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1. INTRODUCTION

Focus of the Workstream

The National Constitution, in Schedules 4 and 5, designates specific powers and functions to each sphere of government, which are enjoined to work together “to secure the well-being of the people of the Republic”.

In practice, there is great complexity with respect to these powers and functions, and significant confusion has arisen with respect to who should do what. The confusion arises from three sources: a) functions may be assigned in the Constitution but be historically unfunded by national and provincial government (as with library services), leading to claims of “unfunded mandates”; b) there may be no clear definitions of / distinctions between functions, as with (provincial) public transport and municipal public transport; or c) functions may be assigned by legislation but not through the Constitution (such as housing), resulting in claims of “underfunded mandates” when municipalities have to subsidise such functions.

Any of the above three situations compromises service delivery, since a sphere of government can argue that a certain function is not its responsibility (if the definition is unclear) or that it is not adequately funded.

This workstream is addressing a) above, namely those functions that are assigned to Provinces in Schedules 4A and 5A of the Constitution but which may be delivered by municipalities. It will also, in its second phase, address the issue of the role of district municipalities.

Need for a Provincial Framework

The allocation of powers to the national and provincial governments is not static as the Constitution provides that both the national and provincial governments may assign any part or aspect of their legislative or executive powers to local government in general or on a differentiated basis to a specific municipality or municipalities.

It is in this context that the need for a provincial framework for the division of powers and functions between provincial and local government and the re-alignment of powers and functions between districts and local municipalities arises.

This project will locate those powers and functions that would release the capacity of the province to fulfil its mandate and assign powers to local government in accordance with the principle of subsidiarity enshrined in the Constitution.

The re-allocation of powers and functions between provincial and local government will ensure that each sphere knows exactly what it is responsible for, thereby reducing inefficiency and increasing accountability, as well as reducing the costs of governance that excessive coordination of concurrency requires.

PART 1 – PRINCIPLES APPLYING WHEN CONSIDERING TRANSFERRING A SPECIFIC POWER IN A PROVINCIAL FUNCTIONAL AREA TO A MUNICIPALITY(IES)

The purpose of the nine principles in this conceptual framework is to guide the Province when exercising its assignment powers. These principles apply only to the transfer of a specific power in a provincial area of functional responsibility to local government through a legislative or executive assignment (delegation).¹ Their purpose is to ensure that any transfer of a provincial power to local government is congruent with local government's constitutional mandate; will incentivise better service delivery and accountability without compromising local government finances and essential national and provincial interests (in particular equitable access to services); and follows a consistent, transparent and inclusive process.

Three related policy choices are involved in transferring a specific power to local government, and the scope and limits of each will be determined by the Constitution and legislation:

- (1) Whether a specific discretionary power should continue to vest in provincial government or be assigned to local government;
- (2) If the latter, whether authority should vest in all or only some municipalities; and
- (3) Whether full or partial discretion should vest in municipalities.

Both the rationale for transferring a specific power to local government and the mechanism selected (legislative assignment or executive assignment – which is equivalent to delegation) must conform to the principles of cooperative governance, the Bill of Rights, the distribution of revenue and expenditure powers and functions between the spheres, the rules of public accountability, applicable national legislation, and the structure and financing of service delivery – for those functions and in general. For present purposes, these institutional properties underpin the eight principles proposed in this framework.

By presenting these principles, the framework does not intend to subject the debate about the location of governance responsibility to a mechanical examination. The principles are meant to ensure a meaningful dialogue around an agreed set of issues.

¹ The congruence between executive assignment and delegation is explained in paragraph 2.5.

Principle 1 The issue in question must in fact concern the transfer of a specific power in a provincial functional area to local government

These principles only apply when the issue for decision in fact involves the possibility of shifting a specific power in a provincial functional area (i.e. Schedule 4 or Schedule 5) to local government. The result will then be the sharing of power in the provincial functional area to the extent of the transfer. The principles do not apply in situations where the issue in question concerns overlapping jurisdictions between the two spheres of government, the present adequacy of funding arrangements in a functional area where a transfer of authority to local government is not at issue, or a specific power whose transfers to local government is already provided for in legislation. Consequently, a factual assessment of the exact issue at stake in each case must be undertaken to ensure that the transfer of a specific power in a provincial functional area to local government is indeed in question.

Principle 2 A power in a provincial functional area necessarily fits local government's place shaping mandate

The Constitution, legislation and policy confer a place shaping mandate on local government. Local government's function in the state is to shape human settlements, local development and community life in local areas through its powers to govern, regulate and invest. This place-shaping role is not exclusive to local government, but is a useful point of entry because it offers a logical description of local government's distinctive developmental objects that has traction in practice. The power in question will fit local government's place shaping role when it necessarily relates to either –

(a) The municipal built environment and human settlements

Municipalities are responsible for planning the development of physical human settlements that promote and sustain human life, well-being, equality and dignity. Municipal service delivery then connects households to basic services that are essential to sustain life and human dignity and fight poverty.

(b) Promoting community development and local enterprise

By controlling physical land use, providing essential services such as water and electricity, and investing in economic infrastructure such as roads and bridges municipalities create incentives to attract the firms and skilled labour they need to grow their local economies and expand their revenue bases. Building community, culture, and inclusive citizenship, and mediating interest-group competition and social conflict, are softer, but not less important, attributes of the place-shaping role.

Principle 3 Transferring a power in a provincial functional area to local government would create incentives for better service delivery and accountability

Even if a power in a provincial functional area fits local government's mandate there must be real benefit to shifting greater discretion to local government, in the form of improved service delivery and accountability. International and domestic experience suggests that devolution will create incentives for local accountability and service delivery efficiency only when local government bears the "benefit and pain" of delivering the service. Benefit is derived from greater local government control over information and decision-making about the mix of service outputs to meet the preferences of local citizens. Pain is induced when local government must fund those services from its own taxes and receipts, keep to a hard budget constraint, and account to citizens that can vote it out of office (voice) or leave its jurisdiction (exit). Shifting the power is likely to incentivise service delivery efficiency and accountability to citizens when -

- (a) Local decision-making will better reflect local preferences (political benefits)**
- (b) There are no spill-over costs associated with local service delivery (economic benefits)**
- (c) Managing service delivery locally is more efficient (administrative benefits)**
- (d) Local government funds the service and keeps to a hard budget constraint (fiscal benefit)**

Principle 4 There are adequate funding arrangements for transferring a power in a provincial functional area to local government

The benefits of devolution will not accrue if funding arrangements for service provision are inadequate. Consequently, as a matter of principle, present and future funding arrangements for the service must be made explicit before any decision is taken to shift the power to local government. In the context of current legislation, this principle requires that –

- (a) The fiscal gap, if any, is quantified and sources of funding are identified**
- (b) The cost of providing the service over a three year period is projected, as required by law**
- (c) The funding commitments of each sphere are agreed**
- (d) The provincial government must assure an appropriate level of funding to meet any standards for a basic level of service it may prescribe**
- (e) Where local government exercises its discretion to deliver a higher standard of service than that prescribed, or if no obligation to provide a service is imposed, it is solely responsible for funding that service**

Principle 5: Transferring a power in a provincial functional area to local government must not have unintended negative consequences for essential provincial and national interests

Although the power might fit local government's mandate and devolution will induce aggregate benefits, shifting discretionary authority to local government might have unintended negative consequences for essential provincial and national interests, including provincial and national policies, inter and intra municipal equity and equitable access to services. Provincial policies and interests should not be compromised by the transfer of the discretionary power. Similarly, in light of the principles of cooperative government, national policies (including equity of access) should not be compromised by the transfer of discretionary power to local government.

Principle 6: Authority in the provincial functional area can be disaggregated into distinct powers if that would maximise fit and minimise adverse consequences without destroying the overall integrity of the function

Disaggregating power in the functional area may be an option to secure the benefits of shifting a discretionary power to local government without compromising provincial and national interests provided that this would not destroy the integrity of authority in the functional area. The institutional structure of service delivery is not uniformly the same for all functions, and each public service will have its own unique value chain, set of actors, intergovernmental connections, funding arrangements, engineering and planning properties, and cost-efficiency scale that makes it either more or less conducive to devolution to local government. In the case of some functions, however, it might be possible and desirable to devolve power over specific services within the functional area without compromising the overall integrity of the function. For example, this is the case for the library function, where the research suggests that it might be feasible for procurement of books to remain a provincial responsibility (to ensure equity), with local government managing library services. Applying this principle requires that -

- (a) **Authority in a functional area should be disaggregated into its constituent services, sub-functions and funding sources**
- (b) **The internal properties of authority in the functional area make it conducive to retain some authority at provincial level while transferring aspects of service provision to local government without it compromising the overall integrity of authority in the functional area**

Principle 7: Assigning a power to some but not all municipalities (differentiation) is justified on the grounds of demand, capacity and equity

A function may fit local government's mandate, yet circumstances exist that make it undesirable or impractical to assign authority in the functional

area to all municipalities in the province. The issue is under what circumstances can and should differentiation occur.

Differentiated policy is a response to the reality of structural or institutional asymmetry in the municipal system. Structural asymmetry exists because there are vast differences in economic potential, population size, levels of poverty and inequality amongst the country's municipalities. Similarly, institutional capacity (skills, experience, systems and resources) varies considerably, making some municipalities more ready to exercise authority than others. Both forms of asymmetry lead to different levels of demand for more authority and varying capacity to exercise it, and policy differentiation is a way of accommodating and addressing those variations. The Constitution provides for asymmetry by recognizing three different categories of municipality – metropolitan (A), local (B) and district (C). Functional differentiation is also explicit because metropolitan municipalities are given full and automatic control over all municipal functions whereas control is only conferred on the other two categories through a subsequent statute. Differentiation is also explicit in the different mechanisms that were created to permit responsibility for non-municipal functions to be transferred to local government.

Differentiation can cause problems when assignment to some but not all municipalities is the preferred response to asymmetry, or when executive assignment (delegation) is the preferred mechanism for transfer but there is a strong demand for legislative assignment. Appropriate differentiation must satisfy three criteria:

(a) Differentiation would not compromise equity

To the extent that full authority is equated with local self-government, differentiation can lead to the perception that some areas are better serviced than others. Equity is also a factor in choosing between legislative and executive assignment. The essential difference between these instruments is the degree of control over service delivery to be retained by the authority that can make the choice to assign. The literature suggests that executive assignment (delegation) is preferred when national or provincial governments have a strong interest in equity or when legislative assignment would compromise inter or intra-municipal equity. In these cases, it is preferable to manage service delivery through a principal-agent relationship than to let go of control and leave the risk of compromising equity entirely to the discretion of local government or municipalities.

(b) There is demand for devolution

For economic and other reasons some municipalities may lay a stronger claim to devolution than others. For example, this is the argument of many advocates for metros having stronger control over their built environments.

(c) There is institutional readiness

This factor is primarily associated with the capacity of the selected municipalities to exercise the authority that would be conferred through assignment, and is built into the present legal framework

governing assignment. Capacity is invoked as an argument against conferring authority (the municipality does not have capacity) and for conferring authority (as in the current process to vet capacity for housing accreditation, which allows municipalities to prove they have the required capacity). Readiness is a broader concept than capacity and is arguably implicit in the notion of conditionality built into the legal framework. A municipality may have the technical capacity to undertake the function but because of persistently poor audit outcomes or corruption is not in a state of readiness for more authority. Taking steps to ensure that a municipality has the requisite capacity to perform the function must therefore be an explicit part of the process.

Principle 8: The mode of transfer selected must suit the function or sub-function, the benefits sought, and any provincial and national interest to be secured

The Constitution enables national and provincial governments to ‘transfer’ a discretionary power to either local government as a whole, a group of municipalities or a specific municipality. The transfer may take the form of a legislative or executive assignment (delegation), when prescribed conditions are met. The difference between the two mechanisms is the degree of discretion the province would retain and local government would receive after the power is transferred, which reflects a decision about the appropriate balance between the interests of all three spheres with respect to that functional area. Legislative assignment would transfer full authority and accountability for decision-making, finance and management of the function, and leads to a relationship between the two spheres based on regulation and oversight. Executive assignment (delegation) would transfer only specific and conditional decision-making powers to local government, not overall authority and accountability, and establishes a form of principal-agent relationship. The two mechanisms would thus result in different incentive structures. The central issue in legislative assignment is creating incentives for local government discretion and, correspondingly, provincial regulation and oversight. The central issue in executive assignment (delegation) is not creating incentives for local autonomy but creating incentives to restrain local government (the agent) to the terms of the provincial government’s (principal) mandate. Neither form of assignment will affect the regulatory and supervisory powers of the province with respect to that functional area, which remain with the provincial government. In practice, this principle is applied as follows:

- (a) **If the service or function would benefit from maximum local government discretion, then legislative assignment is the preferred mode of transfer**

- (b) **If more limited local government discretion is to be transferred, then executive assignment is the preferred option**

- (c) **If no discretion is to be transferred, an agency agreement is the only option**

Principle 9: The provincial government must take steps to strengthen its capacity to regulate, monitor and support local service provision where a discretionary power is assigned to local government

Provincial government's regulatory powers over a function are not disturbed by an assignment. Regulation includes the power to make laws, set standards for service delivery, oversee local government's performance, and intervene to correct failures of execution. The provincial government must ensure that it has the capacity to exercise these powers, in particular that it has sufficient information about the quality of local delivery and the means to gather and analyse data.

The nine principles framed as conceptual questions:

1. Does the issue for decision concern the possible transfer of a power in a provincial functional area to local government?
2. Does the power necessarily fit local government's mandate with respect to -
 - (a) The municipal built environment and human settlements?
 - (b) Promoting community development and local enterprise?
3. Would transferring the power to local government create incentives for better service delivery and accountability?
 - (a) Will local decision-making better reflect local preference (political benefits)?
 - (b) Are there spill-over costs associated with local service delivery (economic benefits)?
 - (c) Would managing service delivery locally be more efficient (administrative benefits)?
 - (d) Is the service to be funded by local government subject to hard budget constraints (fiscal benefits)?
4. **Are there adequate funding arrangements for transferring the power to local government?**
 - (a) Has the funding gap been adequately quantified and the sources of funding determined?
 - (b) Is there a three year projection of costs for providing the service?
 - (c) Are the funding commitments of each sphere clear, explicit and agreed?
 - (d) Is provincial funding for prescribed standards assured?
 - (e) Is local government's discretion to fund a higher level of service clear, explicit, and agreed?
5. Would transferring the power have unintended negative consequences for essential provincial and national interests?
6. Can authority in the functional area be disaggregated to maximize fit and minimize adverse consequences without compromising the overall integrity of the function?
 - (a) Do the internal properties of the functional area make it conducive to assignment?
 - (b) Can the function be disaggregated into constituent services, sub-functions and funding sources?
7. Is assigning authority to some but not all municipalities justifiable on the grounds of demand, readiness and equity?
 - (a) Would it compromise equity within the municipality or between municipalities?
 - (b) Is there a demand for assignment from some municipalities?
 - (c) Does the municipality have the capacity to perform the function and is it ready to exercise additional authority?
8. Does the mode of transfer selected suit the function or sub-function, the benefits sought, and any provincial and national interest to be secured?
 - (a) Would the service benefit from maximum local government discretion, in which case legislative assignment is the preferred mechanism?
 - (b) Is more limited local government discretion to be transferred, in which case executive assignment is the preferred mechanism?
 - (c) Is no local discretion desirable, in which case agency agreement is the only option?
9. Does the provincial government have the capacity to regulate the function and oversee its execution by local government?

PART 2 – METHODS TO TRANSFER ASPECTS OF A PROVINCIAL FUNCTION

2.1 Introduction

It follows from Principle 8 that the provincial government must choose the appropriate method to transfer a specific power in a functional area to local government. Firstly, the method used determines the relationship between the province and the municipality after the transfer. Secondly, the choice has consequences for the legal requirements and internal decision paths that need to be followed in realising the transfer. This framework suggests a menu of three options:

- legislative assignment;
- executive assignment; or
- agency

In broad terms, the three options represent a sliding scale that ranges investing –

- local government with maximum discretion (legislative assignment); via
- local government with some discretion (executive assignment); to
- local government with no discretion (agency).

2.2 Legislative assignment

The Western Cape Parliament has legislative authority over the functional areas listed in Schedule 4 and Schedule 5 of the Constitution.

A legislative assignment means:
The Western Cape Parliament passes a provincial Act in which it transfers aspects of a Schedule 4A or Schedule 5A functional area to a municipality or to local government.

2.2.1 Assignment to one, more or all municipalities

The provincial Act may assign to one or a specified number of municipalities (s 104 Constitution). It may also assign to all municipalities in the province (s 156(1)(b) Constitution).

2.2.2 Discretion for the municipality

This method of transferring aspects of a provincial functional area invests the municipality with maximum discretion over that particular function. The municipality at the receiving end may pass its own by-laws giving effect to its own municipal policy on that topic. This authority is not without boundaries, as is shown below.

In principle, the municipality may also choose not to perform the power. However, this discretion may be limited by provincial regulation on the topic, which may prescribe minimum standards.

2.2.3 Provincial powers after legislative assignment

Even after a legislative assignment, the provincial government retains important powers.

Firstly, a legislative assignment does not mean a change to the Schedules in the Constitution. It does not mean that a function out of Schedule 4A or 5A is shifted to Schedule 4B or 5B and that the provincial government loses all authority. For example, if “Libraries” is legislatively assigned, it does not mean that the provincial government can no longer regulate, establish and operate provincial libraries. The provincial government retains full authority over whatever falls outside of the definition used in the assignment Act.

Secondly, even though a legislative assignment is meant to be permanent, it is not completely irrevocable. The Provincial Parliament could revoke the assignment with a new law.

Thirdly, the provincial government retains its supervisory role over the municipal exercise of the assigned power. After a legislative assignment, the provincial government is still responsible for –

- (1) regulating minimum standards for the municipal exercise of that power (s 155(7) Constitution);
- (2) monitoring municipal performance in the exercise of that power (s 155(7) Constitution);
- (3) supporting municipalities in exercising the assigned power (s 154(1) Constitution and s 10A Municipal Systems Act); and
- (4) intervening in municipalities where needed (s 139 Constitution).

2.2.4 Financial and capacity consequences of legislative assignments that impose a duty

Generally, a legislative assignment will transfer a discretionary power to the municipality. The municipality is given a choice as to whether or not it wants to exercise the power.

However, if the assignment Act (or any other provincial legislation) contains rules that impose a duty on the municipality, for example by prescribing minimum standards for the delivery of a service, the MEC is instructed by the law to take appropriate steps to ensure sufficient funding, and such capacity-building initiatives as may be needed (see also Principle 4(d)). These capacity building initiatives may require departments to –

- make expert advice available to municipalities to support managers; and

- set up training programmes for municipal staff required to undertake the function.

2.2.5 Political and legal accountability

After a legislative assignment, the municipality becomes politically accountable for the performance of the function. Furthermore, all legal liability, i.e. liability for damages arising from the (non)-exercising of the function shifts to the municipality.

For example, the provincial Parliament passes a law that assigns the power over “Municipal libraries” to a municipality. The municipality then becomes legally liable for damages arising out of accidents that occur with staff or visitors (subject to common law rules).

2.2.6 Provincial Act of Parliament

The end-product of a legislative assignment is a provincial law. This provincial law must deal with the following:

- (1) definition of the aspects of the provincial function that are captured by the assignment, including any revenue raising powers associated with the function;
- (2) provision for provincial monitoring of the municipal exercise of the power;
- (3) provisions that clarify to whom the authority is assigned; and
- (4) the transfer of provincial staff, assets and liabilities, if applicable.

2.2.7 Procedure

National legislation prescribes certain procedures. It is primarily the responsibility of the relevant MEC to ensure that these procedures are followed before the Bill is tabled in the Provincial Parliament.

In short, these procedures entail:

- approval by the Provincial Treasury;
- an assessment by the Financial and Fiscal Commission;
- consultation with the MECs for local government and Finance;
- consultation with SALGA – Western Cape;
- publication of the Bill for comment; and
- ensuring that the Bill is accompanied by a memorandum.

In addition, national legislation indicates what these assessments, consultations and communication should deal with. In a way, it prescribes an agenda for these processes which revolves around the reasons for opting for legislative assignment, financial implications for the short and long term, human resources consequences, capacity and future support for municipalities.

2.2.8 Duration

The necessity of adopting a provincial Act, coupled with the abovementioned procedures make this method of transferring aspects of a provincial function a lengthy one. The time lapse between a first consideration of the shift in terms of this framework and the final adoption of a provincial Act will usually be no less than two years.

2.2.9 Diagram on legislative assignment

Assignment of legislative authority

The Western Cape Parliament passes a provincial Act in which it transfers aspects of a Schedule 4A or Schedule 5A functional area to a municipality or to local government.

Constitutional basis:

- S 104 Constitution: legislative assignment to specific municipalities
- S 156(1)(b): legislative assignment to all municipalities

Instrument:

Provincial Act

NB! Legal principle:

If the assignment imposes a duty, province must ensure sufficient funding and capacity building - s 10A Systems Act

Prerequisites:

- Publish Bill for public comment – S 154(2) Constitution
- Consult FFC – S 9(2)(a) Systems Act
- Consult MECs LG and Finance - S 9(2)(b) Systems Act
- Consult SALGA – S 9(2)(b) Systems Act
- Bill accompanied by memorandum 9(2)(3) Systems Act

PROVINCIAL GOVERNMENT	MUNICIPALITY
Legislature's authority: <ul style="list-style-type: none"> • regulatory framework i.t.o. 155(7) Constitution (i.e. monitoring, minimum standards etc) • revocation of the assignment 	Legislative authority: full legislative authority, subject to the provincial regulatory framework
Administration's authority: <ul style="list-style-type: none"> • monitor - s 155(7) Constitution, chapter 10 of Systems Act and provincial law • support - s 154(1) Constitution and s 10A Systems Act • intervention - S 139 Constitution 	Administrative authority: <ul style="list-style-type: none"> • subject to monitoring by province • subject to intervention
Risk <ul style="list-style-type: none"> • No political or legal liability 	Risk <ul style="list-style-type: none"> • Political and legal liability

2.3 Executive assignment

The Provincial Executive Council has executive authority to implement and administer certain national and provincial laws.

The Provincial Executive can transfer aspects of a provincial function to a municipality by concluding an agreement with that municipality in which it transfers the authority (and duty) to implement a national or provincial law. The agreement takes effect upon proclamation by the Premier.

2.3.1 Assignment to one municipality

The Provincial Executive may only assign to individual municipalities. An executive assignment to all municipalities in one agreement is not possible.

2.3.2 Discretion for the municipality

This method of transferring aspects of a provincial function to a municipality results in some discretion to the municipality. After receiving an executive assignment, the municipality exercises the power in its own name. An important principle is that the agreement itself determines the discretion that is transferred. The discretion may be substantial or it may be minimal, depending on the actual content of the agreement.

Importantly, the executive assignment may transfer a duty to exercise certain powers. If it does, the law prescribes that the provincial government must ensure sufficient funding and capacity-building.

There is no transfer of legislative powers. The municipality may not adopt by-laws to give effect to its own municipal policy; it is compelled to implement the provincial (and, if applicable, national) laws that deal with the exercise of the power.

The only exception is when the Provincial Executive transfers to the municipality some of the regulatory powers that it, as a Provincial Executive, exercises. In that event, the municipality may make by-laws but only to administer that aspect of the provincial function. It should not equip the municipality with broad policy making authority.

2.3.3 Provincial powers after executive assignment

The provincial powers after executive assignment are as determined in the agreement. The municipality must agree to the terms of the executive assignment for it to come into effect. Therefore, there cannot be an encroachment of municipal autonomy if the agreement provides for provincial supervision. This supervision can take the form of monitoring schemes, performance assessments, provisions that provide for provincial intervention other than through section 139 etc.

In any event, the power of the provincial Parliament to make laws within the functional area remains completely intact. There has not been any change to the provincial government's lawmaking authority. The provincial government may therefore, in a provincial law, determine policy related to the municipal exercise of an assigned power.

Even though the executive assignment is intended to be durable, nothing stops the parties from agreeing to a time horizon in the agreement.

2.3.4 Financial and capacity consequences of executive assignments that impose a duty

An executive assignment may impose a duty. In that case, the municipality is not given a choice as to whether or not it wants to exercise the power. Rather, it is instructed to do so.

The MEC is then instructed by the law to take appropriate steps to ensure sufficient funding, and such capacity-building initiatives as may be needed (see also Principle 4(d)). These capacity building initiatives may require departments to –

- make expert advice available to municipalities to support managers; and
- set up training programmes for municipal staff required to undertake the function.

2.3.5 Political and legal accountability

After an executive assignment, the municipality becomes politically accountable but only to the extent that it has been afforded discretion in terms of the assignment. It also becomes legally liable for anything that arises as a result of the (non-)exercise of the function.

2.3.6 Executive assignment is sometimes compulsory

Section 156(4) of the Constitution provides that transferring aspects of a provincial function is sometimes compulsory. Because the transfer is done by agreement, this provision means that the provincial government can be forced to enter into negotiations with a municipality on the transfer of executive authority. Section 156(4) of the Constitution mentions three requirements:

- (1) The matter necessarily relate to local government (see Principle 2).
- (2) The matter would most effectively be administered locally (see Principle 3).
- (3) The municipality has the capacity to administer it (see Principle 7).

If these three criteria are all met, the provincial government can be forced to enter into negotiations towards executive assignment. Whether or not the

criteria are met, can be answered with reference to the Principles, mentioned in Part 1.

2.3.7 Agreement

The agreement can take the form of an Implementation Protocol, which is a type of agreement, specifically geared towards solving intergovernmental uncertainty. Implementation Protocols are regulated in the Intergovernmental Relations Framework Act, 2005.

The agreement must address aspects such as –

- a precise description of the powers to be performed by the recipient authority, including any revenue raising powers associated with the function;
- if applicable, a framework for the transfer of staff and assets;
- service levels;
- performance indicators; and
- monitoring and evaluation.

2.3.8 Proclamation

A signed agreement is not sufficient. The Premier determines, by Proclamation, if and when the agreement takes effect.

2.3.9 Procedure

The law prescribes certain procedures for the executive assignment. They are significantly less onerous than those for the legislative assignment. This is logical as the executive assignment is, in essence, an agreement between the Provincial Executive and the municipality. The municipality concerned negotiates its own interests into the agreement.

Before assigning the function, the relevant MEC must submit a memorandum to the national Minister for local government and to the National Treasury. The law does not prescribe that the MEC waits for or considers any response to the memorandum. However, the principle of cooperative government (s 41(1)(h) Constitution) requires that, if the Minister or National Treasury wish to engage on the matter, the MEC may not ignore national government.

Unlike the legislative assignment, the executive assignment does not require an assessment by the Financial and Fiscal Commission.² It is not compulsory

² Section 3(2A) of the Financial and Fiscal Commission Act (FFC Act), which requires the FFC's assessment must be read in conjunction with sections 9 and 10 of the Municipal Systems Act. The Systems Act includes the FFC in the process towards legislative assignments (s 9), but not in the process towards executive assignments (s 10). The two Acts were amended in the same year (with the Systems Act coming

to consult SALGA – Western Cape but it is strongly advised to involve them in the process.

2.3.10 Duration

The executive assignment does not require the adoption of a provincial Act and the legal procedures are less onerous. It could therefore be finalised in a considerably shorter period. However, much will depend on the duration of the negotiations with the municipality in question.

after the FFC Act) so the distinction of the Systems Act determines how the FFC Act must be interpreted.

2.3.11 Diagram on executive assignment

Executive assignment (delegation)

The Provincial Executive can transfer aspects of a provincial function to a municipality by concluding an agreement with that municipality in which it transfers the authority (and duty) to implement a national or provincial law. The agreement takes effect upon proclamation by the Premier.

Constitutional basis:

- S 126 Constitution: assignment of executive authority to individual municipalities

Instrument:

- Agreement (e.g. Implementation Protocol)
- Proclamation by the Premier

NB! Legal principle:

- S 156(4) Constitution: sometimes compulsory
- If the assignment imposes a duty, province must ensure sufficient funding and capacity building - s 10A Systems Act

Prerequisites:

- Submission of memorandum to Minister LG and NT – S 10 Systems Act

PROVINCIAL GOVERNMENT	MUNICIPALITY
Legislature's authority: <ul style="list-style-type: none"> • Full legislative authority • Provincial laws prevail in all instances over any by-law on the matter 	Legislative authority: <ul style="list-style-type: none"> • No substantive, i.e. policy-making authority • By-laws that facilitate administration (but only if part of the assignment) • Provincial law always prevails
Administration's authority: <ul style="list-style-type: none"> • Authority to revoke assignment (subject to s 156(4) Constitution) • Monitor, support and intervene as determined in the agreement 	Administrative authority: <ul style="list-style-type: none"> • Implements relevant national and/or provincial legislation • Subject to monitoring and intervention as determined in agreement
Risk <ul style="list-style-type: none"> • No political or legal liability 	Risk <ul style="list-style-type: none"> • Political and legal liability

2.4 Agency

The Provincial Executive can transfer aspects of a provincial function by shifting operational responsibilities for aspects of a functional area to a municipality by means of an agency agreement.

2.4.1 Agency agreement with one municipality

The agency agreement is a contract between the Provincial Executive and a municipality. Agency agreements with the entire sphere of local government are not possible.

2.4.2 Discretion for the municipality

The essence of an agency agreement is that it does not transfer any policy or decision-making discretion. Its objective is to transfer as little discretion as possible. It rather transfers the operations from a provincial department to a municipality. The municipality may therefore not adopt any by-laws on a matter that has been transferred by agency agreement. It must strictly implement the terms of the agency agreement. After receiving the function in terms of an agency agreement, the municipality performs the function on behalf of and in the name of the provincial department.

2.4.3 Provincial powers after the agency agreement

The Provincial government retains all its legislative and executive powers on the sub-function concerned. The extent to which the provincial government can supervise the exercise of the function is determined in the agency agreement. The municipality implements provincial instructions and plans as per the agency agreement.

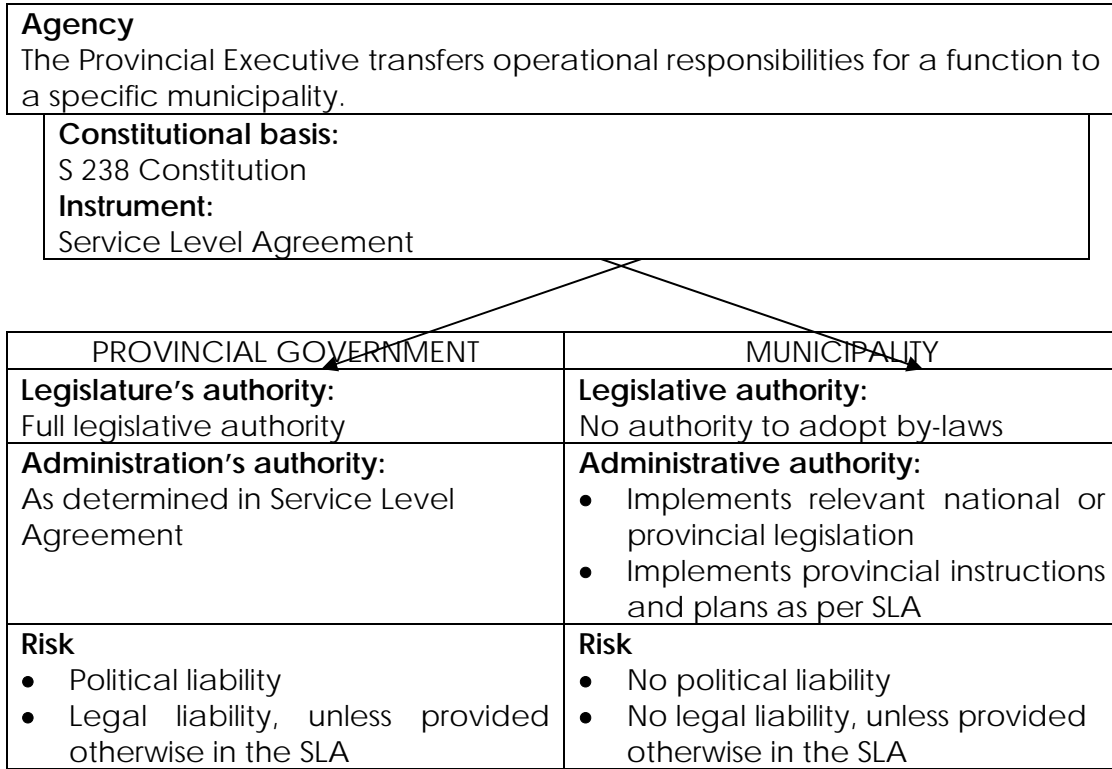
2.4.4 Political and legal liability

The provincial government remains politically accountable for the performance of the function. The provincial government carries all legal liabilities unless the agency agreement provides otherwise.

2.4.5 Procedure

The agency agreement is an ordinary contract. There is no legally prescribed procedure for the conclusion of an agency agreement.

2.4.6 Diagram on agency



2.5 Why no delegation?

The Constitution provides that organs of state may delegate functions to other organs of state (s 238). There are no rules anywhere in the law that provide for a procedure for delegation to local government. However, the instrument of delegation may not be used by the provincial government to transfer functions to local government. The Constitution, Municipal Systems Act and other legislation contain a carefully defined and regulated system for transferring aspects of provincial functions. The provincial government may not circumvent these rules by choosing a general method and thereby opt out of adhering to the assignment rules.³

In any event, whatever the provincial government wants to achieve with delegation, can be achieved with the executive assignment:

- Both methods transfer executive and administrative responsibilities only without transferring legislative authority.
- In both instances, the municipalities can be compelled to perform the function (as opposed to the legislative assignment).
- In both instances, the transfer is implemented through an agreement, which determines the provincial's role after the transfer.

Procedurally, the only difference between an executive assignment and delegation is the Premier's Proclamation and the fact that a Memorandum must be submitted to the Minister for local government and the National Treasury. When compared to delegation, these two aspects do not materially complicate, or extend the time needed to prepare an executive assignment.

2.6 Interim arrangements

Concurrent with the process towards a legislative or executive assignment, agency agreements may be introduced in the interim to *legalise* the exercise of contested powers and functions. Assignment, in particular the legislative assignment, is a lengthy process and it may be desirable to enter into an agency agreement that addresses transitional service delivery arrangements but also stipulates the intention to assign legislatively or executively.

³ The principle of *lex specialis derogat lex generalis* applies; if there is a special law that directly applies to a set of facts, it prevails over a general law that applies to the same and other facts.

PART 3 –DECISION-MAKING

3.1 Introduction

The process to consider the transfer of aspects of a provincial function to local government may be initiated by a provincial department, a municipality or by organised local government.

As referred to earlier, section 156(4) of the Constitution implies that a municipality (or organised local government on behalf of a municipality) may force the provincial government to enter into negotiations on the possible transfer of an aspect of a provincial function to local government.

If the provincial government agrees to consider a transfer, it is suggested to distinguish between a preparatory phase and a decision making phase.

- (1) The preparatory phase is an informal and inclusive process whereby the relevant stakeholders consider the application of the Principles of Part 1 to the issue at hand.
- (2) The decision making phase commences when the relevant MEC, equipped with the outcomes of the preparatory phase, enters the legally prescribed procedures in order to prepare the actual transfer.

3.2 Preparatory phase

3.2.1 Applying the Principles of Part 1

The consideration of the transfer of aspects of a provincial function commences with a preparatory phase in which the principles, outlined in Part 1 are applied to the issue at hand. The purpose is to –

- (1) deliver a rigorous assessment of the status quo performance of the provincial function;
- (2) build understanding amongst stakeholders regarding the challenges and opportunities faced in the specific provincial functional area under consideration;
- (3) interrogate the most effective method to transfer aspects of a provincial function to local government; and
- (4) build consensus amongst stakeholders regarding the method to transfer aspects of a provincial function to local government.

The application of the principles should deal with aspects such as:

- (1) existing definition/s and norms and standards;
- (2) national policy and legislative context;
- (3) global trends and best practice;
- (4) current service levels and capacity to perform the function within the provincial and local government spheres;

- (5) financial indicators: revenue and expenditure trends, operating, capital and maintenance budgets, revenue sources, spend per capita, assets and liabilities, and affordability levels;
- (6) staffing indicators: numbers of staff in different categories, numbers of full and part time staff, vacancy levels, post levels, and skills levels;
- (7) administrative efficiencies in provincial and/or local delivery.

3.2.2 Consultation

The findings and recommendations of the application of the principles will be discussed with all relevant provincial stakeholders for additional qualitative input prior to being reported back to the relevant MECs, SALGA and Provincial Top Management.

3.3 Decision making phase

If the preparatory phase results in a recommendation to proceed with the transfer of aspects of a provincial function, the decision making phase is entered into. It is suggested that the transition from the preparatory phase to the decision making phase is marked by a decision of the Provincial Cabinet. Depending on which method of transferring a specific power is decided on, the relevant MEC needs to ensure that the legislative requirements for legislative assignments are met. These requirements are detailed in the Constitution, section 9, 10 and 10A of the Municipal Systems Act, 2000 and in the Financial and Fiscal Commission Act, 1997.⁴

3.3.1 Legislative assignment

The legislative assignment, i.e. the passing of a provincial Act, transferring an aspect of a provincial function to local government is subject to the following procedures.

3.3.1.1 Provincial Treasury

The relevant MEC must obtain approval from the Provincial Treasury before proceeding with the procedure.

⁴ Section 6 of the Intergovernmental Fiscal Relations Act, 1997 defines the Budget Forum as the body where governments consult on "any proposed legislation or policy which has a financial implication for local government". This has been interpreted to mean that the legislative assignment must be tabled in the Budget Forum. However, this provision stems from 1997 and has been overtaken in 2003 by a legislative scheme, dedicated to assignments. It is suggested that compliance with the scheme for assignments in the Constitution, Systems Act and FFC Act is sufficient and that tabling in the Budget Forum is not legally required.

3.3.1.2 Financial and Fiscal Commission (FFC)

The FFC's advice on the proposed legislative assignment is critical. The FFC Act provides that the provincial assignment Act will be invalid if the MEC has not considered the advice of the FFC. The relevant MEC must inform the FFC of the possible impact of the legislative assignment on –

- the future division of revenue;
- the fiscal power, fiscal capacity and efficiency of affected municipalities; and
- the transfer, if any, of employees, assets and liabilities.

The MEC must then request the FFC to assess the financial and fiscal implications of the legislation and provide its recommendation.

The MEC and FFC must agree on a turnaround time for the FFC's assessment. In the absence of an agreement, the FFC must deliver the recommendation within 180 days after receiving the request. If the FFC does not meet this deadline, the MEC may proceed without it.

The MEC must report on its consideration of the FFC's advice. This report must be submitted to:

- the municipality or municipalities affected by the intended legislative assignment;
- the National Treasury; and
- the Provincial Treasury.

It is preferable that the MEC responsible for managing the transfer should engage with the FFC and the National Treasury at least 18 months (one and a half budget cycles) prior to the desired commencement date.

3.3.1.3 Consultation

The relevant MEC must at least consult:

- the MEC for local government;
- the MEC for finance; and
- SALGA.

Outside of these legally required consultations, it is suggested to include:

- the national Minister of Finance;
- the national Minister responsible for the public service concerned;
- The national Minister responsible for any other line department affected by the inclusion of local government in the provincial function; and
- organised labour.

3.3.1.4 Prescribed agenda for consultation

The consultation must at least deal with:

- the FFC's assessment;
- the outcome of the application of the principles in Part 1;

- the financial implications of the assignment projected over at least three years (see Principle 4);
- any possible financial liabilities or risks after the three-year period (see Principle 4);
- the manner in which additional expenditure by municipalities as a result of the assignment will be funded (see Principle 4);
- the implications of the assignment for the capacity of municipalities (see Principle 7); and
- the assistance and support that will be provided to municipalities in respect of the assignment (see Principle 9);

If the outcome of these consultations is that the legislative assignment will be proceeded with, a Bill must be drafted.

3.3.1.5 Publication and tabling of the Bill

Before tabling the Bill in the Provincial Parliament, the MEC must publish the Bill for public comment to enable SALGA, municipalities and other interested persons to make representations with regard to the Bill.

When the Bill is tabled in the Provincial Parliament, it must be accompanied by a memorandum, which –

- provides at least a three-year projection of the financial and fiscal implications of the assignment for the affected municipalities;
- discloses any possible financial liabilities or risks after the three-year period;
- indicates how any additional expenditure by those municipalities will be funded; and
- indicates the implications of the assignment for the capacity of those municipalities.

The FFC's assessment, referred to above must be included in the Memorandum.⁵

3.3.2 Executive assignment

3.3.2.1 Negotiations

The municipality and the relevant MEC enter into negotiations concerning the envisaged executive assignment.

3.3.2.2 Memorandum to national government

Before concluding the agreement, the MEC must submit a Memorandum to the national Minister for local government and the National Treasury. This Memorandum must at least –

- give a three-year projection of the financial implications of that function or power for the municipality;

⁵ Unless the FFC failed to submit its assessment within 180 days.

- disclose any possible financial liabilities or risks after the three-year period; and
- indicate how any additional expenditure by the municipality will be funded.

3.3.2.3 Financial and capacity consequences

The agreement is likely to contain aspects that impose a duty on the municipality, for example by prescribing service levels, indicators, minimum standards, reporting requirements etc. In that respect, the MEC is instructed by the law to take appropriate steps to ensure sufficient funding, and such capacity-building initiatives as may be needed. These capacity building initiatives require departments to –

- make expert advice available to municipalities to support managers; and
- set up training programmes for municipal staff required to undertake the function.

3.3.2.4 Conclusion of the agreement and proclamation

The agreement can take the form of an Implementation Protocol. An enabling framework for Implementation Protocols is provided by section 35 of the Intergovernmental Relations Framework Act, 2005. Where the implementation of a policy, the exercise of a statutory power, the performance of a statutory function or the provision of a service depends on the participation of organs of state in different spheres of government, those organs of state must co-ordinate their actions in such a manner as may be appropriate or required in the circumstances, and may do so by entering into an implementation protocol.

It is suggested that the agreement entered into between the relevant MEC and the specific Municipal Council includes–

- a clear statement that the specific assignment is in terms of section 126 of the Constitution;
- a clear definition of the function to be assigned; and
- provision for human resource and finance issues.

When the negotiations are successful, both the MEC and the municipality sign the agreement and the Premier proclaims the date on which the agreement goes into effect.

3.3.3 Agency

As indicated earlier, there is no specific legally prescribed procedure for the conclusion of an agency agreement. The normal rules regarding contracts apply. It is advised, however, that the agency agreement contains a precise description of the role to be performed by the recipient authority specifying –

- service levels;
- performance indicators;

- risks transferred to the recipient authority, if any; and
- remuneration to which the municipality is entitled for performing the provider role, whether from subsidies, direct transfers from the primary authority or through authority to levy fees for the service, or a combination of these mechanisms.

The agreement may take the form of a concession-type agreement (provider responsible for raising capital to provide infrastructure), a lease-type agreement (provider responsible for raising revenue but not for capital investment) or a management-contract-type (provider responsible for managing the service for a fee and where all other responsibilities remain with the provincial government).

3.4 Timing the approval of a transfer

Municipal budgets are finalised in June, which implies that functions which are transferred to municipalities will only become effective on the 1st July of any year. Furthermore, the decision to assign a power or function must be included in the Integrated Development Planning (IDP) process of municipalities. In order to allow the municipal planning and budget process to take account of the transfer of a specific power, the transfer must be approved or rejected at least nine months prior to the July month (i.e. September) in which it is anticipated that the municipality will commence taking authority for the newly-assigned function.

- **Part 4 – FINDINGS**

4.1 Libraries

What follows is a report on the application of the above framework to the provincial function “libraries”. This section examines the library function according to the nine principles set out in the Draft Framework.

Introduction

“Libraries other than national libraries” are a Schedule 5A functional area that falls within the exclusive legislative competence of a province. There is no comparable competence for municipalities.

Public libraries in the Western Cape, established and managed by either the province or municipalities, routinely engage in some or all of the following activities:

- Lending books and other reading materials (as well as video and audio recordings) to members of the public free of charge
- Providing reading and reference materials on site to the public free of charge
- Providing a range of other services to the local community, including: internet facilities, communication venue for municipal notices, meeting space for civil society, study space for learners, and space for the conduct of adult education courses.

These activities serve the following functions:

- Providing leisure and culture for members of the community through the lending or use of library materials
- Providing a knowledge source for members of the community through the lending or use of library materials and provision of information
- Providing learner support by making accessible materials (both print and electronic) and providing study space
- Providing community support by providing internet access, a venue for municipal notices and consultation, meeting spaces for civil society and study space for learners

Due to the fact that before the coming into operation of the 1996 Constitution libraries were a local government matter, most public libraries are currently still administered and funded by municipalities. There are 148 library sites in non-metropolitan areas (130 public libraries, 3 multi-purpose community centres, 5 mobile libraries and 10 satellite libraries) and 105 in the City of the Cape Town (98 public libraries, 3 mobile libraries and 4 others).

The Province administers only libraries in three municipalities. Of the entire budget for library services for 2007/08 of R322 million (both provincial and local budgets), the Province contributed only 21%. The R252 million contribution by municipalities is thus for a function that they do not constitutionally hold. Of the provincial library budget of R65 million only 2.9% was earmarked for municipalities. The operating budgets of the local municipalities⁶ and the metro are supported by own revenue to the tune of 95% and 85% respectively.

The core functions of province in the provincial library service are the selection, ordering, professional preparation and processing of library materials, the provision of an information service, the promotion of the use of libraries and library materials, and the maintenance of a computerised library information system. The main functions of municipalities are the employment of staff, managing the operations of libraries and the maintenance of library buildings.

The question that confronts the Western Cape Government is whether and how this practice could be regularised.

Principle 1 The issue in question must in fact concern the transfer of a specific power in a provincial functional area to local government

Since “libraries” are an exclusive functional area of provinces and there is no similar reference in either Schedule 4B or 5B, the issue at hand is the transfer (assignment or delegation) of authority from the Province to municipalities.

Principle 2 The provincial power necessarily fits local government’s place shaping mandate

It is apparent from the functions listed above that libraries fulfil an important function of building cohesive, integrated and viable human settlements:

- They provide leisure and culture to the community.
- They provide a knowledge and information source through materials or internet to a range of sectors in the community, such as scholars, businesses and interest groups, and on a range of issues, such as gender, HIV/AIDs and government programmes.
- They facilitate municipal communication and provide a meeting site for civil society groups.
- They often support the local tourism function through the provision of information to visitors and local residents.
- Overall, librarians have observed that “libraries play a critical role in building social cohesion as it is one of the few meeting places in

⁶ Only one district municipality is providing library services in a district management area.

South Africa society where people across all races, class, gender and geographical areas can meet, interact and feel that they belong.”

Libraries form part of a municipal built environment and act as a public space where everyone has the right to access and benefit from the service. They clearly contribute to community cohesiveness and the promotion of social and economic development.

In addition, public libraries are performing a strong supplementary role in primary and secondary education.⁷ It is a reference source for school projects, particularly in light of the poor quality of many school libraries and the emphasis that outcomes based education has placed on research. Many libraries also provide study space for learners. As primary and secondary education is one of the primary responsibilities of the Province, the educational support that municipal libraries provide goes beyond their own mandate. Furthermore, the appropriateness of the library materials for school purposes is best determined by the Province (where there should be close liaison between the library services and the provincial Department of Education).

Local libraries have thus a strong “provincial” dimension which is also reflected in the library support that the Province currently provides. Whilst the library function has clear linkages to the provincial education function that should be strengthened, it is clear that a library also has a far broader role within the community that is not limited to learner support. The role of libraries in promoting cohesive, integrated and viable human settlements and in stimulating social and economic development has a clear functional link to local government’s place-shaping mandate. Extending the functional area of “libraries” to the competence of municipalities furthers local government’s constitutional objects of: promoting economic and social development; promoting a healthy and safe environment; and encouraging community participation in the affairs of local government.

Principle 3 Transferring a power in a provincial functional area to local government would create incentives for better service delivery and accountability

(a) Local decision making will better reflect local preferences

Making decisions about the continued support, establishment and utilization of a library the competency of the municipal council, should result in the better reflection of local preferences and in the enhancement of accountability. Local government is meant to be more responsive to local community needs and to plan for its services based on community input.

⁷ The City of Cape Town’s main library plays also a supportive role in respect of tertiary education.

The incorporation of the library function into a municipal IDP, through public participation processes, should ensure the reflection of local preferences. Local level involvement by communities is encouraged through local delivery of the service. There are 'friends' and volunteers attached to some libraries who assist with fund raising and through donations. Local organisations and clubs, such as the local bridge, ABET group and bird club, make use of library venues. There are existing partnerships between some municipal libraries and locally based NPOs that are enhanced through local level delivery.

Communities are able to access and hold councillors politically and directly accountable for the delivery of services.

(b) There are no spill-over costs associated with local service delivery (economic benefits)

A library is a direct service to a community within a geographically defined area. Local libraries are generally confined to local catchment areas, whereas the provincial libraries by their nature would tend to have a broader geographical reach. The local geographical 'containment' of the function supports local government responsibility for the function.

(c) Managing service delivery is more efficient (administrative benefits)

It can be argued that local level performance of the library function will result in a more efficient service. Local level management of the function enhances the administrative operations of the library owing to closer management control and quicker response requirements, e.g. ordering of administrative supplies. Furthermore, the expertise of operating libraries lies at the local government level as municipalities have been operating public library facilities in the Western Cape for decades.

The evident economy of scale in the provincial library services is the purchasing of books, although perhaps only for the non-metro municipalities. This function could still be performed by province even if province decided to legislatively or executively assign the function.

Principle 4 There are adequate funding arrangements for transferring a power in a provincial functional area to local government

(a) The fiscal gap, if any, is quantified and sources of funding are identified

Municipalities are providing the bulk of funding for the operation of libraries. The fiscal gap has been quantified in 2007 as a sum of R 252 million, calculated as the contribution of local government to the function. However, this amount does not account for current under-expenditure levels within the function given the lack of prioritisation of the function by municipalities. The City of Cape Town funds the service at R58 per capital

compared to an average of R39 per capita spend by non-metro municipalities.

(b) The cost of providing the service over a three year period is projected, as required by law

(c) The funding commitments of each sphere are agreed

It is proposed that provincial government costs a basic minimum level library service function and funds all municipalities to secure this level of service. Municipalities able to afford a higher level of service should be able to provide top-up funding for this service or secure alternative revenue sources. The funding commitments of provincial government and each individual municipality should be agreed.

By retaining the responsibility for the purchasing and distribution of library materials in non-metro areas, the province play an important role in ensuring equity through a distribution policy designed for this purpose.

(d) The provincial government must assure an appropriate level of funding to meet any standards for a basic level of service it may prescribe

Implicit in the Province's performance of the function of libraries, may be the setting of standards in terms of which each municipality should provide a basic level of the library service, including number of library facilities per capita, size of library holdings, etc. Given that standards are prescriptive, the Province must assure the level of funding to meet the required basic level.

(e) Where local government exercises its discretion to deliver a higher standard of service than that prescribed, or if no obligation to provide a service is imposed, it is solely responsible for funding that service

As noted above, should a municipality want to provide a library service over and above the standards set by the Province, it will be responsible for such costs.

Principle 5: Transferring the function to local government must not have unintended negative consequences for essential provincial and national interests

Historically, the library function has been performed with the co-operation of municipalities in South Africa. The functions that each sphere rendered varied provincially, although in most instances the municipalities managed the operations of the library and funded library infrastructure, staff and library assets. The provincial administrator performed an oversight function, managed provincial libraries and was responsible for the ordering and distribution of library materials. In the Western Cape legislation was past in

the 1950s that formed the basis for the 1981 Libraries Act that legislated these roles and responsibilities within the province. The legal basis for this arrangement changed dramatically with the adoption of the 1996 Constitution, which placed the library function in Schedule 5A as an exclusive provincial competency.

The national Department of Arts and Culture envisages that local government plays a primary role in the delivery of the library function. The assignment of the function to municipalities is thus in line with the national policy. The Department commissioned KPMG to undertake an assessment of the appropriateness of the function for devolution in 2007 and the study findings supported assignment.

Principle 6: Authority in that functional area can be disaggregated if that would maximize fit and minimize adverse consequences without destroying the overall integrity of the function

(a) A function should be disaggregated into its constituent services, sub-functions and funding sources

(b) The internal properties of the function make it conducive to retain some authority at provincial level while transferring aspects of service provision without it compromising the overall integrity of the function

As indicated under principle 2, libraries have both local and provincial dimensions. The current practice of the provision of library services by municipalities speaks to the predominantly local dimension, namely:

- The administration of access to library materials (lending, on site access, internet)
- The selection, establishment and administration of the physical library sites (including mobile and satellite)
- Making available the library site for a variety of local purposes (communicating municipal information, meeting place, programmes)

These functions are conducive to devolution as policy choices regarding these matters are best made by municipalities.

The more limited provincial dimension relates to the following:

- Selection, purchase and distribution of library materials
- Providing a referencing (information) facility
- Maintaining an information sharing system (interlibrary exchange system)

These elements are not conducive to devolution for both policy and practical reasons.

- The selection of materials should be aligned to other provincial priorities such as educational objectives.

- Given the fact that there are great differences between municipalities regarding skills and funding, the Province plays an important role in ensuring equity in distributing materials between municipalities.
- Given that there are 25 local municipalities, the Province provides economies of scale in the selection and procurement of library materials, two activities that require highly skilled personnel and suitable funding. This practical consideration may fall away with respect to the metro.

The “provincial” and “local” dimensions of the library function can be disaggregated in the sub-functions. This disaggregation and the split between provincial and local government roles support the current ‘status quo’ in terms of the delivery of the function.

Principle 7: Assigning authority to some but not all municipalities (differentiation) is justified on the grounds of demand, capacity and equity

The listed elements of the local dimension of the library function should be assigned to local municipalities and the metro. With the disappearance of district management areas at the next local election, the provision of library services by one district municipality will fall away.

With regard to the main provincial function of book selection and acquisition, differentiation could be made between the metro and the local municipalities. The former has the skills and capacity to effect this task as effectively as the Province.

(a) Differentiation would not compromise equity

Differentiation would not compromise equity in the function if all municipalities were required to provide, and funded for, a basic level of service. The differentiation would occur in the ability of municipalities, given their varying levels of capacity and revenue bases, to finance higher service levels. The latter should not be discouraged.

(b) There is demand for the transfer

Since municipalities are already administering libraries, there is a manifest demand for the transfer of this competency. One could also argue that Section 156(4) of the Constitution is applicable in this instance

(c) There is institutional readiness

The very fact that municipalities are administering libraries indicates their institutional readiness. Municipalities are the primary owners of library buildings, furniture, vehicles and computers in the provincial library service.

Province employs only 4% of the total of 1237 staff employed within municipal libraries. These provincial posts are funded through the conditional grant provided by National Treasury. There is a total of 434 staff employed in the 148 non-metro libraries compared to 748 staff in the 105 metro libraries.

Principle 8: The mode of transfer selected must suit the function or sub-function, the benefits sought, and any provincial and national interest to be secured

As indicated above, the assignment of the legislative function of “libraries” to local municipalities and the metro would fit with the effective and accountable performance of this function. However, an executive assignment would have the following benefits: first, the time-period for implementation of the assignment is far quicker; a phased in approach could be used to address the fiscal gap in the performance of the library function; and it would be simpler to differentiate amongst municipalities, in particular the metro and non-metro municipalities, with the acknowledgement that the large B municipalities may require greater discretion in the implementation of the function into the future.

An executive assignment could still allow for varying levels of discretion at local level. For example, it may be beneficial for all municipalities to have discretion over opening times and usage of facilities subject to minimum service levels.

The function of selection, procurement and distribution of library materials could be delegated to the metro where it has the capacity and skills to do so.

Principle 9: The provincial government must take steps to strengthen its capacity to regulate, monitor and support local service provision where discretionary power is assigned to local government

The executive assignment of the “libraries” function should be accompanied by a regulatory framework that structures the governance of libraries, setting norms and standards and basic minimum service levels. These could include the number of fixed libraries per capita, spend per capita, the appropriate mix of library types in metro and non-metro municipalities, the location of public libraries, opening hours, staffing levels and qualifications, circulation figures, types of activities to be encouraged etc. It should also indicate provincial government’s funding commitment.

The Province must continue with its support activities including the training of library officials. The province could also provide support to ensure libraries are fully computerised, have security, photocopy facilities and sufficient space.

The legislative framework should include appropriate monitoring provisions with regard to the equitable distribution of library facilities within municipalities, the management of library holdings, and the performance of the library function against minimum service levels and the UNESCO Library Manifesto.

4.2 MUSEUMS

Introduction

“Museums other than national museums” are a Schedule 5A functional area that falls within the exclusive legislative competence of a province. “Museums” have been broadly defined by the South African Museum Association as follows:

Museums are dynamic and accountable public institutions which both shape and manifest the consciousness, identities and understanding of communities and individuals in relation to their natural, historical and cultural environments, through collection, documentation, conservation, research and education programmes that are responsive to the needs of society.

This definition reflects three important elements: first, museums are not to be equated with the buildings which locate them in space, but with the content which such buildings house, namely collections of objects relating to natural, historical and cultural phenomena. Second, the activities of museums are to collect, conserve, research, educate and make accessible the natural, historical and cultural patrimony of a community or locality to the public. Third, through these activities museums give shape and manifest the connection of communities to their natural environment, history and culture.

Provinces have been active in exercising their constitutional powers by administering or supporting museums. Although “museums” are not listed in local government’s constitutional functional areas in Schedules 4B or 5B, municipalities are conducting similar activities (a practice that predate the Constitution), ostensibly as part of their local tourism function (a Schedule 4B functional area).

The 100 plus museums in the Western Cape (excluding national museums) are classified as follows:

- Western Cape Provincial Administration administers four museums, fully covering both operational and capital costs.
- It further supports 19 so-called provincially aided museums; they fall under the control of boards of trustees, but receive limited grant allocations (R1.3 million in 2006/07) but significant staffing subsidy as staff is accommodated within the provincial administration.

- There is a small number of local aided museums which receives an insignificant amount of financial support from the Province (R36 760 in 2006/07). The rest of the financing is covered by municipalities and other sources.
- The vast majority of museums are so-called unaffiliated museums in respect of which municipalities contribute the majority of operational budgets and management.

Given the strong interest that municipalities have museums, as reflected in practice, the transfer of power in this functional area should be considered by the Western Cape Government.

Principle 1 The issue in question must in fact concern the transfer of a specific power in a provincial functional area to local government

Since “museums” are an exclusive functional area of provinces and there is no similar reference in either Schedule 4B or 5B, the issue at hand is the transfer (assignment of legislative and/or executive authority) power from the province to municipalities.

Principle 2 The provincial power necessarily fits local government’s place shaping mandate

By extending the functional area of “museums” to the competencies of municipalities the constitutional objects of social and economic development are furthered.

Museums serve the following functions in a local community:

- Museums can give effect to, and develop, the identity of the local community in a municipality. It defines the history of the local community and may facilitate the building of an inclusive community. This is effected not only through the collection and exhibition of artefacts, but museums are the centre at which local icons can be identified and important events celebrated.
- Museums are also often linked to the built environment, usually located in historically significant buildings.
- Museums also play a subsidiary function by providing local public space for meetings and exhibitions.
- As museums show case the heritage of the locality, they contribute to economic development through the promotion of tourism.

Principle 3 Transferring a power in a provincial functional area to local government would create incentives for better service delivery and accountability

(a) Local decision-making will better reflect local preferences (political benefits)

Where a museum is concerned with matters of local interest (natural, cultural or historical), entrusting a municipality with decisions relating to the continued support, establishment, focus and utilization of a museum, should result in the better reflection of local preferences and accountability.

(b) There are no spill-over costs associated with local service delivery (economic benefits)

Where a museum is concerned with matters of local interest, there are limited spill-over costs associated with the performance of this function. Schools may visit museums in a neighbouring municipality.

(c) Managing service delivery locally is more efficient (administrative benefits)

Because a local museum is perforce dealing with matters of local interest, a municipality would be in the best position to decide how museums they support are most efficiently administered – as municipal institutions or merely as municipal-aided institutions under an independent board.

(d) Local government funds the service and keeps to a hard budget constraint (fiscal benefit)

Where a municipality decides to establish a municipality or support one, it would be best placed to make expenditure decisions.

Principle 4 There are adequate funding arrangements for transferring a power in a provincial functional area to local government

(a) The fiscal gap, if any, is quantified and sources of funding are identified

The financial implications of extending the museum function to municipalities must be seen in the context of current practice.

- If no transfer of the four provincial museums is intended, they will continue to be administered by the Province, fully covering both operational and capital costs.
- If no transfer of the financial responsibility of the 19 provincially aided museums is intended, they will continue to receive operating costs from the Province. Should the staff and financial responsibility be transferred, there would be a significant fiscal gap (staff costs and grants totalling R1.3 million 2006/07)

- If the transfer of financial responsibility of the small number of local aided museums is contemplated, there would be an insignificant financial gap (R36 750 in 2006/07).
- In the case of the vast majority of unaffiliated museums in respect of which municipalities contribute the majority of operational budgets and management, should continue as present. Municipalities decide whether it is in the interest of the community to continue supporting them.

(b) The cost of providing the service over a three year period is projected, as required by law

If the 19 provincially-funded museums are at issue, then the projected cost over a three year period should be established.

(c) The funding commitments of each sphere are agreed

If the 19 provincially-funded museums are at issue, then the Province must clarify its funding commitments with regard to both the current provincial personnel and the grant allocations.

(d) The provincial government must assure an appropriate level of funding to meet any standards for a basic level of service it may prescribe

Museums are not a basic service and no obligation is imposed on municipalities to either establish or support any. Should a municipality decide to establish a museum, it should confirm to minimum standards in respect of collection management and visitor services and facilities. Without incurring financial obligations for the operational costs, the Province should provide a support service with training and actual assistance with regard to the collections and visitor services.

(e) Where local government exercises its discretion to deliver a higher standard of service than that prescribed, or if no obligation to provide a service is imposed, it is solely responsible for funding that service

As there is no obligation to establish or support a museum(s), municipalities that decide to do so, carry the cost of their operation.

Principle 5: Transferring a power in a provincial functional area to local government must not have unintended negative consequences for essential provincial and national interests

The provincial interest in museums is to ensure that the local museums display the richness and diversity of the history and culture of the province.

Extending authority to municipal council may introduce a bias in favour on one or other community. The museums are currently criticized for displaying predominantly a white cultural heritage. Through targeted grants for museum development, the province may promote an inclusive history and cultural heritage.

The second provincial interest is the protecting of local collections; the provincial natural, historical and cultural patrimony is also represented by the sum total of the local patrimonies. In this regard, two aspects may be of importance: the proper care and recording of collections and preventing municipalities selling family silver for short term financial gains.

The Province's sharing of the museum functional area with local government fits in the national policy of local empowerment in the area of heritage. The South African Heritage Resources Act distinguishes between national, provincial and local heritage sites. Local museums would be aligned with this division.

Principle 6: Authority in that functional area can be disaggregated if that would maximize fit and minimize adverse consequences without destroying the overall integrity of the function

- (a) A function should be disaggregated into its constituent services, sub-functions and funding sources**
- (b) The internal properties of the function make it conducive to retain some authority at provincial level while transferring aspects of service provision without it compromising the overall integrity of the function**

There are two important provincial dimensions to the "museums" function:

- The "museums" functional area is a composite one, consisting of both "provincial" and "local" museums. This distinction follows the logic of the South African Heritage Resources Act which distinguishes between national, provincial and local heritage sites. The transfer of authority in the functional area of "museums" should entail only the local dimension of "museums". The Province retains full power to establish, support and administer "provincial" museums.
- The heritage patrimony of the province is the collective of all the local patrimonies. The Province has thus an interest in the maintenance and conservation of heritage collections, and in preventing the alienation of historical artefacts by municipalities for short term financial gains. Moreover, specific collections could have significance beyond the locality.

Given the composite nature of "museums", only the "local" dimension should be transferred to municipalities. Moreover, the Province's guardian role over the provincial patrimony (which include local collections) should not be compromised.

Principle 7: Assigning authority to some but not all municipalities (differentiation) is justified on the grounds of equity, demand, and readiness

Since the preferred mode of transfer is the legislative assignment of the power of “local museums”, there is no need for differentiation. Any municipality who so desires may establish, administer or support a local museum. Differentiation is thus self-selective. Both district and local municipalities could exercise this power.

(a) Differentiation would not compromise equity

This sub-principle is not applicable as the power can be exercised by all municipalities in the Province.

(b) There is demand for the transfer

Since the majority of municipalities are already either administering or supporting local museums, there is a manifest need for the transfer of the competency to all local municipalities and the metro.

(c) There is institutional readiness

The very fact that municipalities are administering museums indicates their institutional readiness.

Principle 8: The mode of transfer selected must suit the function or sub-function, the benefits sought, and any provincial and national interest to be secured

(a) If the service would benefit from maximum local government discretion, then legislative assignment is the preferred mode of transfer

As indicated above, the assignment of the legislative function of “local museums” to all municipalities would best fit with the effective and accountable performance of this function. The legislative assignment would entail providing a framework within which the power to establish or support a museum must be exercised.

Principle 9: The provincial government must take steps to strengthen its capacity to regulate, monitor and support local service provision where authority is assigned to local government

The legislative assignment of the “local museums” function should be accompanied by a regulatory framework that structures the governance of museums (for example, the compulsory establishment of boards of trustees with, possibly, provincial representation) and the safeguarding of the local (and hence also provincial) patrimony.

Provincial support for the “local museums” function could entail the training of museum officials and financial support for projects.

The legislative framework should include appropriate monitoring provisions, including asset registers and site visits.

The duties of support and monitoring are best executed by is a dedicated authority within the provincial administration, as is currently the practice.

PART 5 - RECOMMENDATIONS

5.1 Based on the provincial framework (principles and methods) it is recommended that-

- The Workstream on Powers and Functions should continue to focus only on the clarification of the powers and functions of local and provincial governments in terms of museums and libraries. Accordingly, no other functions should be considered for now until these two have been resolved.
- The museum function should revert/remain with Province provided that a general assignment of executive powers be approved in order that a municipality that wishes to exploit museums for tourism benefits may lawfully do so at its own expense.
- Libraries’ functions should be transferred to municipalities (including the metro) through the mode of transfer called the executive assignment. However, this must be done in a phased in approach:
 - The first phase must be the conclusion of an agency agreement between the province and the municipalities.
 - The last phase being the executive assignment.
 - Funding formula should be worked out for libraries where a third of the cost to be provided by province to municipalities after a three year period.
- The Workstream must facilitate consultations with provincial stakeholders to work out (a) the norms and standards on the provision of library services by municipalities and (b) the provincial contributions towards this provision.
- That upon finalisation of the library and museum functions ,the workstream proceed to consolidate the assignment /agency of the following functions: vehicle licensing, testing and the issuing of drivers licences

PART 6 – HUMAN RESOURCE IMPLICATIONS

6.1 In the case of both museums and libraries, the purpose of this workstream exercise is to achieve legal clarity, rather than to make recommendations regarding the delivery of the actual function. There are therefore no human resource implications arising from the actual delivery of the function.

6.2 Two human resource issues should, however, be noted:

- Throughout the research conducted, many concerns were raised regarding the deterioration of the municipally-delivered library services in the Province. Owing to the lack of certainty regarding the funding and placement of this function, there has been a consistent under-investment in both the capital and operating budgets of libraries. One consequence has been the exit of many professional librarians from the library system.
- If the recommendation for executive assignment for library services is supported, Province will need to establish a transition team to give effect to the recommendation. This team would comprise provincial and local officials and would not require significant external support as the transfer of assets and liabilities is not under consideration.

PART 7 – FINANCIAL IMPLICATIONS

7.1 Museums

- If museum services are legislatively assigned to municipalities, as recommended above, then there are no direct automatic implications. Municipalities will be empowered to establish and regulate the museum function in their respective areas, but it will be their choice as to whether they do so and whether they then financially support that service.

7.2 Libraries

- If library services are assigned executively to municipalities, then the Province is required to ensure sufficient financial provision to municipalities.
- The resources involved are significant. During the current 2009/10 financial year, the municipal contribution to library services is R344 million.

- This does not imply that the full contribution would need to be provided to municipalities immediately;
- The Province could set norms and standards lower than they are at present and require municipalities to fund the difference;
- The provincial contribution to municipally-rendered library services could be phased in over a number of years. For example, Province could enter into an agency agreement immediately with all municipalities with a zero contribution in Year 1 and phased-in contributions in the following years.