment may still be pursued if it is "operationally justified" (after hearing the views of the employee). Thus, secondments that are not operationally justified can be done, provided there is consent. Secondments that are operationally justified can always be done, irrespective of the employee's consent (provided that his or her views have been considered). A somewhat cynical interpretation of this presents the picture whereby the place of work for a municipal employee depends on the elusive term 'operational justification' as interpreted by his or municipality and the host institution.

In principle, secondments are for no longer than six months, unless the recipient institution has taken all reasonable steps to replace the seconded employee and the interests of the seconded employee have been fairly accommodated. (The Bill is not clear whether the two conditions are cumulative or alternative.)

For the seconding municipality this provision means it may lose an employee for more than six months. If the recipient failed to replace the municipal employee, this is of no consequence as long as “all reasonable steps” have been taken. For the employee this means that he or she may be seconded for more than six months as long as his or her interests have been “fairly accommodated”.

In principle, a seconded employee retains the same conditions of service as he or she enjoyed prior to the secondment. This is not the case in the event of the Minister prescribing otherwise as she has the power to prescribe the conditions of the secondments, including the conditions of service.

A secondment can be organised by the two affected institutions, in which case their consent to the secondment is the starting point. The secondment can also be done by the Minister, after consulting the affected institutions. The agreement of the affected institutions is then a requirement.

Disputes surrounding secondments may be referred for conciliation to the Local Government Bargaining Council and, if such conciliation fails, to the Labour Court.

Collective bargaining

Negotiations on terms and conditions of municipal employees are dealt with in the Local Government Bargaining Council. In that respect, the current framework remains largely intact, albeit with some important nuances.

Firstly, the Bill repeals section 71 of the Systems Act, which binds municipalities to collective agreements concluded in the Bargaining Council. The Bill thus assumes that the new framework no longer requires such a provision as appointments will be done in terms of the Act. The Act, in turn, provides for the Minister to give effect to a collective agreement, which then replaces the message of section 71 of the Systems Act.

If the Bargaining Council cannot come to an agreement, the Minister may make a determination provided that negotiations have been exhausted. Importantly, national organised local government must agree to the determination.

A collective agreement in local government may only be concluded if the Minister has given authorisation concerning certain subject-matters. Which subject matters require prior authorisation must be prescribed by the Minister. The Minister may only refuse authorisation if the agreement results in “unjustifiable disparities within the Public Administration”. In that event, the Minister may submit proposals to the Bargaining Council to rectify these disparities. Again, if the Bargaining Council cannot agree on the matter, the determination of the Minister prevails.

It is suggested that this configuration is not at odds with the Constitution. As stated earlier, the Constitution does not envisage a fully autonomous and isolated local

government sphere. National government can determine a framework and also enforce the adherence to such frameworks.

Hot pursuit of misbehaving employees

The Bill provides for 'hot pursuit' clauses in relation to municipal employees that may avoid disciplinary steps by applying for positions elsewhere in government. Firstly, when applying for positions, employees must disclose any current or past actions taken against them for grounds of misconduct, ill health or poor performance. Former institutions may be requested by the new institution to forward such information to the new institution. If a municipal employee is alleged to have committed misconduct and moves on to another national, provincial or local government institution, the former institution may insist with the new institution that disciplinary proceedings are instituted against its new employee. Even without such insistence, the new institution may prosecute its new employee for misconduct committed in a former institution. If an employee is found guilty of misconduct, even if the misconduct relates to a previous employer, it constitutes a ground for dismissal by the new institution. Employees may thus be dismissed for misconduct committed in a previous job. Any person dismissed for misconduct will be unemployable for a specific period. The Minister determines for various categories of misconduct how long that period is. These provisions must be welcomed. They will be useful in ending the pernicious trend of 'roaming disasters', i.e. senior municipal managers that inflict damage on communities and municipalities before moving on, with impunity, to a next institution.

Public Service Commission

The Bill extends the mandate of the Public Service Commission to local government by vesting it with powers regarding municipal institutions and employees. It is suggested that such alteration of the Public Service Commission's mandate is not possible without a constitutional amendment. The text of the Constitution makes it clear that the mandate of the Public Service Commission was never meant to include local government.

Firstly, the Public Service Commission reports to the National Assembly and, in respect of its activities in a province, to the legislature of that province. There is no compulsory line of reporting from the Public Service Commission to local government. It is suggested that this is a strong indication in the Constitution that the mandate of Public Service Commission was not intended to be extended to local government.

Secondly, the composition of the Public Service Commission reflects national and provincial concerns only (s 196(7) and (8) of the Constitution). Local government is not represented on the Public Service Commission. Again, this is an indication that the Constitution did not intend the Commission's mandate to include local government. Where constitutionally mandated institutions extend to local government, their composition reflects local government concerns. The manner in which the Financial and Fiscal Commission is composed (s 221 of the Constitution) is the clearest example of this trend in the Constitution.

The extension of the Public Service Commission's mandate to local government will destabilise a carefully balanced intergovernmental framework. The Constitution puts forward a carefully balanced scheme for interventions in municipalities that fail to adhere to legal instructions (s 139 of the Constitution). This scheme empowers provincial governments to intervene by issuing directives, assuming responsibilities, dissolving the council, imposing financial recovery plans or budgets etc. It is not clear from the Act how the Commission's powers to investigate and issue instructions will compare with the framework for interventions into municipalities. In any event, it appears to be an anomaly that the Commission can exercise its powers to investigate, issue directions, investigate employee's grievances etc. without reporting to the municipal council of the municipality concerned. This supports the contention that the Constitution never intended the Public Service Commission to extend to local government and that therefore a constitutional amendment is necessary.

Miscellaneous

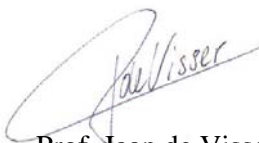
Section 15(4)(a) should be amended to refer to subsection (3) instead of subsection (5).

The wording of item 5.2 of Schedule 3 is unclear; "Sections 66 to 70 to 72 of (...) the Municipal Systems Act, 2000 is repealed. It is not clear whether section 71 of the Systems Act will be repealed.

Item 5.2 of Schedule 3 seeks to repeal section 58 of the Municipal Systems Act while this provision had already been repealed by section 9 of Act. No. 44 of 2003.

We trust that you will take our comments into consideration and once again thank you for this opportunity.

Yours truly,



Prof. Jaap de Visser
Associate Professor
Local Government Project
Community Law Centre
University of the Western Cape



Prof. Nico Steytler
Director: Community Law Centre
University of the Western Cape