

# TOR framework – as amended after 7 July

## **Key:**

Ordinary Times Roman – possible standard text

Arial font shows the framework for drafting the terms of reference but shows that the person drafting would have to fill in specifics.

Courier New font shows notes for the person drafting.

\*\*\* something has to be filled in – name, etc

## **Situations in which the TOR framework may change in its detail**

- \* Redistribution projects may have different wording from labour tenant projects.
- \* Redistribution projects in which legal entity establishment becomes part of a planner's brief – we should take care that legal entity establishment does not get set on one side.
- \* Some information can be left out of internal TOR for DLA staff doing establishment.

# Invitation to submit proposals, workplans and quotations to establish a legal entity for the \*\*\* community residing on the farms \*\*\* in the \*\*\* district. Project facilitated under the Land Reform (Labour Tenants) Act 3 of 1996.

## 1. Purpose

The land reform (Labour Tenant) Act 3 of 1996 provides that labour tenants have a right to apply to the government for grants to buy and develop the land that they have occupied since June 1995. *Vela to check.* The group of people who plan to become new owners of the land have to form a legal entity to take transfer of the land.

The purpose of the brief is to enable the Department of Land Affairs and the \*\*\* community to appoint a service provider to assist with the formation of an appropriate legal entity. The purpose of this legal entity is to secure tenure for a whole group by enabling the group to take transfer of land and to set up a foundation for tenure security for the members of the group.

## 2. Approach

### 2.1 Purposes of the legal entity and of the constitution

The purposes of the legal entity with which this brief is concerned are:

- to secure tenure for a whole group by enabling the group to take transfer of land;
- to set up a foundation for tenure security for the members of the group.

The purposes of the constitution are:

- to provide a record of the founding agreements between the members of the legal entity, to provide guidance in day-to-day matters and to which members can refer when in doubt;
- through processes of registration, to establish the legal entity and the structures which represent it so that both can carry out legal acts;
- to provide a public document which outsiders can have access for information, for example, to find out how decision-making structures are constituted.

### 2.2 Methodological principles

- Accept that social and institutional changes happen in a series of small steps. Move from what people know to what is new. Where possible, adapt, don't replace, existing institutions and practices. Aim for direction towards ideals rather than trying to deliver ideals in a few days work.

- Work with concrete real life examples (such as work with a simple recordal system) and use simple language when talking to people.
- Methods that allow optimum participation, that are visual and concrete, and allow hands on practice, are preferred to question and answer methods.

## 2.3 Approaches

- Fieldwork processes should be carried out with participants from as wide a range of interest groups among the project members as possible.
- People should discuss, understand and agree on the following fundamental issues
  - membership of the legal entity;
  - main rights of members of the legal entity;
  - decision-making processes;
  - dispute resolution processes, including external recourse in disputes.
- Give people time to reflect on issues, and summarize and recap frequently.
- Help people to build an understanding of what currently exists before moving to how arrangements might look in future.
- Draft constitutions must be explained to and discussed with community members.
- Appropriate legal entity options should be offered to people after it has become clearer what they are trying to achieve.
- The service provider, project members and DLA go through the formal steps necessary for approval and registration of the constitution.

The workplan submitted with the service provider's proposal should show how the service provider plans to work with these approaches.

## 3. Background on the community

### Data

DLA file no: \_\_\_\_\_

Names: of project \_\_\_\_\_ of community \_\_\_\_\_ of farm \_\_\_\_\_

Info. on people: No. of households \_\_\_\_\_ No. of beneficiaries \_\_\_\_\_ No of other members ("associates") \_\_\_\_\_

Property description: Farm name and number \_\_\_\_\_ Subdivision \_\_\_\_\_ District \_\_\_\_\_

Owner: \_\_\_\_\_ Distance from nearest town \_\_\_\_\_

Officials responsible: Project manager \_\_\_\_\_ Team leader \_\_\_\_\_

Contact information for officials: Address\_\_\_\_\_ Tel/fax\_\_\_\_\_ Email\_\_\_\_\_

Notes to person drafting TOR

- \* If the TOR are for producing more than one legal entity, the person drafting should arrange information in a table.
- \* Official producing the information should give some indication of how reliable the information is.
- \* If the official does not have certain information, put the heading in, but leave the heading blank.

## History

The focus is history as it relates to the land, and includes the following kinds of things. If the official does not have certain information, say so.

- \* Occupation
- \* Agreements made
- \* The way people have of explaining or justifying their rights – e.g. “the graves of our ancestors are here; our families lived here from the 1800’s; we used to use those fields over there but the farmer took them over to grow tomatoes
- \* Evictions (could be crucial for membership)
- \* Conflicts
- \* Past and current relationships with the tribal authorities (if any)
- \* Where the group is now in the land reform timeline
- \* Liaison person or people within the community working with land reform

## Issues

Specific things/ difficulties that a service provider needs to take account of. Examples...

- \* relationships with neighbours
- \* power relations within the community

## 4. Outputs expected

As part of the process of legal entity establishment, the service provider will be expected to deliver the following minimum outputs:

- **A constitution** which
  - can be used and understood by project members and outsiders working with them and can stand in court;
  - is appropriate to the situation of project members (see section 5.1 below).
- **A legal entity establishment report** which
  - will assist DLA to make an assessment of the constitution for approval and registration purposes
  - will enable legal entity establishment to be integrated better into institutional development in the land reform timeline. (see section 5.2 below).
- **A simple system for recording membership**  
The service provider should leave with the community a simple system for recording membership.

## 5. Requirements

### 5.1 The constitution

#### 5.2.1 Essential content of the constitution

The following content of the constitution is considered essential. Note that the actual content of the constitution may be arranged differently from this list.

- Name of the legal entity.
- Clear objectives of the legal entity (note that these are largely givens).
- Clear definition of first members of the legal entity. If appropriate, clear definitions of classes of members.
- Who are the rights holders together with the nature of their main rights.
- How the legal entity and its decision-making and executive structures are built up. Decision making structures may include a general meeting and an annual general meeting; the executive may be a committee.
- Decision making steps, who makes decisions and sometimes principles to guide decisions, for the following:
  - Determining and changing the nature, breadth and duration of rights
  - Determining and changing rights holders. These may be changes in membership, and may be by means of resignation and transfer, death and inheritance, termination of membership and transfer of rights.
  - Determining and changing rules that qualify how rights are exercised.
  - Determining and changing sanctions when these rules are not kept
  - Changing the constitution
  - Terminating the legal entity
- Define the scope of the disputes with which the legal entity is concerned (mainly the nature, breadth and duration of rights and how these rights are being exercised) and how these will be resolved. External recourse for members trying to assert and realize rights in disputes.
- Establishment and responsibility for recordal systems for decisions, especially those relating to rights holders and rights, for example, minutes and membership registers.

The constitution should further

- make provision for special protection required by the group, for example, to counter specific risks of outside interference
- as far as possible reflect agreements actually made by people;

- be a practical document adapted to people's real situation, institutions and practices. This means that there should **not be glaringly inappropriate provisions**, for example, setting up a committee to manage the affairs of a legal entity consisting of two families.

### 5.2.3 Language and form of the constitution

The following are requirements for the language and form of the constitution:

- **Clarity and transparent meaning.** The document should not require considerable re-reading or re-writing before its meaning becomes clear.
- **The logic of the document should be clear** – i.e. headings should be organized in a way that helps understanding. Important points should come before the less important. Connected ideas should be grouped together.
- **The document should not contain internal contradictions.** Watch out for use of different terms for the same concept and cross-references which undermine each other. Membership is a crucial area needing clarity and an area where there are frequently internal contradictions. Watch out also for internal contradictions about powers and quorums. If the document is organized in a logical way, and the person drafting is careful about using the same term to mean the same idea and avoids cross referencing, it is less likely that these contradictions will occur so frequently.
- The constitution should be either drafted and registered in the **vernacular language** of project members or translated into it for use by the project.
- Because the courts and banks are not fully multilingual, copies of the constitution should be available in **English as well as vernacular languages**, irrespective of the language of registration.
- The constitution is a founding document and should not be too long.

### 5.2.4 First draft of community rules (bylaws) relating to land use and management.

Most of the work of developing community bylaws will happen in the later stages of land reform, either with or without outsider intervention. The service provider should not include by-laws or community rules in the constitution itself. Some groups may be able to name only some community rules during the legal entity establishment phase. The service provider should note these and leave them behind with the community.

### **5.2.5 Access to the constitution**

In order to improve access to the constitution, a minimum of \*\*\* copies of the constitution in the vernacular language must be distributed appropriately throughout the community. If the number of households is small, the service provider should ensure that all households have a copy. A minimum of \*\*\* copies of the constitution in English lodged with a responsible person in the community.

### **5.2.6 Authorship**

While noting that ownership of the legal entity document remains with DLA and the project for which it has been prepared, the final constitution should record the authors of the constitution. The purpose of this requirement is to enable future determination of the provenance of constitutions, should this become necessary.

### **5.2.7 Procedures for approval and registration**

See attachment ##. Vela will submit his proposals for consultation and approval and these will then be attached to the terms of reference.

## **5.3 The legal entity establishment report**

The final legal entity establishment report should be submitted when the constitution is submitted. In redistribution situations where legal entity establishment is part of a planner's brief, the person drafting could request reports along the way.

The legal entity establishment report should cover the following, as briefly as possible. The service provider is free to arrange information in ways that feel useful.

### **5.3.1 Aspects of fieldwork**

- A description of the fieldwork actually carried out;
- A brief description of the situation of the people worked with (aspects relevant to legal entity establishment);
- Agreements made by project members around issues considered essential for legal entity establishment;
- Additional important issues that came up, for example, families living as occupiers who refused to join the legal entity, evictees who may return to land and want to be members, the need for special protection from outside interference;
- Inputs of service providers into shaping people's thinking;
- Which legal entity was adopted and why;
- Particular constraints and issues in carrying out fieldwork and how these were dealt with.

### **5.3.2 Aspects of the constitution**

A description and assessment of how the service provider has taken the following into account in drafting the constitution:

- The agreements and decisions actually made between project members;
- How the service provider worked with the tension between the requirements of law and the ideals of policy (direction towards ideals) and those of appropriateness and practical functioning for project members in their own situation;
- External recourse for resolving disputes;
- Provisions in the constitution that particularly relate to processes for asserting, justifying and realizing rights.

### **5.3.3 Way forward**

This section should name specific essential issues, such as development of rights recordal systems, that must be picked up during later stages of the land reform timeline or beyond, which can be included in the terms of reference of DLA officials and later service providers.

## **6. Time frame**

The person drawing up the terms of reference should fill in this section. Note that proposals in which the workplan contains less than ten days for fieldwork and drafting combined and plans to spend less than two months from start to finish will probably deliver a lower quality product. This has implications for the budget.

If there are particular reasons for urgency, the person drafting the terms of reference should note these.

## **7. Tendering details**

DLA have to agree internally on whether they include kinds of skill and knowledge required. If yes, it goes in here.

Service providers may establish teams to ensure that they can meet these requirements.

Ownership of the constitution and other documents remains with DLA and the community.

The person drafting should put in details of who the proposal should be sent to.



## 8. Sources of information

The service provider is free to consult the following sources of information in order to complete the proposal:

- Information contained in file number \*\*\* available from \*\*\*
- Service providers who have worked previously on this project \*\*\* (contact details)
- DLA officials familiar with the project\*\*\* (contact details)
- Copies of white paper, acts, other relevant reports

The following information is available from the LEAP project:

- LEAP conceptual framework – work in progress (*concept outline*) 3 pp
- LEAP Conceptual framework summary DRAFT 5pp
- CONSTITUTION DRAFTING for LEAP learning group 20.6.2000 3 pp
- Some tips for drafting legal entities in simple language 7pp
- Language and translation – implications and questions 4 pp