

LEGAL RESOURCES CENTRE SUBMISSION on the
**DRAFT GUIDELINES FOR THE ESTABLISHMENT AND OPERATION OF WARD
COMMITTEES: LOCAL GOVERNMENT: MUNICIPAL SYSTEMS ACT, 2000**
Published in the Government Gazette for public comment on 24 October: Notice 2649 of
2003

20 November 2003

This submission consists of two parts. The first part briefly raises concerns and makes practical suggestions with regard to the Guidelines. The second part gives a summary of more fundamental concerns regarding the establishment of traditional councils as a new fourth sphere of government.

PART I: Introduction: The Legal Resources Centre is a non-profit public interest law firm. Much of our work is devoted to representing poor rural communities, and our comments on the Guidelines are made in the light of such experience.

The LRC has over the past two years actively participated in the law reform process concerned with the Communal Land Rights Bill, [B 67 – 2003] (**CLRB**). The LRC has also commented on the Traditional Leadership and Governance Framework Bill [B 58 -2003] (**TLGFB**).

We are concerned about the consequences that will result from a whole scale overlap between the functions and powers of 'traditional councils' established in terms of the CLRB and TLGFB and the functions and powers of ward committees.

The boundaries of traditional councils will overlap and possibly coincide with the boundaries of ward committees. At least 9 out of the 13 functions of traditional councils in terms of clause 4 of the TLGFB are duplications of the clause 5 proposed functions of the ward committees. The overlap in powers and functions is such that it will leave little if any space for ward committees to achieve their statutory objective, namely to 'enhance participatory democracy in local government'.

Suggestions and proposals: The CLRB and TLGFB have not yet completed the parliamentary processes. We wish to suggest that the DPLG holds back the finalisation of the Guidelines until such time as the CLRB and TLGFB has reached greater finalisation in the legislative process. We also suggest that in the mean time, DPLG considers developing mechanism that will ensure that overlap and duplication of effort does not occur between traditional councils / land administration committees and ward committees.

Because of the duplication of functions and powers, it will be necessary to give municipal managers or executive mayors specific authority guided by determinable principles to define and focus issues concerning participation to ensure that duplication and the potential for encroachment and tension is avoided.

The extent to which ward boundaries and traditional council boundaries clash or overlap and the consequences of such clashes and/or overlaps, must be catered for.

In a case where boundaries coincide, the implementation of the Guidelines will give rise to difficult challenges. Only 40% of the membership of traditional councils will be elected. Further, although the Structures Act requires that that 'women to be equitably represented' on ward committees, this representation requirement for traditional councils is set a 30%.

PART II:

A fundamental concern: In addition to these practical concerns about the manner in which ward committees may struggle to effectively 'engender a spirit of public participation' in the face of the establishment of wall to wall traditional councils in the former homeland areas, our fundamental concern is that the TLGFB and CLRB, read together, establishes a fourth sphere of government which is not recognised by the Constitution, particularly because it will be an undemocratic and unaccountable fourth sphere of government. We include a summary of the main points and concerns in this regard which is based on counsel's opinion. We have made a copy of the opinion available to DPLG.

A summary of the provisions concerning ward committees in the Structures Act:

The object of a ward committee is to enhance participatory democracy in local government. (72(3)).

The powers and functions of a ward committee are to (a) make recommendations on any matter affecting its ward to the ward councillor or via the councillor to the council, and, more importantly to exercise such duties and powers as the council may delegate to it in terms of section 32. (73).

Municipalities may be established as a section 7(e) ward participatory system which allows for matters of local concern to wards to be dealt with by committees established for wards.

The types of local municipalities that may have ward committees are determined in section 72(1).

If a local council decides to have ward committees, it must establish a ward committee for each ward in the municipality (73(1)).

73(2) A ward committee consists of-

- (a) the councillor representing that ward in the council, who must also be the chairperson of the committee; and
- (b) not more than 10 other persons.

73(3) A local council must make rules regulating-

- (a) the procedure to elect the subsection (2) (b) members of a ward committee, taking into account the need-
 - (i) for women to be equitably represented in a ward committee; and
 - (ii) for a diversity of interests in the ward to be represented.

73(4) A local council may make administrative arrangements to enable ward committees to perform their functions and exercise their powers effectively.

The 10 other members of the ward committee members are not entitled to remuneration (75).

Schedule 1 to the Act determines the electoral system for metro and local councils and in sparsely populated areas. It provides inter alia for the delimitation of wards; number of wards; delimitation criteria; electoral system; and ward elections.

Participation of Traditional Leaders in municipal councils

In terms of section 81(1) Traditional authorities that traditionally observe a system of customary law in the area of a municipality, may participate through their leaders in the proceedings of the council of that municipality.

(2)(a) The MEC for local government in a province, in accordance with Schedule 6 and by notice in the *Provincial Gazette*, must identify the traditional leaders who in terms of subsection (1) may participate in the proceedings of a municipal council.

(b) The number of traditional leaders that may participate in the proceedings of a municipal council may not exceed 20 per cent of the total number of councillors in that council, but if the council has fewer than 10 councillors, only one traditional leader may so participate.

(3) Before a municipal council takes a decision on any matter directly affecting the area of a traditional authority, the council must give the leader of that authority the opportunity to express a view on that matter.

(4) The MEC for local government in a province, after consulting the provincial House of Traditional Leaders, may by notice in the *Provincial Gazette*-

- (a) regulate the participation of traditional leaders in the proceedings of a municipal council; and
- (b) prescribe a role for traditional leaders in the affairs of a municipality.

(5) When participating in the proceedings of a municipal council a traditional leader is subject to the appropriate provisions of the Code of Conduct set out in Schedule 1 of the Local Government: Municipal Systems Act, 2000.

THE CREATION OF AN UNDEMOCRATIC AND UNACCOUNTABLE FOURTH SPHERE OF GOVERNMENT:

Read together, the CLRB and the TLGFB establishes a fourth sphere of government which is not recognised by the Constitution, particularly because it will be an undemocratic and unaccountable fourth sphere of government.

13% of South Africa is to be cut up and transferred in private ownership to hundreds of communities that comprise more than 30% of our population. Powerful Land Administration Committees (LACs) will represent hundreds of communities and millions of people concerning matters that affect their land and livelihoods.

LACs, merely in terms of the CLRB, will do what land owners do, but it will also do, on a massive scale, what local government should do, namely make rules to administer land **without** LACs as constituted in terms of the CLRB: receiving the support that government gets; being subjected to the checks that local government is; and complying with the principles that government is required to comply with.

This is so because it was never envisaged and it is not permissible that a **fourth sphere of government** should be established. If Parliament wishes to go the route proposed in the CLRB, the Constitution needs to be amended.

The ownership and administrative powers and functions of LACs under the CLRB are set out in clauses 9 and 24, read with clause 19.

In terms of the CLRB, LACs may exercise the powers traditionally associated with private ownership. Examples are: land management and resource maintenance functions and land allocation functions (which include the conclusion of leases or other land availability agreements).

But LACs are not ordinary owners of land that need to fulfill ordinary land ownership functions. LACs are the institutions that have to step into the shoes of the state as land administrator. LACs have to assume and exercise the fiduciary responsibilities of the state on behalf of generations to come. In terms of clause 9, LACs are given unfettered powers to approve the cutting up and transferring off in private ownership of communal land to new order rights holders.

In addition to ownership powers, the CLRB also vests LACs with public land administrative and regulatory powers and functions: Regulating the administration and use of communal land (19(2)(a)); imposing conditions or reserving rights in favour of the community (9(3)); allocating new order rights (24(3)(a)(i)); registering of new order rights (24(3)(a)(ii)); establishing and maintaining registers and records and recording transactions (24(3)(b)).

The (public) administrative powers conferred by the clauses 9¹ and 24 of CLRB are the core powers of the fourth sphere.² The conferral of such public land administration functions lays the foundation for the creation of a fourth sphere of government.

On 17 October, a mere three weeks before the parliamentary public hearings, the issue became much more serious with the introduction of 'traditional councils' as default LACs. It needs to be noted that at no stage has this change been effectively communicated to rural communities. To date, the CLRB has only been available in English. It needs to be further noted that the critical amendments to the draft CLRB that introduced the establishment traditional councils was effected after the conclusion of the PLG Port Folio deliberations on the TLGFB.

The TLGFB³ boosts the public powers of the LACs in a massive way by providing for them to be established as traditional councils. The TLGFB provides the framework for the conferral of a vast array of public powers and functions on traditional councils.

¹ Approval or rejection by the LAC of an application for the conversion of a new order right to be cut out of the communal land and transferred off in ownership.

² Even if the Minister fulfils all the functions envisaged by clause 18 and 6, the LAC still retains its clause 9 and 24 powers under the CLRB to be exercised in terms of community rules.

³ Traditional Leadership and Governance Framework Bill [B 58B -2003].

In terms of clause 4(1)(a) (TLGFB) a traditional council is empowered *inter alia* to administer 'the affairs of the traditional community in accordance with custom and tradition'.⁴ The council is also to assist, support and guide traditional leaders in the performance of their functions,⁵ which include the functions conferred by customary law, customs and statutory law.⁶

In addition, clause 20(1) permits national and provincial government to by law provide a role for traditional councils in land administration, agriculture, the management of natural resources, etc. Whenever such provision is made, provincial and national government must *inter alia* "strive to ensure that the allocation of a role or function is accompanied by resources and that appropriate measures for accounting for such resources are put in place".⁷

The organ of state must monitor the implementation of the function in order to ensure that it is consistent with the Constitution and that the function is being performed. If this does not happen, any resource given to a traditional council to perform that function may be withdrawn.⁸

None of these supervisory powers exist over the exercise of administrative powers by traditional leaders in terms of custom and tradition. The state has divested itself almost completely of the responsibility to ensure that ownership of the land serves the public good.

Clause 5 of the TLGFB, under the heading, '*Partnerships between municipalities and traditional councils*' it is provided that national government and provincial government must promote partnerships between municipalities and traditional councils through legislative and other measures.

These provisions, in conjunction with the provisions of clause 20 confirm that traditional councils are to be established as 'distinctive, interdependent and interrelated' fourth sphere of government.

The role of this 'sphere' is further recognised by clause 6 (TLGFB): '*A provincial government may adopt such legislative or other measures as may be necessary to support and strengthen the capacity of traditional councils within the province to fulfill their duties*'.

⁴ See, also, s 17(1) of the TLGFB, in terms of which 'A traditional leader performs the functions provided for in terms of customary law and practices of the traditional community concerned, and in applicable legislation.'

⁵ Clause 4(1)(b) of the TLGFB.

⁶ Clauses 4(1)(l) and 17(1) of the TLGFB.

⁷ Clauses 20(2) of the TLGFB. This provision is in crude way the same as section 10(3) of the Municipal Systems Act which provides that: The Cabinet member or MEC initiating the legislation or agreement referred to in subsections (1) and (2), respectively, must take appropriate steps to ensure sufficient funding, and capacity building initiatives as may be needed, for the performance of the assigned function or power by the municipality concerned if-

- (a) the assignment of the function or power imposes a duty on the municipality concerned;
- (b) that duty falls outside the functional areas listed in Part B of Schedule 4 or Part B of Schedule 5 to the Constitution or is not incidental to any of those functional areas; and
- (c) the performance of that duty has financial implications for the municipality concerned.

⁸ Clause 20(3) and (4).

This provision reminds one of section 154(1) of the Constitution, where a similar duty is imposed on national government in respect of municipalities.⁹

In fact, it is difficult not to conclude that the TLGFB as a whole is geared towards substituting local government, functioning under the laws of the land, by traditional councils and traditional leaders, functioning in terms of customs and tradition, in respect of communal land.

Read together, the CLRB and the TLGFB provide for the exercise of public administrative powers and ownership powers by traditional leaders in terms of custom and tradition. In this form the Bills create a fourth sphere of government despite the constitutional commitment to establishing a unitary, democratic and developmental system of local government. (White Paper on Local Government: March 1998).

The net effect is that land administration in communal areas will not be governed by democratically elected municipalities but by re-vamped un-democratic 'wall to wall' 'tribal authorities'.¹⁰

Does the Constitution recognise a fourth sphere of government?

The only recognition of a role for traditional leadership is to be found in Chapter 12 of the Constitution, most pertinently in section 212(1) which provides that '*National legislation may provide for a role for traditional leadership as an institution at local level on matters affecting local communities. This provision must be read with s 211(1) where it is provided that '*The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.*'*

Chapter 3 of the Constitution, which sets out the spheres of government in the Republic, makes no mention of a fourth sphere of government in the form of traditional councils. On the contrary, it provides for only three spheres.

⁹ 154(1) The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.

¹⁰ The 1997 White Paper on Land Policy notes at para 1.2.1: Issues raised at Green Paper workshops: Institutional framework for land administration

That there were, inter alia, calls for: the roles and responsibilities for land administration at the different levels of government to be clarified; and offices to be located close to the people; the clarification of relations between tribal authorities and local authorities;

At para 2.5: 'The case for the government's land reform policy' it is noted that:

"Under the *Native Trust and Land Act, 1936*, black people lost even the right to purchase land in the reserves and were obliged to utilise land administered by tribal authorities appointed by the government."

Paras 5.3 'Legacy of apartheid' and, 5.3.1 'Problems in rural areas'

It is recorded that: "The regulations governing land use in these areas are derivatives of the regulations promulgated in terms of the *Black Administration Act, 38 of 1927*. These regulations, whether contained in various versions of the betterment or R188 regulations, are authoritarian, have inappropriate punitive measures and have no provision at all for public participation. The regulations hand responsibility for administration to magistrates who must consult with tribal authorities. In many areas, these regulations are not administered at all. There is a serious need for a new land use planning and a development planning and control system responsive to the needs of people living in these areas."

LRC submission on Ward Committee Guidelines: 20 November 2003

ref: kobus@lrc.org.za; tel: 021 423 8285; fax: 021 423 0935

The structure of the Constitution therefore does not envisage a fourth sphere of government in the form of traditional leaders. It recognises three spheres of government and all organs of states must fall within these spheres. Legislative and executive authority is divided amongst three spheres,¹¹ and revenue is raised and divided amongst three spheres, and not four.¹²

Municipalities established throughout the territory of the Republic constitute the (third) local sphere of government.¹³ As stated above, section 212(1) envisages a role for traditional leadership as an institution at local level on matters affecting local communities. In short, section 212 envisages traditional leadership to be an organ of state within the local sphere of government. As described above, the CLRB and the TLGFB creates an autonomous fourth sphere of government, in some respects subject to national and provincial control. This was not the intention of the drafters of the 1996 Constitution.¹⁴

Additional points not covered in this submission:

The CLRB empowers the Minister to make planning and land use determinations when an application is made for the transfer of land. In terms of the Constitution, Municipalities are made responsible for such planning and development decisions and not the Minister. The CLRB permits the Minister to usurp municipal powers and functions. In so doing, the CLRB will '*compromise or impede the ability of municipalities*' to comply with their constitutional and statutory duties to provide municipal services.

The CLRB is badly drafted and contradictory. It vests duplicate and overlapping powers in the Minister (and the Deeds Registry Office) and, at the same time, in LACs. The confusion will make it difficult to determine and enforce rights and to implement the CLRB. The effect of the confusion will be that vulnerable people whose rights should be protected, will be rendered even more vulnerable.

Legal Resources Centre: Cape Town: ref: kobus@lrc.org.za

¹¹ See, in respect of the legislative authority of the Republic, s 43; in respect of executive authority, s 85(1) (national), s 125 (provincial) and s 156 (local).

¹² Section 214.

¹³ Section 151(1).

¹⁴ See *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996 (First Certification judgment) 1996 (4) SA 744 (CC)* para 195, where the Court stated the purpose of the Constitutional Principles, in respect of traditional leadership were to recognise "a degree of cultural pluralism with legal and cultural, but not necessarily governmental, consequences."

LRC submission on Ward Committee Guidelines: 20 November 2003
ref: kobus@lrc.org.za: tel: 021 423 8285; fax: 021 423 0935