

# Navigating the grey areas

## REFLECTIONS ON THE WESTERN CAPE POWERS AND FUNCTIONS REVIEW PROCESS

The powers and functions shared between provincial and local government have traditionally been a source of great confusion and concern for municipalities. Ill-defined powers and functions have often led to duplication, inefficiencies and arguably even deterioration in the delivery of services to communities. In the Western Cape in particular, the status quo has resulted in a lack of uniformity in approach to municipalities across provincial sector departments. This has led to an impasse between the provincial and local sphere on the delivery of certain powers and functions.

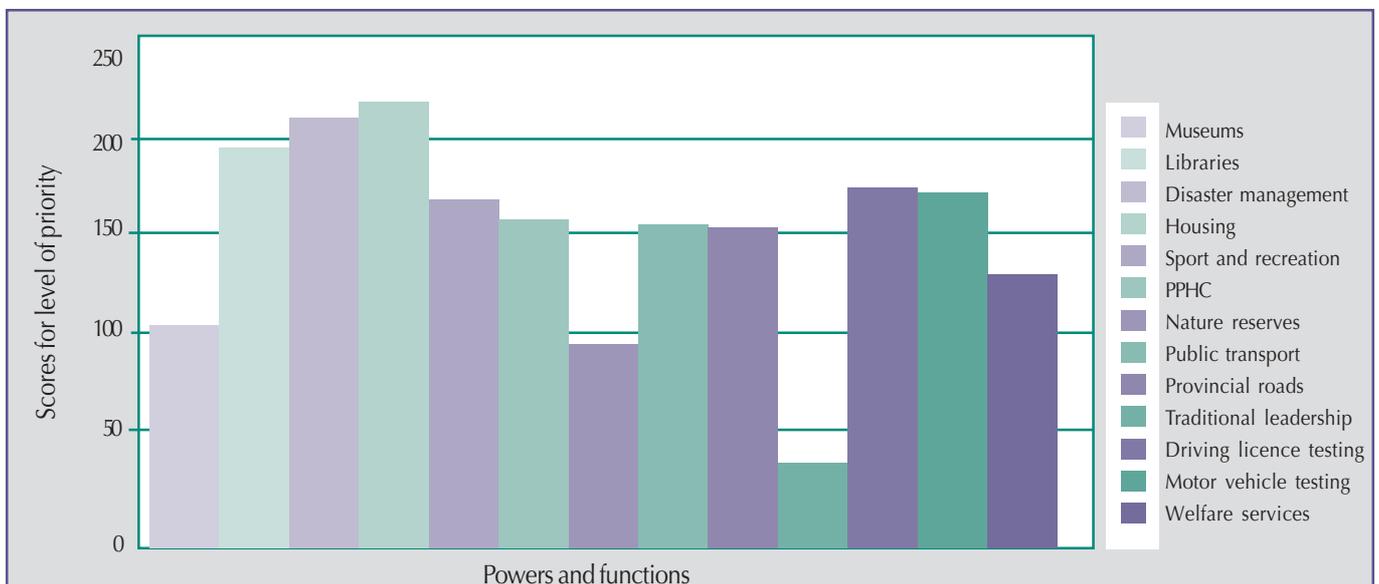
In response, the Western Cape Provincial Cabinet identified the need for a shared provincial decision-making framework on the performance of provincial powers and functions by the local sphere. The province's Ministry of Local Government and Housing was mandated to lead the process. At least 13 'grey area' powers and functions were identified that are currently performed by municipalities, but are problematic because they are:

- constitutionally assigned to another sphere and currently performed outside of the existing constitutional and legal framework for the assignment or delegation of powers and functions;

- legislatively assigned with insufficient consideration of the financial and other capacity implications for municipalities; or
- concurrent without clearly defined roles and responsibilities.

Confusion around powers and functions has a particularly severe impact on the municipal manager, as the head of the municipal administration and the chief financial officer. The relative significance of the 13 grey-area powers and functions to municipal managers in the Western Cape is illustrated in Figure 1, based on a simple prioritisation tool.

Figure 1: Extent to which municipal managers in the Western Cape rank importance of grey-area powers and functions



A draft framework based on a review of existing legislative and policy mechanisms was developed between May 2007 and June 2008. As part of this process, the proposed approach was piloted in four functional areas – libraries, museums, disaster management and public transport. The emerging framework, approach and main review findings are discussed briefly below.

## The emerging framework

The three constitutional options available to provinces when deciding on the delivery mechanism for exclusive provincial powers and functions are:

- provincial delivery;
- delegation; and
- assignment to the local sphere.

Provincial delivery may be effected through deconcentration or by entering into implementation protocols. By law, delegation to the local sphere may be achieved through a service delivery agreement, as a delegation is simply the transfer of the provider role to the local sphere. Assignments, on the other hand, have to be effected through legislation as they involve the transfer of both the authority (legislative) and provider (implementing) roles. In the case of concurrent provincial and municipal functions, the critical objective is to ensure clear definitions and delineations of roles and responsibilities. A simple four-step review and decision-making process was used as a means to inform decisions:

1. Initiate discussion on a proposed assignment or delegation of a power and function.
2. Undertake a technical review and costing of the power and function that include initial consultations.
3. Undertake consultations on the findings of the technical review with all affected parties.
4. Make an informed decision regarding the preferred service delivery mechanism.

A single technical review format was developed for each power and function as part of the second step. This involves an investigation into:

- relevant legislation and policy;
- comparative international and local experience;
- existing definitions, norms and standards;
- financing mechanisms and requirements;
- capacity within local and provincial government;
- the links with local government matters;
- community accountability, and
- the extent of disruption to the service as a consequence of the alternative decisions.

The recommendations emerging from the reviews must be

canvassed with all key stakeholders, such as the relevant national and provincial departments, SALGA, technical municipal staff, municipal management, the municipal political leadership and other provinces, in a consultative process. The framework recognises that if a delegation or assignment is made, the provincial government will always retain its constitutional powers to set framework legislation and to monitor and support municipalities in the performance of the powers and functions.

## Key findings of the pilot reviews

Table 1 gives a brief overview of the applicable legislation, problem statements for each function and recommendations based on the review of that function. The library, museum, disaster management and public transport function reviews highlight a number of key lessons that must be learnt if grey-area powers and functions are to be resolved in the Western Cape.

## Key lessons

### *Urgency*

A sense of urgency must be generated for resolving grey-area powers and functions, as the performance of affected powers and functions is deteriorating. This will have negative long-term financial and service delivery implications for the province.

### *Funding*

Funding is a critical constraint to the resolution of grey-area powers and functions at provincial level. Greater certainty needs to be created at national level about the costing and availability of funds for specific powers and functions. This would greatly enhance provinces' ability to make sound decisions on appropriate delivery mechanisms and levels. In addition, the national and provincial treasuries need to lead the way in removing financial obstacles once the most effective service delivery options have been identified.

### *Shared framework for navigating shared powers and functions*

There is an urgent need for a shared framework for deciding on grey areas of powers and functions among sector departments at national and provincial level to ensure a coherent and consistent approach in government.

- There is no one-size-fits-all approach. A technical review of each power and function needs to be undertaken in order to inform a decision regarding the best service delivery mechanism for that power and function.
- Assignments and delegations cannot be made without the requisite financial and other capacity support.
- There is still significant goodwill and understanding

among municipalities regarding the challenges provinces face in resolving powers and functions. However, to preserve this goodwill and the credibility of the process, some quick wins and open communication are needed.

Finally, an institutional mechanism should be created at national and provincial level to facilitate and monitor the implementation of the agreed frameworks for resolving powers and functions. The national Department of Provincial and

Local Government and the provincial departments of local government are strategically placed to perform this function.

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Table 1: Legislation and functional areas

	Libraries	Museums	Disaster management	Public transport
Constitutional Schedule and legislation	Schedule 5A exclusive provincial competence; Libraries Act (1981), Local Government Transition Act (1993)	Schedule 5A exclusive provincial competence; Western Cape Museums Ordinance (1975), Department of Arts, Culture, Science and Technology White Paper (1995), Public Finance Management Act (1999)	Schedule 4A concurrent provincial and national function, legislatively assigned to local government in the Disaster Management Act (DMA), (2002), National Disaster Management Framework (2005), Western Cape Disaster Management Framework (2007)	White Paper (1996), Schedule 4A and 4B assignment in the Constitution, National Land Transport Transition Act (NLTTA) (2000), Western Cape Provincial Land Transport Framework (2004), National Land Transport Transition Amendment Act (2006), Public Transport Strategy (2007), National Land Transport Bill (2008)
Problem statement	<ul style="list-style-type: none"> <li>* Internationally and historically in South Africa, libraries are a concurrent function.</li> <li>* There is no clear definition of 'library services' in South Africa.</li> <li>* Current service levels are significantly below developed country standards.</li> <li>* <b>There is a major funding gap.</b> Local government in the Western Cape spends R254 million per annum on the function (76% from the metro) and directly employs 1 237 staff.</li> <li>* The function is declining as uncertainty persists.</li> <li>* There is a clear link to the heritage sector and other local government functions.</li> <li>* The function is part of a broader underfunded heritage sector.</li> </ul>	<ul style="list-style-type: none"> <li>* Of the 108 museums in the province, 14 are national and 66 are unaffiliated. Affiliated museums are classified under the 1975 ordinance as provincial, provincial aided and local museums, with huge funding and capacity variations. Provincial museums operate and are funded as state departments.</li> <li>* Municipalities play the strongest role, with local and unaffiliated museums, and contribute approximately R600 000 per annum to the function.</li> <li>* Legislation is weak on the role of the local sphere. There are clear links with local government in terms of museums' locality and specific nature, to libraries and to social and economic development.</li> <li>* Community participation in museums is important.</li> <li>* Internationally, museums are a concurrent function.</li> </ul>	<ul style="list-style-type: none"> <li>* The legislative assignment of the function to the local sphere failed to comply with section 10A of the Municipal Systems Act because it failed to address the financial and support implications.</li> <li>* The DMA failed to address the appropriate roles and responsibilities of B and C municipalities. Category B municipalities have critical roles in local level planning, public participation, basic service delivery and services such as fire and traffic, which are integral to disaster management. Local municipalities are often the first to respond to a local disaster. The focus is currently on compliance and there is still a definite bias towards response and recovery.</li> <li>* The function is underperforming in the Western Cape.</li> </ul>	<ul style="list-style-type: none"> <li>* This is a concurrent competence.</li> <li>* National policy and legislative principles are consistent, but there is an apparent gap between the national and provincial approach.</li> <li>* Municipal public transport is not clearly defined.</li> <li>* There is a conflict between the Municipal Systems Act and the NLTTA.</li> <li>* <b>There is no sustainable funding option for the function at local level.</b></li> <li>* Local government lacks the instruments to enable it to undertake integrated transport planning.</li> <li>* The function is seriously under-capacitated in the Western Cape.</li> </ul>
Recommendations	Assign, or at least delegate, the function to municipalities. But before the assignment or delegation, the capacity and funding gap must be addressed.	Assign or delegate, depending on municipal capacity, or at least enter into implementation protocols to secure subsidised services.	The provincial government must lobby the national government for adequate financing and capacity for the function, and for legislation to be amended to recognise more explicitly the role of category B municipalities in disaster management. Additional capacity must be created at provincial and district levels.	The National Land Transport Bill is critical in addressing uncertainties. It must include clear fiscal and financial arrangements for the function. Communication from national and provincial spheres must be consistent.