
GENERAL NOTICE

NOTICE 490 OF 2007

MINISTRY FOR PROVINCIAL AND LOCAL GOVERNMENT

LOCAL GOVERNMENT: MUNICIPAL SYSTEMS ACT, 2000 (ACT NO. 32 OF 2000)

GAZETTE FOR PROMULGATION

I, Fholisani Sydney Mufamadi, Minister *for* Provincial and Local Government, acting under powers vested in me in terms *of* section 120(1)(c) of the Local Government: Municipal Systems Act, 2000 (**Act No. 32 of 2000**), hereby publish for promulgation and coming into effect of the guidelines contained in schedule 1 to this notice.

FHOLISANI SYDNEY MUFAMADI

MINISTER FOR PROVINCIAL AND LOCAL GOVERNMENT

**GUIDELINES ON ALLOCATION OF ADDITIONAL POWERS AND
FUNCTIONS TO MUNICIPALITIES**

GUIDELINES ON ALLOCATION OF ADDITIONAL POWERS AND FUNCTIONS TO MUNICIPALITIES

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CHAPTER 1

INTERPRETATION, PURPOSE AND APPLICATION OF THESE GUIDELINES

Interpretation

1. (1) In these Guidelines, a word or expression which is defined in the Municipal Systems Act has the same meaning as in that Act, and unless the context otherwise indicates –

"agency agreement", in relation to a municipality, means an agreement contemplated in section 238(b) of the Constitution in terms of which a municipality undertakes to exercise a power or function on behalf of an executive organ of state on an agency basis;

"assignment" means a legislative or executive assignment;

"consult" means to seek the views of another person and to consider any views expressed by that other person, whether such views were sought or expressed –

- (a) orally or in writing;
- (b) in discussions; or
- (c) in any other form of communication;

"delegation", in relation to a municipality, means delegation to a municipality –

- (a) in terms of section 238(a) of the Constitution; or
- (b) in terms of a power contained in national or provincial legislation;

"executive assignment", in relation to a municipality, means the assignment of a power or function by an executive organ of state to a specific municipality in terms of –

- (a) an agreement contemplated in section 99, 126 or 156(4) of the Constitution; or
- (b) a power contained in national or provincial legislation, but excludes the delegation of a power or function to a municipality;

"executive organ of state" means –

- (a) a national executive organ of state; or
- (b) a provincial executive organ of state;

"facilitator" means a person designated in terms of clause 37 to facilitate an assignment process;

"Financial and Fiscal Commission Act" means the Financial and Fiscal Commission Act, 1997 (Act No. 99 of 1997);

"Financial and Fiscal Commission" means the Financial and Fiscal Commission established by section 220 of the Constitution;

"Intergovernmental Fiscal Relations Act" means the Intergovernmental Fiscal Relations Act, 1997 (Act No. 97 of 1997);

"labour legislation" means any legislation that is applicable when employees are transferred from an organ of state to a municipality to give effect to an assignment of a power or function to a municipality, and includes to the extent applicable –

- (a) the Labour Relations Act, 1995 (Act No. 66 of 1995);
- (b) any collective agreement concluded in terms of the Labour Relations Act, 1995;
- (c) the Government Employees Pension Law, 1996; and
- (d) the Public Service Regulations;

"legislative assignment", in relation to municipalities, means the assignment of a power or function by –

- (a) an Act of Parliament to –
 - (i) all municipalities in general; or
 - (ii) a specific category or group of municipalities; or
- (b) a provincial Act to –
 - (i) all municipalities in the relevant province; or
 - (ii) a specific category or group of municipalities in the relevant province;

"MEC" means a member of the Executive Council of a province;

"Municipal Finance Management Act" means the Local Government: Municipal Finance Management Act, 2003 (Act No. 56 of 2003);

"Municipal Systems Act" means the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000);

"national executive organ of state" means –

- (a) a Cabinet member; or
- (b) another executive organ of state in the national sphere of government, and includes any national public entity within the meaning of the Public Finance Management Act, 1999 (Act No. 1 of 1999);

"national legislation" means –

- (a) an Act of Parliament;
- (b) legislation that was in force when the Constitution took effect and that is administered by the national government; or
- (c) subordinate legislation made in terms of an Act of Parliament or legislation referred to in paragraph (b);

"power" includes a right, entitlement, authority or competence to do something;

"provincial executive organ of state" means –

- (a) an MEC; or
- (b) another executive organ of state in the provincial sphere of government, and includes any provincial public entity within the meaning of the Public Finance Management Act, 1999 [Act No. 1 of 1999];

"provincial legislation" means –

- (a) an Act of a provincial legislature;
- (b) legislation that was in force when the Constitution took effect and that is administered by a provincial government; or
- (c) subordinate legislation made in terms of a provincial Act or legislation referred to in paragraph (b);

"relevant legislature" means –

- (a) Parliament, in the case of an Act of Parliament; or
- (b) the provincial legislature of a province, in the case of an Act of that legislature;

"SALGA" means the South African Local Government Association recognised in terms of section 2 of the Organised Local Government Act, 1997 (Act No. 52 of 1997), as the national body representing organised local government in the Republic.

(2) In these Guidelines a word or expression which is a derivative or other grammatical form of a *word* or expression defined in sub-clause (1) or in the Municipal Systems Act, has a corresponding meaning unless the context indicates that another meaning is intended.

Assumptions as to legal character of assignment, delegation and agency

2. These Guidelines have been drafted on the following assumptions relating to the legal character of assignment, delegation and agency:

- (a) **Legislative assignment:** A legislative assignment implies that –
 - (i) the municipalities to whom the power or function is assigned are each individually responsible and accountable for the exercise of the assigned power or function in accordance with the legislation by way of which that power or function is assigned;
 - (ii) each of those municipalities municipality acts in its own name when exercising the assigned power or function; and
 - (iii) the assigning organ of state as a general rule is not accountable and does not attract liability when the municipality exercises the assigned power or function.
- (b) **Executive assignment:** An executive assignment implies that –
 - (i) the agreement or instrument in terms of which the power or function is assigned to a specific municipality must be consistent with the legislation which enables the assignment;
 - (ii) the municipality to whom the power or function is assigned is responsible and accountable for the exercise of the assigned power or function in accordance with such agreement or enabling legislation;
 - (iii) the municipality acts in its own name when exercising the assigned power or function; and
 - (iv) the assigning organ of state as a general rule *is* not accountable and does not attract liability when the municipality exercises the assigned power or function.
- (c) **Delegation:** A delegation implies that –
 - (i) the executive organ of state delegating a power or function remains responsible and accountable for the exercise of the power or function by the municipality to whom the power or function is delegated;

- (ii) the municipality to whom the power or function is delegated acts in the name of the delegating organ of state;
 - (iii) the municipality must act in accordance with the directions, conditions and limitations as the delegating organ of state may determine;
 - (iv) the municipality binds the delegating organ of state in its decisions taken in the exercise of the delegated power or function; and
 - (v) the delegation may at any time be amended or revoked by the delegating organ of state.
- (d) **Agency:** An agency implies that –
- (i) the agreement in terms of which a municipality acts as the agent of an executive organ of state must be consistent with the legislation which enables the agency agreement;
 - (ii) the ordinary rules governing the legal relationship between principal and agent apply which means that the municipality acts in the name of and on behalf of its principal;
 - (iii) the municipality must act within the mandate as determined by the principal; and
 - (iv) the municipality binds the principal in its decisions taken within its mandate.

Purpose of these Guidelines

3. Section 156(1) of the Constitution allocates to municipalities certain original powers and functions contained in Part B of Schedule 4 and Part B of Schedule 5 to the Constitution, whilst various other sections provide for the assignment and delegation of additional powers and functions to municipalities. The purpose of these Guidelines is therefore –

- (a) to list and explain the various methods by way of which a relevant legislature or an executive organ of state could assign or delegate additional powers and functions to municipalities;

- (b) to explain the constitutional and statutory provisions which are relevant to the assignment or delegation of these additional powers and functions to municipalities;
- (c) to provide general policy principles in accordance with which any legislation providing for the assignment or delegation of additional powers and functions to municipalities should be considered; and
- (d) to provide suggested procedural guidelines for the uniform and practical implementation of these constitutional and statutory provisions by executive organs of state.

Application of these Guidelines

4. (1) These Guidelines are not obligatory, but should in the interest of more effective and practical administration be followed by executive organs of state when considering and effecting the assignment or delegation of additional powers or functions to municipalities¹.

(2) If an Act of Parliament or a provincial Act contains any specific provisions applicable to the assignment or delegation of powers or functions to municipalities, these Guidelines must be applied subject to those specific provisions.

CHAPTER 2

OVERARCHING CONSTITUTIONAL FRAMEWORK FOR VESTING POWERS AND FUNCTIONS IN MUNICIPALITIES

Part 1: List of applicable constitutional provisions

List

5. The constitutional provisions providing for the allocation, assignment, delegation and contracting out of powers and functions to municipalities are as follows:

¹ See also the general note contained in Guideline 27

(a) **Original constitutional powers and functions of municipalities**

Section 156 (1) (a) of the Constitution which directly allocates powers and functions to municipalities to administer all local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 to the Constitution.

(b) **Assignment of powers and functions to municipalities by legislation**

(i) Section 156(1)(b) of the Constitution which provides for national and provincial legislation to assign additional powers and functions to municipalities;

(ii) Section 44(1)(a)(iii) of the Constitution which empowers the National Assembly to assign additional legislative powers, in addition to their original constitutional powers to make by-laws, to Municipal Councils; and

(iii) Section 104(1)(c) of the Constitution which empowers provincial legislatures to assign additional legislative powers within the provinces' competence to Municipal Councils in their respective province;

(c) **Assignment of powers and functions to municipalities through executive acts**

(i) Section 156 (4) of the Constitution which provides for the national or a provincial government to assign by agreement and subject to any condition, the administration of any of the matters listed in Part A of Schedule 4 and Part A of Schedule 5 to a municipality;

(ii) Section 99 of the Constitution which authorises a Cabinet Member to assign by agreement any power or function that is to be exercised or performed in terms of an Act of Parliament, to a Municipal Council; and

(iii) Section 126 of the Constitution which authorises an MEC to assign by agreement any power or function that is to be exercised or performed in terms of an Act of Parliament or a provincial Act, to a Municipal Council;

(d) **Delegation of powers and functions to municipalities**

- (i) Section 238(a) of the Constitution which authorises executive organs of state to delegate to municipalities powers or functions that are to be exercised or performed in terms of legislation; and
- (ii) Section 238(b) of the Constitution which authorises municipalities to exercise any power or function for any other executive organ of state on a delegation basis;

(e) **Contracting out of matters to municipalities by way of agency agreements**

Section 238(b) of the Constitution which authorises municipalities to exercise any power or function for any other executive organ of state on an agency basis.

Part 2: Explanation of applicable constitutional provisions

Original powers and functions of municipalities

6. (1) Section 156(1)(a) of the Constitution allocates to municipalities the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5 to the Constitution.

(2) The right to administer these local government matters includes both executive authority to administer these matters [see section 156(1)(a)] and the legislative authority to make and administer by-laws on these matters [see section 156(2)].

(3) As these powers and functions are allocated directly by the Constitution, municipalities are not dependent on any statutory or executive assignment or delegation for their exercise, although the national government and provincial governments may in terms of section 155(7) regulate the exercise of those powers and functions by municipalities.

Additional assignments to municipalities by parliamentary legislation

7. (1) Section 156(1)(b) of the Constitution empowers Parliament to assign any additional matter within Parliament's competence to municipalities.

(2) Matters that may be assigned by Parliament in terms of this section are those falling either within Parliament's concurrent powers listed in Schedule 4A or within Parliament's exclusive domain. Parliament's exclusive domain covers matters not mentioned in Schedules 4 and 5 or exclusively allocated to provinces elsewhere in the Constitution.

(3) Read with section 156 (2), municipalities have both executive and legislative power in relation to any additional matters assigned to them by national legislation in terms of section 156(1)(b).

(4) The assignment of additional legislative powers to municipalities is also borne out by section 44(1)(a)(iii) of the Constitution. In terms of this section Parliament may by an Act of Parliament assign to municipalities the power to make by-laws on any matter specified in the **Act**, irrespective of whether those powers fall within Parliament's concurrent powers listed in Schedule 4A or Parliament's exclusive legislative domain.

(5) Assignments in terms of section 44(1)(a)(iii) are additional to the legislative power municipalities already have in relation to matters listed in Schedules 4B and 5B.

(6) As Parliament cannot relinquish its legislative powers, it follows that Parliament can at any time revoke the assignment by repealing the assigning Act.

Additional assignments to municipalities by provincial legislation

8. (1) Section 156(1)(b) of the Constitution empowers a provincial legislature to assign any additional matter within a provincial legislature's competence to municipalities.

(2) Read with section 156 (2), municipalities have both executive and legislative power in relation to any additional matters assigned to them by provincial legislation in terms of section 156(1)(b).

(3) The assignment of additional legislative powers to municipalities is also borne out by section 104(1)(c) of the Constitution which provides for provincial legislatures by a provincial Act to assign to municipalities the power to make by-laws on any matter specified in the Act

(4) As provincial legislative power is limited to matters listed in Schedules 4 and 5, it is self-evident that only matters listed in Schedules 4A and 5A may be assigned in terms of sections 156(1)(b) and 104(1)(c).

(5) Provincial assignments in terms of sections 156(1)(b) and 104(1)(c) are additional to the legislative power municipalities already have in relation to matters listed in Schedules 4A and 5B.

(6) As a provincial legislature cannot relinquish its legislative powers, it follows that such a legislature can at any time revoke the assignment by repealing the assigning Act.

Assignment of matters listed in Schedule 4A or 5A to municipalities by agreement between municipalities and the national or a provincial government

9. (1) Section 156(4) of the Constitution makes provision for the national government or a provincial government to assign to a municipality, by agreement and subject to conditions, the administration of a matter listed

in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if –

- (a) the matter would most effectively be administered locally; and
- (b) the municipality has the capacity to administer it.

(2) The section specifically states that this kind of assignment must be effected by agreement with a specific municipality that meets the conditions for the assignment, and therefore depends on whether consensus can be reached between the parties. It follows that if there is no consensus regarding the assignment, even though the conditions for such assignment may be satisfied –

- (a) the national or a provincial government cannot be compelled to assign the relevant powers and functions to a municipality; and
- (b) a municipality cannot be compelled to accept the assignment of such powers and functions.

(3) An assignment in terms of section 156(4) cannot include the allocation of **legislative** powers to the municipality as the assignment of legislative powers to municipalities can only be done through parliamentary or provincial legislation.

(4) An assignment in terms of section 156(4) is terminated when the agreement expires or when one of the parties to the agreement withdraws from the agreement

Assignment of executive powers and functions to municipalities by Cabinet members

10. (1) Section 99 of the Constitution authorises a Cabinet Member to assign by agreement any power or function that is to ~~be~~ exercised in terms of an Act of Parliament, to a municipality. In terms of this section the assignment takes effect upon proclamation by the President.

(2) As an executive assignment, this kind of assignment differs from a legislative assignment in that agreement with the affected municipality is a constitutional requirement. Legislative assignments are not subject to formal agreement with municipalities, but must be dealt with in accordance with the requirements of cooperative government as set out in Chapter 3 of the Constitution..

(3) Executive assignments therefore depend on an agreement being reached between the relevant Cabinet member and Municipal Council, which means that a municipality cannot be compelled to accept an assignment.

(4) The assignment must be consistent with the Act of Parliament in terms of which the relevant power or function is exercised or performed, and such Act may prescribe additional requirements for the assignment..

Assignment of executive powers and functions to municipalities by MECs

11. (1) Section 126 of the Constitution authorises an MEC to assign by agreement any power or function that is to be exercised in terms of an Act of Parliament or a provincial Act, to a municipality in the province.

(2) As is the case with executive assignments by Cabinet members explained in clause **10**, this assignment –

- (a) depends on agreement between the relevant MEC and the Municipal Council, which means that a municipality cannot be compelled to accept an assignment;
- (b) has to be consistent with the Act of Parliament or provincial Act in terms of which the relevant power or function must be exercised or performed; and
- (c) only takes effect upon proclamation by the Premier of the province.

Delegation of powers or functions to municipalities by executive organs of state

12. (1) Section 238(a) of the Constitution authorises Cabinet members, MECs and other executive organs of state to delegate to municipalities powers and functions that are to be exercised or performed in terms of legislation.

(2) Section 238(a) contains a proviso to the effect that a delegation must be consistent with the legislation in terms of which the relevant power or function is exercised, which means that the enabling legislation would normally regulate the delegation.

- (3) Generally speaking such a delegation –
- (a) would be subject to any conditions, limitations or directions determined by the Cabinet member, MEC or other executive organ of state;
 - (b) would not divest the Cabinet member, MEC or other executive organ of state of the responsibility concerning the exercise of the delegated power or function, which means that the municipality acts in the name of Cabinet member, MEC or other executive organ of state; and
 - (c) may at any time be amended or revoked by the Cabinet member, MEC or other executive organ of state.

(4) Although section 238(a) may be read as a general power given to executive organs of state to delegate their statutory powers and functions to other executive organs of state, it more specifically serves as constitutional sanction to Parliament and provincial legislatures to enact legislation providing for such delegations.

(5) Section 238(a) does not mention agreement between the parties as a formal requirement for the delegation, but it is suggested that agreement should, as a matter of principle, always be sought before powers and functions are delegated to municipalities.

Appointment of municipalities to perform agency functions on behalf of executive organs of state by way of agency agreements

13. (1) Section 238(b) of the Constitution authorises a municipality to perform any function or exercise any power for and on behalf of a Cabinet member, MEC or other executive organ of state in terms of an agency agreement.

(2) The performance of a function or the exercise of a power for and on behalf of a Cabinet member, MEC or other executive organ of state in terms of section 238(b) entails that –

- (a) an agency agreement has to be concluded between the relevant Cabinet member, MEC or other executive organ of state and the municipality concerned, stating all the terms agreed upon by the parties; and
- (b) the normal principles of agency will apply, which means that the Cabinet member, MEC or other executive organ of state will be the principal in respect of the exercise of the power or function, and the municipality will be the agent that acts in the name and on behalf of the principal.

(3) As agency is an agreement, municipalities cannot be compelled to accept an agency appointment under this section.

CHAPTER 3

**STATUTORY PROVISIONS REGULATING ASSIGNMENTS AND
DELEGATIONS TO MUNICIPALITIES**

List of statutory provisions regulating assignments to municipalities

14. The following statutory provisions regulate, or are relevant to, the assignment of powers and functions to municipalities:

- (a) Section 9 of the Municipal Systems Act, which prescribes the process to be followed when powers and functions are assigned to municipalities by way of legislative assignments;
- (b) section 10 of the Municipal Systems Act, which prescribes the process to be followed when an executive assignment of a power or function to a municipality is effected in terms of –
 - (i) a power contained in enabling legislation; or
 - (ii) by agreement in terms of section 99 or 126 of the Constitution;
- (c) section 10A of the Municipal Systems Act, which obliges national or provincial organs of state to ensure sufficient funding, and other initiatives, when effecting either legislative or executive assignments;
- (d) section 3(2A), (28) and (2D) of the Financial and Fiscal Commission Act, which prescribes certain measures before an assignment may be effected by way of legislation;
- (e) section 6(a) and (b) of the Intergovernmental Fiscal Relations Act, if an assignment may have fiscal, financial or budgetary implications for a municipality; and
- (f) any provisions of the annual Division of Revenue Act that may affect an assignment

Part 1: Regulation of assignments by Municipal Systems Act

Legislative assignments

15. (1) Section 9 of the Municipal Systems Act regulates **legislative assignments** to municipalities. The section applies both to Cabinet members and Deputy Ministers initiating assignments by way of Acts of Parliament and to MECs initiating assignments by way of provincial Acts. Cabinet members and Deputy Ministers must comply with the procedures set out in section 9(1) and (3) and MECs must comply with the procedures set out in section 9(2) and (3).

16. The procedures prescribed by section 9 generally require a proper assessment of the implications of the assignment, consultation with

interested organs of state and submission of all views and assessments to the relevant legislature when the Bill providing for the assignment is introduced in the legislature.

(3) It is important that the required assessments and consultations be carried out before the draft Bill is introduced in the relevant legislature otherwise the Portfolio Committee processing the legislation in Parliament or the provincial legislature may recommend rejection of the Bill and reintroduction of the Bill only after the prescribed procedures have been complied with.

Procedures for assignments by Acts of Parliament

16. (1) Section 9(1) of the Act states that a Cabinet member or Deputy Minister who initiates legislation providing for the assignment of a power or function to all municipalities or a specific category of municipalities must within a reasonable time before introducing the draft legislation in Parliament

-
- (a) inform the Financial and Fiscal Commission of the possible impact of the assignment on –
 - (i) the future division of revenue between the spheres of government in terms of section 214 of the Constitution;
 - (ii) the fiscal power, fiscal capacity and efficiency of municipalities or the category of municipalities to which the assignment applies; and
 - (iii) the transfer, if any, of employees, assets and liabilities; and
 - (b) request the Commission to make an assessment of the financial and fiscal implications of the draft legislation.

(2) After receiving the Financial and Fiscal Commission's assessment referred to in subclause (1)(b), the Cabinet member or Deputy Minister initiating the assignment must consult with the Minister of Provincial and

Local Government, the Minister of Finance and organised local government nationally, with regard to –

- (a) the Commission's assessment of the legislation;
- (b) the policy goals to be achieved by the assignment and the reasons for deciding on assignment as the preferred option;
- (c) the financial implications of the assignment projected over at least three years;
- (d) any possible financial liabilities or risks after the three year period referred to in paragraph (c);
- (e) how additional expenditure by municipalities as a result of the assignment will be funded;
- (f) the implications of the assignment for the capacity of the affected municipalities; and
- (g) the assistance and support that will be provided to municipalities in respect of the assignment.

(3) When the Cabinet member or Deputy Minister introduces the draft Bill in Parliament, the Bill must be accompanied by –

- (a) a memorandum –
 - (i) giving at least a three year projection of the financial and fiscal implications of the assignment for municipalities in general or the affected category of municipalities;
 - (ii) disclosing any possible financial liabilities or risks after the three-year period;
 - (iii) indicating how any additional expenditure by municipalities or the affected municipalities will be funded; and
 - (iv) indicating the implications of the assignment for the capacity of municipalities or the affected municipalities; and
- (b) the Commission's assessment referred to in subclause (2)(b).

Procedures for assignments by provincial Acts

17. (1) Section 9(2) of the Municipal Systems Act states that an MEC who initiates legislation providing for the assignment of a power or function to all municipalities in the province or a specific category of municipalities in the province must within a reasonable time before introducing the draft legislation in the provincial legislature –

(a) inform the Financial and Fiscal Commission of the possible impact of the assignment on –

(i) the future division of revenue between the spheres of government in terms of section 214 of the Constitution;

(ii) the fiscal power, fiscal capacity and efficiency of municipalities or the category of municipalities to which the assignment applies; and

(iii) the transfer, if any, of employees, assets and liabilities; and

(b) request the Commission to make an assessment of the financial and fiscal implications of the draft legislation.

(2) After receiving the Financial and Fiscal Commission's assessment referred to in subclause (1)(b), the MEC initiating the assignment must consult with the MEC for local government, the MEC for responsible for finance and organised local government in the province concerned, with regard to –

(a) the Commission's assessment referred to subclause (1)(b);

(b) the policy goals to be achieved by the assignment and the reasons for deciding on assignment as the preferred option;

(c) the financial implications of the assignment projected over at least three years;

(d) any possible financial liabilities or risks after the three year period referred to in paragraph (c);

(e) how additional expenditure by the affected municipalities as a result of the assignment will be funded;

- (f) the implications of the assignment for the capacity of the affected municipalities; and
- (g) the assistance and support that will be provided to the affected municipalities in respect of the assignment.

(3) When the MEC introduces the draft Bill providing for the assignment in the provincial legislature, the Bill must be accompanied by –

- (a) a memorandum –
 - (i) giving at least a three year projection of the financial and fiscal implications of the assignment for the affected municipalities;
 - (ii) disclosing any possible financial liabilities or risks after the three-year period;
 - (iii) indicating how any additional expenditure by the affected municipalities will be funded; and
 - (iv) indicating the implications of the assignment for the capacity of the affected municipalities; and
- (b) the Commission's assessment referred to in subclause (2)(b).

Executive assignments

18. (1) Section 10 of the Municipal Systems Act regulates the assignment by executive organs of state of powers and functions to specific municipalities –

- (a) in terms of powers contained in Acts of Parliament or provincial Acts;
or
- (b) **by** way of agreements contemplated in section 99 or 126 of the Constitution.

(2) It is to be noted that section 10 applies both to Cabinet members, Deputy Ministers and other national executive organs of state and to MECs and other provincial executive organs of state initiating the assignment of powers and functions to a specific municipality.

- (3) The procedures prescribed by section 10 generally require –
- (a) a proper assessment of the financial implications of the assignment for the specific municipality; and
 - (b) the submission of information on those financial implications to interested organs of state.

Memorandum to be submitted to Minister of Provincial and Local Government and National Treasury

19. (1) In terms of section 10 of the Municipal Systems Act an executive organ of state (i.e. both national and provincial executive organs of state) must submit to the Minister of Provincial and Local Government and the National Treasury a memorandum containing the information referred to in sub-clause (2) if that organ of state intends to assign a power or function to a specific municipality in terms of –

- (a) a power contained in an Act of Parliament or a provincial Act; or
- (b) an agreement in terms of section 99 or 126 of the Constitution.

(2) The memorandum to be submitted to the Minister of Provincial and Local Government and the National Treasury must –

- (a) give at least a three-year projection of the financial implications of that power or function for the municipality;
- (b) disclose any possible financial liabilities or risks after the three-year period; and
- (c) indicate how any additional expenditure by the municipality will be funded.

Organs of state assigning powers and functions to ensure funding- and capacity building initiatives

20. In terms of section 10A of the Municipal Systems Act a Cabinet member, MEC or other organ of state that initiates a legislative assignment in terms of section 9 or an executive assignment in terms of section 10, must take appropriate steps to ensure that sufficient funding- and capacity building

initiatives are in place for the performance of the assigned power or function by the relevant municipalities or municipality if –

- (a) the assignment of the power or function imposes a duty on the municipalities or municipality;
- (b) that duty is not a local government matter listed in Part B of Schedule 4 and Part B of Schedule 5 to the Constitution, or is not incidental to any of those listed matters; and
- (c) the performance of that duty has financial implications for the municipalities or municipality.

***Part 2: Regulation of assignments by financial and Fiscal
Commission Act***

General note

21. (1) Section 3(2A) to (2D) of the Financial and Fiscal Commission Act regulates all inter-governmental assignments made "in terms of a law" which is broad enough to cover assignments contemplated in section 10 of the Municipal Systems Act, i.e. executive assignments by an executive organ of state to a municipality –

- (a) in terms of a power contained in an Act of Parliament or a provincial Act; or
- (b) by way of an agreement contemplated in section 99 or 126 of the Constitution.

(2) As such it is important to note that these provisions of the Financial and Fiscal Commission Act not only overlap with section 10 of the Municipal Systems Act, but also add some additional procedural elements such as input from the Financial and Fiscal Commission before the power or function is assigned and treasury approval before the input from the Commission is sought. For this reason compliance with both section 10 of the Municipal Systems Act and section 3(2A) to (2D) of the Financial and Fiscal Commission Act is necessary for effecting a valid executive assignment to a municipality.

(3) As section 3(2A) to (2D) of the Financial and Fiscal Commission Act is confined to assignments made "in terms of a law", in other words executive assignments, it would appear as if section 9 of the Municipal Systems Act regulating legislative assignments is unaffected by the requirements of the Financial and Fiscal Commission Act.

Commission's recommendations or advice on assignments

22. (1) Section 3(2A)(a) of the Financial and Fiscal Commission Act obliges an organ of state intending to assign a power or function in terms of a law to a municipality, before assigning the power or function –

- (a) to notify the Financial and Fiscal Commission of the fiscal and financial implications of such assignment on –
 - (i) the future division of revenue raised nationally between the spheres of government as requires by section 214 of the Constitution;
 - (ii) the fiscal power, fiscal capacity and efficiency of the particular municipality;
 - (iii) the transfer of employees, assets and liabilities, if any; and
- (b) to request the Commission for its recommendation or advice regarding such assignment.

(2) When notifying or requesting the Commission for its recommendation or advice, the organ of state must in terms of **section 3(2)(B)** of the Act use a form prescribed by the Commission.

(3) In terms of section 3(2A)(b) of the Act the Commission must give its response to such a request not later than 180 days from the date of receipt of the request or such other period agreed with the relevant organ of state.

Treasury approval

23. (1) In terms of section 3(2D) of the Financial and Fiscal Commission Act the organ of state intending to assign a power or function must before requesting the recommendation or advice of the Commission, first obtain the written approval of –

- (a) the National Treasury, if that organ of state is a national organ of state; or
- (b) the relevant provincial treasury, if that organ of state is a provincial organ of state.

(2) If the relevant treasury refuses to give its approval the Commission may not be approached and the proposed assignment cannot be proceeded with.

Consideration of Commission's recommendations or advice

24. (1) Section 3(2A)(d) of the Financial and Fiscal Commission Act compels the organ of state proposing the assignment not only to consider the recommendations or advice but to indicate the extent to which it has considered the recommendation or advice, to –

- (a) the Commission;
- (b) the municipality to which the power or function is to be assigned;
- (c) the National Treasury; and
- (d) any other functionary responsible for authorising the assignment.

(2) Section 3 (2A)(c) of the Act makes it clear that an assignment covered **by** the section has no legal force unless the organ of state making such assignment has given consideration to the Commission's recommendation or advice.

(3) However, the requirement referred to in subclause (1) does not apply if the Commission fails to make a recommendation or give advice within the period referred to in clause **22(3)**. In such a case the organ of state

intending to assign the power or function may proceed with the assignment provided –

- (a) the National Treasury is consulted; and
- (b) the assignment takes into account the financial and fiscal implications of the assignment on the matters referred to in clause **22(1)(a)(i)** to (iii).

Part 3: Regulation of assignments by Intergovernmental Fiscal Relations Act

Consultation with Local Government Budget Forum

25. In terms of section 6(b) of the Intergovernmental Fiscal Relations Act, a national or provincial organ of state must consult the Local Government Budget Forum if a proposed assignment of a power or function to municipalities has a financial implication for local government.

Part 4: Regulation of delegations to and agency agreements with municipalities

General regulation of municipal delegations and agency appointments

26. (1) Apart from section 238 of the Constitution which requires agreement between the parties and consistency with any applicable legislation, there are no general statutory provisions regulating procedures when executive organs of state delegate powers and functions to municipalities or appoint municipalities as their agents for the exercise of powers and functions.

(2) Legislation which provides for the delegation of powers and functions to municipalities or for their appointment as agents usually determines specific procedures that must be applied in that specific case, and it is therefore important to carefully scrutinise the legislation providing for the delegation or agency for any specific requirements that must be complied with.

(3) Legislation providing for the delegation of powers and functions to municipalities must be read against the background of the common law rule that no statutory power or function entrusted to a specific organ of state may be delegated by that organ of state to another unless that legislation specifically or by necessary implication authorises such delegation. This means that delegation is normally not permissible unless specifically provided for in legislation.

CHAPTER 4

POLICY PRINCIPLES APPLICABLE TO ASSIGNMENTS AND DELEGATIONS TO MUNICIPALITIES

Legislation providing for assignments and delegations to be applied according to policy principles

27. Any legislation providing for the assignment or delegation of additional powers and functions to municipalities should **be** considered and applied in accordance with the policy principles set out in this Chapter.

Application of constitutional principles of co-operative government

28. When initiating a legislative assignment of any additional power or function to municipalities or considering an executive assignment of any additional power or function to a specific municipality, a national or provincial executive organ of state should apply the principles of co-operative government as set out in section 41 of the Constitution, and should in particular –

- (a) base its decision always on what is most beneficial and effective for the Republic as a whole;
- (b) accept the responsibility of assisting and supporting the affected municipalities or municipality by fulfilling any funding-, capacity building- and monitoring requirements necessary to ensure the success of the assignment; and

- (c) ensure that any agreement in terms of which a municipality undertakes to exercise a power or function on behalf of the organ of state, is **based** on consensus between the organ of state and the relevant municipality.

Powers and functions to be assigned in full whenever possible and practicable

29. When considering the assignment of a power or function, a national or provincial executive organ of state should endeavour, whenever possible and practicable, to assign the power or function to the affected municipalities or municipality in its entirety and not unnecessarily split the exercise of the power or function between different spheres of government.

Preference for general assignments whenever possible and practicable

30. (1) A national or provincial executive organ of state intending to assign a power or function should, in the interest of coherent government, give preference to general assignments whenever possible and practicable, subject to sub-clause (2).

(2) If it is not possible or practicable to effect a general assignment, or if circumstances exist that favour an assignment to a specific municipality, a national or provincial executive organ of state should assign the power or function to that specific municipality.

Exact description of power or function to be assigned

31. (1) When considering the assignment of a power or function, a national or provincial executive organ of state should determine precisely what the power or function to be assigned comprises and formulate an exact description of that power or function before the assignment is effected.

(2) The exact description of the power or function to be assigned should be included in –

- (a) the legislation providing for the assignment, in the case of legislative assignment; or
- (b) the agreement concluded between the organ of state and the relevant municipality, if the power or function is assigned in terms of an agreement.

Consideration of funding of assigned powers or functions

32. When considering the assignment of a power or function, a national or provincial executive organ of state should take into account how the exercise of the power or function to be assigned to a municipality or municipalities will be funded.

Municipalities not obliged to accept delegations

33. A national or provincial executive organ of state intending to delegate a power or function to a municipality should take into account that delegations should be effected by agreement and that a municipality cannot be obliged to accept a delegation.

Transfers of personnel to be effected in terms of applicable labour legislation

34. If an assignment involves the transfer of personnel, the assigning national or provincial executive organ of state must ensure that any applicable labour legislation relating to the transfer is complied with.

Legislation regulating consultation processes to be complied with before assignment of powers or functions

35. A national or provincial executive organ of state intending to assign a function or power should ensure that all applicable legislation relating to assignment processes have been complied with before any assignment is effected.

CHAPTER 5

UNIFORM GUIDELINES FOR LEGISLATIVE AND EXECUTIVE ASSIGNMENTS TO MUNICIPALITIES

General note

36. It is to be noted that although these Guidelines are not obligatory, all constitutional and statutory provisions discussed in Chapter 3 must be complied with and that any failure to do so may result in a futile or invalid assignment. To the extent then that these Guidelines give effect to these constitutional and statutory provisions they cannot simply be disregarded as non-mandatory recommendations, and executive organs of state would be well advised to follow the Guidelines rather than to disregard them.

Designation of facilitators

37. (1) As the assignment of powers and functions to municipalities is a highly technical process, it is advisable that national and provincial executive organs of state when contemplating such assignments designate a suitable state official or other person to facilitate and assist in the assignment process. The designation of facilitators should be made both for legislative assignments and executive assignments.

(2) Because of different sets of statutory provisions applicable to legislative assignments and executive assignments, the recommended processes for, and the role of the facilitator in, the two kinds of assignments will differ. Different sets of Guidelines are therefore proposed for legislative assignments and executive assignments.

Part 1: Guidelines for legislative assignments

Role of facilitators

38. A facilitator designated as proposed in clause 37 should perform the functions set out in this Part to assist a Cabinet member, Deputy Minister or MEC when initiating and finalising legislative assignments to municipalities. The facilitator should be responsible for –

- (a) driving the process and making all logistical arrangements;
- (b) preparing documentation required for the process;
- (c) conducting preliminary consultations and negotiations with **SALGA**, affected municipalities and other role players;
- (d) giving regular feedback to the Cabinet member, Deputy Minister or MEC initiating the assignment;
- (e) act as the central contact person for purposes of the process;
- (f) giving information on matters affected by the proposed assignment;
and
- (g) assisting in the drafting of legislation necessary for effecting the assignment.

Preparation of initial explanatory memorandum

39. (1) As a first step in the process of initiating a legislative assignment of a power or function to municipalities, the designated facilitator should prepare an initial explanatory memorandum on the proposed assignment covering at least the following:

- (a) a precise description of the power or function to be assigned to municipalities and any qualifications as to the exercise of that power or function by municipalities;
- (b) whether the power or function is to be assigned to all municipalities or to a specific category or group of municipalities;
- (c) a list of the constitutional and statutory provisions that are applicable to or otherwise regulates the proposed assignment;
- (d) an explanation of the policy goals to be achieved by the proposed assignment and a motivation of the reasons for utilising assignment to municipalities as the preferred option to achieve those policy goals;
- (e) an account of the level of technical and managerial expertise required for the exercise of the power or function;
- (f) an account of the capacity for the exercise of the power or function –
 - (i) at national or provincial level currently responsible for the power or function; and

- (ii) municipalities in general or the category of municipalities to which the power or function is to be assigned; and
- (g) the possible impact of the proposed assignment on –
 - (i) the future division of revenue between the spheres of government in terms of section 214 of the Constitution;
 - (ii) the fiscal power, fiscal capacity and **efficiency** of municipalities or the category of municipalities to which the assignment applies; and
 - (iii) the transfer, if any, of employees, assets and liabilities;
- (h) appropriate steps that should be considered to ensure sufficient funding- and other capacity for the performance of the function by municipalities or the relevant category of municipalities;
- (i) other assistance and support that should be considered for municipalities or the relevant category of municipalities in respect of the assignment;
- (j) national or provincial monitoring measures that should be taken to ensure municipal compliance with the assignment;
- (k) matters that should be covered by the legislation that will provide for the assignment; and
- (l) the proposed timeframes for introducing such legislation in Parliament or the provincial legislature, as the case may be.

(2) When preparing the initial explanatory memorandum the facilitator must act in accordance with the directions of the Director General of the Department responsible for the proposed assignment.

**Submission of initial explanatory memorandum to Cabinet member,
Deputy**

Minister or MEC initiating assignment

- 40.** (1) The facilitator should through the Director General of the Department responsible for the proposed assignment, submit the initial

explanatory memorandum for approval in principle to the Cabinet member, Deputy Minister or MEC initiating the assignment.

(2) If the Cabinet member, Deputy Minister or MEC requests any amendments to the initial explanatory memorandum, the facilitator must effect the amendments and resubmit the memorandum to the Cabinet member, Deputy Minister or MEC.

Drafting of legislation providing for proposed assignment

41. (1) If the Cabinet member, Deputy Minister or MEC initiating the assignment approves the initial explanatory memorandum or amended memorandum, a departmental draft of the legislation that will provide for the assignment should be drafted.

(2) In drafting the legislation provision should be made for implementation time frames that correspond with –

- (a) the budgetary processes set out in the Municipal Finance Management Act, in the case of an assignment that is likely to have a financial impact on municipalities; and
- (b) the integrated development planning processes of municipalities set out in the Municipal Systems Act.

Assessment by Financial and Fiscal Commission

42. (1) Once the departmental draft of the proposed legislation is ready, the Financial and Fiscal Commission must in terms of section 9(1)(a) or 9(2)(a) of the Municipal Systems Act be requested to assess the financial and fiscal implications of the proposed legislation.

(2) Such request must be accompanied by –

- (a) the departmental draft of the proposed legislation; and
- (b) the initial explanatory memorandum approved in principle in terms of clause **40** and containing the information required in terms of section

9(1)(a) (i), (ii) and (iii) of the Municipal Systems Act, in the case of a national assignment, and section 9(2)(a) (i), (ii) and (iii), in the case of a provincial assignment.

Amendment of initial explanatory memorandum

43. (1) On receipt of the assessment of the Financial and Fiscal Commission the facilitator should make such amendments to the initial explanatory memorandum as may be necessary in view of the assessment.

(2) To the extent that the explanatory memorandum not already does that, the memorandum must also be amended to reflect the information required by section 9(3)(a) of the Municipal Systems Act, viz. –

- (a) at least a three year projection of the financial and fiscal implications of the assignment for municipalities in general or the affected category of municipalities;
- (b) any possible financial liabilities or risks after the three-year period;
- (c) how any additional expenditure by municipalities or the affected category of municipalities will be funded; and
- (d) the implications of the assignment for the capacity of municipalities or the affected municipalities, including staff and financial resources.

Consultation with other role-players

44. (1) The amended explanatory memorandum, the assessment of the Financial and Fiscal Commission and the departmental draft of the proposed legislation should serve as the basis for the consultation process required by section 9(1)(b) or 9(2)(b) of the Municipal Systems Act.

(2) In terms of section 9(1)(b) of that Act the Cabinet member or Deputy Minister initiating the assignment must consult the Minister of

Provincial and Local Government, the Minister of Finance and SALGA with regard to –

- (a) the Commission's assessment of the legislation;
- (b) the policy goals to be achieved by the assignment and the reasons for deciding on assignment as the preferred option;
- (c) the financial implications of the assignment projected over at least three years;
- (d) any possible financial liabilities or risks after the three year period referred to in paragraph (c);
- (e) how additional expenditure by municipalities as a result of the assignment will be funded;
- (f) the implications of the assignment for the capacity of the affected municipalities; and
- (g) the assistance and support that will be provided to municipalities in respect of the assignment.

(3) If the assignment is initiated by an MEC, the MEC must in terms of section 9(2)(b) of that Act consult the MEC for local government, the MEC for finance and organised local government representing local government in the province with regard to those matters.

(4) It is advisable that the Cabinet member, Deputy Minister or MEC initiating an assignment should also consult organised labour if the assignment will necessitate staff transfers.

Referral of legislation to Local Government Budget Forum

45. If the proposed legislation which provides for the assignment has a financial implication for the local sphere of government, the Cabinet member, Deputy Minister or MEC initiating the assignment must in terms of section 6(b) of the Intergovernmental Fiscal Relations Act refer the proposed legislation to the Local Government Budget Forum.

Inclusion of views of role-players in explanatory memorandum and adjustment of proposed legislation

46. After completion of the consultation process –

- (a) the facilitator should include in the explanatory memorandum a summary of the views of role-players referred to in clause **44**; and
- (b) the departmental draft of the proposed legislation should be adjusted as may be necessary in view of the consultation process.

Submission of draft legislation to Cabinet or provincial Executive Council and publication for public comment

47. (1) When the departmental draft of the proposed legislation is submitted to Cabinet or the relevant provincial Executive Council for approval to publish the draft legislation for public comment in terms of section 154(2) of the Constitution, the submission should include the explanatory memorandum in order that the views of all role players are available to Cabinet or the relevant provincial Executive Council.

(2) If Cabinet or the relevant provincial Executive Council approves proposed legislation for publication for public comment, the proposed legislation must be published in accordance with the provisions applicable to such publication.

Legislative assignments necessitating staff transfers

48. (1) If a proposed legislative assignment of a power or function to municipalities would necessitate staff transfers, the Cabinet member, Deputy Minister or MEC initiating the assignment should enter into negotiations with SALGA and organised labour on the transfer before the legislation providing for the assignment is introduced in the relevant legislature.

(2) Because of the technical nature of such negotiations it is suggested that the facilitator should have a key role in these negotiations.

Preparation of final version of explanatory memorandum

- 49.** When the public comment process has been completed, the facilitator must prepare the final version of the explanatory memorandum and submit it to the Cabinet member or MEC initiating the assignment.

Introduction of draft legislation in relevant legislature

- 50.** When the draft legislation has been approved by Cabinet or the relevant provincial Executive Council and certified by the state law advisers, the draft legislation may be introduced in Parliament or the relevant provincial legislature but must in terms of section 9(3) of the Municipal Systems Act be accompanied by –
- (a) the final version of the explanatory memorandum reflecting at least the information mentioned in section 9(3) of the Act; and
 - (b) the assessment of the Financial and Fiscal Commission referred to in section 9(1)(b)(i) or 9(2)(b)(i) of the Municipal Systems Act.

Part 2: Guidelines for executive assignments**General note**

51. (1) Unlike legislative assignments to municipalities which are regulated only in terms of the Municipal Systems Act, an executive assignment to a municipality is regulated by both the Municipal Systems Act and the Financial and Fiscal Commission Act. As the regulatory processes in terms of the two Acts overlap and in certain important respects require different procedures, the aim of the Guidelines in this Part is to suggest a uniform and synchronised process covering both Acts.

(2) A further complicating factor is the fact that powers and functions could be assigned to individual municipalities by agreement with the municipality in terms of section 99 or 126 of the Constitution or by executive act in terms of a power contained in national or provincial legislation. The guidelines aim to cover both scenarios.

Role of facilitator

52. A facilitator designated as proposed in clause 37 should perform the functions set out in this Part to assist an executive organ of state seeking to assign a power or function to a specific municipality. The facilitator should be responsible for –

- (a) driving the process and making all logistical arrangements;
- (b) preparing documentation required for the process;
- (c) conducting preliminary consultations and negotiations with the municipality and other role players;
- (d) giving regular feedback to the Cabinet member, Deputy Minister or MEC initiating the assignment;
- (e) acting as the central contact person for purposes of the process;
- (9)** giving information on matters affected by the proposed assignment; and
- (g) assisting in the drafting of any agreement that may be necessary for effecting the assignment.

Preparation of explanatory memorandum

53. (1) As a first step in the process of initiating an executive assignment of a power or function to a municipality, the designated facilitator should prepare an explanatory memorandum on the proposed assignment covering at least the following:

- (a) the name of the municipality to whom the power or function is to assigned;
- (b) a precise description of the power or function, and any qualifications as to the exercise of that power or function by the municipality;
- (c) indicate whether the power or function is assigned –
 - (i) in terms of a power contained in enabling legislation, and if so which provision of such legislation; or
 - (ii) by way of agreement in terms of section 99, 126 or 156(4) of the Constitution;

- (d) a list of the constitutional and statutory provisions that are applicable to the proposed assignment;
- (e) the views of the affected municipality on the proposed assignment and any the specific terms provisionally agreed upon by the parties;
- (f) information required **by** section 10 of the Municipal Systems Act, viz. –
 - (i) at least a three year projection of the financial and fiscal implications of the assignment for the municipality;
 - (ii) any possible financial liabilities or risks after the three year period;
 - (iii) how any additional expenditure by the municipality will be funded;
- (g) information required by section 3(2A) of the Financial and Fiscal Commission Act, viz. the fiscal and financial implications of the proposed assignment on –
 - (i) the future division of revenue raised nationally between the spheres of government in terms of section 214 of the Constitution;
 - (ii) the fiscal power, fiscal capacity and efficiency of the municipalities; and
 - (iii) the transfer of employees, assets or liabilities, if any;
- (h) an explanation of the policy goals to be achieved by the proposed assignment and a motivation of the reasons for utilising assignment as the preferred option to achieve those policy goals;
- (i) an account of the level of technical and managerial expertise required for the exercise of the power or function;
- (j) an account of the capacity of the municipality for the exercise of the power or function;
- (k) whether the assignment is likely to necessitate –
 - (i) any transfers or secondments of staff, and if so, which labour legislation will be applicable to such transfers or secondments;
 - (ii) any transfers of assets or liabilities, and if so, the cost and risks involved in any such transfers;

- (l) appropriate steps that should be considered to ensure sufficient funding- and other capacity for the performance of the function by the municipality;
- (m) other assistance and support that should be considered for the municipality in respect of the assignment; and
- (n) the proposed implementation time frames for the assignment that will correspond with –
 - (i) the budgetary processes set out in the Municipal Finance Management Act, if the assignment that is likely to have a financial impact on the municipality; and
 - (ii) the integrated development planning processes set out in the Municipal Systems Act.

Submission of explanatory memorandum to executive organ of state initiating assignment

54. (1) The facilitator should submit the explanatory memorandum for approval in principle to the executive organ of state initiating the assignment.

(2) If the executive organ of state requests any amendments to the explanatory memorandum, the facilitator must effect the amendments and resubmit the memorandum to the executive organ of state.

Treasury approval in terms of Financial and Fiscal Commission Act

55. (1) Before requesting the recommendation or advice of the Financial and Fiscal Commission in terms of section 3(2A)(a) (ii) of the Financial and Fiscal Commission Act, the executive organ of state seeking to assign the power or function must in terms of section 3(2D) of that Act obtain the written approval of –

- (a) the National Treasury, if that organ of state is a national organ of state; or

(b) the relevant provincial treasury, if that organ of state is a provincial organ of state.

(2) The submission to the relevant treasury for such approval must include a copy of the explanatory memorandum approved in terms of clause **54**.

Submission to Financial and Fiscal Commission

56. (1) The Financial and Fiscal Commission may be approached for its recommendation or advice in terms of section 3(2A)(a) (ii) of the Financial and Fiscal Commission **Act** only after treasury approval referred to in clause **55** has been obtained.

(2) The submission to the Financial and Fiscal Commission must include a copy of the explanatory memorandum approved in terms of clause **54**.

Confirmation that recommendation or advice of Financial and Fiscal Commission has been considered

57. (1) Once the recommendation or advice of Financial and Fiscal Commission has been received and considered, the executive organ of state initiating the assignment must in terms of section 3(2A)(d) of the Financial and Fiscal Commission **Act** indicate to the following role players the extent to which it has considered the recommendation or advice:

- (a) the Commission;
- (b) the municipality to whom the power or function is to be assigned;
- (c) the National Treasury; and
- (d) any other functionary responsible for authorising the assignment.

Submission to Minister and National Treasury in terms of Municipal Systems Act

58. (1) It is advisable that the submission in terms of section 10 of the Municipal Systems Act to the Minister of Provincial and Local Government and the National Treasury should be made only after the Financial and Fiscal Commission has given its recommendation or advice on the proposed assignment as contemplated in clause **56**.

(2) The submission to the Minister of Provincial and Local Government and the National Treasury should include –

- (a) a copy of the explanatory memorandum approved in terms of clause **54** and updated in accordance with any recommendation or advice by the Financial and Fiscal Commission; and
- (b) the confirmation referred to in clause **57**.

(3) Although not a statutory requirement, it is advisable that a provincial executive authority seeking to assign a power or function to a municipality should also consult the MEC for local government and the MEC for finance in the province on the assignment.

Final negotiations with municipality

59. (1) An executive organ of state seeking to assign a power or function to a municipality should conduct the final negotiations with the municipality only after the above consultation process has been concluded.

(2) If the assignment is to be effected by way of an agreement in terms of section **99**, 126 or 156(4) of the Constitution, the agreement should take into account the views of other role players referred to in this Part.

Executive assignments necessitating staff transfers

60. (1) ~~If~~ a proposed executive assignment of a power or function to a municipality would necessitate staff transfers, the executive organ of state

seeking to assign the power or function and the municipality should enter into negotiations with the municipality and organised labour on the transfer.

(2) Because of the technical nature of such negotiations it is suggested that the facilitator should have a key role in these negotiations.

Assignments by way of agreements

61. If an assignment is to be effected by way of an agreement contemplated in section 99, 126 or 156(4) of the Constitution, the agreement should –

- (a) describe clearly and in sufficient detail the power or function being assigned;
- (b) state the term of the agreement and the conditions subject to which the power or function is assigned;
- (c) state any capacity building- and support initiatives to be undertaken by the assigning organ of state, if any;
- (d) make provision for the transfer or secondment of employees to the municipality, if necessary, in accordance with any applicable labour legislation;
- (e) indicate any monitoring measures to be taken by the assigning organ of state;
- (f) provide for dispute resolution in accordance with the Intergovernmental Relations Framework Act, 2005; and
- (g) indicate when the assignment takes effect subject to section 99 or 126 of the Constitution.

CHAPTER 6

UNIFORM GUIDELINES FOR DELEGATIONS AND AGENCY APPOINTMENTS

General note

62. (1) As there are no statutory provisions regulating the allocation of powers and functions to municipalities on an delegation or agency basis, it is suggested that this method of vesting powers and functions in municipalities be confined to cases where such delegations or agency agreements are specifically authorised by empowering legislation. Section 238 of the Constitution lays the constitutional basis for such delegations or agency agreements but requires consistency with the empowering legislation.

(2) To ensure a measure of uniformity, it is recommended that the process as set out in this Chapter be followed when executive organs of state delegate powers or functions to municipalities or appoint municipalities as their agents.

Preparation of explanatory memorandum

63. As is suggested for the other methods of vesting powers and functions in municipalities, the executive organ of state initiating a delegation or agency appointment should cause an explanatory memorandum to be prepared that should at least cover the following matters:

- (a) a precise description of the power or function to be delegated to the municipality or for which the municipality is to be appointed as agent;
- (b) the legislation in terms of which the power or function will be delegated or the municipality appointed as agent, including any procedures required to be followed in terms of that legislation;
- (c) the views of the affected municipality on the proposed delegation or agency appointment and any specific terms provisionally agreed upon by the parties;

- (d) the reasons why the power or function is to be delegated to the municipality or the municipality is to be appointed as agent;
- (e) the level of technical and managerial expertise required for the exercise of the power or the performance of the function;
- (f) the current capacity of the municipality to exercise the delegated power or function or to act as agent;
- (g) the impact, if any, of the proposed delegation or appointment on the financial and fiscal capacity of the municipality; and
- (h) the measures the organ of state intends to take to ensure sufficient funding- and other capacity in the municipality for the proposed delegation or appointment.

Consultation with other role players

64. (1) Before an executive organ of state delegates a power or function to a municipality or appoints a municipality as its agent, that organ of state should first obtain the views of the Minister of Provincial and Local Government and the National Treasury.

(2) If that organ of state is a provincial organ of state, it should also obtain the views of the MEC for local government and the MEC for finance in the province.

(3) When seeking the views of the role players referred to in sub-clause (1) and (2), the explanatory memorandum prepared in terms of clause 63 should be made available to them.
