

Defining local government powers

The need for guidelines

The powers and functions of local government are listed in Schedules 4B and 5B of the Constitution. The Schedules list functional areas without detailed definitions of each area. There is a considerable overlap between local government functional areas and those of provincial government, listed in Schedules 4A and 5A. Due to this, there is a degree of confusion about who does what. A lack of clarity about role definition may prejudice service delivery and cause conflict over resources and authority.

Defining functional areas with reference to 'provincial' and 'local'

The most obvious case of overlap is where the functional areas allocated to each sphere are circumscribed with reference to 'provincial' or 'local'. There is local tourism and provincial tourism, municipal planning and provincial planning, municipal health services and provincial health services, municipal public transport and provincial public transport, municipal roads and provincial roads and traffic, and so on. The question has often been asked: where does a provincial road stop and a local road commence?

Inclusive provincial functional areas

Since most provincial functions are broadly defined, by necessity they cover or include a



key points

- There is a considerable overlap between the powers and functions of local and provincial government.
- This may affect effective and efficient delivery of services.
- Guideline definitions may help all spheres of government interpret local government powers.
- It may be necessary to conclude intergovernmental protocols to apply definitions in practice.

listed local functional area. Examples are listed below.

Local functional areas	Provincial functional area
Air pollution (4B)	Environment (4A)
Control of undertakings that sell liquor to the public (5B)	Liquor licenses (5A)
Local sport facilities (5B)	Provincial sport (5A)
Pounds (5B)	Animal control and diseases (4A)
Refuse removal, refuse dumps and solid waste disposal (5B)	Environment (4A)
Traffic and parking (5B)	Road traffic regulation (4A)

Liquor licences are an exclusive provincial function as far as retail licences are concerned. How must this competency be aligned with local government's power to "control undertakings selling liquor"? Any licence may include conditions on how liquor is to be sold to the public. How does it comply with municipal zoning competencies?

Problems

The overlapping of functions and unclear allocation of responsibilities may give rise to various problems, such as:

- *lack of accountability* to the electorate: blame for underperformance can be shifted from one sphere of government to the other;
- *duplication of services*: where both spheres of government are responsible for a functional area, both may provide the same service;
- *ineffective service delivery*: confusion over responsibility can lead to inefficient and slow service delivery;
- *no service delivery*: confusion could even lead to a situation where none of the responsible spheres provides the service; and
- *local government solely responsible*: local government as the sphere closest to the people will inevitably 'face the music' if no services are delivered on a concurrent functional area and will be compelled to fill the gap without necessarily having the funds.

Courts

As the interpreters of the Constitution and all its schedules, the courts have the final word on defining the ambit and reach of functional areas. However, very few cases come before the courts for them to give a full definition.

Statutory interpretation

It is open to the national and provincial legislatures to define the functional areas. This power flows from their regulatory function in terms of section 155(7) of the Constitution. The difficulty with the legislative interpretation of functional areas is the adequacy thereof.

Definitions may unduly restrict local government powers, or extend local government powers beyond their constitutional mandate.

Further, there is a lack of uniformity in approach by national line departments. Each line department that deals with local government

may have a different conception of how local government powers should be defined and consequently implemented in practice. The definition of "municipal health services" in the National Health Act of 2003 as it relates to water quality monitoring may be at odds with the regulation of water

quality by the Water Services Act of 1997.

An approach to the definition of local government powers and functions

To devise appropriate definitions for each competence, the following three-step process could be followed:

1. develop and adopt official guideline definitions;
2. develop and adopt statutory definitions; and
3. if required, negotiate the practical implementation of definitions.

The first step is to develop a set of guideline definitions that will guide all spheres of government in the exercise of their constitutional powers. The Minister responsible for local government can issue such regulations in terms of the Municipal Structures Act. The aim is three-fold:

1. to give municipalities guidance on the ambit of their powers and functions. This will be of great relevance to the drafting of by-laws and the structuring of the executive authority, including the drafting of integrated development plans (IDPs);
2. to guide the national and provincial departments when they draft statutory definitions of powers and functions concerned with a particular sector of government; and

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3. to guide the provincial governments in defining the scope of their monitoring and support functions with regard to municipalities.

The aim of the guidelines is to secure a uniform and consistent approach to Schedule 4B and 5B competences. This will promote a coherent, overarching view of the nature and ambit of local government powers and functions. The guideline definitions would not, however, have the binding force of law, but would provide municipalities and sector departments at both national and provincial level with a framework in terms of which the details of a particular functional area can be determined.

The guidelines should be developed in consultation with the various line departments and local government to achieve an informed and sector-specific definition as possible.

memoranda of understanding on a particular competency.

An example of the need for an intergovernmental protocol is the classification of roads. While a provincial Act could define the broad framework of how to distinguish between provincial and municipal roads, the application of the Act to actual roads could best be done in an intergovernmental agreement by an IGR forum envisaged by the Intergovernmental Relations Framework Act of 2005.

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