

Appendix 2:

THE IMPACT OF UNFUNDED MANDATES IN SOUTH AFRICAN INTERGOVERNMENTAL RELATIONS

A2.1 Introduction

This Appendix reports on the progress of the first phase of the work, which the Commission began during the second half of 2010, into the impact of unfunded/underfunded mandates on provincial and local government. This phase focused primarily on the six metropolitan areas. Since their inception, some municipalities have raised the issue that they are compelled to perform functions, which are not allocated to them in terms of the Constitution and legislation on powers and functions. Some provinces have also pointed out that they face unfunded or underfunded mandates as a result of policy decisions made at a national level. These decisions have financial implications, but come without the necessary funding for their implementation. To deal with unfunded mandates and the constraints they place on other spheres of government, the government has put in place several initiatives. The most notable are the 2003 amendments to the Municipal System Act of 2000, specifically to Sections 9 and 10, which aim to prevent unfunded mandates flowing from legislative assignments; and the 2003 amendments to the Financial and Fiscal Commission Act of 1997, which requires organs of state to assess the financial and fiscal implications (and obtain the Commission's recommendations) before functions that are assigned to other organs of state in another sphere of government become law. In evaluating the impact of unfunded mandates on service delivery at provincial and local government level, this Appendix focuses on housing, health care services, roadworks, libraries and museums, as these are the commonly cited services when unfunded mandates are discussed.

Section A2.2 discusses the legislative framework for assigning or shifting powers and functions, which is followed by a discussion of unfunded mandates in Section A2.3. In section A2.4 the results of a questionnaire administered to assess the prevalence and impact of unfunded mandates in South Africa are discussed and interpreted. The Appendix concludes by highlighting the key findings and providing advisories.

A2.2 Framework for transferring powers and functions

The starting point is that unfunded mandates can be understood in the context of the constitutional and legislative framework for the allocation and transfer of powers and functions.

A2.2.1 Constitutional framework

The Constitution defines the functions and relationships of the spheres of government in South Africa. Provinces have concurrent powers in functional areas listed in Schedule 4 (shared with the national government) and exclusive powers with regard to Schedule 5 matters. Municipalities have powers in respect of the functional areas listed in Schedules 4B and 5B. All residual matters fall under the national government's jurisdiction. Table 15 provides a summary of each sphere of government's role in providing specific functions in the areas reviewed and highlights sector-specific legislation for the assignment of these functions.

Table 15. The role of each sphere of government and legislation for the assignment of functions

Functions in constitution			Sector specific legislation for the assignment of specific functions	
Function	Relationship to schedule 4B and 5B	Provinces	Municipalities	Legislation
Health care services	A municipal health service is listed as a Schedule 4B function in the Constitution.	Undertakes a function of Primary Health Care services.	Provide Primary Health Care Services as a delegation from provinces.	The National Health Act, 2003 (Act No 61 of 2003) provides for the primary health care functions to be assigned to local government.
		Co-ordination of municipal health services.	Undertakes a function of municipal health services.	
Housing	Housing appears as a competency in Schedule 4A. 'Housing' as a competency has not been defined in any statute or court judgment.	Facilitates and promotes the provision of adequate housing with the province and within the framework of national policy.	Implement the process of integrated development planning within the framework of national and provincial housing legislation and policy.	The Housing Act 107 of 1998 provides for 'accreditation' of municipalities to undertake housing activities.
Libraries	"Libraries other than national libraries" are a Schedule 5A function that falls within the exclusive legislative competence of a province.	Provincial libraries and archives.	Provide libraries although this is not a municipal function.	There is no legislation. The function is provided without formal delegations from provinces.
Museums	"Museums other than national museums" are a Schedule 5A functional area that falls within the exclusive legislative competency of a province.	Provincial museums.	Provide museums although this is not a municipal function.	There is no legislation. The function is provided without formal delegations from provinces.

This division of powers is not watertight, as there are great difficulties in defining the cut-off points between the schedules and the two parts of the schedules. Provinces and municipalities may exercise their powers in the listed functional areas at their discretion. However, the Bill of Rights does impose duties on the government as a whole to perform functions in the areas covered by the listed socioeconomic rights⁷¹. In addition, municipalities are also constitutionally bound to provide basic municipal services.⁷²

The Constitution draws a link between the functions of sub-national governments and the funding to perform that mandate. Section 227(1)(a) provides that: "Local government and each province is entitled to an equitable share of revenue raised nationally to enable it to provide basic services and perform functions allocated to it". The entitlement to an equitable share is thus linked to basic services to be provided.

Equitable share transfers are complementary rather than the sole source of revenue for such functions. Therefore, when determining the equitable share allocation, the fiscal capacity and efficiency of provinces and municipalities must be taken into account.

A2.2.2 Legislative framework

The relevant legislation includes the Municipal Systems Act (32 of 2000), the Intergovernmental Fiscal Relations Act (97 of 1997), the Financial and Fiscal Commission Act (99 of 1997), the Division of Revenue Act (DORA) and the Public Finance Management Act (PFMA).

71 Ss 26 and 27 Constitution.

72 Joseph v City of Johannesburg 2010 (3) BCLR 212 (CC).

The Municipal Systems Act (32 of 2000). In terms of section 9 and 10 of the Municipal Systems Act there are procedural and substantive requirements that must be complied with during the assignment process. A national minister initiating the assignment of a function to municipalities in general (or to any category of municipalities) by means of an Act of Parliament must go through a procedure of consultation with the various stakeholders within a reasonable time before the Bill is introduced in Parliament.

The Intergovernmental Fiscal Relations Act (97 of 1997). The Act provides for consultation with the Financial and Fiscal Commission (the Commission) when any sphere of government intends to shift or delegate a function to another sphere of government.

The Financial and Fiscal Commission Amendment Act (99 of 1997). Section 3 of the Act provides for consultation with the Commission on the financial and fiscal implications before an organ of state in one sphere of government assigns the power or function to an organ of state in another sphere of government.

Division of Revenue Act (DoRA). When a function is shifted, the resources employed to render the function shift with the function. This principle arises from section 27(2) of the Annual Division of Revenue Act and requires that the equitable share allocations for the financing of particular functions and conditional grants (both operating and capital) must be paid to the organ of state that will become responsible for the function following an assignment.

The Public Finance Management Act (PFMA) provides for the calculation of the financial implications for the transfer of function. In terms of Section 35, draft national legislation that assigns an additional function or power to, or imposes any other obligation on, a provincial government, must, in a memorandum that must be introduced in Parliament with that legislation, give a projection of the financial implications of that function, power or obligation to the province.

A2.3 Definition of unfunded mandates

The concept of unfunded mandate is used loosely in the South African intergovernmental relations context. Unfunded mandates can be viewed broadly as (Khumala and Mokate, 2007:271):

Unfunded mandates refer to situations in which sub-national governments are legally mandated in terms of the Constitution or by policy pronouncement to undertake specific functions but do not receive funds from nationally raised revenues in order to fulfil these functions. This scenario is highlighted in cases where the framework underlying the provision of particular services require provincial or local governments to implement nationally determined minimum-service standards. However, the funding for the delivery of such services fails to reflect the cost of the service standards, forcing sub-national authorities to divert scarce own-revenue funds to meet the standard set.

A more narrow definition confines unfunded mandates to the transfer of new functions (not constitutionally assigned) to provinces and municipalities. The South African Cities Network defines an unfunded mandate as when “cities perform the functions of other spheres of government and bear significant costs out of their own revenue sources” (South African Cities Network, 2007:78).

The focus here will be on the narrow definition of unfunded mandates because the functional areas of housing, libraries, museums and primary health care are all matters that appear to fall outside Schedules 4B and 5B.

A2.3.1 International case studies on eliminating unfunded mandates

This section provides comparative case studies in order to gain insight into respective countries’ experiences with addressing problems associated with unfunded mandates. The concern about unfunded mandates is widespread in federal and decentralised systems and appears under various names. It is referred to as service responsibility downloading in Canada (McMillan, 2006) and cost shifting in Australia (Sansom, 2009).

During the late 1970s–early 1980s and again in the early 1990s, 15 states in the United States amended their constitutions to curb unfunded mandates. The methods used were the following (Zimmermann 1995: 88):

- (a) Prohibiting the imposition of some or all types of state mandates;
- (b) Requiring reimbursements of all or part of the costs associated with the mandates;
- (c) Authorising local governments to ignore an unfunded mandate;
- (d) Requiring a two-thirds vote of each house of the state legislature for imposing a mandate;
- (e) Authorising the governor of a state to suspend a mandate; or

- (f) Providing for the implementation date of a mandate to be delayed.

Following state initiatives that sought to curb states from imposing unfunded mandates on municipalities, the US Congress passed the Unfunded Mandates Reform Act of 1995 (UMRA). The object of the UMRA was not to place a ban on unfunded mandates, but to promote decision-making by compelling the Congress and federal agencies to consider the cost of imposing mandates on states, local and tribal governments and the private sector.

Unfunded federal mandates on local government also featured in the recent reform agenda of German federalism. In the major reform initiative of 2006, the *Länder*⁷³ asserted their constitutional dominance over local governments to the exclusion of the federal government. Articles 84(1) and 85(1) were thus amended by adding the following sentence to each: "Federal laws may not entrust municipalities and associations of municipalities with any tasks". Thus, transfers of tasks would come only from *Länder* (Gunlicks, 2007:120). Lander constitutions have also contained some provisions to limit unfunded mandates.

A2.4 The existence of unfunded mandates

A2.4.1 Health service (primary health care)

Municipalities also often cite primary health care as an unfunded mandate⁷⁴. In 2005 the National Health Council resolved that primary health care would be a provincial responsibility, and municipal health services (comprising selected components of the environmental health package of services) would remain a municipal responsibility. In terms of the 2005 resolution, municipal clinics were to be transferred under the provincial health structures, in a process known as "provincialisation". This policy will be reviewed in 2015 and may be amended or reversed if a single public service has been established by then.

Following this resolution, the provincialisation process started, with provinces making different levels of progress. However, in October 2007 the South African Local Government Association (SALGA) advised municipalities to halt all further transfers of primary health care to the provincial government until clarity had been reached on what constitutes primary health care, and research has been done on whether municipalities are best placed to provide effectively and efficiently primary health care services. According to Versteeg et al. (2009), since then no primary health care services have been provincialised from any metropolitan municipality in the country.

(a) Relation to Schedules 4B and 5B

The Constitution lists "Municipal health services" as a Schedule 4B function. The National Health Care Act 61 of 2003 defines municipal health services as water quality monitoring, food control, waste management, health surveillance of premises, surveillance and prevention of communicable diseases excluding immunisations, vector control, environmental pollution control, disposal of the dead and chemical safety.

Municipalities that provide primary health services must adhere to national standards, which deal with, among other things, the free provision of health services. In addition, municipalities are under considerable situational pressure to perform the service or to maintain quality standards. Thus these municipalities feel compelled to provide the service and to uphold a legally prescribed standard in doing so – which comes at a cost. Municipalities that perform primary health services do so in terms of agency agreements, which reportedly provide for inadequate funding arrangements.

A2.4.2 Libraries

(a) Relationship to Schedules 4B and 5B

"Libraries other than national libraries" are a Schedule 5A functional area that falls within the exclusive legislative competence of a province. Municipalities have no comparable competence. As an exclusive provincial competence, provinces are active in this functional area but to a limited degree. For example, in the Western Cape, the core functions of 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. Municipalities perform the bulk of the function, i.e. employing staff, managing the operations of libraries and maintaining library buildings.

Furthermore, municipal libraries also perform a strong supplementary role in primary and secondary education (a Schedule 4A function). They are a reference source for school projects, particularly in light of the poor quality of many school libraries. Many libraries also provide study space for learners.

(b) Duty or discretion?

There has been no legislative or executive assignment by the provinces of the library function to municipalities. However, until the 1996 Constitution came into operation, libraries were a local government matter, and so most public libraries are currently still administered and funded by municipalities.

In the Western Cape, for example, there are 148 library sites in non-metropolitan areas (130 public libraries, three multi-purpose community centres, five mobile libraries and ten satellite libraries) and 105 in the City of Cape Town (98 public libraries, three mobile libraries and four others). The Province administers libraries in only three municipalities, which was apparently due to the refusal of the municipalities to continue with the library function in 2000, and the province was willing to take them over. The question is then why do municipalities continue to perform a function that is not legally theirs. The answer is situational: it is socially and politically unacceptable for municipalities to close their libraries knowing that the provincial governments may not take over or provide adequate compensation for this function.

A2.4.3 Museums**(a) Relation to Schedule 4B and 5B**

“Museums other than national museums” are a Schedule 5A functional area that falls within the exclusive legislative competence of a province. 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, like libraries, predates the Constitution), ostensibly as part of their local tourism function (a Schedule 4B functional area).

(b) Duty or discretion?

There has been no legislative or executive assignment by the provinces of the museum function to municipalities. As museums were a local government matter until the 1996 Constitution came into operation, most museums are currently still administered and funded by municipalities.

Museums are not a basic service, and no obligation is imposed on municipalities to either establish or support them. Should the province assign the legislative function to municipalities, it would merely be extending a discretionary competence. Thus, there can be no compulsion to establish, run or support a museum. However, should a municipality decide to venture into this functional area, the province could set minimum standards for managing museum collections, visitor services and facilities.

(c) Costs

As suggested above, since the functional area of museums is discretionary power, any costs incurred would be for the account of the municipality concerned.

A2.4.4 Housing

Although the precise content of the housing competency in Schedule 4A is not defined in any statute, it broadly refers to the regulation, planning, funding and execution of government-subsidised housing schemes. The location of housing in Schedule 4A means that both national and provincial government may adopt and administer housing legislation. However, without assignment, municipalities may not make legislation with regard to housing or administer the housing subsidy.

There are two important legal qualifiers. First, municipalities may be accredited to assume a greater role in housing, and the process of accreditation does not result in an unfunded mandate as defined in this Appendix. Second, the Constitution instructs the State, including municipalities, to realise the right of access to housing. Municipalities have been allocated, by statute and by court judgment, responsibilities to realise the right of access to housing. For example, the Prevention of Illegal Evictions from and Unlawful Occupation of Land (PIE) Act instructs municipalities to submit information to the eviction court about alternative accommodation, and courts have instructed municipalities to make alternative land available to evictees whose eviction will result in homelessness. Municipalities have argued that, in practice, these obligations are no longer a small component, but go to the heart of the housing function.

First, the imposition of the abovementioned obligations emanates not only from PIE but mostly from the Bill of Rights, which removes the issue from the definition of unfunded mandates adopted here. Duties, arising from the Bill of Rights and imposed on municipalities through court orders, should not be considered unfunded mandates.

Second, while the provision of subsidised housing falls outside of the municipality's constitutional mandate, the same cannot be said of the provision of serviced sites or the facilitation of access to unoccupied buildings.

A responsibility would qualify as an unfunded mandate, as defined in this Appendix, to the extent that government has transferred responsibility to local government to submit reports to eviction courts. It is a responsibility, imposed by national government through legislation that falls outside Schedule 4B and 5B, and is not accompanied by a dedicated funding stream from national government. The Act predates the assignment framework of the Municipal Systems Act and the FFC Act. However, the courts appear to attenuate this duty by requiring municipalities to act "reasonably". Municipalities may therefore limit their involvement to evictions of the desperately poor that will result in homelessness. This involvement is based on the municipality's duty to implement the right of access to housing. Evictions that do not result in homelessness do not fall within that category.

The duty of local government to respect, protect, promote and fulfil the right of access to housing is not an unfunded mandate as defined in this Appendix. It forms part of the responsibilities allocated to the municipality by the Constitution and must be catered for in the equitable share. However, it may very well be an underfunded mandate in that the equitable share is not designed to incorporate a municipality's constitutional responsibilities concerning the right of access to housing in the context of evictions.

A2.5 The impact of unfunded mandates between spheres of government

This section provides an analysis of the financial impact of unfunded mandates as they relate to local government and provinces. First, it looks at the financial impact of unfunded mandates on metropolitan municipalities i.e., eThekweni, City of Johannesburg, Nelson Mandela Bay, Ekurhuleni, Tshwane and City of Cape Town. A questionnaire was administered to the six metros to assess the financial impact of unfunded mandates. The focus is only on metropolitan municipalities and KwaZulu-Natal, Eastern Cape and Gauteng provinces, and is part of the Commission's first attempt to assess the impact of unfunded mandates in South African intergovernmental relations. The Commission plans to undertake further research into the impact of unfunded mandates on local municipalities, district municipalities and other provinces in 2011.

A2.5.1 The financial impact of unfunded mandates in practice

(a) Metropolitan municipalities

What emerged from the questionnaire was that municipalities perform functions on behalf of provinces. These functions include Health Care Services, Libraries, Housing Services, Museums and Roadworks.

Table 16. Unfunded mandates by metropolitan municipality (nominal terms)

Type of unfunded mandate	eThekweni		City of JHB		Nelson Mandela		Ekurhuleni		Tshwane		City of Cape Town	
	08/09	09/10	08/09	09/10	08/09	09/10	08/09	09/10	08/09	09/10	08/09	09/10
R million/year												
Health Care Services	115.3	112.4	308.2	330.8	42.4	45.3	90.2	274.8	215.2	277.4	88.9	120.3
Library Services	131.4	155.6	121.1	139.9	45.1	42.7	15.3	45.6	54.2	60.1	203.0	274.0
Museums	29.6	35.5	44.4	54.6	8.5	16.8	0.0	0.0	13.1	14.2		
Housing: New Develop.	578.6	492.8	446.7	547.4	0.0	0.0	432.7	519.2	318.9	53.5		
Formal Housing	89.8	120.6	205.8	130.6	18.7	-53.9	0.0	0.0	197.6	379.0		
Roadworks subsidies	0.0	0.0	0.0	0.0	4.0	5.0	0.0	0.0	0.0	0.0		
Total	944.7	916.9	1126.2	1203.3	118.7	55.9	538.2	839.6	799.0	784.2	291.9	394.3
Total 2008/09	3818.7											
Total 2009/10	4194.2											

Source: Metropolitan Municipalities: eThekweni, City of Johannesburg, Nelson Mandela Bay, Ekurhuleni, Tshwane and City of Cape Town

73 German state

74 Metropolitan municipalities provide primary health care services in terms of agency agreements with their provincial departments.

Table 16 summarises the cost of unfunded mandates by metropolitan Municipality. It reflects that, in addition to the total amount received from provinces and other sources, the six metros have used/spent from their own budget on existing unfunded mandates. They spent an additional amount of R3,819 billion in 2008/09 and R4,194 billion in 2009/10. The City of Johannesburg spent more on unfunded mandates than other metros did for the 2008/09 and 2009/10 financial years, allocating R1,126 billion and R1,203 billion respectively. The eThekweni municipality spent about R945 million in 2008/09 and R917 million in 2009/10.

Based on the figures above, municipalities clearly perform functions on behalf of provinces without assigning full expenditure to the functions. This has implications for the equitable sharing of nationally collected revenue and the delivery of services. The findings of the research also highlighted the following challenges related to the delivery of these services as a result of unfunded mandates:

Health Care Services	Libraries
<ul style="list-style-type: none"> • Infrastructure is inadequate and does not address the needs of the patients and the health care services. Extensions, upgrading and maintenance of the health facilities is for the account of the local government. • There is a critical shortage of personnel to render the promotive and preventative health care. • In some instances nongovernmental organisations are used to fund staff and implement certain programmes in primary health care facilities. Once the service is provided, the funding of the non-governmental organisations is stopped or limited, and the staff has to continue rendering services, which creates an even higher workload for the remaining staff. • Financial constraints are experienced as stock, equipment and records required for primary health care (e.g. needles, syringes, dressings) have to be funded by the local government budget. 	<ul style="list-style-type: none"> • The Library Grant published in the Gazette is inadequate to fund the expenses of the Library service. • The Library service has been curtailed in its functionality to save on costs. • There is a shortage of staff. • Existing buildings need maintenance. • There is lack of funding for programmes and projects. • Municipal operational and capital budgets allocated internally are not sufficient to maintain/improve/expand services, resources and facilities. The standard of library services and facilities is declining slowly, instead of growing to satisfy the ever-changing and increasing needs of communities.
Housing	Museums
<ul style="list-style-type: none"> • The rental collection rates are poor. • There is scarcity of suitable land for development. • Inherited aging stock leads to high maintenance costs. • The subsidy quantum does not relate to the cost of delivery. • Additional facilities are needed. 	<ul style="list-style-type: none"> • There is shortage of education and support staff. • Most museums have inadequate infrastructure for storage and exhibitions. • The space for visiting schools and practical workshops is limited.

Other issues related to the exercise of powers and functions among the three spheres of government include:

- In some instances, the Service Level Agreements for the last three years have not been signed by Provincial Departments.
- Provincial Departments do not adhere to the principles of these agreements with regard to the provision of all resources.
- Some allocations from the province are not transferred on time according to the agreed payment schedule.
- Some services are devolved to municipalities without consultation and additional funding.

(b) Provinces

In addition to a questionnaire devised for metropolitan municipalities, the existence of unfunded mandates between national and provincial government (where metropolitan municipalities are funded through the respective provincial treasuries) was investigated. The findings of the investigation are summarised below. KwaZulu-Natal Provincial Treasury indicated that unfunded mandates do exist between national and the province. These arise because of policy decisions made at a national level, which have financial implications but come without the necessary funding to the province for implementation. The Treasury further argued that these unfunded mandated place pressure on the provincial fiscus. The total cost of unfunded mandates in the province amounts to R310,888 million, with the bulk emanating from the Departments of Education (R130,000 million) and Agriculture, Environmental Affairs and Development (R85,070 million).

Table 17. Unfunded mandates by Province and Department – 2011/12

Department (R'000)	KwaZulu-Natal	Eastern Cape
Provincial legislature	11,445	
Agriculture, Environmental Affairs and Rural Development	85,070	
Rural Development and Agrarian Reforms		1,040,040
Economic Development and Tourism	4,000	1,239,669
Education	130,000	2,514,233
Health		1,242,500
Social Development		38,900
Human Settlements		131,922
Public Works	47,114	155,339
Arts and Culture	33,259	
Total	310,888	6,362,603

Source: KwaZulu-Natal Provincial Treasury and Eastern Cape Provincial Treasury

The Eastern Cape Provincial Treasury also highlighted that unfunded mandates exist between national and the province. It indicated that, in the current financial year, the total cost of unfunded mandates amounts to R6,363 billion. Similar to KwaZulu-Natal the bulk emanates from the Department of Education, followed by the Departments of Health, Economic Development and Rural Development and Agrarian Reforms with estimated costs of R2,514 billion, R1,243 billion, R1,240 billion and R1,040 billion respectively.

According to the above, Section 35 of the Public Finance Management Act (PFMA) is contravened, as it requires the financial implications for the transfer of a function to be calculated, which is not the case. It also states that draft national legislation that assigns an additional function or power to (or imposes any other obligation on) a provincial government, must, in a memorandum that must be introduced in Parliament with that legislation, give a projection of the financial implications to the province of that function, power or obligation.

In the case of Gauteng, the Provincial Treasury's understanding is that an unfunded mandate is a statute or regulation that requires a provincial government or local government to perform certain functions, yet provides no money for fulfilling the requirement. Thus, in the strictest sense of this definition, the province does not have unfunded mandates. However, over the years the province has suffered from the misalignment between policy and the manner in which funds are allocated to the province, which has resulted in partial funding. The Provincial Treasury highlighted that:

There is a gap in the manner in which the province has been compensated for occupation specific dispensation (OSD). This gap will remain in the system for the years to come.

In the last two years, Human Settlement Departments are now expected to register the houses built with the National Home Builders Registration Council. However, the conditional grant does not make provide for this and the cost of other related professional fees.

Through a conditional grant called Public Transport Operations, the province has been mandated to provide a bus subsidy on behalf of the National Department of Transport. Being aware that such a grant will not be sufficient to cover everything, national government has classified this grant as Schedule 4, which creates problems for the province at implementation stage.

A2.6 Observations

The Commission is of the view that unfunded mandates do possibly exist between the spheres of government, as municipalities do perform provincial functions without the necessary funding. For instance, what emerged from the metropolitan municipalities questioned was that in total the six metros have spent an additional amount of R3,819 billion in 2008/09 and R4,194 billion in 2009/10 in the provision of existing unfunded mandates. In this case, it was the responsibility of the metros to use/spend their own budget for these functions.

There are examples of unfunded mandates in the fields of libraries, museums, health and, to some extent, housing. However, numerous claims by municipalities may not be sustained based on the narrow definition of unfunded mandates. It is suggested that they must therefore be addressed through the equitable share.

However, determining whether a mandate falls outside Schedules 4B and 5B is not always easy, as the cut off points between functional areas are not readily ascertained, which becomes apparent in the area of health services.

Essential legal procedures clearly need to be followed when assigning and delegating additional functions or powers to other spheres of government. However, in some instances metros are allocated functions without the Service Level Agreements governing such delegations. Where agreements exist, allocations from the provinces are not always transferred on time according to agreed payment schedule.

There are also problems with a shortage of staff to render the services. This raises serious concerns, as section 27(2) of the Annual Division of Revenue Act (DORA) requires that the resources employed to render a function are shifted with the function. It requires equitable share allocations for the financing of particular functions and conditional grants (both operating and capital) to be paid to the organ of state that will become responsible for that function following an assignment.

The assignment framework that binds national and provincial governments and seeks to prevent unfunded mandates is not effective. Despite the overlapping of the various pieces of legislation dealing with assignments (and which sometimes makes the framework difficult to apply), it is clear that section 9 and 10 of the Systems Act are honoured in their breach rather than in their application. This is even more pertinent to section 3(2D) of the Financial and Fiscal Commission Act. Local government's ability to discharge its mandate effectively is damaged when the lack of compliance results in an unfunded mandate.

In a number of functional areas, there is no legal basis for local government's activities. The clearest example is libraries. A further troublesome example is primary health services. While it is permissible for "municipal health services" to be defined in national legislation (subject of course to judicial scrutiny), the (informal) administrative reallocation of tasks to metros has no secure legal basis and tends to disadvantage municipalities.

Lastly, prior consultation with the Commission, before assignment legislation is introduced in a legislature, can be regarded as a formal validity requirement of such legislation. It may be argued that the provisions of the Systems Act and the FFC Act do not necessarily "overrule" provisions contained in other statutes. However, the "manner and form" provisions of the Systems Act and the FFC Act apply before the new legislation becomes a reality. They regulate the actions of the executive in preparing assignment legislation or making assignment decisions. With regard to assignments done by executive act, section 3(2A) (b) of the FFC Act is clear. It provides that an assignment "has no force" unless the Commission's recommendation has been considered.⁷⁵

In response to the problems identified above, the following advisories are made by the Commission:

- Government should undertake a review of the extent of compliance with legal procedures for the assignment and delegation of functions, as set out in the Intergovernmental Fiscal Relations Act, the Financial and Fiscal Commission Act, the Division of Revenue Act and the Local Government Municipal Systems Act. In particular, it is recommended that compliance with the following legal requirements are assessed:
 - a. The financial and fiscal implications of a function shift on the sphere of government or organ of state. The organ of state initiating a general assignment must provide these implications to the Commission for its recommendations to the Minister of Finance in line with Section 3 of the FFC Act 2003 as Amended and the Minister of Finance. The Commission tabled a compliance check list for this specific purpose in 2007.
 - b. All resources associated with delivering a service associated with a function to be shifted are transferred. These should include current assets, budgets and all future resources. There must be evidence of a decision taken by the Executing Authority of the assigning or delegating department or organ of state that this is acknowledged and pledged.
- Government should take steps to ensure that all mandates have a legal basis. The functions performed by each sphere of government must have a secure legal footing. Performing functions falling outside their mandate impinges upon the lawfulness of their budgets (although their expenditure is not necessarily illegal).
- Government should develop a time-bound programme to regularise the functional assignment of libraries and museums.

⁷⁵ A consultation requirement in the Constitution with regard to legislation dealing with local government's taxing powers (s 229(5) Constitution), was successfully challenged in court. See *Robertson v City of Cape Town* 2004 (9) BCLR 950 (C). The invalidity of the contested Act was not upheld by the Constitutional Court on a different ground. See *Steytler & De Visser* 2007, para 1.2.1.