

LEGISLATIVE ALERT

ISSN 0855-2460 A Publication of The Institute of Economic Affairs - November 2007

THE NEW SUB-METROPOLITAN DISTRICT COUNCIL ESTABLISHMENT INSTRUMENTS:

LACK OF POLICY CLARITY OR FAILURE OF LEGISLATIVE DRAFTING?

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INTRODUCTION

The otherwise serene existence of Sub-Metropolitan District Councils (SMDCs) as the first levels of the metropolitan structures of the Metropolitan Assemblies has been thrown into confusion as a result of the enactment of four pieces of subsidiary legislation which sought to reconfigure their structure, composition and functions.

The Local Government (Accra Metropolitan Assembly) (Establishment) (Amendment) Instrument, 2004, L.I. 1804; the Local Government (Kumasi Metropolitan Assembly) (Establishment) (Amendment) Instrument, 2004, L.I. 1805; and the Local Government (Shama-Ahanta East Metropolitan Assembly) (Establishment) (Amendment) Instrument, 2004, L.I. 1806, substitute Regulation 20 of the three Metropolitan Assemblies' Establishment Instruments namely, L.I. 1615 of 1995, L.I. 1614 of 1995 and L.I. 1613 of 1995 respectively.

The three Amendment Instruments also amend the functions of the SMDCs by

substituting a new Schedule for the Fourth Schedule (Regulation 21) of the three original Instruments on the "Functions of Sub-Metropolitan District Councils". All the Amendment Instruments referred to entered into force on 5th November 2004.

Meanwhile barely four months earlier, on 16th July 2004, the Local Government (Tamale Metropolitan Assembly) (Establishment) Instrument, L.I. 1801, had been passed. The Instrument repeals and replaces the Local Government (West Dagomba District Assembly) (Establishment) Instrument, 1988, L.I. 1453. It upgrades the West Dagomba Municipal Assembly to metropolitan status and re-designates the Assembly as the Tamale Metropolitan Assembly. Strangely, however, L.I. 1801 retains the same structure, composition and functions of the SMDCs as those that were subsequently repealed for the three Metropolitan Assemblies referred to earlier.

THE CORE ARGUMENT

The core argument of this paper is that

sufficient reconciliation was not done between the Amendment Legislative Instruments and the original Legislative Instruments, and between the Tamale Metropolitan Assembly Legislative Instrument and the Amendment Legislative Instruments for the other three Metropolitan Assemblies, such that the legislative frameworks for the establishment and operation of the SMDCs are presently very clumsy and in a state of total confusion.

What exists is real legislative confusion. Nomenclatures and concepts have been used that are not known to the law. A Sub-District Assembly has been referred to that is non-existent and functions have been assigned that cannot be justified either because the sectors to which those functions

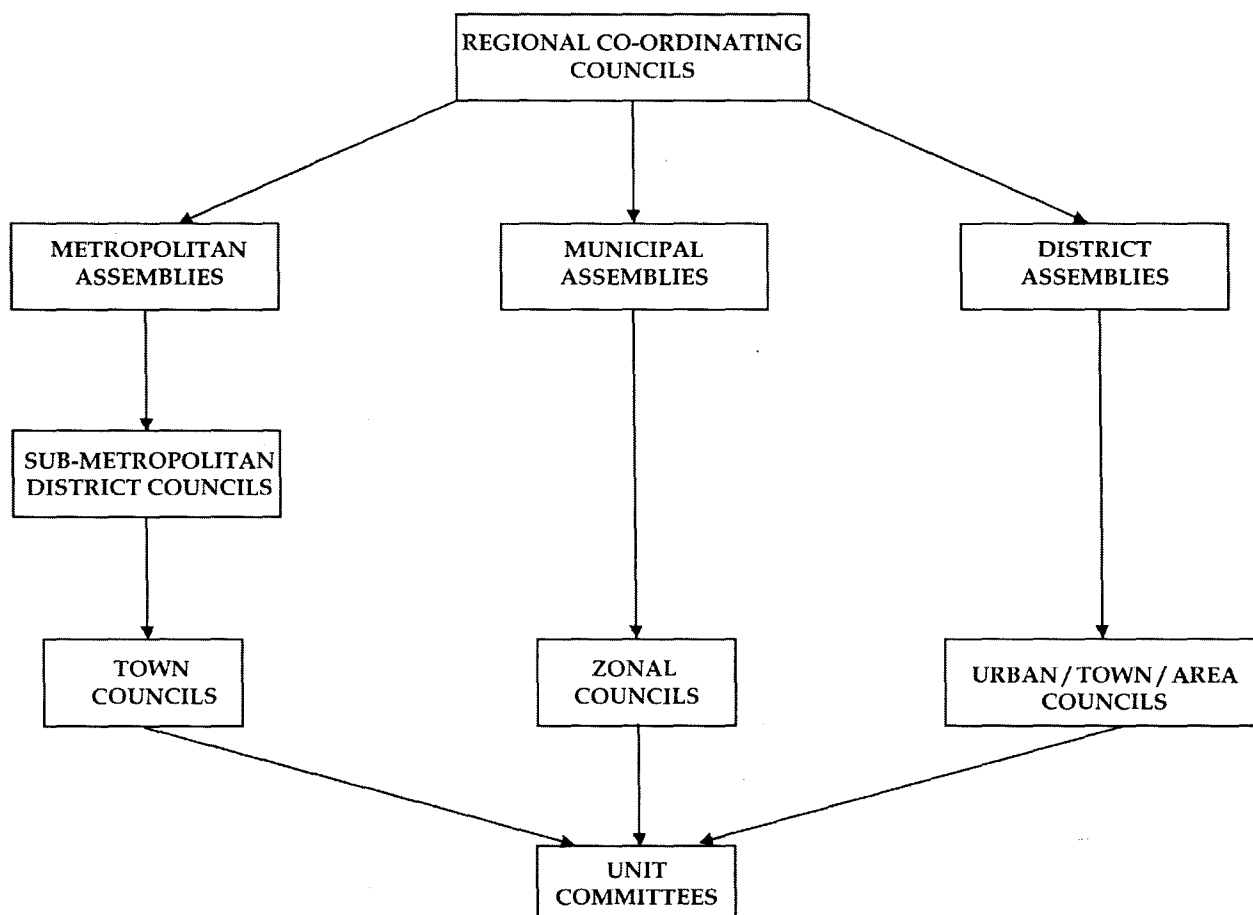
belong are not decentralized or because powers have purportedly been given that the SMDCs do not or cannot have.

But first, let us deal with the original SMDCs.

THE ORIGINAL SUB-METROPOLITAN DISTRICT COUNCILS

The SMDCs are part of the sub-district political/administrative structures of the Metropolitan/Municipal/District Assemblies (MMDAs). They exist only in the Metropolitan Assembly areas and form the first level of local government authority below the MMDA level. Their position on the local government structure is shown in Figure 1:

Figure 1: Structure of the Local Government System showing the position of the Sub-Metropolitan District Councils



Under their original Legislative Instruments, SMDCs of the three original Metropolitan Assemblies were constituted in Figure 2:

Accra	Kumasi	Shama-Ahanta East
1. Ablekuma	1. Asokwa	1. Sekondi
2. Ashiedu Keteke	2. Bantama	2. Shama
3. Ayawaso	3. Manhyia	3. Takoradi
4. Kpeshie	4. Subin	
5. Okaikwei		
6. Osu Klottey		

The SMDC structure was dictated by the complex and peculiar socio-economic, urbanization and management problems which confronted the three Metropolises.

Under the repealed provisions of their Establishment Legislative Instruments, the original SMDCs were composed and staffed as follows:

- "1 Each Sub-Metropolitan District Council shall consist of
 - (a) the chairperson of the Sub Metropolitan District Council;
 - (b) elected members of the Assembly in that Sub-Metropolitan District; and
 - (c) such number of adult residents in the Sub-Metropolitan District as may be determined by the Regional Minister who shall appoint the persons on behalf of the President in consultation with the traditional authorities and other interest groups in the sub-metropolitan district except that the total membership shall not be less than twenty-five nor more than thirty
2. The chairperson of a Sub-Metropolitan District Council shall be elected from among the members and shall hold office for two years and be eligible for re-election.
3. Each Sub-Metropolitan District Council shall have an Administrative Officer who shall be the Secretary to the Sub-

Metropolitan District Council.

4. The Administrative Officer referred to in sub-regulation (3) shall be a member of the Civil Service.
5. Other staff of the Sub-Metropolitan District Councils may be appointed by the Assembly".

With respect to functions, the original SMDCs were assigned the following responsibilities under the Fourth Schedules of the respective Legislative Instruments:

- "1. To number and keep records of all rateable properties in its area and collect all rates fixed and taxes levied by the Assembly.
2. Be responsible for the day-to-day administration of its area.
3. Promote and safeguard public health and for this purpose assign medical officers of health, health inspectors and other staff as appropriate except semi-skilled and unskilled labourers to its area.
4. Cause its area to be inspected regularly for the detection of nuisance or any condition likely to be offensive or injurious to health and to cause all proper steps to be taken to secure the abatement of the nuisance or the removal of the condition.
5. Build, install, maintain and control public latrines, lavatories and urinals.

6. Name all streets in its area and cause all buildings in such streets to be numbered.
7. Administer as agents the issue of loans under the Roof Loans Scheme.
8. Be responsible for the administration of self-help projects in consultation with the Ministry of Mobilisation and Social Welfare; and
9. Prepare annual estimates covering recurrent and development expenditure for inclusion in the budget of the Assembly”.

THE AMENDMENTS

Section 1 of the Amendment Legislative Instruments provides for the new membership of the SMDC as follows:

“1. The Membership of each Sub-Metropolitan District Council shall not exceed 40 members as indicated below:

- (a) the Deputy Chief Executive of each Sub-Metropolitan District Council;
- (b) all the elected members of the Assembly within the Sub-Metropolitan District Council;
- (c) not less than 10 Unit Committee

- members elected bi-annually on rotational basis within the Sub-Metropolitan District Council; and
- (d) such other persons not exceeding 30% of the Sub-Metropolitan District Council appointed by the Regional Minister on behalf of the President in consultation with the traditional authorities and interest groups in the Sub-Metropolitan District Council.

PROBLEMS WITH THE AMENDMENT LEGISLATIVE INSTRUMENTS

1. Re-demarcation of the Sub-Metropolitan District Councils.

There is evidence that the Metropolitan Assembly areas have been re-demarcated into new Sub-Metropolitan District Council areas, but this does not appear to have been backed by legislation, neither an Act of Parliament nor subsidiary legislation. According to information from the three Metropolitan Assemblies, the re-demarcated SMDCs are as shown in Figure 3:

Figure 3: New Sub-Metropolitan District Councils (Author's information)

Accra	Kumasi	Shama-Ahanta East
1. Abossey Okai	1. Asawase	1. Effia
2. Ashiedu Keteke	2. Asokwa	2. Essikado-Ketan
3. Central Ayawaso	3. Bantama	3. Shama
4. East Ayawaso	4. Kwadaso	4. Sekondi
5. La	5. Manhyia	5. Takoradi
6. North Ablekuma	6. Nhyiaeso	
7. North Okaikwei	7. Oforikrom	
8. Nungua	8. Old Tafo	
9. Osu Klottey	9. Suame	
10. South Ablekuma	10. Subin	
11. South Okaikwei		
12. Teshie		
13. West Ayawaso		

If this is indeed the policy decision of Government, and it appears to be, then the original Legislative Instruments of the three Metropolitan Assemblies ought to be amended to reflect this position in the Instruments.

Sub-Metropolitan District Councils created for the newly established Tamale Metropolitan Assembly under the Local Government (Tamale Metropolitan Assembly) (Establishment) Instrument, 2004, L.I. 1801 are as shown in Figure 4:

Figure 4: Sub-Metropolitan District Councils for the Tamale Metropolitan Assembly

Tamale Metropolitan Assembly	1. Central Sub-Metropolitan District Council
	2. North Sub-Metropolitan District Council
	3. South Sub-Metropolitan District Council

2. Composition of the SMDCs

The Amendment Instruments name as a member of the SMDC the “Deputy Chief Executive of the SMDC”. There are several problems with this position and nomenclature.

First of all, the position of the Deputy Chief Executive of the SMDC is not known to the law. It is not established by the Constitution. It is not established by Parliament because it is not the creation of the Local Government Act, 1993, Act 462, which is the enabling Act of Parliament on the local government structure. It is not established by the Presidential Office Act, 1993, Act 463, under which the incumbent could have been considered as a Presidential Staffer. The person holding the office is not appointed by the President as is required to be done of all public officers. The position is neither a creation of the Civil Service Law, 1993, PNDCL 327 nor of the Local Government Service Act, 2003, Act 656.

Regulation 20 (2) of the Amendment Establishment Legislative Instruments simply states that “there shall be a Deputy Chief Executive of the Council”. This is a completely illegal way of establishing a public office. Ministers must be appropriately empowered by law before

they can create public offices whether by Legislative Instrument or not, if they can at all. In the absence of such empowerment, the Minister of Local Government cannot confer on himself the power to create a public office, proceed to create and fill the public office (under Regulation 20 (2) (b) the Deputy Chief Executive is appointed by the Minister of Local Government with the prior approval of the SMDC), and have the public officer paid by the Central Government (under Regulation 20 (7), the emoluments of the Deputy Chief Executive shall be charged on the Consolidated Fund and the quantum of his emoluments are determined by the Minister of Local Government in consultation with the Minister of Finance).

The second problem is with the concept of the “Deputy Chief Executive of the SMDC” itself. It is not clear whether he is a Deputy Chief Executive “of” or “for” the SMDC. Regulation 20 (1) (a) refers to him as “the Deputy Chief Executive of each SMDC” whilst regulation 20 (2) states that “there shall be a Deputy Chief Executive for the Council”.

If he is the Deputy Chief Executive “of” the SMDC, then, it presupposes that there must exist a substantive position of “Chief Executive of the SMDC”, but that position

does not exist anywhere on the statute books. So in effect he is a Deputy to nobody. If he is Deputy Chief Executive "for" the SMDC, then it presupposes that he is Deputy to somebody somewhere else and is being appointed Deputy to be responsible for the SMDC. The only reasonable interpretation is that he is being appointed Deputy Chief Executive to the Metropolitan Chief Executive with responsibility for the

SMDC.

What that means is that there will be as many Deputy Metropolitan Chief Executives as there will be SMDCs. Under the new SMDC structure therefore, the Metropolitan Assemblies will have the number of Deputy Metropolitan Chief Executives as shown in Figure 5:

Figure 5: Number of Deputy Metropolitan Chief Executives under the new Legislative Instruments

Name of Metropolitan Assembly	Number of SMDCs	Number of Deputy MCEs
1. Accra	13	13
2. Kumasi	10	10
3. Shama-Ahanta East	5	5

There are very serious problems of jurisdictional competence, status, seniority, priority and cost both in cash and in kind involved with this kind of arrangement. Because Tamale still has the old SMDC structure, the assumption is that it does not have Deputy Chief Executives.

There is a third problem. Regulation 20 (3) of the Amendment Legislative Instruments refers to an "Executive Committee" of the "Sub-Metropolitan Assembly" which shall be presided over by the Deputy Chief Executive. There is no "Executive Committee" of the SMDC anywhere in the local government arrangement and there is no structure called the "Sub-Metropolitan Assembly". The Metropolitan Assembly rather has an "Executive Committee", but it is called the "Metropolitan Authority" and is chaired by the Metropolitan Chief Executive. As for the "Sub-Metropolitan Assembly", it does not exist at all! What exists is the Sub-Metropolitan District Council.

There is yet a fourth problem. Also made members of the SMDC (Regulation 20 (1) (c)) are "not less than 10 Unit Committee members elected bi-annually on rotational basis within the SMDC". This membership is lifted from the formula for the composition of the Town Councils and it has been lifted without first doing anything about the composition of the Town Councils themselves. It is not stated whether the 10 Unit Committee members to the SMDCs are the same as the 10 Unit Committee members to the Town Councils.

In any case, one would have thought that the Town Councils being the intermediate structure between the Unit Committee and the SMDC (see Figure 1 above), any representation to the SMDC from structures below it would come from the Town Councils and not the Unit Committees. As presently constituted, the relationship between the Unit Committee members on the SMDC and the members of the Town Councils is very unclear.

4. The Deputy Chief Executive and the Decentralization Concept

It is not clear whether the Deputy Chief Executive is a political office holder or a public office holder. If he is a political office holder, then he ought to be appointed by the President. If he is just a public office holder, then his appointment ought to be on the advice of the Public Services Commission, the Office of the Head of Civil Service or the Office of the Head of the Local Government Service. The Amendment Legislative Instruments fail all these tests. The Deputy Chief Executive is appointed by the Minister of Local Government "with the prior approval by simple majority of members of the Council present and voting at the meeting". Yet this strange "animal" called the Deputy Chief Executive is paid from public funds and his emoluments are charged on the Consolidated Fund.

Another strange provision is that the Deputy Chief Executive may be removed from office by the Minister of Local Government under Regulation 20 (4) (b). This is ministerial dictatorship at its worst and completely undermines the decentralization concept. How can a non-elected Minister of State be empowered by himself to permanently hold the "Sword of Damocles" over a member of the democratically constituted Metropolitan Assembly since under Regulation 20 (2) (a), the Deputy Chief Executive must be "a member of the Metropolitan Assembly"?

Another complication is introduced by Regulation 20 (8) of the Amendment Instruments. Regulation 20 (3) (a) provides that the Deputy Chief Executive shall "preside at meetings of the Executive Committee of the Sub-Metropolitan Assembly", whatever that means. Under

Regulations 20 (5) and (6), the Deputy Chief Executive has two four-year terms. Yet Regulation 20 (8) also makes reference to "the Chairman of the Sub-Metropolitan District Council" who shall "be elected from among the members and shall hold office for two years and be eligible for re-election". It would appear therefore that the Chairman of the SMDC is different from the Deputy Chief Executive who shall "preside at meetings of the Sub-Metropolitan Assembly". Two questions arise:

- What are the functions of the Chairman of the Sub-Metropolitan District Council?
- What body is it whose meetings the Deputy Chief Executive is supposed to "preside at"?

5. Functions of SMDCs

The functions of the SMDCs have been increased from the original nine (9) functions to twenty-five (25) functions in the Fourth Schedule of the Amendment Legislative Instruments. To the extent that these represent sub-delegation of the Metropolitan Assembly's delegated functions under their Establishment Legislative Instruments, it is a step in the right direction and a further boost to decentralization especially since it accords with the principle of *delegatus non potest delegare*. Two problems however arise with the new sub-delegated functions of the SMDCs.

First, some of the sub-delegated functions imply the exercise of legislative functions which is not allowed by the Local Government Act, 1993, Act 462 since that Act makes the Metropolitan Assembly the sole legislative body in the District Assembly system. The offending Regulations are:

- Function Number 12: To regulate any trade or business which may be noxious or injurious to public health or a source of danger to the public or which otherwise is in the public interest to regulate.
- Function Number 21: To control and regulate the sitting [sic] of advertisements and hoardings or other structures designed for the display of advertisements.

It is suspected that what is really meant is that the SMDCs will implement the Regulations relating to the performance of these functions as enacted by the Metropolitan Assembly in Regulations passed as bye-laws, because that is the competent local government body vested with the power to enact bye-laws. If, however, that is the case, then the draftsman failed to convey the intention of the legislator in the provisions of the Amendment Legislative Instruments.

Second, some of the added functions relate to the health sector which is no longer a decentralized sector. The offending Regulations are:

- Function Number 3: Promote and safeguard public health and for this purpose assign medical officers of health, health inspectors and other staff as appropriate except semi-skilled and unskilled labourers to its area.
- Function Number 4: Cause its area to be inspected regularly for the detection of nuisance or any condition likely to be offensive or injurious to health and to cause proper steps to be taken to secure the abatement of the nuisance or the removal of the condition.
- Function Number 11: To establish, maintain and carry out services for the removal and destruction of all refuse, filth and carcasses of dead animals from any public or private place.
- Function Number 12: To regulate any trade or business which may be noxious or injurious to public health or a source of danger to the public or which otherwise is in the public interest to regulate.
- Function Number 13: To provide the inspection of all meat, fish, vegetables and all other foodstuffs and liquids of whatever kind or nature intended for human consumption whether exposed for sale or not; and to seize, destroy and otherwise deal with all such foodstuffs or liquids as are unfit for human consumption and to supervise and control the manufacture of food and liquids of whatever kind or nature intended for human consumption.
- Function Number 15: To deal with the outbreak or the prevalence of any disease.

Under the Local Government Service Act, 2003, Act 656, Health is no longer a decentralized sector. Health sector functions are therefore not expected to feature among the functions of the decentralized structures of local government since those functions are now required to be performed by the de-concentrated offices and agencies of the Ministry of Health and the Ghana Health Service.

6. The Tamale Metropolitan Assembly Legislative Instrument, 2004, L.I. 1801

L.I. 1801 of 2004 establishing the Tamale Metropolitan Assembly was enacted just four (4) months before the Amendment Legislative Instruments to the three (3) original Metropolitan Assemblies drastically modifying the structure, composition and functions of their SMDCs, as already discussed. Those modifications

therefore must have been in contemplation at the time L.I. 1801 was being enacted. Yet L.I. 1801 repeats verbatim the structure, composition and functions of the SMDCs as they existed under the original Legislative Instruments for Accra, Kumasi and Shama-Ahanta East. What we have therefore is that the “new-look” SMDCs exist for the three (3) original Metropolitan Assemblies only, while Tamale continues to subsist on the old SMDC structure as they existed under the original Legislative Instruments. Whether this was intentional or a failure of legislative drafting or just drafting sloppiness is not quite clear.

QUESTIONS

A lot of confusion has been introduced into the Sub-Metropolitan District Council structure of Ghana's local government system. One is not certain whether it is as a result of lack of policy clarity or a failure of legislative drafting. It however appears to be a combination of both.

In the area of policy, the following are relevant and legitimate questions to ask:

- Is it the intention to change the nomenclature of the SMDC level of the local government system from Sub-Metropolitan District Council to Sub-Metropolitan Assembly?
- Is it the intention to appoint as many Deputy Chief Executives as there are SMDCs who will be Deputies to the Metropolitan Chief Executive?
- Is it the intention to appoint substantive Chief Executives to the SMDCs but who will nevertheless be styled “Deputy Chief Executives”?
- Is the Deputy Chief Executive “of” or “for” the SMDC?
- Is the position of Deputy Chief Executive a political office, a public service office or a hybrid of the two?
- Is it really the intention to vest the power of appointment of the Deputy Chief Executive in the Minister of Local Government and if yes, what is constitutional or legislative basis of that power?
- Is it the intention to vest law-making power in the SMDCs such that regulatory powers are assigned to them as part of their delegated functions?
- How come that the Minister of Local Government is decentralizing health functions to the SMDCs when Health is no longer a decentralized sector?
- Is it intended that there should be a Deputy Chief Executive appointed by the Minister of Local Government with the prior approval of the SMDC who presides at meetings of the non-existent Executive Committee of the non-existent Sub-Metropolitan Assembly (Regulation 20 (3) (a)) separate and apart from the Chairman of the SMDC who is elected from among the members of the Sub-Metropolitan District Council and who holds office for two years renewable (Regulation 20 (8))?
- Is it intended that there should be a SMDC structure, composition and functions for the Tamale Metropolitan Assembly different from those for the Accra, Kumasi and Shama-Ahanta East Metropolitan Assemblies?
- Is it confirmed that the numbers of the SMDCs have been increased from 6 to 13 for Accra, 4 to 10 for Kumasi and from 3 to 5 for Shama-Ahanta East?

In the area of legislative drafting, the following questions are both relevant and legitimate:

- Is it deliberate or a drafting mistake or oversight that what appears to be the

same body is referred to variously as "Sub-Metropolitan District Council" (Regulation 20 (1); 20 (1) (a); 20 (1) (b); 20 (1) (c); 20 (1) (d); 20 (3) (b); 20 (4) (a); 20 (8); 20 (9); 20 (11) and the Fourth Schedule; referred to as "Council" (Regulation 20 (2); 20 (2) (b); and referred to as "Sub-Metropolitan Assembly" (Regulation 20 (3) (a) and 20 (3) (c)?

- How come there is no Interpretation section in the Instruments when it is obvious that words and phrases like "Council", "Minister" and "Sub-Metropolitan Assembly" have been used which need to be defined?
- Is the Deputy Chief Executive "of" or "for" the SMDC since the two prepositions have been used separately in Regulations 20 (2) and 20 (3) (a)?
- Is the Minister of Local Government authorized by the Constitution or by legislation to establish political offices or public offices and to charge the cost of those offices to the Consolidated Fund and in any case, can he do so? If yes, which Article of the Constitution or which law? If no, then by what authority does he purport to establish the office of Deputy Chief Executive (Regulation 20 (2)) and charge his emoluments to the Consolidated Fund (Regulation 20 (7))?
- Regulation 20 (3) (a) makes reference to an "Executive Committee of the Sub-Metropolitan Assembly". Under what law is that Executive Committee established and which structure of the local government system is referred to as "Sub-Metropolitan Assembly"?
- From where does the SMDC derive legislative power such that it can be authorized "to regulate any trade or business which may be noxious or injurious to public health-----" (Fourth Schedule, Function 12) and also "to

control and regulate the sitting [sic] of advertisements and hoardings-----" (Fourth Schedule, Function 21)?

- Can the Minister of Local Government legally decentralize and delegate the functions of a sector that is not decentralized to a local government body as he has purported to do with the functions in the Health sector?
- Why has the policy of increasing the number of SMDCs not been reflected in the Amendment Instruments so that the anomalous situation has been created in which the Metropolitan Assemblies are working with SMDCs which have no legal backing?
- Is it not appropriate to amend the Tamale Metropolitan Assembly Establishment Legislative Instrument to make its framework for the SMDCs conform to those of the other Metropolitan Assemblies?

CONCLUSION

Clearly, there is the need to go back to the drawing board. The new SMDC Establishment Instruments are completely untenable and must be repealed. Thereafter, the Ministry of Local Government, the Local Government Service Council, the Attorney General's Department, the Subsidiary Legislation Committee of Parliament and representatives of the Metropolitan Assemblies as well as all other stakeholders in local government and decentralization must get together and agree on all the policy issues raised in this paper. These should include but need not be limited to:

- The number and names of the SMDCs for each of the Metropolitan Assemblies;
- The structure, composition and functions of the SMDCs and whether these should be the same for all the Metropolitan Assemblies or Tamale

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- should have a different structure, composition and functions;
- The position of the Deputy Chief Executive, his status, mode of appointment and functions;
 - The other related issues that have been unnecessarily complicated by the Amendment Legislative Instruments.

Thereafter, the Director of Legislative Drafting and his Drafting Team must sit

down with experts in the area and draft Legislative Instruments that will appropriately reflect the policy decisions as well as the intentions of the legislator. There is too much confusion in the legislations on the SMDCs as they exist now and the earlier they are cleaned up for easier interpretation and application as well as implementation, the better it would be for local government and decentralization implementation.

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