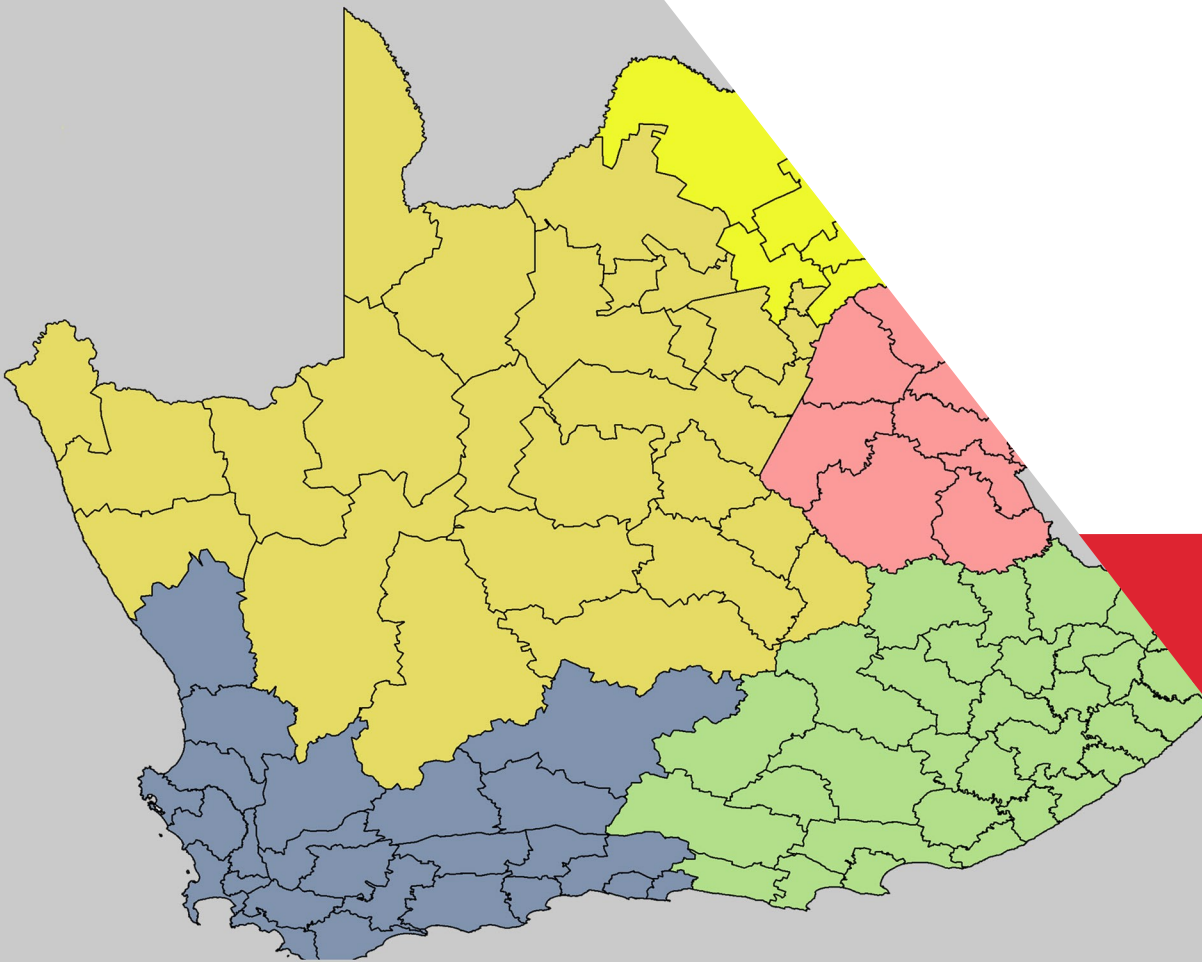




ORGANISATION UNDOING TAX ABUSE



29 July 2020

OUTA'S COMMENTS ON THE LOCAL GOVERNMENT: MUNICIPAL DEMARCATION BILL

**Submission to the Department of Cooperative
Governance and Traditional Affairs**

Submitted by:

STEFANIE FICK

OUTA Chief Legal Officer

Email: stefanie.fick@outa.co.za



SUBMISSION TO THE DEPARTMENT OF COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS

The Director-General
Attention: Dr Kevin Naidoo
Email: kevin@cogta.gov.za

29 July 2020

For further information contact:

Chief Legal Officer
Adv Stefanie Fick
stefanie.fick@outa.co.za

Contents

CHAPTER 1: INTRODUCTION	3
1. PRELUDE	3
2. GENERAL	4
CHAPTER 2: LINKS BETWEEN THE CURRENT DEMARCATION ACT AND OTHER NATIONAL LEGISLATION	7
3. GENERAL	7
4. MUNICIPAL STRUCTURES ACT 117 OF 1998 ("MSA")	7
5. MUNICIPAL SYSTEMS ACT, 32 OF 2000 ("MSA2000")	15
6. MUNICIPAL PROPERTY RATES ACT 6 OF 2004 ("MPRA")	16
7. MUNICIPAL FINANCE MANAGEMENT ACT 56 OF 2003 ("MFMA")	17
8. SPATIAL PLANNING AND LAND USE MANAGEMENT ACT 16 OF 2013 ("SPLUMA")	17
9. INTERGOVERNMENTAL RELATIONS FRAMEWORK ACT 13 OF 2005 ("IRFA")	18
10. LOCAL GOVERNMENT: MUNICIPAL ELECTORAL ACT 27 OF 2000 ("MEA")	18
CHAPTER 3: ANALYSIS OF THE MUNICIPAL DEMARCATION BILL	19
11. COMMENTS ON THE TEXT OF THE MUNICIPAL DEMARCATION BILL 2020	19
12. CONCLUSION	45

CHAPTER 1: INTRODUCTION

1. PRELUDE

- 1.1 The Organisation Undoing Tax Abuse (“OUTA”) hereby makes its submission in response to a call for public comment on the Municipal Demarcation Bill (“the Bill”) by the Department of Cooperative Governance and Traditional Affairs (“COGTA”). OUTA trusts that the inputs reflected in its submission will assist the legislator by taking cognisance of the implications of the Bill in conjunction with the broader spectrum of the current local government legislative framework.
- 1.2 By way of introduction, OUTA is a proudly South African non-profit civil action organisation, comprising of and supported by people who are passionate about improving the prosperity of our nation. We envision a prosperous country, with an organised, engaged and empowered civil society that ensures responsible use of tax revenues, especially at Local Government levels.
- 1.3 Part and parcel to OUTA’s mission is the challenging of legislation and regulatory environment, this includes participating and engaging with government on legislation such as the abovementioned Bill.
- 1.4 In order to address the Bill’s deficiencies and supplementary contributions to municipal demarcation in general, a holistic understanding of all governing principles and provisions is warranted. OUTA contends that the reintroduction of provisions already in existence within the current local government legislative framework will result in interpretational uncertainty and render a vast majority of provisions currently in force either superfluous or invalid.

- 1.5 OUTA's comments will further reflect that approximately 85% of the propositions imposed by the Bill are a repetition of existing legislation.

2. GENERAL

- 2.1 The geographical area of South Africa is not specifically described in the Constitution of the Republic of South Africa ("the Constitution"). In terms of section 103(1) of the Constitution, the nine provinces are listed comprising the areas contained in the maps detailed in Schedule 1A to the Constitution.
- 2.2 Section 40(1) of the Constitution provides that government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated. In addition, section 151(1) of the Constitution provides that the local sphere of government consists of municipalities, which must be established for the whole of the territory of South Africa.
- 2.3 Section 152 deals with the objects of local government and identifies the following (to):
- 2.3.1 provide democratic and accountable government for local communities;
 - 2.3.2 ensure the provision of services to communities in a sustainable manner;
 - 2.3.3 promote social and economic development;
 - 2.3.4 promote a safe and healthy environment; and
 - 2.3.5 encourage the involvement of communities and community organisations in the matters of local government.
- 2.4 In addition, a municipality must strive, within its financial and administrative capacity, to achieve these objects.

2.5 Section 155(1) of the Constitution deals with the establishment of municipalities.

Provision is made for the following:

2.5.1 Categories of municipalities:

2.5.1.1 **Category A:** A municipality that has exclusive municipal executive and legislative authority in its area – metropolitan municipalities;

2.5.1.2 **Category B:** A municipality that shares municipal executive and legislative authority in its area with a category C municipality within whose area it falls – local municipalities; and

2.5.1.3 **Category C:** A municipality that has municipal executive and legislative authority in an area that includes more than one municipality – district municipalities.

2.6 National legislation must define the different types of municipalities that may be established within each category.

2.6.1 Section 155(3) of the Constitution calls for national legislation that must also:

2.6.1.1 establish the criteria for determining when an area should have a single category A municipality or when it should have municipalities of both category B and category C;

2.6.1.2 establish criteria and procedures for the determination of municipal boundaries by an independent authority; and

2.6.1.3 subject to section 229 of the Constitution, make provision for an appropriate division of powers and functions between municipalities when an area has municipalities of both category B and category C. A division of powers and functions between a category B municipality and a category C municipality may differ from the division of powers

and functions between another category B municipality and that category C municipality.

2.7 The legislation referred to above must consider the need to provide municipal services in an equitable and sustainable manner.

2.8 Section 157 of the Constitution deals with the composition and election of Municipal Councils. Accordingly, section 157(4)(a) provides as follows:

*“If the electoral system includes ward representation, the delimitation of wards must be done by **an independent authority appointed** in terms of, and operating according to, procedures and criteria prescribed by national legislation.”*

CHAPTER 2: LINKS BETWEEN THE CURRENT DEMARCATION ACT AND OTHER NATIONAL LEGISLATION

3. GENERAL

- 3.1 In the illustration below, OUTA highlights the similarities between various local government legislation and the Local Government: Municipal Demarcation Act 27 of 1998 (“MDA”). OUTA refrains from deliberating on the technical interpretation of these comparisons. It is nevertheless crucial to consider the governing provisions (currently in force) in order to grasp the potential impact of the Municipal Demarcation Bill.

4. MUNICIPAL STRUCTURES ACT 117 OF 1998 (“MSA”)

- 4.1 Section 2 of the MSA:

“2 Areas which must have category A municipalities

An area must have a single category A municipality if that area can reasonably be regarded as-

(a) a conurbation featuring-

(i) areas of high population density;

(ii) an intense movement of people, goods, and services;

(iii) extensive development; and

(iv) multiple business districts and industrial areas;

(b) a centre of economic activity with a complex and diverse economy;

(c) a single area for which integrated development planning is desirable; and

*(d) having strong interdependent social and economic linkages
between its constituent units.”*

4.2 Section 4 of the MSA:

“4 Application of criteria

(1) The Demarcation Board must-

(a) apply the criteria set out in section 2 and determine whether an area in terms of the criteria must have a single category A municipality or whether it must have municipalities of both category C and category B; and

(b) determine the boundaries of the area in terms of the Demarcation Act.

(2) The Demarcation Board may determine that an area must have a category A municipality only after consultation with the Minister, the MEC for local government in the province concerned and SALGA.”

4.3 Section 12(1) of the MSA:

“12 MECs to establish municipalities

(1) The MEC for local government in a province, by notice in the Provincial Gazette, must establish a municipality in each municipal area which the Demarcation Board demarcates in the province in terms of the Demarcation Act.”

4.4 Section 17(1) of the MSA:

“17 Repeal, amendment or replacement of section 12 notices when boundaries are re-determined

(1) When the Demarcation Board in terms of the Demarcation Act re-determines a municipal boundary which affects the area of a municipality established in terms of section 12-

(a) the provisions of sections 12 and 14 are applicable to the extent necessary to give effect to the re-determination; and

(b) the MEC for local government in the province concerned must repeal, amend or replace the relevant section 12 notice as may be required in the circumstances.”

4.5 Section 34(3) of the MSA:

“34 Dissolution of municipal councils

(3) The MEC for local government in a province, by notice in the Provincial Gazette, may dissolve a municipal council in the province if the Electoral Commission in terms of section 23 (2) (a) of the Demarcation Act is of the view that a boundary determination affects the representation of voters in that council, and the remaining part of the existing term of municipal councils is more than one year.

4.6 Section 62(2) of the MSA:

“62 Establishment of metropolitan subcouncils

(2) When clustering wards to determine a metropolitan subcouncil area, the municipal council must-

(a) apply the criteria set out in sections 24 and 25 of the Demarcation Act in so far as they can be applied; and

(b) consult the Demarcation Board.”

4.7 Section 85 of the MSA:

“85 Adjustment of division of functions and powers between district and local municipalities¹

(1) The MEC for local government in a province may, subject to the other provisions of this section, adjust the division of functions and powers between a district and a local municipality as set out in section 84 (1) or (2), by allocating, within a prescribed policy framework, any of those functions or powers vested-

(a) in the local municipality, to the district municipality; or

(b) in the district municipality (excluding a function or power referred to in section 84

(1) (a), (b), (c), (d), (i), (o) or (p), to the local municipality.

(2) An MEC may allocate a function or power in terms of subsection (1) only if-

(a) the municipality in which the function or power is vested lacks the capacity² to perform that function or exercise that power; and

(b) the MEC has consulted the Demarcation Board and considered its assessment of the capacity of the municipality concerned.

(3) Subsection (2) (b) does not apply if the Demarcation Board omits to comply with subsection (4) within a reasonable period.

(4) The Demarcation Board must-

(a) consider the capacity of a district or local municipality to perform the functions and exercise the powers vested in the municipality in terms of section 84 (1) or (2) when-

¹ See Section 84 of the MSA for the division of functions between district and local municipalities.

² Capacity is defined as follows in the MSA1998: '**capacity**', in relation to a municipality, includes the administrative and financial management capacity and infrastructure that enables a municipality to collect revenue and to govern on its own initiative the local government affairs of its community.

(i) determining or redetermining the boundaries of the district and the local municipalities; or

(ii) requested in terms of subsection (2) (b) by the MEC for local government in the province concerned to do so; and

(b) convey its assessment in writing to the relevant MEC.

(5) If an MEC disagrees with the Demarcation Board on the capacity of the district or local municipality and adjusts the division of functions and powers between the district and local municipality, or refuses to adjust the division, contrary to the assessment of the Demarcation Board, the MEC must furnish reasons to the relevant municipalities and the Minister before finalising an adjustment in terms of subsection (1).

(6) Any adjustment of the division of functions and powers by way of an allocation in terms of subsection (1) or reallocation in terms of subsection (9) must be reflected in the notices referred to in section 12 which establish the municipalities concerned. Where applicable the legal, practical and other consequences of the allocation or reallocation must be regulated, including-

(a) the transfer of staff;

(b) the transfer of assets, liabilities and administrative and other records; and

(c) the continued application of any by-laws, regulations and resolutions in the area or the municipalities concerned and the extent of such application.

(7) The Minister may by notice in the Government Gazette and after consulting the MEC for local government and the municipalities concerned-

(a) vary or withdraw any allocation of a function or power in terms of subsection (1) or reallocation of a function or power in terms of subsection (9); or

(b) adjust the division of functions and powers between a district and local municipality if the MEC has refused to make an adjustment in accordance with the assessment of the Demarcation Board.

(8) The MEC must amend the relevant section 12 notices to give effect to any variation or withdrawal of any allocation or reallocation in terms of subsection (7).

(9) (a) If a function or power has been allocated in terms of subsection (1) the MEC for local government in the province must regularly review the capacity of the relevant municipality and reallocate that function or power to that municipality when that municipality acquires the capacity to perform that function or exercise that power.

(b) A reallocation in terms of paragraph (a) must be made with the concurrence of the receiving municipality or, in the absence of such concurrence, after having consulted the Demarcation Board.

(9A) (a) Subject to paragraph (c), any adjustment of the division of functions and powers under this section takes effect on the commencement date of the municipal financial year following the date of publication of the notice effecting such adjustment.

(b) The MEC or Minister, as the case may be, must inform the national Minister responsible for finance of his or her intention to publish a notice contemplated in paragraph (a) at least four months before the notice is to take effect in terms of that paragraph.

(c) Paragraph (a) does not apply if any adjustment of the division of powers and functions under this section is to coincide with an election of the council of an affected municipality.

(d) The Minister of Finance may, in exceptional cases, including those referred to in section 87 of Municipal Structures Act, 1998 (Act 117 of 1998), decide on a different or shorter period than the period referred to in paragraph (a) and (b).

(10) This section does not apply before the date of the first elections of municipal councils in terms of this Act.”

4.8 Section 87 of the MSA:

“87 Temporary allocation of functions and powers

(1) If the provision of basic services by a district or local municipality collapses or is likely to collapse because of that municipality's lack of capacity or for any other reason, the MEC for local government in the province may, after written notice to the district or local municipality and with immediate effect, allocate any functions and powers necessary to restore or maintain those basic services, to a local municipality which falls within that district municipality or to the district municipality in whose area that local municipality falls, as the case may be.

(2) The district or local municipality may lodge a written objection against the allocation to the Minister, who may confirm, vary or withdraw the allocation after having consulted the Demarcation Board.

(3) If the district or local municipality does not lodge a written objection against the allocation to the Minister within 14 days of the date of the notice referred to in subsection (1), the municipality is regarded as having consented to the allocation.

(4) The MEC for local government must reallocate that function or power to the original municipality when that municipality is in a position to resume the provision of those basic services.”

4.9 Schedule 1: Electoral Systems for Metro and Local Councils

"Part 1

2 Delimitation of wards

The Demarcation Board after consultation with the Electoral Commission, for purposes of an election, must delimit all metropolitan municipalities and all local municipalities that must have wards, into wards.

3 Number of wards

The number of wards in a metropolitan or local municipality must be equal to the number of ward councillors determined for the municipality in terms of section 22 (2).

4 Delimitation criteria

The Demarcation Board after consulting the Electoral Commission must delimit a municipality into wards, each having approximately the same number of voters, taking into account the following criteria:

(a) The number of registered voters in each ward, may not vary by more than fifteen per cent from the norm, where the norm is determined by dividing the total number of registered voters on the municipality's segment of the national common voters roll by the number of wards in the municipality.

(b) The need to avoid as far as possible the fragmentation of communities.

(c) The object of a ward committee as set out in section 72 (3) which is to enhance participatory democracy in local government.

(d) The availability and location of a suitable place or places for voting and counting if appropriate, taking into consideration-

(i) communication and accessibility;

(ii) density of population;

- (iii) topography and physical characteristics; and*
- (iv) the number of voters that are entitled to vote within the required time-frame.*
- (e) The safety and security of voters and election material.*
- (f) Identifiable ward boundaries.*

5 Publication of delimitation

- (1) The Demarcation Board must publish its delimitation of wards for a municipality in the Provincial Gazette.*
- (2) Any person aggrieved by a delimitation may within 14 days of publication submit objections in writing to the Demarcation Board, and the Board must-*
 - (a) consider those objections; and*
 - (b) confirm, vary or withdraw its determination.”*

5. MUNICIPAL SYSTEMS ACT, 32 OF 2000 (“MSA2000”)

“2 Legal nature

A municipality-

- (a) is an organ of state within the local sphere of government exercising legislative and executive authority within an area determined in terms of the Local Government: Municipal Demarcation Act, 1998;*
 - (b) consists of-*
 - (i) the political structures and administration of the municipality; and*
 - (ii) the community of the municipality;*
 - (c) functions in its area in accordance with the political, statutory and other relationships between its political structures, political office bearers and administration and its community;*
- and*

(d) has a separate legal personality which excludes liability on the part of its community for the actions of the municipality.”

6. MUNICIPAL PROPERTY RATES ACT 6 OF 2004 (“MPRA”)

6.1 Section 89A of the MPRA:

“89A Transitional arrangements relating to redetermination of municipal boundaries:

Use of valuation rolls and supplementary valuation rolls

(1) If, as a result of the redetermination of a municipal boundary in terms of the Local Government: Municipal Demarcation Act, 1998 (Act 27 of 1998), an area is included into the existing area of jurisdiction of a municipality, that municipality may-

(a) continue to use a valuation roll and supplementary valuation roll that was in force in the area that has been included in its area of jurisdiction; and

(b) levy rates against property values as shown on that valuation roll or supplementary valuation roll, until it prepares a valuation roll or supplementary valuation roll that includes such area.

(2) If a municipality uses valuation rolls and supplementary valuation rolls in terms of subsection (1), that municipality may, notwithstanding section 19 (1) (a), impose different rates based on the different valuation rolls or supplementary valuation rolls, so that the amount in the Rand on the market value of the property payable on similarly situated property is more or less the same.”

6.2 Section 90 of the MPRA:

“90 Transitional arrangements relating to redetermination of municipal boundaries:

Existing rates policies.

If, as a result of the redetermination of a municipal boundary in terms of the Local Government: Municipal Demarcation Act, 1998 (Act 27 of 1998), an area is included into the existing area of jurisdiction of a municipality during the course of a financial year, that municipality may during the financial year in which the inclusion becomes effective and subsequent financial years, until it prepares a valuation roll or a supplementary valuation roll that includes such area-

(a) continue to use the rating policy and by-laws that were in force in the area that has been included in its area of jurisdiction; and

(b) levy rates consistent with that rating policy and by-laws.”

7. MUNICIPAL FINANCE MANAGEMENT ACT 56 OF 2003 (“MFMA”)

“Definitions:

'municipality'-

(a) when referred to as a corporate body, means a municipality as described in section 2 of the Municipal Systems Act; or

(b) when referred to as a geographic area, means a municipal area determined in terms of the Local Government: Municipal Demarcation Act, 1998 (Act 27 of 1998)”

8. SPATIAL PLANNING AND LAND USE MANAGEMENT ACT 16 OF 2013 (“SPLUMA”)

Definitions:

'municipal area' means the area of jurisdiction of a municipality in terms of the Local Government: Municipal Demarcation Act, 1998 (Act 27 of 1998)”

9. INTERGOVERNMENTAL RELATIONS FRAMEWORK ACT 13 OF 2005 (“IRFA”)

“Definitions:

'municipality'-

(a) when referred to as a corporate body, means a municipality as described in section 2 of the Municipal Systems Act; or

(b) when referred to as a geographic area, means a municipal area determined in terms of the Local Government: Municipal Demarcation Act, 1998 (Act 27 of 1998)”

10. LOCAL GOVERNMENT: MUNICIPAL ELECTORAL ACT 27 OF 2000 (“MEA”)

“Definitions:

'municipality'-

(a) as a corporate entity, means a municipality established in terms of Chapter 2 of the Municipal Structures Act; and

(b) as a geographical area, means an area determined in terms of the Local Government: Municipal Demarcation Act, 1998 (Act 27 of 1998)”

CHAPTER 3: ANALYSIS OF THE MUNICIPAL DEMARCATION BILL

11. COMMENTS ON THE TEXT OF THE MUNICIPAL DEMARCATION BILL 2020

11.1 Section 1(1): Definitions

- 11.1.1 “Municipal financial year” – the municipal financial year is defined as follows in section 1 of the MFMA:

“financial year’ means a year ending on 30 June.”

- 11.1.2 There is no need to redefine a “municipal financial year” in the Bill and preference should be given to the definition as contained in the MFMA which is the apex legislation and starting point in respect of municipal budgets.

- 11.1.3 It is therefore proposed that the definition be amended to read as follows:

“Municipal financial year” means the financial year of a municipality as defined in section 1 of the Municipal Finance Management Act (Act 56 of 2000).”

- 11.1.4 “municipality” – the definition as contained in section 1 of the MFMA, section 1 of the IRFA and Section 1 of the MEA is more comprehensive and it is therefore proposed that the definition be amended to read as follows:

“municipality’-

- (a) when referred to as a corporate body, means a municipality as described in section 2 of the Local Government: Municipal Systems Act 32 of 2000; or*
- (b) when referred to as a geographic area, means a municipal area determined in terms of this Act.”*

11.2 Section 1(2): In consultation with and after consultation with

11.2.1 This provision requires the Minister to obtain the majority wish and/or support of Members of the Executive Council and then to act in accordance therewith.

This sub-section is the only provision requiring a procedure of this nature whilst the text of the Bill is “*after consultation with*” – see the following sections:

11.2.1.1 Section 9(1)(b)(ii); and

11.2.1.2 Section 28(3).

11.2.2 It is proposed that this sub-section be deleted *in toto*.

11.3 Section 2: Establishment

11.3.1 With the repeal of legislation of this nature, due diligence must be exercised by ensuring that the constitutional obligation as enshrined in section 155(3)(b) of the Constitution is not interrupted by such repeal. The Municipal Demarcation Board (“MDB”) was duly established by section 2 of the current MDA (current) as was required by section 237 of the Constitution. The MDB performed its main constitutional functions by demarcating municipal areas and delimitating municipal wards.

11.3.2 The way in which this section is worded implies that the MDB is being created for the first time, which is not the case. This interpretation is supported by the incomplete Schedule to the Bill whereby only certain sections of the Municipal Systems Act will be repealed. OUTA notes that no mention is made of a repeal of the MDA.

11.3.3 Section 2 should be reworded whereby cognisance is given to the current MDB.

In this regard, the MDB should henceforth be disestablished and that a new board should be established to perform the constitutional functions as detailed in sections 155(3)(b) and 157(4) of the Constitution and perform such other functions as the national legislature may assign to the newly established MDB.

11.4 Section 3: Status

11.4.1 The independent status created by sections 155(3)(b) and 157(4) of the Constitution is only limited to the *“determination of municipal boundaries”* and *“the delimitation of wards”*. In addition to the establishment of such independent authority, the national legislature must also determine the criteria to be taken into account and the procedures to be followed by the independent authority in respect of demarcation and delimitation.

11.4.2 The national legislature may also assign other secondary or consultative functions to the independent authority that will not bear the same constitutional independence such as the division of Schedule 4B and 5B functions between district and local municipalities as well as undertaking capacity assessments. In performing its consultative functions, the MDB will make recommendations to the either the Minister or respective MEC charged with local government

11.4.3 OUTA therefore proposes that the text of section 3 be amended to read as follows:

“3. Status

The Municipal Demarcation Board in performing its constitutional obligations in terms of sections 155(3)(b) and 157(4) of the Constitution -

(a) is a juristic person;

(b) is independent; and

(c) must be impartial and perform such functions without fear, favour or prejudice”.³

11.5 Section 4. Functions of the MDB

11.5.1 A clear distinction should be made between the constitutionally charged functions of demarcation of municipal boundaries and the delimitation of ward boundaries where the MDB must act solus and those functions where it can render advisory services.

11.5.2 The MDB should not be empowered to undertake municipal capacity assessments as this would be in contrast with the obligations of the national and provincial spheres of government as reflected in terms of section 154(1) of the Constitution:

“154 Municipalities in co-operative government

The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to

³ It must be noted that this requirement to be impartial and perform such functions without fear, favour or prejudice is established by national legislation and does not necessarily carry the same “protection” as those bestowed upon the Judicial authority (Section 165(2)), Prosecuting authority (Section 179(4)) and Chapter 9 institutions (Section 181(2)) by the Constitution.

manage their own affairs, to exercise their powers and to perform their functions.” Own emphasis added.

11.6 Section 155(6) of the Constitution:

“Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must

- a. provide for the monitoring and support of local government in the province; and*
- b. promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.”*

11.7 Section 156(4) of the Constitution:

“The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if -

- a. that matter would most effectively be administered locally; and*
- b. the municipality has the capacity to administer it.”*

11.8 In addition, section 195 of the Constitution deals with basic values and principles governing public administration and requires, *inter alia*, that a high standard of professional ethics must be promoted and maintained. It is therefore the prerogative of each sphere of government to comply with this peremptory obligation coupled by the oversight of provinces over municipalities and the national government oversight over provinces and finally, the National Assembly who has the oversight over all organs of state.

11.9 The functions of municipalities as set out in schedules 4B and 5B cover a wide field. In this regard, the following is a brief summary of national legislation and the national departments responsible for the various functions performed by municipalities:

11.9.1 **COGTA:**

- Municipal Systems Act;
- Municipal Structures Act;
- Disaster Management Act;
- Intergovernmental Relations Framework Act;
- Fire Services Act; and
- Property Rates Act

11.9.2 **Finance:**

- Municipal Finance Management Act;
- Municipal Fiscal Powers and Functions Act;
- Water and Sanitation:
- Water Act;
- Water Services Act

11.9.3 **Environmental Affairs:**

- Environmental Management: National Environmental Management Act;
- National Environmental Management: Protected Areas Act;
- National Environmental Management: Air Quality Act;
- National Environmental Management: Waste Act;

11.9.4 Energy:

- Electricity Regulation Act;
- National Energy Act;
- National Energy Regulator Act;

11.9.5 Agriculture, Forestry and Fisheries:

- Veldt and Forest Act;
- Fencing Act;

11.9.6 Human Settlements:

- National Housing Act;

11.9.7 Rural Development and Land Reform:

- Spatial Planning and Land-use Management Act

11.9.8 Public Service and Administration:

- Public Administration Management Act 11 of 2014 – the Act has not yet
not come into operation which endeavours to create one single public
administration for all three spheres of government

11.9.9 Transport:

- Urban Transport Act;
- Land Transport Act; and
- National Road Traffic Act

11.9.10 **Health:**

- National Health Act

11.10 Since the coming into operation of the Demarcation Act on 1 February 1999, the national legislature had passed the following legislation to give effect to the following:

- 11.10.1 Competency levels for certain financial officials with the promulgation of the Local Government: Municipal Finance Management Act (Act 56 of 2003) with effect from 1 July 2004 in respect of:
- 11.10.2 Competency levels of professional financial officials of metropolitan, district and local municipalities – Section 83;
- 11.10.3 Competency levels of professional financial officials of municipal entities – Section 107; and
- 11.10.4 Competency levels of officials involved in municipal supply chain management – Section 119
- 11.10.5 Co-operative Governance with the promulgation of the Intergovernmental Relations Framework Act (Act 13 of 2005) with effect from 15 August 2005 with the aim of establishing a framework for the national government, provincial governments and local governments to promote and facilitate intergovernmental relations and to provide for mechanisms and procedures to facilitate the settlement of intergovernmental disputes;
- 11.10.6 Determination of procedures for the appointment and minimum qualifications for municipal managers and managers reporting to the municipal manager with amendments to the Municipal Systems Act with effect from 5 July 2011 that will be re-enacted soon to rectify a procedural problem. Due effect was however given with the promulgation of the Local Government: Regulations on

Appointment and Conditions of Employment of Senior Managers (published under GN 21 in GG 37245 of 17 January 2014). These regulations provide for:

11.10.7 A Competency Framework for Senior Managers - Annexure A; and

11.10.8 Minimum Competency Requirements for Senior Managers - Annexure B.⁴

11.11 From the foregoing it is clear that since the MDB demarcated the first municipal boundary during 2000, the municipal environment has changed dramatically. The request by a MEC to determine the capacity of a municipality in terms of section 85(4) of the MSA, must rather be seen in the light of the establishment of new municipalities before the first democratic municipal elections of 5 December 2000. The undertaking multi-functional municipal capacity assessments vest squarely on the shoulders of the national departments as detailed above.

11.12 In addition, the MDB does not have the capacity to conduct such assessments and has, since its inception, made use of external services providers to perform capacity assessments. Despite having conducted capacity assessment up to 2012 and then again in 2018, there was no improvement in the functioning of municipalities taking the Auditor General's reports for the past five years into consideration.

11.13 It is proposed that capacity assessments by the MDB be scrapped as this would mean the usurpation of executive powers of the national and provincial governments involved as well as that of municipal councils.

⁴ The application of Annexures A and B is undertaken by specialised selection panels.

11.14 Section 5: General powers of the Municipal Demarcation Board

11.14.1 The text of this section is almost identical to the current provisions of section 5 of the MDA. The only difference is that section 5(d) provides as follows:

“generate revenue, for the purpose of funding organizational projects that cannot be accommodated from the allocation.”

11.14.2 The MDB operates under the banner of *“without fear, favour or prejudice”* and any other income, be it in the form of donations or any other form, will jeopardise the independent image of the MDB. Thus, OUTA proposes that section 5(d) be deleted.

11.15 Section 6: Members of the Board

11.15.1 OUTA notes the provisions of this section and it would seem that they conform to the general principles of corporate governance as detailed in the King Reports IV. In particular, the King Reports require that the Board serve as the focal point and custodian of corporate governance. Perhaps, the only criticism is that instead of specifying the exact responsibilities and role of the Board in so far as corporate governance and stakeholders are concerned, this section regurgitated the exact wording of the King Reports.

11.16 Section 7: Composition

11.16.1 This section is simply a re-enactment of section 6 of the current DMA barring the omission of the requirement of a reflection of regional diversity as detailed in section 6(3)(b) of the current DMA.

11.16.2 The omission of regional diversity has the effect that some provinces may not be represented on the MDB and that members from one province only may be appointed.

11.16.3 OUTA proposes that the current section 6(3)(b) be included in the new text of section 7.

11.17 Section 8: Qualifications

11.17.1 This section is a re-enactment of the current section 7 of the MDA.

11.18 Section 9: Appointment procedure

11.18.1 This section is a re-enactment of the current sections 8 and 14 of the MDA.

11.19 Section 10: Terms of office

11.19.1 This Section is a re-enactment of the current Sections 9 and 13 of the MDA.

11.19.2 Attention is directed to the following material changes:

11.19.2.1 **Term of office** – the current term of office for members of the MDB is five years. The proposal now is to extend the term to seven years. The ideal system would be if the term of office of the MDB would follow that of municipal councils. This will enable the MDB to undertake municipal boundary determinations and ward delimitations seamlessly during its term of office and that of a municipality. If the term is for seven years, the demarcation and delimitation work initiated by the outgoing MDB, will be interrupted, and completed by a newly constituted MDB. In such

an instance, valuable institutional memory will be lost – which will undoubtedly be counterproductive.

11.19.2.2 **Only full-time Chairperson** – provision is made for only a full-time chairperson of the MDB whilst in its current form, the Minister is empowered to appoint some of the members to be fulltime. Potential problems, which can be anticipated, include instances where both the Chairperson and Deputy Chairperson are unavailable. An ordinary member will then have to be appointed by the board to act as Chairperson.

11.20 Section 11: Conditions of appointment of members

11.20.1 This section resembles part of the current section 11 of the MDA. It would appear that some part of this section was omitted which is fully covered by the current section 11.

11.20.2 The current section 11 reads as follows:

“11 Conditions of appointment of members

(1) The Minister, with the concurrence of the Minister of Finance, must determine the conditions of appointment of the members of the Board, taking into account-

(a) the conditions of appointment of members of other institutions referred to in section 219 (5) of the Constitution;

(b) the role, duties and responsibilities of a member of the Board;

(c) affordability in relation to the responsibilities of the Board; and

(d) the level of expertise and experience required for a member of the Board.

(2) A member of the Board is either a full-time or part-time member, as may be determined by the Minister.

(3) Conditions of appointment may differ in respect of-

(a) the chairperson, deputy chairperson and other members of the Board;

(b) full-time and part-time members; and

(c) any other appropriate circumstances.

11.20.3 The current section 11 is more comprehensive and ensures certainty. OUTA proposes that the current section 11 be incorporated and used in the Bill.

11.21 Section 12: Chairperson and Deputy Chairperson

11.21.1 This Section is a re-enactment of the current section 10 of the MDA.

11.22 Section 13: Meetings

11.22.1 This Section is a re-enactment of the current section 15 of the MDA.

11.23 Section 14: Rules of Procedure

11.23.1 This Section is a re-enactment of the current section 16 of the MDA.

11.24 Section 15: Committees

11.24.1 This Section is a re-enactment of the current section 18 of the MDA.

11.25 Section 16: Assignment of Powers and Duties

11.25.1 This Section is a re-enactment of the current section 19 of the MDA

11.25.2 It is noted that in both texts, that the power to determine municipal boundaries may not be delegated and may only be considered by the MDB. OUTA takes note of the fact that one of the two constitutional obligations, namely the delimitation of ward boundaries may be delegated.

11.25.3 It is submitted that wording of section 157(4)(a) of the Constitution obligating an independent authority to delimitate ward boundaries does not include the delegation of such a constitutionally created obligation.

11.25.4 In view of the importance of ward boundaries, OUTA proposes that this power too, should be performed only by the MDB.

11.26 Section 17: Conduct of Members

11.26.1 This section is a re-enactment of the current section 12 of the MDA

11.27 Section 18: Chief Executive Officer

11.27.1 This section is a re-enactment of the current sections 32 and 33 of the MDA barring the period of appointment of the Chief Executive Officer ("CEO") that is now extended from five to seven years. The ideal system would be if the term of office of the CEO would follow that of municipal councils.

11.27.2 This will enable the MDB to undertake municipal boundary determinations and ward delimitations seamlessly during its term of office and that of a municipality. If the term is for seven years, the demarcation and delimitation work initiated by the outgoing CEO, will be interrupted, and completed by a

newly appointed CEO. In such an instance, valuable institutional memory will be lost and will lead to a counterproductive scenario.

11.28 Section 19: Conditions of Employment of Employees

11.28.1 This section is a re-enactment of the current section 34 of the MDA.

11.29 Section 20: Services of Non-employees

11.29.1 This section is new, and no reference is made to following of supply chain procedures to procure the services of “*non-employees*” as prescribed by regulation promulgated in terms of the PFMA.

11.29.2 OUTA proposes that this section be deleted.

11.30 Section 21: Funding

11.30.1 This section is a re-enactment of the current section 36 of the MDA.

11.31 Section 22: Accountability

11.31.1 This section is a re-enactment of the current section 37 of the MDA.

11.32 Section 23: Audit

11.32.1 This section is a re-enactment of the current section 38 of the MDA.

11.33 Section 24: Reporting

11.33.1 This section has similarities to Section 39 of the current MDA barring the fact that there is no obligation to provide provincial legislatures with a copy of the annual report.

11.33.2 In addition, the time period during which the report must be submitted to both Houses of Parliament has been omitted. The current provision is contained in Section 39(2) and reads as follows:

“(2) The report must be submitted within six months after the end of the financial year to which it relates, and must include audited financial statements if those statements are available at that time, reflecting the Board's financial affairs during the year, consisting of at least-

(a) a balance sheet;

(b) an income statement; and

(c) a report of the auditors.”

11.33.3 It is proposed that the furnishing of copies of the annual report to provincial legislatures and the determination of time period during which the report must be submitted, be retained.

11.34 Section 25: Demarcation objectives

11.34.1 This section is a re-enactment of the current section 24 of the MDA barring the addition of section 25(e) which requires the MBD to determine the capacity of the municipality to execute its functions in terms of the MSA.

11.34.2 The request by a MEC to determine the capacity of a municipality in terms of section 85(4) of the MSA, must rather be seen in the light of the establishment of new municipalities before the first democratic municipal elections of 5 December 2000. The undertaking multi-functional municipal capacity assessments vest squarely on the shoulders of the national departments.

11.34.3 In addition, the MDB does not have the capacity to conduct such assessments and has, since its inception, made use of external services providers to perform capacity assessments. Despite having conducted capacity assessment up to 2012 and then again in 2018, there was no improvement in the functioning of municipalities taking the Auditor General's reports for the past five years into consideration.

11.34.4 OUTA proposes that Section 25(e) be deleted.

11.35 Section 26: Factors to be taken into account

11.35.1 This section is a re-enactment of the current section 25 of the MDA barring the addition of sections 26(m) to (p).

11.35.2 Section 26(m) now requires the MDB to consider a technical tool of common geo-statistical building blocks, which facilitate and support a standard geographical hierarchy.

11.35.3 Section 26(n) provides for the MDB to take into consideration relevant national development policies and plans which might impact on the nature of local government and its boundaries. This provision is problematic as it could jeopardise the independence of the MDB to demarcate municipal boundaries without fear, favour or prejudice – Section 3(c) of the Bill.

11.35.4 Examples of such policies lead to the current demarcation of the City of Tshwane comprising an area of 30% of the whole of Gauteng Province and the

disastrous combination of Potchefstroom and Ventersdorp into one municipality. This subsection should accordingly be deleted.

11.35.5 Section 26(o) provides for the MDB to take into consideration relevant national and provincial policies and legislation relating to the institutional or functional reorganisation of local government. This provision is problematic too as it could jeopardise the independence of the MDB to demarcate municipal boundaries without fear, favour or prejudice – section 3(c) of the Bill.

11.35.6 Section 26(p) provides for the MDB to take into consideration natural endowments, resources, assets, business investments and other drivers of economic growth. This subsection can lead to a situation whereby areas with low growth will demand to be included in areas with high growth thereby diluting the endeavours of the better performing area.

11.35.7 On the other hand, if the matters contained in section 26(p) are to be taken into consideration, then regard will also have to be given to ensure that the rights endowed to cultural, religious and linguistic communities as detailed in section 31 of the Constitution, should also be taken into consideration. Section 31 of the Constitution provides as follows:

“31. Cultural, religious and linguistic communities

1. Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –

a. to enjoy their culture, practise their religion and use their language; and

b. to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

2. The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”

11.36 Section 27: Determination of Category of Municipality

11.36.1 The provisions of this section had its origin in section 2 of the MSA which according to Schedule 1 of the Bill, will be repealed once the Bill comes into operation. There is one objection to this section as it is consolidating the functions of the MDB into one act.

11.37 Section 28: Initiation of Demarcation Process

11.37.1 This section is a re-enactment of the current section 22 of the MDA.

11.37.2 Section 28(1) limiting demarcation periods to once every 10 years. This limitation is difficult to understand as the main function of the MDB is to demarcate and delimit municipal and ward boundaries yet on the other hand it wishes to undertake municipal capacity assessment which it does not have the capacity to undertake.

11.37.3 Section 2(b) which now for the first time allows an individual or a community to request demarcation of municipal boundaries subject to certain conditions, this is a step forward as it brings local government closer to communities.

11.37.4 One of the major problems with demarcation of municipal boundaries is that it was linked with the Integrated Development Plan (“IDP”) of a municipality. Section 35 of MSA provides as follows:

“35 Status of integrated development plan

(1) An integrated development plan adopted by the council of a municipality-

(a) is the principal strategic planning instrument which guides and informs all planning and development, and all decisions with regard to planning, management and development, in the municipality;

(b) binds the municipality in the exercise of its executive authority, except to the extent of any inconsistency between a municipality's integrated development plan and national or provincial legislation, in which case such legislation prevails; and

(c) binds all other persons to the extent that those parts of the integrated development plan that impose duties or affect the rights of those persons have been passed as a by-law.

(2) A spatial development framework contained in an integrated development plan prevails over a plan as defined in section 1 of the Physical Planning Act, 1991 (Act 125 of 1991)."

11.37.5 As the principal strategic planning instrument of municipal government as the third sphere of government that is distinctive, interdependent and interrelated, all municipal planning must first form part of a municipality's IDP regardless the source of the request for demarcation.

11.37.6 The initiator of the request, be it the MDB, an individual or a community, the relevant MEC or the Minister, will have to prepare a memorandum addressing the matters detailed in sections 25 and 27 of the Bill for inclusion in the municipal IDP. IDP preparation has its own prescripts for public participation and will this assist in disseminating demarcation actions.

11.38 Section 29: Notification of Intention to Consider Request for Determination of Municipal Boundary

11.38.1 This section is a re-enactment of the current section 26 of the MDA and addresses the problems experienced with the shortcoming of the current provisions.

11.39 Section 30: Conducting Investigations on Municipal Boundaries

11.39.1 This Section is a re-enactment of the current Sections 27 and 29 of the MDA and addresses the problems experienced with the shortcoming of the current provisions.

11.40 Section 31: Public Consultation; Section 32: Mechanisms, Processes and Procedures for Public Participation; Section 33: Communication of Information Concerning Public Participation

11.40.1 These sections contain new and more elaborate provisions encouraging public participation in an endeavour to address the deficiencies in the current legislation. Most of the litigation was as a result of a lack of due and proper public participation and the publication of notices.

11.40.2 OUTA notes the provisions set out above and reiterates that the provisions as set out in the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") will take precedence in instances where public participation do not conform to the standard as prescribed in PAJA.

11.40.3 In this regard, OUTA further proposes the promulgation of regulations in terms of the Bill in order to ensure uniformity in relation to the demarcation process.

Moreover, OUTA cannot anticipate participatory problems upon mere observation of the Bill itself. Whether public participation constitutes as being “fair” in terms of PAJA will be dependant on the circumstances under which a decision by the MDB had been taken.

11.41 Section 34: Publication of Municipal Boundary Determination

11.41.1 This section is a re-enactment of the current section 21 of the MDA barring the new obligation on the MDB to give reasons for its decision after publication of the final decisions on boundary changes in the relevant Provincial Gazette by way of publication on its website or through any other appropriate means. This transparency is in line with the provisions of section 195(1)(g) of the Constitution.

11.42 Section 35: When Boundary Determinations Take Effect

11.42.1 This section is a re-enactment of the current section 23 of the MDA.

11.43 Section 41: Establishment and Constitution of Appeals Authority; Section 42: Functions of Appeals Authority; Section 43: Qualifications of Members of Appeals Authority; Section 44: Term of Office of Members of Appeals Authority; Section 45: Chairperson and Deputy Chairperson of Appeals Authority; Section 46: Appeals Authority Proceedings; Section 47: Conflicts and Disclosure of Interest by Members of Appeals Authority; Section 48: Acting by Member of Appeals Authority after Expiry of Term of Office; Section 49: Remuneration and Benefits of Members of Appeals Authority; and Section 50: Administrative Assistance to Appeals Authority

11.43.1 The above sections are new thus, the proceeding comments are applicable.

11.43.2 The introduction of an appeals mechanism is welcomed as this would facilitate demarcation and delimitation issues. The current system is subjected to recourse directly to the court. An Appeals Authority would alleviate unnecessary clogging of the court rolls.

11.43.3 The Chair of the Appeals Authority should either be a current or retired judge in order to enhance his/her credibility.

11.43.4 The term of office for members should be limited to five years. The ideal system would be if the term of office of the MDB Appeals Authority and the MDB itself would follow that of municipal councils. This will enable the MDB to undertake municipal boundary determinations and ward delimitations seamlessly during its term of office and that of a municipality. If the term is for seven years, the demarcation and delimitation work initiated by the outgoing MDB, will be interrupted and completed by a newly constituted MDB. The proposal as contained in Section 48 of the Bill to extend the term of office of a member will be obviated as municipal boundary determinations and ward delimitations must be completed well before municipal elections take place.

11.44 Section 51 Municipal capacity assessments

11.44.1 For the reasons as set out above, the MDB should not be charged with the function of the determination of capacities of municipalities.

11.44.2 In addition, consideration should also be given in deleting the references to the MDB undertaking capacity assessments in Sections 85 and 87 of the MSA1998 should be repealed.

11.45 Section 52: Provincial Boundary Alteration

11.45.1 This is an appropriate addition to the functions of the MDB, especially in the light of the following judgments:

11.45.1.1 *Matatiele Municipality and Others v President of the Republic of South Africa and Others (1) (CCT73/05) [2006] ZACC 2; 2006 (5) BCLR 622 (CC); 2006 (5) SA 47 (CC) (27 February 2006);*

11.45.1.2 *Matatiele Municipality and Others v President of the Republic of South Africa and Others (2) (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC) (18 August 2006); and*

11.45.1.3 *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008)*

11.45.2 It would appear that there is a *lacuna* as far as the amendment of provincial boundaries is concerned. In addition, this new provision brings the request to the doorstep of an individual or a community to make such a request.

11.46 Section 53: Regulations and Guidelines

11.46.1 This section is a re-enactment of the current section 41 of the MDA.

11.47 Section 54: Offences and Penalties

11.47.1 This section is a re-enactment of only a portion of the current section 41 of the MDA. The current provisions are more comprehensive in that it ensures proper order and a protection of members of the board and members of the public making submissions. In addition, provision should also be made to cover proceedings of the Appeals Authority.

11.47.2 The current provision reads as follows and should be used as text in the Bill:

“42 Offences and penalties

(1) A person commits an offence if that person-

- (a) wilfully disrupts the proceedings of the Board or a Board committee;*
- (b) wilfully hinders, obstructs or threatens members of the Board or of a committee, or other persons in the exercise of their powers or the performance of their duties in terms of this Act;*
- (c) does anything calculated to improperly influence the Board or a committee in its consideration of a matter;*
- (d) after having been summoned in terms of section 31 (a) fails-*
 - (i) to be present at a meeting of the Board or an investigating committee at the time and place specified in the summons;*
 - (ii) to remain present until excused by the Board or committee; or*
 - (iii) to produce a document specified in the summons;*
- (e) after having been called in terms of section 31 (b) refuses-*
 - (i) to appear before the Board or the committee;*
 - (ii) to answer any question; or*
 - (iii) to produce a document in that person's custody; or*

(f) *falsely gives out to be a Board member, a committee member or an employee.*

(2) *A person convicted of an offence in terms of subsection (1) is liable to a fine or to imprisonment not exceeding one year or to both a fine and imprisonment.”*

11.48 Section 55: Amendment of Legislation

11.48.1 Please refer to Schedule 1 in its current form below. Should the Bill be passed, such schedule will be published in an incomplete state.

11.49 Section 56: Transitional Arrangements

11.49.1 Please refer to Paragraph 3.3 above to ensure that with the repeal of legislation of this nature, due care must be exercised by ensuring that the constitutional obligation as contained in Section 155(3)(b) of the Constitution, is not interrupted by such repeal.

11.50 Section 57: Short Title and Commencement

11.50.1 No comment

11.51 Schedule 1

11.51.1 This Schedule is incomplete and the following amendments to the legislation as indicated, should also be contained:

No and year of law	Short title	Extent of application
ACT 32 OF 2000	LOCAL GOVERNMENT: MUNICIPAL SYSTEMS	Year/date reference to new Act in Section 2(a)
ACT 6 OF 2004	MUNICIPAL PROPERTY RATES ACT	Year/date reference to new Act in Sections 89A(1) and Section 90
ACT 56 OF 2003	MUNICIPAL FINANCE MANAGEMENT ACT	Year/date reference to new Act in Section 1 – definition of “municipality”

ACT 16 OF 2013	SPATIAL PLANNING AND LAND USE MANAGEMENT ACT	Year/date reference to new Act in Section 1 – definition of “municipal area”
ACT 13 OF 2005	INTERGOVERNMENTAL RELATIONS FRAMEWORK ACT	Year/date reference to new Act in Section 1 – definition of “municipality”
ACT 27 OF 2000	LOCAL GOVERNMENT: MUNICIPAL ELECTORAL ACT	Year/date reference to new Act in Section 1 – definition of “municipality”

12. CONCLUSION

- 12.1 Due consideration should be given in improving the current DMA as reflected in this submission instead of considering a brand-new Demarcation Bill.