Western Cape Government

MINISTRY OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING

Ref No. 1/3/1/NAC 10 of 2016-17

Portfolio Committee on Cooperative Governance and Traditional Affairs

Parliament of South Africa

Attention: Ms. S Cassiem

Per email: scassiem@parliament.gov.za

RE: LOCAL GOVERNMENT: MUNICIPAL STRUCTURES AMENDMENT BILL [B19-2018]

The Local Government: Municipal Structures Amendment Bill [B19-2018] is referred to as the "amendment Bill" and the Local Government: Municipal Structures Act, 1998, is referred to as "the principal Act".

Kindly find attached the specific comments of the Western Cape Government on the amendment Bill.

Mr. A Bredell

Provincial Minister of Local Government, Environmental Affairs and Development Planning

Western Cape Province

Date: 12/11/2018

1 Dorp Street, Cape Town, 8001
tel: +27 21 483 3915 fax: +27 21 483 6081

Private Bag X9186, Cape Town, 8000
www.westerncape.gov.za

COMMENTS

Clause *(Indicate clause/ regulation Number)*	**Comment** *(State why the clause/regulation or proposed amendment is not supported or what the problem is with the provision)*	**Suggestion** *(Suggested deletion/amendment/ addition)*
General legal comment:	Paragraph 8 of the Memorandum on the Objects of the Bill states that the amendment Bill does not contain provisions to which the procedure set out in section 76 of the Constitution, 1996, applies. It is submitted that the amendment Bill does indeed contain such provisions in substantial measure. The amendment Bill for example in clause 24 and 32 seeks to ensure that public administration in municipalities is accountable. These are principles set out in section 195(1)(b) and (f) of the Constitution, 1996. It is submitted that the provisions of the amendment Bill render the amendment Bill legislation referred to in section 195(3) of the Constitution and thus legislation envisaged in section 76(3)(d) of the Constitution. In the premise and in accordance with the ratio in South African Municipal Workers Union v Minister of Co-operative Governance and Traditional Affairs[1], the provisions of the amendment Bill trigger the requirement that it should be dealt with in accordance with the procedure set out in section 76 of the Constitution.	It is proposed that the tagging of the amendment Bill is reconsidered.
General legal comment:	The whole of Part 3 of the amendment Bill is being inserted and therefore the underlining of the inserted text must start with the word "Part'. The headings to the part and the sections must also be underlined in accordance with generally accepted legislative drafting principles.	It is proposed that the amendment Bill is checked and edited by a legal editor experienced in commonwealth legislative drafting practice.

[1] South African Municipal Workers Union v Minister of Co-operative Governance and Traditional Affairs [2017] ZACC 7 par. 67

	Not all the consequential amendments have been effected. For example, section 63(3) of the principal Act refers to Schedule 1 of the Local Government: Municipal Systems Act, 2000, when clause 32 read with clause 33 repeals the Code and incorporates it into the principal Act. The reference in section 63(3) is therefore incorrect.	
Clause 1(a):	The insertion of the draft definition of "whip' necessitates a consequential amendment to the definition of 'political officer bearer" in the Local Government: Municipal Systems Act, 2000.	It is proposed that the definition of 'political office bearer" in section 1 of the Local Government: Municipal Systems Act, 2000, is amended to include a whip.
Clause 3:	Clause 7 of the amendment Bill proposes the deletion of the plenary system of governance. This proposed amendment will restrict the possible governance structure options that a MEC may consider appropriate. It also removes the ability of a municipal council to revert to a plenary system by default if it decides not to exercise its election in terms of section 42(2) or 54(2). This is particularly pertinent in the case of coalition governments that may not agree on a particular system. The Memorandum on the Objects of the Bill does not provide reasons for the proposed amendment. Clarity is required on the rationale for this amendment. Further, if the MEC does not change the governance structure of municipalities with an existing plenary executive system to other governance systems in terms of section 16(1)(a) of the principal Act after the enactment of this amendment Bill, then in the absence of any transitional arrangements in this regard, there will be existing municipalities with this plenary system and none going forward. It is submitted this results in a disjunctive system.	The proposed amendment is not supported. It is proposed that the plenary system of governance is retained.

Clause 4:	See comment under clause 3.	
Clause 5:	See comment under clause 3.	
Clause 6(b):	The notice in section 12(3)(a) is different to the consultation required in section 12(3)(b). Paragraph 3.4 of the Memorandum on the Objects of the Bill states that paragraph (a) is proposed for deletion because SALGA and affected municipalities are already consulted in paragraph (b). If paragraph (a) is deleted, what mechanism is envisaged would be in place to trigger the consultation in paragraph 9(b)?	It is proposed that section 12(3)(a) must be retained.
Clause 7:	See comment under clause 6(b).	
Clause 8:	The amendment is not supported. The amendment is problematic for the following reasons: a) The stated rationality for the amendment is contained in paragraph 3.6.2 of the Memorandum on the Objects of the Bill. It is arguable that a smaller ratio of citizens to councillor does not necessarily result in an improvement in democracy. While it may possibly increase responsiveness, it does not necessarily result in increased efficacy. b) There are serious cost implications of the proposed amendment, for example, the increase in the number of councillors will mean an increase in the number of salaries that will have to be paid to the councillors. In the Western Cape Province, the Laingsburg Municipality has 3 councillors. The proposed amendment may have unintended financial implications for smaller municipalities that do not require 15 councillors. c) Clause 8 proposes a minimum of 15 councillors resulting in a minimum of 8 wards in local or district municipalities. The proposed amendment adopts a one-size-fits-all approach regardless of the population size of	It is proposed that clause 8 is reconsidered and deleted.

	the municipality or the needs of the municipality. d) How is the number of 15 councillors determined and what is it based on? Why is it held that 15 councillors at a minimum will improve democracy and not any other minimum number? e) A consequence of the proposed amendment is that the MEC will have to transition those local and district municipalities that currently have less than 15 councillors to ones that do by amending all the affected section 12 notices in terms of section 16(1)(c) of the principal Act before the next municipal election after the commencement of the amendment Bill. This will be an administratively onerous task.	
Clause 9:	The proposed amendment is not supported. Section 19 of the Constitution, 1996, provides that every citizen has the right to stand for public office. Section 158 of the Constitution provides for who is eligible to be a member of a municipal council. In terms of section 158, national legislation may set qualification criteria for membership of a municipal council. Section 21(1) of the principal Act provides that every citizen who is eligible to vote for a particular municipal council may stand as a candidate in an election for that council and if elected, become and remain a councillor. Clause 9 provides that a councillor who is removed from office by the MEC in terms of item 16 of the Code of Conduct for Councillors may not stand as a candidate in an election for any municipal council for a period of two years after the date of removal from office. Paragraph 3.7.2 of the Memo on the Objects of the Bill states that the objective of the proposed amendment in clause 9 is to ensure that there is a "cooling-off" period.	It is proposed that clause 9 is reconsidered and deleted.

	Why a cooling-off period is required is not apparent from the memo. It is submitted that once removed, a councillor does not stop being eligible unless that councillor may not vote. The clause proposes a prohibition against standing as a candidate for a period of 2 years, but the practical effect may be a prohibition of 7 years. Excluding by-elections, municipal elections only take place every 5 years and so a councillor that has been removed from office may be precluded from standing as a candidate for 7 years. The proposed amendment is therefore not rational and limits a citizen's right in terms of section 19 read with section 158 of the Constitution, 1996. It is submitted that this limitation cannot be justified in terms of section 36 of the Constitution because the objective of the proposed amendment is not rationally based.	
Clause 10(b):	Given section 26(2) of the principal Act and the new proposed definition of "declared elected', it is submitted that the amendment proposed in clause 10 is unnecessary.	It is proposed that clause 10(b) is deleted.
Clause 11(c):	See comment under clause 10(b).	
Clause 12(e):	The proposed amendment is not supported. Without the election of a ward councilor for the period provided there would be no representation for that ward during the period. The proposed amendment now extends the period of the vacancy. This may impact municipalities with a participatory system because the lack of representation in a ward is now extended by 3 months. This may disrupt the responsiveness of the municipality to the constituent community in the affected ward and have cost implications. The word "if" in the new proposed section 25(6)(a)(ii) is already in the introductory	It is proposed that clause 12(e) is reconsidered.

	sentence to the provision and should therefore be removed from the beginning of subparagraph (ii).	
Clause 13(a):	The Code of Conduct for Councillors is being incorporated into the principal Act by the amendment proposed in clause 32. Without the concomitant deletion of Schedule 1 in the Local Government: Municipal Systems Act, 2000, the proposed amendment in clause 13(a) may lead to confusion.	
Comment on section 29(1) of the principal Act:	Clarity is required on whether the majority of councillors referred to in section 29(1) of the principal Act means a majority of the members allocated to a municipality in terms of its establishment notice (section 12) or does it mean the majority of councillors in office at the time of the meeting. Further, section 30(2) also refers to a majority of councillors. Clarity is also required on whether the same meaning ascribed to the expression "majority of councillors" in section 29(1) should be ascribed to section 30(2) and elsewhere in the principal Act.	It is proposed that section 29(1) and 30(2) is amended to provide clarity.
Clause 14:	The new proposed amendment is supported in as far as it attempts to address the situation where a speaker or acting speaker refuses to call the meeting of the council as requested by a majority of the councillors in terms of section 29(1) of the principal Act. The proposed amendment is problematic in the following respects: a) Two types of meetings are contemplated in section 29(1). These are the "ordinary" council meetings of the council and the meetings requested by a majority of the councillors. It is submitted that the amendment must also provide for the situation where a speaker or acting speaker refuses, fails or is unavailable to call the "ordinary" meetings contemplated in section 29(1).	It is proposed that the new proposed section 29(1A) must provide that the municipal manager must be empowered to designate a person to call and chair both types of meetings contemplated in section 29(1) if the speaker or acting speaker not only refuses to do so, but also fails or is unavailable to do so. Further, it is proposed that the provision provides that if the municipal manager refuses, fails or is unavailable to designate a person, the MEC must be empowered to do so. It must be clearly provided for in the

	b) The functionary identified in the proposed amendment is the MEC. It is submitted that the functionary should be the municipal manager and that only where the municipal manager refuses, fails or is unavailable to designate a person to call and chair the meetings contemplated in section 29(1), the MEC must be empowered to do so. This will align the proposed amendment to section 29(2).	proposed clause 29(1A) that the purpose of the designation is for the person so designated to at the meeting preside over the election of an acting speaker who must then further chair the remainder of the meeting.
Clause 15:	The provisions of this clause are provided for in section 19 of the Local Government: Municipal Systems Act, 2000. Paragraph 3.13 of the Memorandum on the Objects of the Bill states that section 19 of that Act will be repealed. It is imperative that the envisaged repeal and enactment of clause 15 happens simultaneously with the enactment of the amendment Bill to avoid confusion. Further, neither the Local Government: Municipal Systems Act, 2000, nor the principal Act indicates what an ordinary, special or urgent meeting is.	It is proposed that the terms "ordinary", "special" and "urgent" meeting are clearly defined. It is also proposed that the nature of the meetings referred to in section 18(2) and 29(1) are clarified i.e. would the meetings contemplated in section 18(2) be considered ordinary meetings and those contemplated in section 29(1) when a request for a meeting is made, would those be considered special meetings? Clarity must be provided in this regard.
Clause 17:	See comments made under clause 3.	
Clause 18(b):	Despite paragraph 3.15 of the Memorandum on the Objects of the Bill, it is not clear what the purpose of the provisions in the new proposed section 37(g) and (h) is. If paragraph (g) relates to when a municipal council sits as a legislature, the speaker will not need to exercise this power for most of the time because the municipal council mostly convenes in its executive role. It does not appear that the provisions serve any meaningful legislative purpose. Further, the municipal council is vested with legislative authority and exercises it. What will the "ensuring" role of the speaker entail? For	It is proposed that clause 18 adding paragraphs (g) and (h) to section 37 in the principal Act is reconsidered and that clarity as to its meaning is provided.

	example, if a municipal council does not pass a by-law or follows the incorrect procedure in doing so, the proposed amendments will mean that the speaker will hold the municipal council accountable. Such a role is legally unsound. Furthermore, how can it be envisaged that a speaker has oversight over the executive authority of a municipality when that authority vests in the council? The municipal council is not accountable to its speaker. It is further submitted that the envisaged amendment will lead to potentially strained relations and rivalry between a speaker and an executive mayor.	
Clause 23(a):	Section 160(1)(c) of the Constitution, 1996, confers a discretionary power on a municipal council to establish committees, subject to national legislation. Section 33 read with section 72(1) of the principal Act confirm this power. The wording of clause 23(a) now appears to make the establishment of ward committees peremptory upon municipal councils. From paragraph 3.20 of the Memorandum on the Objects of the Bill this does indeed appear to be the intention of the proposed amendment. It is submitted that the clause, unless legislative competence for it can be founded in Chapter 7 of the Constitution, fetters the discretion of a municipal council as contemplated in section 160(1) of the Constitution and is inconsistent with section 160(1) of the Constitution and section 33 of the principal Act. [2]	It is proposed that clause 23(a) is reconsidered.
Clause 24:	For the same reasons as commented under clause 23, this clause, unless legislative competence for it can be sourced in Chapter 7 of the Constitution, fetters the discretion of a municipal council as contemplated in section	It is proposed that clause 24 is reconsidered.

[2] Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development and Another 2000 (1) SA 661 (CC) par 87.

	160(1) of the Constitution and is inconsistent with section 160(1)(c) of the Constitution, 1996. It is not clear from the provisions of the new proposed clause 79A when it is envisaged the reports and reviews referred to should be done because no time periods are provided for. The provision in the new proposed section 79A(5)(b) is already provided for in section 166(1) of the Local Government: Municipal Financial Management Act, 2003. The new proposed provision is superfluous.	
Clause 26:	Given paragraph 3.23 of the Memorandum on the Objects of the Bill, the commencement of clause 26 must be simultaneous with the proposed amendment to the Local Government: Municipal Demarcation Act, 1998.	
Clause 28:	If the reference to sections 9(e), (f) and 10(c) is deleted in the sections listed in this clause, then what is envisaged will govern the election of members of an executive committee should a MEC intend to change the type of municipality in terms of section 16(1)(a) of the principal Act from the type referred to in section 9(e), (f) and 10(c)? The amendment Bill does not contain any savings or transitional provisions. Clarity is required in this regard.	
Clause 32:	Item 2(b): The words "credibility and integrity' are two different concepts that are seldom compromised at the same time.	It is proposed that the provision must be redrafted to refer to "credibility or integrity, or both credibility and integrity".
	Item 5(2): The words "must be removed from office as a councillor" must be changed to 'may be removed from office as a councillor". This will align the provision to the rest of the provisions	

	in item 5 thereby allowing for a uniform procedure to be followed that complies with the rules of natural justice before a councilor can be removed or fined.	
	Item 15(3): Item 15(3) should be moved to item 16 as it does not fit coherently in item 15. This is because it is doubtful that a municipal council would be able to conduct a lawful hearing that complies with all the legal requirements given the number of persons involved, the lack of clarity on the constitution and composition of the special committee and the lack of clarity on how the investigation is to be conducted. Furthermore, regarding the conduct of investigations, it is proposed that provision is made in the Code that a person who can act as an initiator in the investigation is appointed. If the proposal to move item 15(3) to item 16 is accepted, then the following consequential amendments would have to be effected: a) The words "the council or "must be deleted from item 16(2); b) A new item 16(3) should be inserted to read as follows; "(3) The Municipal Manager must inform the MEC for local government in the province concerned within 14 days of the finding and sanction decided on by the council.". c) The current item 16(b) must be amended by adding the following words at the end of the provision: "by the MEC." This will ensure that the MEC can be assured that the appeal was received by the municipality when making the finding on the appeal.	It is proposed that item 16 is amended to read as follows: "When a municipal council has considered a report as referred to in item 15(1)(c) and decided that disciplinary steps must be instituted against a councillor, the municipal council must – (a) establish a special committee consisting of councillors, or councillors as well as a person with the appropriate legal knowledge or only a person with appropriate legal knowledge– (i) to investigate and make a finding on any alleged breach of the Code; and (ii) to make recommendations to the Council regarding an appropriate sanction or sanctions; (b)appoint a person to act as an initiator in the investigation or authorise the municipal manager to appoint an initiator.".
	Item 16(7):	It is proposed that the wording of item 16(7) is reconsidered

	It is not clear whether the reference to the "rules of natural justice" means that the listed actions or aspects thereof are subject to the Promotion of Administrative Justice Act, 2000. It is submitted that clarity must be provided in this regard.	and redrafted to provide clarity.

MR A BREDELL
PROVINCIAL MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING
DATE: 12/11/2018