



MANUAL FOR CHECKLIST
FOR ASSESSING
FUNCTION SHIFTS

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FINANCIAL
AND FISCAL
COMMISSION

For an Equitable Sharing of National Revenue

MANUAL FOR CHECKLIST FOR ASSESSING FUNCTION SHIFTS



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INTRODUCTION

The Constitution of the Republic of South Africa, 1996 (Act No.108 of 1996) defines spheres of government, national, provincial and local and it broadly assigns functions to each sphere (s125, s156 and Schedules 4 and 5). The Act also provides for three types of local governments.

When promulgating legislation intended to regulate the execution of these functions Parliament, Provincial Legislatures and other organs of state must do so in the spirit of cooperative government (s41).

Since the promulgation of the Constitution functions have been shifted between government departments and between spheres of government. The motivation of the shifts is usually a belief that they will lead to greater efficiency and effectiveness of government in delivering services to the population. The shifting of any function has far-reaching consequences, not the least of which is the implication for the allocation of funds through the budget.

Legislation has been enacted requiring the FFC to assess and comment on functions shifts. To respond efficiently and timeously to this task it is imperative that a framework(s) be urgently developed to guide the work of the FFC.

The FFC has begun to develop a framework to use in assessing function shifts that are proposed by any organ of state (in line with the Commission's strategic plan adopted for 2006/05-2007/08).

The framework will also be used to make an assessment of the location of current functions and the suitability of such arrangements thereof. A key factor would be the manner in which services are provided in a co-ordinated and integrated framework.

PART 1: DEFINING A FUNCTION SHIFT

Part 1 of the Checklist deals with the reasons for the proposed shift. It covers policy and legal issues. Page 1 is intended for recording the shift that is contemplated, who the proposing party is and what the shift is that is contemplated. The first thing to do is to establish whether the change contemplated is a shift in terms of the definition:

1 Definition of Function Shift

A 'function shift' means that a function previously assigned by the Constitution or any law made by Parliament or a Provincial Legislature to any 'organ of state' is reassigned to a different organ of state.

'Organs of State' that are assigned functions are many and varied in their status and structure. The following may propose a function shift:

- a) any national department;
- b) any provincial department;
- c) any municipality;
- d) any public entity established under Schedules 2; 3 and 4 of the Public Finance Management Act, 1999 (Act No. 1 of 1999) (PFMA); and
- e) any Constitutional Institution referred to in Schedule 1 of the PFMA.

If the change is indeed a "Shift" then COMPLETE THE **IDENTIFICATION DATA** and take care to note:

- the type of municipalities defined in the Constitution (Types A, B and C)
- the type of public entities (Constitutional Institutions, Major Public Entities, Other Public Entities, National Government Business Enterprises, Provincial Public Entities and Provincial Government Business Enterprises)
- the current national or provincial department as listed by the Public Service Act, 1994 (Act No. 103 of 1994)

2 Principles Applying to Shifting of Functions

'**Subsidiarity**' (the principle that a central authority should have a subsidiary function, performing only those tasks which cannot be performed at a local level) is the main factor to consider.

2.1	Does the proposed shift of the function respect, promote and fulfil the provisions of the Constitution that apply to delegation and assignment?
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2.1 This will require an assessment of the motivation that is provided by the proposing authority. To make this assessment the motivation will have to show that the proposed shift genuinely has the intention of fulfilling a Constitutional provision. It is not merely a "yes/no" answer. The reference to the motivation should be recorded in the Comments.

2.2	Does the shift contemplated fits in with a general framework of an established government policy?
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2.2 In the motivation the proposer will provide reference to the current government policy such as a White Paper or other policy document. Check that such documentation is on record. If the policy does not support the function shift then the FFC should not recommend that the shift takes place. Check "yes" or "no" and provide the reference in the Comments, then attach the document to the file.

3	Co-operative government
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3.1	Is the decision to assign or delegate a function based on what is appropriate for the Republic as a whole, rather than on what is appropriate for a particular sphere of government or organ of state?
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3.1 In formulating an opinion on the value and viability of the proposed function shift the FFC needs to consider the impact on service delivery and assess if it is appropriate for the country. A function shift may make life easier for a particular department or sphere without any positive impact on services to the country. The evidence should show that the change is beneficial for the country.

Check “yes” or “no” and provide the reference in the Comments, then attach the document to the file.

3.2	Does the assigning or delegating department or organ of state accept the funding requirements or support that is necessary to make the assignment or delegation successful?
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3.2 “Funds follow functions” which means that all resources that are associated with delivering a service associated with a function must be transferred if the function is shifted. This includes current assets and budget 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. (for example minutes of a meeting or other correspondence)

Check “yes” or “no” and provide the reference in the Comments, then attach the document to the file.

3.3	Does the assigning or delegating department or organ of state accept responsibility for constantly monitoring or reviewing the function assigned or delegated?
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3.3 Once a function is shifted it cannot just be left to the new authority to manage alone. There must be evidence of a decision taken by the Executing Authority of the assigning or delegating department or organ of state that they will constantly monitor or review the function assigned or delegated. (for example minutes of a meeting or other correspondence)

Check “yes” or “no” and provide the reference in the Comments, then attach the document to the file.

3.4	Has an agreement been reached between the parties to assign or delegate a function by consensus and not forced on either party?
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3.4 Ask for minutes of meetings, a signed memorandum of agreement between affected parties or other correspondence that confirms unambiguously that the parties both (all if multi-lateral) understand the same intention and content and that there is un-coerced agreement. See later regarding unambiguous definition.

Check “yes” or “no” and provide the reference in the Comments, then attach the document/s (or reference if too bulky) to the file.

3.5	Have the benefits for government as a whole in the Republic have been thoroughly explored and understood?
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3.5 Go through the minutes or the discussion papers that support the decision that was taken and agreed to and seek evidence that the motivation for the shift has been thoroughly explored and understood. If there is no evidence of the implications having been documented and evaluated the FFC should refer the motivation back to the proposer for clarification.

Check “yes” or “no” and provide the reference in the Comments, then attach the document/s (or reference if too bulky) to the file.

4 Transfer of the Authority Role

4.1	Is it explicit that the authority role will be transferred in full when a function is shifted by assignment between spheres of government or other organs for state?
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4.1 There must be evidence in the documented decision taken by the Executing Authority that the authority role will be transferred **in full** when a function is shifted. This can be very difficult to elicit from the way that decisions are minuted. In the case of delegation the ultimate authority remains with the primary and the function can be withdrawn under agreed conditions, but in the case of assignment the function ceases to be a function of the primary and is wholly transferred. This mans that the new authority must have full and unfettered authority for the function and the delivery of the services associated. If there is no evidence of this then the FFC should write to the Executing Authority of the assigning authority and request confirmation in writing that full authority transfer is intended.

Check “yes” or “no” and provide the reference in the Comments, then attach the document to the file.

4.2	Is there evidence that the function is being shifted as a whole and that it will not be split between spheres of government?
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4.2 When a function is shifted it should not create a split that results in bureaucratic burdens and opportunity for conflict. In order to assess whether a function is to be shifted completely it is essential to understand the definition of the function and to fully understand that function in the context of the associated services. There is no problem with creating checks and balances to prevent monopolies but dividing the authority or separating parts of a function that may create service delivery obstacles has to be avoided. Make sure that this is understood and carefully documented. It becomes very important for costing the transfer once the decision is taken. There are also far-reaching consequences for affected personnel.

Check “yes” or “no” and provide the reference in the Comments, then attach the document to the file.

4.3	The function is not spilt between a district and a local municipality: BUT
4.3.1	<i>it is not assigned uniformly to either district or local municipalities for the whole country or to all local municipalities within the area of a district municipality</i>
4.3.2	<i>it is not assigned uniformly to either a government department and a public entity for the whole country</i>

4.3 In the case of shifting of functions from the provincial (or national) sphere to local government the implications can be more complex. If the shift in question does not affect the local sphere then leave these questions unanswered and draw a line through the Comments space.

If the shift is to local government check carefully to ascertain the intended applicability of the shift:

- In 4.3.1 if the assignment contemplated is intended for only district municipalities or for a sub-set of municipalities and not as a national assignment, for instance, then check “yes” and indicate the applicability in the Comments. If the intention is that the shift will affect all municipalities then check “no” and state that it is universal.
- In 4.3.2 if the assignment contemplated to a provincial department or a public entity but is intended for only selected geographical areas (provinces, regions or districts) then check “yes” and explain the extent intended.

Such asymmetrical function shifts have lots of potential complications, not the least of which is the plethora of by-laws that subsequently evolve. Every effort should be made to interrogate the reason and logic for any asymmetrical assignment.

5 Efficient, Effective and Sustainable Delivery of Service

The transfer of the function:	
5.1	Promotes equitable, efficient, affordable, economical and sustainable access to basic services by all customers
5.2	Serves to place responsibility of providing services as close as possible to the communities the services are meant to serve (subsidiarity)
5.3	Minimises costs of services to consumers and customers
5.4	Achieves economies of scale in the delivery of services
5.5	Minimises jurisdictional spillovers
5.6	Benefits the greatest number of residents
5.7	Causes the least disrupting effect on the delivery of services
5.8	Promotes a safe and healthy environment
5.9	Promotes efficient, effective, accountable public administration
5.10	Promotes cooperative government
5.11	Addresses the historical inequalities in society

5.1 – 5.11 This section is not to be taken lightly. The main purpose of shifting functions is to expedite the administration and delivery of services. Not all function shifts will achieve an entirely positive outcome but on the balance of the benefits that are likely the shift may still be justified.

Carefully go through the motivation and seek evidence for improvements in efficiency, effectiveness and sustainability of service delivery. The proposer should have made an assessment of the issues listed in 5.1 to 5.11. If there is no evidence that thought has been given to these issues then the FFC should refer the motivation back to the proposer and request clarification on each point.

An unsubstantiated sentence in a paragraph is insufficient to demonstrate that the respective organs of state have sufficiently applied their minds to the earnestness of the contemplated function shift. This must be properly documented, and preferably backed up with a due diligence study. (See later in section 2 on Process.)

Check “yes” or “no” against each point and provide the reference in the Comments, then attach the document/s to the file.

6 Primary assignment is determined by a Constitutional mandate

Several functions have historically resided under the authority of a specific sphere or department whereas the 1996 Constitution intends those functions to be elsewhere. Somewhat belatedly the authorities may now be shifting the functions to their constitutionally correct places. This does not mean that there will be automatic improvement in efficiency, effectiveness and sustainability of service delivery.

It may well be that formal delegation is a more constructive route so that the delivery of the service remains in the historical location but that the authority is correctly placed.

Check the Constitutional intention. (This is not always as straight forward as it seems because the Constitution assigns functions at a high level and does specify sub-sets of the functions so described.)

Comment on the apparent constitutionality of the contemplated function shift.

7 Delegation

Delegation has been considered as an option and this function shift:	
7.1	is the temporary transfer of the service provision component of a power or function in provincial or national legislation to a another executive organ of state by agreement as envisaged in section 238(a) of the Constitution
7.2	is the temporary transfer of the service provision component of any power or function in the provincial or national sphere as envisaged in section 238(b) of the Constitution
7.3	The term of the delegation has been defined
7.4	A precise description of the provider role to be performed by the recipient authority is available and specifies:
7.4.1	<i>service levels;</i>
7.4.2	<i>performance indicators;</i>
7.4.3	<i>risks transferred to the recipient authority; and</i>
7.4.4	<i>whether the recipient authority functions as an agent of the assigning organ of state; and</i>
7.4.5	<i>the remuneration to which the recipient authority is entitled for performing the provider role, whether from subsidies, direct transfers from the primary authority or through authority to levy fees for service, or a combination of these mechanisms.</i>

7.1 – 7.4 Delegation is to be taken no less lightly than assignment. It still involves shifting functions and in some ways should be assessed even more carefully because technically it can be rescinded and cause a new function shift to occur (and function shifts are always disruptive and time-consuming).

Check the Constitution and indicate if this shift is related to 238(a) in 7.1 or 238(b) in 7.2. These are General provisions in Chapter 14. Check “yes” or “no” against the relevant point and provide an explanation in the Comments column as to what legal provision is being contemplated. Attach the relevant legal reference to the file.

In every case the time period of applicability of the delegation must be specified (even if it is in perpetuity unless certain conditions are no longer met). Note the term in 7.3. If the information is absent then request the details from the contact person.

Ensure that the provider role to be performed by the recipient authority is documented. Go through the documentation and note that it specifies the elements in 7.4.1 to 7.4.5. If the information is absent then request the details from the contact person.

8 Assignment

Even if the Constitution does not primarily assign a function to a specific authority there are provisions, including s238(a) and 238(b), that provide for assigning. Assignment of a function may be general, asymmetrical or specific.

General Assignment (Transfer by legislation of a function in the national sphere of government to all provinces or in the provincial sphere of government to all municipalities that fall within a designated category. General assignment is the favoured mechanism for transferring functions.)

8.1	Has the function has been comprehensively and unambiguously defined?
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8.1 Many of the problems associated with functions shifts are owing to inadequate definition of the function intended for transfer. It is essential that there is a full description of exactly what is planned. The definition can be long and list all of the components that comprise the function. There may be specific

geographical definitions too. Words used must leave nothing for assumption. All jargon must be excluded and any technical words must be accompanied by proper definitions.

Since all that follows depends on the definition this is important and great care must be taken to understand the definition. Any ambiguity can cause delays and disruptions along the way and thereby disrupt services.

The parties cannot agree to an ambiguously defined function.

Check “yes” or “no” and provide the reference in the Comments, then attach the document/s to the file. If the answer is “no” then refer the matter back to the proposer for clarity before proceeding with the assessment of the motivation.

8.2	Has agreement been reached between the parties?
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8.2 It is critical that the affected parties agree to the function shift. This can be a complex matter. If the shift is between two discrete organs of state the documentation should be straight forward and may merely be a signed off page attached to the motivation.

In the case of municipalities this can be more intricate. Check whether all municipalities are affected or only some and then check that the relevant ones have agreed (or if there is a minority objection note the objections). It is not a good idea to accept a SALGA letter as sufficient documentation of agreement. It is preferable to request a Council decision (or CEO letter that refers to a particular Council decision) from each affected party. There are further parties that need to agree but this is discussed separately later. The important thing is that there is a documented agreement between the directly affect parties that they agree that the function should be shifted. Thereafter one can attend to process issues.

Check “yes” or “no” and provide the reference in the Comments, then attach the document/s to the file. If the answer is “no” then refer the matter back to the proposer for clarity before proceeding with the assessment of the motivation.

8.3	Has compliance with financial conditions been ensured?
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8.3 When the function shift occurs there will be many compliance issues to document. However, it is important to commence the entire motivation with a clear statement of understanding of how the financial conditions are to be managed. This includes the responsibility for budgeting and the rights to collect revenue for the services provided by the function in question.

Ensure that there is at least a concept statement of the principle of “funds follows functions” and that provision for budgeting and financial management is included. The details will be dealt with in Part 2 under “Process”.

Check “yes” or “no” and provide the reference in the Comments, then attach the document/s to the file. If the answer is “no” then refer the matter back to the proposer for clarity before proceeding with the assessment of the motivation.

8.4	Has compliance with labour requirements been ensured?
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8.4 The details of managing labour issues when the employer changes will be attended to as process issues. However it is important to acknowledge and understand the labour issues that a function shift creates right up front and to have at least an initial approach to consultation from the beginning.

At the initial motivation it is unlikely that the proposer will have had time to consult and reach agreement with labour on the labour process. At a minimum there should be evidence that labour has been formally engaged in the discussion process and that a forum for managing the relationship has been established.

Check “yes” or “no” and provide the reference in the Comments, then attach the document/s to the file. If the answer is “no” then refer the matter back to the proposer for clarity before proceeding with the assessment of the motivation.

8.5	Has compliance with legislative requirements been ensured?
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8.5 Notwithstanding any policy documentation or Constitutional interpretation there has to be legislation to enable a shift in the functions. This may be in the form of existing legislation or through recognition of a statutory void that has to be filled through new or amended legislation.

The documentation should list the relevant statute and reference the applicable clauses. Alternatively there should be a documented process for statutory amendment or drafting. This will usually be “Section 76” legislation (Constitution s76, Bills affecting provinces) and the process will have to comply with this section. This can be a very time-consuming process since it involves NCOP hearings and mostly Provincial public hearings too.

Check “yes” or “no” and provide the reference in the Comments, then attach the document/s to the file. If the answer is “no” then refer the matter back to the proposer for clarity before proceeding with the assessment of the motivation.

8.6	Has the Financial and Fiscal Commission been requested to assess the financial and fiscal implications of the legislation?
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8.6 Obviously “yes” if this assessment is being undertaken! Check whether there has been a prior or similar assessment done already. There should be a formal letter in file requesting the FFC to make recommendations on the proposed function shift.

8.7	Has the Financial and Fiscal Commission been informed of the possible impact of such assignment on:
8.7.1	<i>the future division of revenue between the spheres of government in terms of section 214 of the Constitution?</i>
8.7.2	<i>the fiscal power, fiscal capacity and efficiency of municipalities or any category of municipalities?</i>
8.7.3	<i>the transfer, if any, of employees, assets and liabilities?</i>

8.7 In the motivation to the FFC the proposer should specifically deal with the future division of revenue. This includes addressing the question of Provincial Equitable Share, Municipal allocations and Conditional Grants.

If the function is being shifted to or from the local sphere there must be an evaluation of the revenue potential of the services concerned on the financial position of the municipality/ies concerned. This assessment should comment on the revenue management systems, amounts and proportion of the municipal revenue that is contemplated accompanying the shift.

The initial estimates of the numbers of affected personnel and the major assets and liabilities should be included in the motivation. The FFC should expect detailed documentation that shows breakdowns of the management and other levels of personnel, numbers of professionals, contract and appointed staff, etc. The assets include fixed and mobile assets, remembering that transfer of land and other properties have a host of issues that have to be considered. Land may be parks land, governed by mineral legislation or have other statutory restrictions. Liabilities include the HR liabilities, outstanding legal claims and any settlement conditions that may already have been negotiated (or that are contemplated) with organised labour.

The proposer should have a full due diligence report that documents all of these issues and a copy of such report (which may run into volumes in the case of a large function shift) should be attached to the FFC’s file.

Check “yes” or “no” and provide the reference in the Comments, then attach the document/s to the file. If the answer is “no” then refer the matter back to the proposer for clarity before proceeding with the assessment of the motivation.

8.8	If the function shift involves Local Government, has the Minister of Provincial and Local Government, the Minister of Finance and the South African Local Government Association been consulted with regard to:
8.8.1	<i>the assessment by the Financial and Fiscal Commission?</i>
8.8.2	<i>the policy goals to be achieved by the assignment and the reasons for utilising assignment as the preferred option?</i>
8.8.3	<i>the financial implications of the assignment projected over at least three years?</i>

8.8.4	<i>any possible financial liabilities or risks after the three-year period referred to above?</i>
8.8.5	<i>the manner in which additional expenditure by municipalities as a result of the assignment will be funded?</i>
8.8.6	<i>the implications of the assignment for the capacity of municipalities?</i>
8.8.7	<i>the assistance and support that will be provided to municipalities in respect of the assignment?</i>

8.8 In the case of a general assignment of a function by Provincial Government, section 9(2) of the Local Government: Municipal Systems Act, 2000 (Act 32 of 2000) requires that the MEC must consult the Minister of Provincial and Local Government, the Minister of Finance and the South African Local Government Association.

The FFC must check that the documentation has been prepared in respect of each of the elements in 8.8.1 to 8.8.7 above. Again this points to the need for a thorough due diligence investigation. (This check-sheet may be useful for authorities contemplating commissioning such due investigations.)

Check “yes” or “no” and provide the reference in the Comments, then attach the document/s to the file. If the answer is “no” then refer the matter back to the proposer for clarity before proceeding with the assessment of the motivation.

8.9	If the shift of a function is from a national to provincial governments:
8.9.1	<i>Has the approval of the national Treasury and Budget Council been received?</i>
8.9.2	<i>Has the Minister for the Public Service and Administration (MPSA) been requested to make a determination regarding the function?</i>
8.9.3	<i>Has the Minister of the national department involved been consulted (in terms of section 3(3)(b) of the Public Service Act)?</i>
8.9.4	<i>Have the nine Premiers been approached and granted their approval (that they will accept the function within their administrations)?</i>

8.9 In the case of the shift of a function from a national to provincial governments, besides obtaining approval of the national Treasury and Budget Council, in order to enable the Minister for the Public Service and Administration (MPSA) to make a determination regarding the function, in terms of section 3(3)(b) of the Public Service Act, the Minister of the national department needs to be consulted. The nine Premiers also need to be approached requesting their approval that they will accept the function within their administrations. The MPSA does not have the authority to shift a function to a provincial administration without the agreement of the relevant Premier.

Check “yes” or “no” and provide the reference in the Comments, then attach the document/s to the file. If the answer is “no” then refer the matter back to the proposer for clarity before proceeding with the assessment of the motivation.

PART 2: PROCESS OF FUNCTION SHIFTS

The decision to shift a function is not something to be taken lightly. Besides the constitutional, policy and political issues, service disruption needs to be considered. The practical issues are complex and each step that is imperative in preparation for a shift must be planned and executed properly if it is not going to result in chaos, which may take years to recover from.

The FFC has an obligation to comment on not only the high-level policy principles but on the level of understanding and preparedness of the players to manage a shift. The shifting of functions with significantly large service implications and budgets may take years to implement. This is because of the sequencing of budget redistribution with financial years and a host of other factors. In the case of a function shift that involves local government and any other organ of state there is also an added complication of the financial years not being synchronised, the former having a June 30th year-end and the other organs having a March 31st year-end.

The purpose of Part 2 of the checklist is to allow the FFC to evaluate the understanding and preparedness of the parties for the practical implications of the proposed shift. The issues are very practical and if properly documented can save an enormous amount of time and frustration for all parties involved.

9 Define the Function

The Constitution lists functions in the broadest terms, providing only headings. It is left to specific legislation to define functions in greater detail. The process of defining functions normally commences with policy formulation, which is later captured in the statutes. Notwithstanding this process functions are frequently inadequately defined and the ambiguity makes it difficult to attribute authority and responsibility for the specific function.

When considering a proposed function shift it is imperative that the function be defined very clearly, whether the authority for rendering the service is to be by delegation or assignment. This may seem like stating the obvious but it can be complex and may result in splitting an existing service delivery component with unintended negative consequences.

The exact definition of the function to be delegated or assigned must be settled before the delegation or assignment may occur. Definitions must be **comprehensive and unambiguous** and should be included in the appropriate memorandum of understanding, the delegation or the assigning legislation or proclamation.

9.1	Has the policy of the department been formulated?
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Obtain the policy documentation (White Paper, departmental documents, Cabinet or Executive Committee resolutions or other formally signed-off documentation) and study the definition. Check that the service elements are defined without ambiguity.

During 2006 the responsibility for providing and running medico-legal mortuaries was shifted from SAPS to the provincial health departments. This was the culmination of a policy decision that was taken in Cabinet almost seven years prior to implementation. The White Paper on Health, however, does not mention mortuaries. The only references to forensic medicine are to the Forensic Chemistry Laboratories and Forensic Psychiatric Services which provide services defined as functions of the national Department of Health. The Cabinet decision would serve as the reference in this case.

Check “yes” or “no” and provide the reference in the Comments, then attach the document/s to the file. If the answer is “no” then refer the matter back to the proposer for clarity before proceeding with the assessment of the motivation.

9.2	Has the policy been captured in the statutes?
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Using the example given above: section 27(2)(l) of the Health Act, 200>>>>>, states that:

“The head of a provincial department must, in accordance with national health policy and the relevant provincial health policy in respect of or within the relevant province ... provide and co-ordinate emergency medical services and forensic pathology, forensic clinical medicines and related services, including the provision of medico-legal mortuaries and medico-legal services;”

Some provinces have read this to mean that they are responsible for the laboratory services too. This statute is silent regarding the responsibility for the Forensic Laboratories. However there is another statute, The National Health Laboratory Services Act, 2000 (Act No. 37 of 2000) which deals with this function. The Preamble to the Act states that the purpose is:

“To provide for the establishment of a juristic person to be known as the National Health Laboratory Service; to provide for the abolition of the South African Institute for Medical Research, the National Institute for Virology, the National Centre for Occupational Health, certain forensic chemistry laboratories and all provincial health laboratory services; and to provide for matters connected therewith.”

And section 28(2) (Transitional provisions) states that:

“The following bodies and laboratories must cease to exist, and together with their employees be incorporated into the Service from the commencement date:

- (a) South African Institute for Medical Research;*
- (b) National Institute for Virology;*
- (c) National Centre for Occupational Health;*
- (d) forensic chemistry laboratories owned by the State; and*
- (e) all provincial health laboratory services.”*

It may take some investigation to discover the statutory provisions and it should not be taken for granted that the officials of the responsible department know the statutes well.

Check “yes” or “no” and provide the reference in the Comments, then attach the document/s to the file. If the answer is “no”, and there are no statutes that enable the shift to take place then the department must show that they have drafted appropriate legislation and that they understand the process that is to be embarked on to promulgate an Act or to amend Regulations if an Act provides for this, then refer the matter back to the proposer for clarity before proceeding with the assessment of the motivation.

9.3	Has the function to be shifted been adequately defined so as to eliminate all ambiguity and to attribute authority and responsibility for that specific function?
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Schedule 4, Part A of the Constitution defines “Health services” as a functional area of concurrent national and legislative competence but “Municipal health services” are listed in Schedule 4, Part B (local government matters) which provinces must delegate these functions to municipalities.

The question is “what is a municipal health service”? There are different interpretations depending on the former (apartheid era) administration of ‘homelands’ or of ‘own affairs’ or of ‘Bantu areas’, etc. In this example there is a need to obtain absolute clarity on whether this refers to environmental health services only, whether it includes or excludes port health services, and whether it refers to the primary health care clinics and health centre system. Even primary health care means different things to different people!

Examine the documentation on the definition of the function that is to be shifted. Check “yes” or “no” and provide the reference in the Comments, then attach the document/s to the file. If the answer is “no”, and there is no evidence of a clear and unambiguous definition of the shift to take place then refer the matter back to the proposer for clarity before proceeding with the assessment of the motivation.

9.4	Is the definition comprehensive and included in the appropriate memorandum of understanding, delegation or the assigning legislation or proclamation?
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Even if there is a clear definition this does not mean that the affected parties **all** agree with the definition! It is important to obtain documentation that illustrates that all affected parties agree with the definition of what they are talking about and that there is no ambiguity at all regarding the services that will be shifted when the function shift occurs.

The inclusion of “all” is not always easy and the FFC reviewer should strive for as wide a set of role-players as is possible, especially the affected organs of state, but also organised labour. In a case where

municipalities are affected it may be in a general manner affecting all municipalities or selective in that only one category (A, B or C) is affected or only the municipalities in a particular geographical area. However, shifts create precedent and it is important to check that there is wide consensus on the definition.

Check “yes” or “no” and provide the reference in the Comments, then attach the document/s to the file. If the answer is “no”, and there is no evidence of agreement of the stake-holders on the definition of the shift to take place then refer the matter back to the proposer for clarity before proceeding with the assessment of the motivation.

10 Finance (Resources) Follow Function

Calculating the Financial Implications

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

Section 27(1) of the DORA provides that the transfer of functions or obligations from one organ of state in one sphere of government to an organ of state in another sphere of government must take place only with prior written approval of the National Treasury and the national accounting officer responsible for provincial and local government. Section 27(2) requires that, unless the Minister of Finance has directed otherwise, the transfer of functions must also include the transfer of funds available to the transferring sphere of government for the purpose of performing such transferred function or obligation.

Accordingly the assignment of a function requires a recalculation of equitable share allocations in terms of the DORA. In the case of integrated capital grants such as the provincial and municipal infrastructure grants there has to be a revision of the formula used and recalculation. Allocation of any revenue raising powers associated with the function must be transferred to the organ of state receiving the function, subject to any constitutional or legislative requirement to the contrary.

It may be more appropriate in certain circumstances to fund a function shift through a transitional period by means of a conditional grant, rather than to adjust the equitable share. This is likely to be the case when the shifted function does not have huge financial implications or is contemplated mid-financial year.

Budget adjustments do not apply in the same way in the case of a delegation as with an assignment. While a delegating authority must pay operating or capital funds to a municipality undertaking a service on its behalf through a delegation, such payments do not represent transfers between spheres of government in terms of the DORA and are subject only to the applicable provisions of the PFMA.

10.1	Does the Department understand that when the function is shifted the resources employed to render the function must be shifted with the function? (section 27(2) of the Annual Division of Revenue Act (DORA) which requires that equitable share allocations for the financing of particular functions, and conditional grants, both operating and capital, must be paid to the organ of state which will become responsible for that function following an assignment)
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If there is a plan for the identification of the relevant funds and for the transfer of these funds to the organ of state receiving the shifted function that is a good start. However, the intention is that all financial benefits that are attached to a function must shift with the function. This includes assets (including property), authority to raise revenue where appropriate, etc.

Check “yes” or “no” and provide the reference in the Comments, then attach the document/s to the file. If the answer is “no”, and there is no evidence of understanding that the resources must follow the shift to take place, then refer the matter back to the proposer for clarity before proceeding with the assessment of the motivation.

10.2	Has prior written approval of the National Treasury and the national accounting officer responsible for provincial and local government been obtained? (Section 27(1) of the DORA applies in respect of transfers of functions or obligations from one organ of state in one sphere of government to an
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	organ of state in another sphere of government)
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This should be straight forward. There must be signed correspondence in this regard. Obviously the preceding comments regarding the definition are critical to what approval has been obtained!

Check “yes” or “no” and provide the reference in the Comments, then attach the document/s to the file. If the answer is “no”, and there is no correspondence that confirms approval in terms of s27(1) of the DORA, then refer the matter back to the proposer for clarity before proceeding with the assessment of the motivation.

10.3	Has the Minister of Finance directed other than that the transfer of functions must also include the transfer of funds available to the transferring sphere of government for the purpose of performing such transferred function or obligation? (Section 27(2) of the DORA)
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This too should be straight forward.

Check “yes” or “no” and provide the reference in the Comments, then attach the document/s to the file. If the answer is “**yes**”, and there is correspondence that confirms the Minister’s direction in terms of s27(2) of the DORA, then also check that this has been followed up and that the Treasury officials are revising the allocations appropriately.

10.4	Have the equitable share allocations in terms of the DORA been recalculated?
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See 10.3 above. The share allocation calculations are complex. The applicant should not merely state that Treasury has agreed to amend the allocations but should be able to show the existing and the proposed new allocations.

Check “yes” or “no” and provide the reference in the Comments, then attach the document/s to the file.

10.5	Has a revision of the formula used for integrated capital grants (such as the provincial and municipal infrastructure grants) been recalculated?
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There may be a once-off reallocation of the share. However, it may be that the function shift is substantial and in this case there will be a revised formula. It is a core responsibility of the FFC to make proposals on formulae and there should be adequate evidence that the FFC has been formally involved in proposing new formulae for the recalculation. The Treasury should also be able to show that the revised formula has been developed and will be implemented at the time of the function shift.

Check “yes” or “no” and provide the reference in the Comments, then attach the document/s to the file.

10.6	Has the process for the reallocation of any revenue raising powers associated with the function been documented? (subject to any constitutional or legislative requirement to the contrary)
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Not all functions have revenue generating potential. However, some functions result in services for which fees may be charged. Check that the legislation is planned to empower the levying of fees and that the receiving organ of state has planned a system (may be collection offices, receipt books, IT system, etc) to collect, deposit and account for the funds so raised.

Check “yes” or “no” and provide the reference in the Comments, then attach the document/s to the file. If the answer is “no”, and there is no plan for managing revenue from a shifted function, then refer the matter back to the proposer for clarity before proceeding with the assessment of the motivation.

10.7	Has a conditional grant, rather than adjustment of the equitable share been proposed as an alternative route for the funding of the function through a transitional period?
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One of the methods of protecting a clearly defined function when it is shifted, especially if it is a vulnerable function that is in need of development, is to use a “conditional grant” to ring-fence the funds for separate reporting during a defined development period (usually 3 to 5 years).

If this route is being used for the funding of the shifted function then Treasury has to create the Grant and a set of conditions has to be developed for publication as a part of the DPRA.

Check “yes” or “no” and provide the reference in the Comments, then attach the document/s to the file. If the answer is “yes” and a conditional grant is to be used then check that the wording in the grant conditional will achieve the purpose otherwise raise any conflict or concerns with the proposer for clarity before proceeding with the assessment of the motivation.

10.8	Note that a delegating authority must pay operating or capital funds to a municipality undertaking a service on its behalf through a delegation and that there will be no transfers between spheres of government.
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If the function is being shifted as a delegated function (as opposed to assigned) then there will not be any change in budget allocation in DORA. There must, however be a process in place for paying the relevant associated costs to the organ of state that is delegated the responsibility for providing the service. This must be formal and systematic, failing which the Auditor General will take a dim view of the payments and regard them as ‘unauthorised expenditure’.

Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file that show that the payments are to be planned and systematic.

Compliance with Procedures

The shifting of a function must comply with the procedures for assignment and delegation set out in the Intergovernmental Fiscal Relations Act, the DORA, the Local Government: Municipal Systems Act and any specific public entity legislation as the case may be.

The impact of a function shift on equitable share allocations must be calculated by the organ of state initiating a general assignment. This calculation should be provided to the Financial and Fiscal Commission and to national Treasury.

Subject to the DORA, equitable share allocations for the financing of an assigned function, but not a function delegated or deconcentrated, must be transferred to the province, municipality or municipalities responsible for the function before a specific or general assignment is implemented.

The process of obtaining the necessary approvals from national government is lengthy and, in order that the FFC be consulted, the champion responsible for managing the shift should engage with the FFC and national Treasury at least 18 months (one and a half budget cycles) prior to the desired commencement date. A proper project plan with a realistic timeline must be developed and aligned with the budget cycle (key decision-taking meetings).

Steps that are required include the need for the Cabinet member in the national or provincial sphere of government responsible for the function to be shifted to inform Cabinet of the intention to undertake a shift, written approval from the Minister responsible for Finance, the FFC to be consulted and a submission to be prepared to the local Government Budget Forum as required by the Intergovernmental Fiscal Relations Act.

Treasury must agree with the assessment of the impact of the function shift on equitable share allocations. This may require several presentations to the Technical Committee in Finance (TCF) and Budget Council before approval is granted.

It is advisable that the national Minister responsible for finance and the relevant line function Minister should approve the request for the shift at least 9 months prior to the commencement of the financial year in which it is anticipated that the shift of the function will occur, taking into consideration the findings of the FFC and the relevant Budget Forum.

The revenue-raising powers associated with a function must be included in all calculations.

10.9	Does the shifting of a function comply with the procedures for assignment and delegation set out in:
10.9.1	<i>the Intergovernmental Fiscal Relations Act</i>

10.9.2	<i>the DORA</i>
10.9.3	<i>the Local Government: Municipal Systems Act, and</i>
10.9.4	<i>any specific public entity legislation as the case may be</i>

Refer to the legislation and note that what is planned is in accordance with the Acts. Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file.

10.10	Has the impact of the planned function shift on equitable share allocations been calculated by the organ of state initiating a general assignment (and been provided to the FFC and to national Treasury)?
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This has been alluded to in 10.4 above. Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file.

10.11	Has the process and timing of the shift of the equitable share allocations for the financing (assigned, but not delegated or deconcentrated functions) to be transferred to the province, municipality or municipalities responsible for the function before the assignment is implemented been understood and is it realistic?
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Timing is a vexed issue as there is never a ‘good time’ for making changes. However, there are certain timetables, such as the Budget timetable, that are absolutely critical to a function shift. There is no absolute formula for when a shift can or cannot occur because there are many factors that are unique to each transfer.

What is important is that no unrealistic timeframes are set. It takes a long time to set up the systems for the transfer of assets, human resources and budget. If the statutes still need amendment then the Parliamentary cycle has to be considered, and a longer cycle if the legislation requires provincial consultation.

Evaluate the documented understanding of the time that is required for the implementation of the steps in the processes of the function shift then check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If there is poor understanding of the time and process issues raise the alarm in the FFC and with the proposer for further discussion and work before proceeding with the assessment of the motivation.

10.12	Did the organ of State contemplating the shift engage with the FFC and national Treasury at least 18 months (one and a half budget cycles) prior to the desired commencement date?
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file.

10.13	Has a proper project plan , with realistic timelines, been developed and aligned with the budget cycle (key decision-taking meetings)?
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These points in section 10 of the check-list should all be addressed in a clearly outlined project plan. Such a plan should be comprehensive, commencing with the strategic issues and outlining the practical and implementation processes (this checklist could serve the proposer as a guideline for ensuring that all key issues are addressed). It may be that the responsible organ of state adopts an approach that has two distinct phases: strategic first and then process. If so then the first phase will present an opportunity to engage on the details that are required in the implementation.

Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file.

10.14	Has the Cabinet member in the national or provincial sphere of government responsible for the function to be shifted informed Cabinet of the intention to undertake a shift? (Advisable that the national Minister of Finance and the relevant line function Minister should approve the request for the shift at least 9 months prior to the commencement of the financial year in which it is anticipated that the shift of the function will occur)
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then inform the proposer that this should be done. Documentary proof will be required when the audit is conducted.

10.15	Has written approval been secured from the Minister of Finance?
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then inform the proposer that this should be done. Documentary proof will be required when the audit is conducted.

10.16	Was the proposal submitted to the local Government Budget Forum (as required by the Inter-Governmental Fiscal Relations Act)?
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then inform the proposer that this should be done. Documentary proof will be required when the audit is conducted.

10.17	Has Treasury agreed with the assessment of the impact of the function shift on equitable share allocations?
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then inform the proposer that this should be done. Documentary proof will be required when the audit is conducted.

PFMA Compliance

Typically an agreement contemplated in terms of a delegation will constitute a "future financial commitment" as contemplated in section 66 of the PFMA and will require authorisation under the PFMA. In terms of sections 66(2)(a) or (b) of the PFMA a government may only borrow money, or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind a Revenue Fund to any future financial commitment under clearly defined authorities.

In terms of section 70 in respect of the National Revenue Fund the Minister of Finance or, in the case of the issue of a guarantee, indemnity or security, the responsible Cabinet member acting with the concurrence of the Minister of Finance may grant authority.

In respect of a Provincial Revenue Fund the MEC for finance in the province, acting in accordance with the Borrowing Powers of Provincial Governments Act, 1996 may grant authority.

The responsible accounting officer must comply with applicable obligations under section 38 of the PFMA. This includes settling all contractual obligations and paying all money owing, including intergovernmental claims, within the prescribed or agreed period and before transferring any funds (other than grants in terms of the DORA or to a constitutional institution) to an entity within or outside government obtaining a written assurance from the entity that that entity implements effective, efficient and transparent financial management and internal control systems, or, if such written assurance is not or cannot be given, rendering the transfer of the funds subject to conditions and remedial measures requiring the entity to establish and implement effective, efficient and transparent financial management and internal control systems.

If the function is to be shifted to a newly created national public entity then the national Treasury must authorise the establishment of the entity. Likewise if the function is to be shifted to a newly created provincial public entity then the provincial Treasury must authorise the establishment of the entity. No public entity may operate without being registered and in terms of section 47 of the PFMA it is incumbent on the accounting authority to register the entity.

10.18	Has any "future financial commitment" (as contemplated in section 66 of the PFMA) been authorised clearly defined authorities?
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10.18.1	<i>National Revenue Fund - Minister of Finance</i>
10.18.2	<i>Issue of a guarantee, indemnity or security - responsible Cabinet member acting with the concurrence of the Minister of Finance</i>
10.18.3	<i>Provincial Revenue Fund - MEC for Finance in the province</i>

Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then inform the proposer that this should be done. Documentary proof will be required when the audit is conducted.

10.19	Has a plan been documented for settling all contractual obligations and paying all money owing, including intergovernmental claims, within the prescribed or agreed period and before transferring any funds to the entity? <i>(Within or outside government requires a written assurance from the entity that that entity implements effective, efficient and transparent financial management and internal control systems, or, if such written assurance is not or cannot be given, rendering the transfer of the funds subject to conditions and remedial measures requiring the entity to establish and implement effective, efficient and transparent financial management and internal control systems)</i>
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then inform the proposer that this should be done. Documentary proof will be required when the audit is conducted.

Sometimes the plan is to ring-fence the function in question in a dedicated public entity. These entities (colloquially known as “parastatals”) can be established by any sphere of government. No function can be transferred to an entity unless it has been duly established with the proper authority. So:

10.20	If the function is to be shifted to a newly created national public entity has the national Treasury authorised the establishment of the entity?
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then inform the proposer that this should be done. Documentary proof will be required when the audit is conducted.

10.21	If the function is to be shifted to a newly created provincial public entity has the provincial Treasury authorised the establishment of the entity?
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then inform the proposer that this should be done. Documentary proof will be required when the audit is conducted.

10.22	If the function is to be shifted to a newly created local public entity has the establishment of the entity been authorised?
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then inform the proposer that this should be done. Documentary proof will be required when the audit is conducted.

Budget Process Implications

A function shift has tremendous implications for the budgeting processes of all affected authorities in both the transferring organ of state and the authority receiving the function.

The timing of decisions to shift a function must take the budgeting process into consideration. In order for funds to be allocated properly in provincial and national budgets the approval for function shifts must be completed by the end of September in the year before the commencement date.

It is possible to shift a function and to adjust the respective budgets with the (mid-financial-year) Adjustment DORA but it is more complicated than adhering to the routine budget process. Experience has shown that it is better to delay a shift than to rush it for a particular cut-off date.

The revised figures for transfers will be published in the DORA and the figures for new allocations of funds must also be reflected in budgets of the organ of state to which the function is shifted. In the case of municipalities these budgets are finalised in June, which implies that functions which are transferred to municipalities will only become effective on 1st July of any year, nine months after the deadline for approval of the transfer of the function and related finances. In the case of public entities the PFMA was fortunately amended to bring all financial year-ends into line with national and provincial government.

10.23	Does the timing of the intended shift of the function take the budgeting process into consideration? (By the end of September in the year before the commencement date)
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then advise the proposer accordingly.

Implications for Planning

The acceptance of an assignment or a delegation must be addressed in the planning process and specifically in the integrated development planning (IDP) process in the case of municipalities. For all other organs of state the Treasury Regulations in terms of the PFMA require Business Plans and these too will need to be adjusted and submitted by September ahead of the year of the transfer. If the shifted function is to be funded through a Conditional Grant then the planning and other conditions must be prepared and published in the DORA.

In order to allow the municipal budget process to take account of new priorities set in the IDP in anticipation of an assignment, an assignment or delegation must be considered in the IDP review in the middle of the year so that, once a decision is taken in September to approve and assignment, the function can be included in the IDP to be completed in December of that year.

10.24	Has the assignment or delegation been documented in the planning process and specifically in the integrated development planning (IDP) process in the case of municipalities?
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then advise the proposer accordingly.

10.25	Has this proposed function shift taken into account the potential impact on complementary functions, negative or positive?
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This can be more difficult to assess, especially for the outsider. The important thing is that the proposers are aware that no function exists in an island and that any change can create knock-on affects to ostensibly unrelated functions. There should be a sufficient documentation that shows that the impact on other functions has been considered and assessed to be either positive or manageable.

Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then advise the proposer accordingly.

10.26	Have the implications for transfer of third party contracts and any Public Private Partnerships (PPPs) been considered and documented?
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It may be that the shifting of the function will impact on an existing PPP or other contractual agreement. Check that the agreement has been recognised and that there is a legal opinion regarding the breach and termination clauses. If the agreement is to regulate a PPP then due care should have been taken to transfer the PPP or to terminate the arrangement prior to the function shift. Once again, check for legal opinion.

Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then advise the proposer accordingly.

Transfer of Assets and Liabilities

In principle any authority should own the assets required for undertaking the function for which it is responsible and accordingly if a function is shifted the ownership of related assets must be transferred (without compensation) unless the parties specifically agree otherwise.

Assets that are transferred should not be separated from liabilities. The authority receiving the function should also accept the existing liabilities associated with the function, both of a short and long-term nature. This emphasises the reason for thorough due diligence investigations when assessing the implications of a function shift. Both assets and liabilities must be listed and valued and this information must be included with the assessment report.

A detailed asset register should be provided by the organ of state from which the function is to be shifted. This register should be specific and detailed and should be included as an annex to the memorandum of understanding that guides the transition process.

Assets include outstanding debtors. It is important to resolve the cut off date for the right to the debts and the responsibility for the collection thereof.

Transfer of deeds in respect of property can be cumbersome and should not be taken lightly.

The annex should also include a documented process for the transfer of the assets (including records and archived materials).

Liabilities include disputes and disciplinary processes, unresolved litigation and outstanding creditors. Here too there needs to be a process, a cut off date for the responsibility for the liabilities and the responsibility for the resolution thereof.

10.27	Has authority been granted for the assets required for undertaking the function to be transferred? (without compensation unless the parties specifically agree otherwise)
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then advise the proposer accordingly.

10.28	Has the authority receiving the function accepted the existing liabilities associated with the function, both of a short and long-term nature? (See due diligence investigations)
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then advise the proposer accordingly.

10.29	Are both assets and liabilities listed and valued and is this information included with the assessment report?
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then refer the matter back to the proposer and note that this will be required for the FFC to make a positive recommendation for the function shift.

10.30	Has a detailed asset register been provided by the organ of state from which the function is to be shifted?
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then refer the matter back to the proposer and note that this will be required for the FFC to make a positive recommendation for the function shift.

10.31	Check that the register is specific and detailed and is included as an annex to the memorandum of understanding that guides the transition process.
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then refer the matter back to the proposer and note that this will be required for the FFC to make a positive recommendation for the function shift.

10.32	Has the cut off date for the right to the debts and the responsibility for the collection thereof been resolved and documented?
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then refer the matter back to the proposer and note that this will be required for the FFC to make a positive recommendation for the function shift.

10.33	Has a process designed to transfer of deeds in respect of property? (including records and archived materials)
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then refer the matter back to the proposer and note that this will be required for the FFC to make a positive recommendation for the function shift.

10.34	Have a process and cut-off dates been developed and documented for the liabilities (include disputes and disciplinary processes, unresolved litigation and outstanding creditors) to be resolved?
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then refer the matter back to the proposer and note that this will be required for the FFC to make a positive recommendation for the function shift.

11 Human Resources

Consultation

Function shifts have significant impact on the inter-governmental fiscal system and should be subject to mandatory consultation. Consultation is mandatory for reassignment of functions in terms of section 27 of the Annual Division of Revenue Act (DORA) and section 6 of Intergovernmental Fiscal Relations Act, 1997 (Act No.97 of 1997).

Cabinet should have been informed of the desire to shift a function and should have approved the shift in principle before the planning commences. Once the financial and fiscal implications of have been documented the organ of state that wishes to transfer the function should consult:

- a) the Fiscal and Finance Commission
- b) Budget Council
- c) the Minister of Finance
- d) the Minister of Public Service and Administration
- e) the Minister of Provincial and Local Government
- f) the Minister responsible for any other line department affected by the shifting of the function
- g) the Minister of Provincial and Local Government if the shift involves municipalities
- h) organised local government if the shift involves municipalities
- i) organised labour (the relevant bargaining chamber/s).

Specific assignments and assignments in terms of section 156(4) of the Constitution do not require consultation with the FFC but do require consultations with the Budget Council and the Local Government Budget Forum in terms of section 6 of the Intergovernmental Fiscal Relations Act. Delegations are not subject to any mandatory consultation requirements. However as a courtesy and for continuity it is advisable that there be wide consultation or at least information sharing.

11	Has there been a clearly documented process of consulting personnel (Required in terms of section 27 of the Annual Division of Revenue Act and section 6 of Intergovernmental Fiscal Relations Act, 1997 (Act No.97 of 1997))?
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11.1	Have the following bodies been consulted:
11.1.1	<i>the Fiscal and Finance Commission</i>
11.1.2	<i>Budget Council</i>
11.1.3	<i>the Minister of Finance</i>
11.1.4	<i>the Minister of Public Service and Administration</i>
11.1.5	<i>the Minister of Provincial and Local Government</i>
11.1.6	<i>the Minister responsible for any other line department affected by the shifting of the function</i>
11.1.7	<i>the Minister of Provincial and Local Government if the shift involves municipalities</i>
11.1.8	<i>organised local government if the shift involves municipalities</i>
11.1.9	<i>organised labour (the relevant bargaining chamber/s)</i>

Check “yes” or “no” against each of these stake-holder groups and provide the reference in the Comments, then attach any document/s to the file. If any “no” is recorded then refer the matter back to the proposer and note that this will be required for the FFC to make a positive recommendation for the function shift. If all are checked “yes” then still pay careful attention to items 11.2 to 11.12 below.

Labour Issues - Labour Relations Act (LRA)

The shifting of a function nearly always involves transferring employees. If the function is shifted **between national and provincial governments** the employees remain in the Public Service. The exception is when SAPS or the Defence Force is involved since the employees do not form a part of the Public Service.

Function shifts that involve municipalities (**shift to or from municipalities**) are more complex.

In terms of the Public Service Regulations, 2001, the transfer of employees from the national or provincial spheres of government to municipalities on assignment of a function must be dealt with in terms of section 197 of the LRA. One implication is that the allocation of the financial liability between employers in respect of accrued employee benefits must be transferred.

The application of section 197 may require agreements to be entered into between the assigning department, municipalities and employees where there is a difference in the affected employees' current conditions of service and the conditions of service applicable to employees in the relevant local authority and it is necessary to allocate liability between employers in respect of accrued employee benefits (including leave credits, long service awards and post retirement medical assistance).

Section 197(8) of the LRA obliges the old employer to accept joint and several liability with the new employer for a period of 12 months after date of transfer to any employee who becomes entitled to receive a payment as a result of the employee's dismissal for a reason relating to the new employer's operational requirements, unless the old employer is able to show that it has complied with the provisions of section 197 LRA.

Notwithstanding the implications of section 197 of the LRA which requires that all employees involved with the performance of an assigned function at national and provincial level at the date of commencement of the assignment be transferred to the local level, a department may apply section 189 of the LRA which regulates dismissals for operational reasons when restructuring within the assigning department occurs before implementation of the assignment. In the event of following section 189 new posts must be created and advertised, recruitment processes established and criteria published for the information of affected employees.

Function shifts to or from public entities are also complex. In this case the public entity will usually have its own conditions of employment and bargaining structure.

This is a complex area that has to be managed very carefully in a successful function shift. No function should be shifted unless there is a clearly documented labour relations plan, appropriate structures in place to manage the labour implications and, if necessary, independent technical assistance to steer the process.

11.2	Is there a personnel transfer plan that complies with the LRA?
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then refer the matter back to the proposer and note that this will be required for the FFC to make a positive recommendation for the function shift.

11.3	Is there a detailed plan (backed up by an agreement with organised Labour) to transfer the documented accrued employee benefits?
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then refer the matter back to the proposer and note that this will be required for the FFC to make a positive recommendation for the function shift.

11.4	If the department has chosen to apply section 189 of the LRA will new posts be created and advertised, recruitment processes established and criteria published for the information of affected employees? (Documented?)
------	--

Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “yes” then ensure that the proposed organogram has been developed through a properly consulted process and makes sense.

11.5	Is independent technical assistance available to steer the process?
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then check that there is a dedicated person or team within the department who will be managing the shift. An ad hoc arrangement as a part of another job is not appropriate.

Government Employees Pension Fund (GEPF) and Other Pension Funds

The fate of the pensions of transferring employees must be planned well in advance of a function shift. If the function shifts between organs of state in the Public Service there is no change. However, if a public entity is involved there may be a change in pension arrangements. If a municipality is involved there will be a change in pension arrangements.

Notwithstanding the stipulations of section 197(4) of the LRA, concomitant withdrawals from the GEPF must satisfy the requirements laid down in Section 32 of the Government Employees Pension Law, 1996 and Rule 21 of the Rules of the GEPF.

In respect of group transfers from the GEPF the rules require that provision be made in legislation for the transfer of employees to the pension fund arrangements of the new employer.

A collective agreement must be concluded and the approval of financial arrangements regarding the transfer of members' accrued interest in the GEPF must be obtained from the Minister of Finance (in concurrence with the Board of Trustees of the GEPF).

Transfers of employees must take account of the rules of the GEPF which provide that the value of each member's interest to be transferred will not exceed the funded position of such member's accrued interest in the Fund. This actuarial valuation is based on market values and in this regard any agreement between the assigning department and municipalities/the public entity must include stipulations on the funding liability that will result from the current funding shortfall in the GEPF. It is important to note that the GEPF is a defined benefit fund while public entities mostly use defined contribution funds. **The negotiations between trustees can therefore take some time to reach conclusion.**

11.6	Do the planned withdrawals from the GEPF satisfy the requirements laid down in Section 32 of the Government Employees Pension Law, 1996 and Rule 21 of the Rules of the GEPF? <i>(In respect of group transfers from the GEPF the rules require that provision be made in legislation for the transfer of employees to the pension fund arrangements of the new employer.)</i>
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then refer the matter back to the proposer and note that this will be required for the FFC to make a positive recommendation for the function shift.

11.7	Has a collective agreement been concluded?
------	--

Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then refer the matter back to the proposer and note that this will be required for the FFC to make a positive recommendation for the function shift.

11.8	Has approval been obtained from the Minister of Finance for the financial arrangements regarding the transfer of members' accrued interest in the GEPF? (in concurrence with the Board of Trustees of the GEPF)
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then refer the matter back to the proposer and note that this will be required for the FFC to make a positive recommendation for the function shift. The audit process will require proof of authorisation.

11.9	Is it clear that each member's interest to be transferred will not exceed the funded position of such member's accrued interest in the Fund?
------	--

Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then refer the matter back to the proposer and note that this will be required for the FFC to make a positive recommendation for the function shift.

Personnel Transfer

In preparation for the function shift the payroll and employee roll must be created in the recipient authority (for example BAS) and the records migrated. It is advisable to conduct a ‘dummy payroll’ run at least once prior to the date of the shift. This enables the human resources department to check the accuracy and completeness of data, including pay-points and correct spelling of names, etc. The physical personnel records (files) must be transferred when the employees move.

Every transferring employee must receive a letter from the receiving authority informing him/her of the job title, conditions of employment, transferred benefits, supervisor in the new organisational structure, etc.

11.10	Has the payroll and employee roll been created in the recipient authority (for example PERSAL and BAS) and a process established for the records to be migrated?
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If employees are to be correctly paid their employment details must be entered into the payroll of the receiving authority. This takes time to attend to and can be complex where the conditions of service are not identical and the transfer is to a different payroll system. It is advisable that a “dummy payroll run” be conducted to check that the correct data is printed on payslips and that the pay-points are correct.

For obvious reasons it is also very important to ensure that measures are in place to terminate payment of salaries on the original employer’s payroll in the same month that it commences in the new employing authority. Once an employee has been removed from the payroll it is difficult to pay any arrears or amounts owing and these payments have to be made through the general ledger. Such payments should therefore be concluded prior to termination of the old payroll.

Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then refer the matter back to the proposer with appropriate suggestion that this be done well in advance of the shift.

11.11	Has a plan been made for the physical personnel records (files) to be transferred when the employees move?
-------	--

Once an employee is transferred the records become the responsibility of the new employer. In case of challenges and queries (such as promotions and leave) the records need to be at the disposal of the new HR department. Very old records can be archived by the original employer as long as access to these historical records can be obtained with ease if required.

Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then refer the matter back to the proposer with appropriate suggestion that this be done well in advance of the shift.

11.12	Has a letter from the receiving authority informing him/her of the job title, conditions of employment, transferred benefits, supervisor in the new organisational structure, etc been prepared for every transferring employee?
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In order to enter the data onto the payroll there must have been confirmation of each employee’s conditions of employment and the employee should have accepted the details. (See 11.10 above)

Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then refer the matter back to the proposer with appropriate suggestion that this be done well in advance of the shift.

12 Service Risk Management

Amidst all of the necessary bureaucracy it is not difficult to forget the rendering of the services during the transition. A plan for a function shift should very clearly illustrate the steps that are planned to ensure that there is no disruption to services during the transition.

12.1	Is there a documented plan for the function shift that very clearly illustrates the steps that are planned to ensure that there is no disruption to services during the transition?
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Do not underestimate the disruptions that can occur in a badly planned function shift! Make sure that the parties all understand that there should be attention to technical details and a thorough ‘change management’ process in place. For example, if assets are not transferred in time the employees may find themselves stranded and unable to conduct their work. If the assets are not marked and incorporated into the new asset register they can easily disappear and also strand the services.

Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then refer the matter back to the proposer and note that this will be required for the FFC to make a positive recommendation for the function shift.

Dedicated Project team and Budget

There are so many elements to manage to successfully shift a function that it is not advisable to do so without the responsible organ of state appointing a **dedicated Project Manager and Project Team**.

This can be outsourced or done with personnel transferred, or seconded, for the duration of the project.

There are also many costs involved in managing a function shift, not the least of which is the travelling involved to consult affected parties, preparing communication material and contracting specialist advisors from time to time. It is advisable that an **adequate budget is set aside** to facilitate the project and that the **mechanisms be put in place to ensure that the Project Manager has the authority to spend the money**.

Sometime when a function is shifted it moves from the result of a split in an existing function. In this case the management may chose to remain with the primary authority and leave the new function leaderless.

There needs to be a plan to ensure that there are competent managers in place to manage the function immediately once it is shifted. It is extremely debilitating to try to recover lost ground after a bad start.

It is advisable to provide **additional managerial support during the initial transition period**. This can even be through outsourcing, since the additional capacity will no longer be needed once the function has settled in its new locus.

12.2	Have a dedicated Project Manager and a Project Team been created?
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The reasons for this have been explained. This should not be taken lightly and for all but the smallest function shift should be an absolute pre-requisite.

Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then refer the matter back to the proposer and note that this will be required for the FFC to make a positive recommendation for the function shift.

12.3	Has an adequate budget been set aside to facilitate the project?
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The reasons for this have been explained. This too should not be taken lightly and for all but the smallest function shift should be an absolute pre-requisite. Ensure that there has been adequate provision and that it has not been a ‘thumb-sucked’ figure.

Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then refer the matter back to the proposer and note that this will be required for the FFC to make a positive recommendation for the function shift.

12.4	Have the mechanisms been put in place to ensure that the Project Manager has the authority to spend the money?
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The reason for this is that the normal daily work goes on but the changes associated with the shift usually create exponential workload on managerial decision-taking. If the process is held to ransom by the daily work pace of the authorities in question. Also, since a budget is set aside to manage the transfer there has to be a person held accountable for the control of the spending. Auditors watch these processes carefully because it is very easy to abuse the state of flux that usually accompanies transition. This should not be taken lightly and for all but the smallest function shift should be an absolute pre-requisite.

Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then refer the matter back to the proposer and note that this will be required for the FFC to make a positive recommendation for the function shift.

Legislation

Legislation has been alluded to in Part 1 of this check list. All applicable legislation should be examined very thoroughly to check that **provisions exist that allow the shift**. A new law may need to be promulgated. This will require drafting and piloting through Parliament or the provincial legislature. This takes a great deal of time, the sequence of drafting, consultation and proclamation has to bear in mind recesses, ‘section 76 laws’ have to be referred to the National Council of Provinces (NCOP), the many committees of Parliament may need to be consulted.

All draft legislation is scrutinised by the State Law Advisers for constitutionality, correctness and potential conflict with other laws. No draft law can be forwarded to Parliament until the Chief State Law Adviser and the Executing Authority has authorised this step.

All laws are drafted in only one language but must be published in at least two official languages. This means that the drafted law needs translation. The time required to enable the translation has to be allowed in the project plan.

Most Acts require Regulations (or Rules in the case of public entities). The drafting of these details can be very time-consuming but should be completed before the shift is contemplated. It is not advisable to shift a function into a legislation void.

12.5	Are the necessary legislative provisions in place that allow the shift?
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then refer the matter back to the proposer and note that this will be required for the FFC to make a positive recommendation for the function shift.

12.6	Has a new law been drafted and/or promulgated?
12.6.1	<i>drafting</i>
12.6.2	<i>piloting through Parliament / provincial legislature</i>
12.6.3	<i>proclamation</i>
12.6.4	<i>National Council of Provinces (NCOP) (s76 only)</i>
12.6.5	<i>committees of Parliament</i>
12.6.6	<i>State Law Advisers</i>
12.6.7	<i>Chief State Law Adviser</i>

Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file.

12.7	Has the legislation been translated into at least one other official language than the drafted language?
------	--

Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file.

12.8	Have the necessary Regulations (or Rules in the case of public entities) been drafted?
------	--

Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file.

Personnel secondments

Every function shift is different. In some cases the transfer of personnel will occur in terms of section 197 of the LRA but, as has been mentioned in the human resources section, this is not always the case. It is possible that a function is shifted because it is not being provided adequately or at all. If no (or few) personnel are transferred to the new authority with the function the service will commence in a vacuum. This can be overcome with secondments of personnel from the primary authority to bridge a period until permanent personnel can be recruited and competently skilled. Another alternative is to establish the new function as a discrete unit in the primary authority prior to the shift and to shift the entire new unit once the capacity is in place and all bureaucratic procedures are complete.

12.7	Has secondment of personnel from the primary authority been planned to bridge a period until permanent personnel can be recruited and competently skilled?
------	--

Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file. If “no” then refer the matter back to the proposer and note that this will be required for the FFC to make a positive recommendation for the function shift.

12.8	Transitional management and additional capacity
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file.

12.9	Has a plan been made to ensure that competent managers are in place to manage the function immediately once it is shifted?
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file.

12.10	Has any additional managerial support been allocated for the period during the initial transition?
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file.

Delay capital expectations

The management of a capital programme (building) is both time-consuming and fraught with delays because of the nature of the approval of the construction process. It may be advisable to either outsource the management of any capital programme, to leave this responsibility with the primary authority during the transition or to postpone capital works.

12.11	What plan has been made to manage any capital programme?
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Check “yes” or “no” and provide the reference in the Comments, then attach any document/s to the file.

13 Deciding to Shift the Function

It should be clear from the complexity of the management process that are required for a function to be shifted that the decision to shift should not be taken lightly.

Any decision to shift a function must demonstrate that a transparent process has been followed, that the implications have been thoroughly thought through and, where appropriate, quantified.

The process for deciding to shift a function involves the following three phases:

1. the first phase is the decision whether to transfer responsibility for a function to a different organ of state;
2. if the decision is taken to transfer responsibility for a function, the second phase is the choice of assignment or delegation; and
3. thirdly, whether the decision is taken to **assign** the function or to **delegate it**, there are many decisions to be taken on timing and process.

Having reached this point of the evaluation it is an appropriate point to take stock of the function ship proposal as a whole. The question is “Is this really necessary and will it truly enhance service delivery?” There are alternatives and it is not appropriate to automatically recommend the function transfer.

Alternatives to Shifting Functions - Deconcentration

Shifting of a function from one sphere of government to another or to a public entity is not always the most appropriate way to move services closer to the communities. One alternative is to deconcentrate the management. This involves localising the provision of a function by the organ of state with primary accountability through its **own** structures rather than transferring the function to another sphere of government.

Deconcentration must be considered as an alternative to assignment if the aim is merely to improve delivery through geographic rather than administrative and political localisation of the function.

Deconcentration should be effected through a management decision to localise the provision of the function in geographic terms without transferring the authority role or responsibility for service provision. This still requires internal activities that must comply with Public Service Regulations and the PFMA but **deconcentration does not require a function shift.**

If the motivation for the shifting of the function looks inappropriate or unconvincing then the FFC should respond as such and suggest alternative ways of managing the managerial arrangements.

Criteria for Decision Making

The organ of state considering whether responsibility for a function should be shifted should demonstrate that the following factors have been evaluated:

- a) any legislation or policy that relates to the function and any indication in existing or draft legislation that the function is suitable for transfer;
- b) any technical, operational or financial factors specific to the function that make the function suitable for transfer;
- c) the capacity of the receiving authority to receive and exercise the function;
- d) a comparative assessment of the capacity or potential capacity of the initiating organ of state and the receiving authority or authorities to undertake the function, which shall favour transfer if both entities have the same capacity;
- e) the extent to which transfer would allow for greater accountability to the communities that are intended to benefit from the exercise of the function;
- f) the extent to which the function requires a single authority across a whole province or across the Republic as the case may be;
- g) the extent to which there would be any benefit in terms of cost or efficiency in managing the function broadly across a whole province or across the Republic, in an autonomous public entity or a government department, as the case may be, because:
 - i. a high-level of technical and managerial expertise is required;
 - ii. the provision of the service or function requires substantial crossing of provincial or municipal boundaries or large-scale bulk services or infrastructure; or
 - iii. this is appropriate in terms of any other factor which the motivating authority reasonably considers relevant;
- h) the implications for inter-governmental fiscal arrangements; and
- i) the transfer costs relating to staff, assets and professional or expert advice.

13.1	Have the following factors been evaluated:
13.1.1	<i>any legislation or policy that relates to the function and any indication in existing or draft legislation that the function is suitable for transfer;</i>
13.1.2	<i>any technical, operational or financial factors specific to the function that make the function suitable for transfer;</i>
13.1.3	<i>the capacity of the receiving authority to receive and exercise the function;</i>
13.1.4	<i>a comparative assessment of the capacity or potential capacity of the initiating organ of state and the receiving authority or authorities to undertake the function, which shall favour transfer if both entities have the same capacity;</i>

13.1.5	<i>the extent to which the function requires a single authority across a whole province or across the Republic as the case may be;</i>
13.1.6	<i>the extent to which there would be any benefit in terms of cost or efficiency in managing the function broadly across a whole province or across the Republic, in an autonomous public entity or a government department, as the case may be, because:</i>
a	<i>a high-level of technical and managerial expertise is required;</i>
b	<i>the provision of the service or function requires substantial crossing of provincial or municipal boundaries or large-scale bulk services or infrastructure; or</i>
c	<i>this is appropriate in terms of any other factor which the motivating authority reasonably considers relevant;</i>
13.1.7	<i>the implications for inter-governmental fiscal arrangements; and</i>
13.1.8	<i>the transfer costs relating to staff, assets and professional or expert advice</i>

Check “yes” or “no” next to each item and provide the reference in the Comments, then attach any document/s to the file. This is essentially the beginning of the conclusion. The comments should contain opinion because the preceding part of the document has already covered all of the details.

A well considered motivation for a function shift should include a **thorough due diligence investigation** which would include:

1. identified factors that may impact on the viability of a change in locus of the function;
2. weighting to be attributed to these identified factors;
3. information gathered to allow for measurement of each factor;
4. where there is no quantifiable measurement for the factor, qualitative information should be obtained from an expert or an agreed group of stakeholders, or both;
5. an analysis comparing the status quo with the situation likely to follow the shifting of the function should be undertaken based on the measures for each of the criteria and the relative weights; and
6. an assessment of the risks associated with the proposed function shift.

13.4	Has there been an assessment of the risks associated with the proposed function shift?
------	--

Check “yes” or “no” and provide a reference and **an opinion** in the Comments, then attach any document/s to the file. This is integral to the conclusion.

Assessing Capacity

The intended recipient authority may not possess the capacity to administer the function. For instance the proposal may be to establish a new Public Entity. In this case the planned "capacity building initiatives" and expert advice that will be made available to the recipient authority to support managers, and to set up training programmes for key staff required to undertake the function, must be clearly documented.

The potential of the municipality to undertake the performance of the function must be assessed. This includes the capacity to provide the services, the extent to which there is an appropriate capital budget to develop the service and the financial viability of the authority in question.

If the function is to be shifted to municipalities by general assignment then the capacity of the metropolitan, district and local municipalities must be separately considered and a decision taken on which level is most appropriate as the service delivery authority.

The assessment of the capacity of the assigning authority must also be considered and may be based on a history of delivery of the function to be assigned.

13.5	If the recipient authority has too little capacity to manage the shift then "capacity building initiatives" and expert advice should be made available to the recipient authority to support managers, and to set up training programmes for key staff required to undertake the function.
------	--

Check "yes" or "no" and provide a reference and **an opinion** in the Comments, then attach any document/s to the file. This is integral to the conclusion.

13.6	Has the potential of the recipient authority to undertake the performance of the function been assessed?
------	--

Check "yes" or "no" and provide a reference and **an opinion** in the Comments, then attach any document/s to the file. This is integral to the conclusion.

Monitoring Capacity

The assigning authority must establish a monitoring function which must assist in identifying and developing the ability of the new authority to fulfil its mandate following the function shift.

13.7	Has the assigning authority established a monitoring function which must assist in identifying and developing the ability of the new authority to fulfil its mandate following the function shift?
------	--

Check "yes" or "no" and provide a reference in the Comments, then attach any document/s to the file. This is integral to the conclusion.

Nature of the Agreement

When the function shift is the result of a delegation, rather than a re-assignment of the function, a service level agreement must be drafted and signed between the respective parties. This might take the form of a concession-type agreements (responsibility for raising capital to provide infrastructure), a lease-type agreements (responsible for raising revenue but not responsible for capital investment) or a management-contract-type (responsibility for managing the service for a fee and where all other responsibilities remain with the assigning authority).

No delegated function should be shifted without an unambiguous, time-bound contract between the parties.

13.8	Has a service level agreement been drafted and signed between the respective parties?
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Check "yes" or "no" and provide a reference in the Comments, then attach any document/s to the file. This is integral to the conclusion.

14 Reporting & Communication

Apart from any line department requirement, any function shift, whether by assignment or delegation of function, should be recorded and reported to the FFC within 3 months of the effective date.

14.1	Does the authority know that besides any line department requirement, any function shift, whether by assignment or delegation of function, must be recorded and reported to the FFC within 3 months of the effective date?
------	--

Check "yes" or "no" and provide a reference in the Comments, then attach any document/s to the file.

No shift can just happen! No matter what the change in service delivery will entail the public and the other associated role-players (and stakeholders) need to be informed well in advance of the changes and the way in which those changes may affect the way they receive the services. This may be very minimal and even cosmetic but it must be communicated in advance of the changes being effected. So;

14.2	Has a communication strategy been planned for informing relevant role-players, especially the public affected by the service delivery implications?
------	---

Check “yes” or “no” and provide a reference in the Comments, then attach any document/s to the file.

15 Intergovernmental Dispute

It is likely that the possibility of a function shift may not be equally attractive to the affected spheres of government involved.

It is not advisable to proceed with a function shift if the key stakeholders are not equally committed to the shift.

If they cannot agree on whether responsibility for a function should be shifted, the methodology, (including criteria, weighting and the analysis) and this produces a disagreement about whether a function should be shifted or whether assignment or delegation is the appropriate mechanism for the shift of the function, an intergovernmental dispute may be called in terms of the Intergovernmental Relations Framework Act.

15.1	Has an intergovernmental dispute been called in terms of the Intergovernmental Relations Framework Act?
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Check “yes” or “no” and provide a reference and **an opinion** in the Comments, then attach any document/s to the file. This is integral to the conclusion.

15.2	Is an intergovernmental dispute likely to occur?
------	--

Check “yes” or “no” and provide a reference and **an opinion** in the Comments, then attach any document/s to the file. This is integral to the conclusion.

Finally:

Having reached this point in the assessment the FFC needs to formulate an opinion and make a recommendation.

- Either the proposed function shift is supported or not.
- If it is supported, are all of the policy and preparatory issues in order?
- Even if it is supported there may be reservations regarding details such as preparedness, management capacity and timing. Any reservations should be highlighted with clear explanation of the concerns.
- If it is not supported there has to be a good reason.

END

Annexure A – Abbreviations used

BAS	Basic Accounting System
DORA	Division of Revenue Act
DPLG	Department of Provincial and Local Government
EMS	Emergency Medical Service
FFC	Financial and Fiscal Commission
GEPF	Government Employees Pension Fund
IDP	Integrated Development Plan
IGFR	Intergovernmental Fiscal Relations
MEC	Member of the Executive Council
MPSA	Minister of Public Service and Administration
NCOP	National Council of Provinces
NHLS	National Health Laboratory Service
PFMA	Public Finance Management Act
PHC	Primary Health Care
PSA	Public Service Act
SA	South Africa
SAPS	South African Police Service
SASSA	South African Social Security Agency
TCF	Technical Committee on Finance

FRAMEWORK FOR ASSESSING FUNCTION SHIFTS

1 Definition of Function Shift

A 'function shift' means that a function previously assigned by the Constitution or any law made by Parliament or a Provincial Legislature to any 'organ of state' is reassigned to a different organ of state.

	NAME OF PROPOSING ORGAN OF STATE	
National department	<input type="checkbox"/>	
Provincial department	<input type="checkbox"/>	
Municipality	<input type="checkbox"/>	
Type (enter A; B or C)	<input type="checkbox"/>	
Public Entity established under Schedules 2; 3 and 4 of the Public Finance Management Act, 1999 (Act No. 1 of 1999)	<input type="checkbox"/>	
Schedule 2; 3 or 4	<input type="checkbox"/>	
Major Public Entities	<input type="checkbox"/>	
National Government Business Enterprise	<input type="checkbox"/>	
National Public Entities	<input type="checkbox"/>	
Provincial Government Business Enterprise	<input type="checkbox"/>	
Provincial Public Entities	<input type="checkbox"/>	
Constitutional Institution referred to in Schedule 1 of the PFMA	<input type="checkbox"/>	

Description of proposed Function Shift

DELEGATION / ASSIGNMENT (DELETE ONE)

Proposer Name and contact details

--

FFC Officer responsible for assessment

--

Date Proposal received for Recommendation

Date Recommendation made

Date Proposal and Recommendation presented to FFC Meeting

		YES	NO	COMMENTS
2	Principles Applying to Shifting of Functions			
	Subsidiarity (the principle that a central authority should have a subsidiary function, performing only those tasks which cannot be performed at a local level) is the main factor to consider.			
2.1	Does the proposed shift of the function respect, promote and fulfil the provisions of the Constitution that apply to delegation and assignment?			
2.2	Does the shift contemplated fits in with a general framework of an established government policy?			
3	Co-operative government			
3.1	Is the decision to assign or delegate a function is based on what is appropriate for the Republic as a whole, rather than on what is appropriate for a particular sphere of government or organ of state?			
3.2	Does the assigning or delegating department or organ of state accept the funding requirements or support that is necessary to make the assignment or delegation successful?			
3.3	Does the assigning or delegating department or organ of state accept responsibility for constantly monitoring or reviewing the function assigned or delegated?			
3.4	Has an agreement been reached between the parties to assign or delegate a function by consensus and not forced on either party?			
3.5	Have the benefits for government as a whole in the Republic have been thoroughly explored and understood?			

4 Transfer of the Authority Role

4.1	Is it explicit that the authority role will be transferred in full when a function is shifted by assignment between spheres of government or other organs for state?			
4.2	Is there evidence that the function is being shifted as a whole and that it will not be split between spheres of government?			
4.3	The function is not spilt between a district and a local municipality: BUT			
4.3.1	<i>it is not assigned uniformly to either district or local municipalities for the whole country or to all local municipalities within the area of a district municipality</i>			
4.3.2	<i>it is not assigned uniformly to either government department and a public entity for the whole country</i>			

5 Efficient, Effective and Sustainable Delivery of Service

The transfer of the function:

5.1	propotes equitable, efficient, affordable, economical and sustainable access to basic services by all customers			
5.2	serves to place responsibility of providing services as close as possible to the communities the services are meant to serve (subsidiarity)			
5.3	Minimises costs of services to consumers and customers			
5.4	Achieves economies of scale in the delivery of services			
5.5	Minimises jurisdictional spillovers			
5.6	Benefits the greatest number of residents			
5.7	Causes the least disrupting effect on the delivery of services			
5.8	Promotes a safe and healthy environment			
5.9	Promotes efficient, effective, accountable public administration			
5.10	Promotes cooperative government			
5.11	Addresses the historical inequalities in society			

6 Primary assignment is determined by a Constitutional mandate

7 Delegation

Delegation has been considered as an option and **this function shift:**

- 7.1 is the temporary transfer of the service provision component of a power or function in provincial or national legislation to a another executive organ of state by agreement as envisaged in section 238(a) of the Constitution
- 7.2 is the temporary transfer of the service provision component of any power or function in the provincial or national sphere as envisaged in section 238(b) of the Constitution
- 7.3 the term of the delegation has been defined
- 7.5 a precise description of the provider role to be performed by the recipient authority is available and specifies:
 - 7.5.1 *service levels;*
 - 7.5.2 *performance indicators;*
 - 7.5.3 *risks transferred to the recipient authority; and*
 - 7.5.4 *whether the recipient authority functions as an agent of the assigning organ of state; and*
 - 7.5.5 *the remuneration to which the recipient authority is entitled for performing the provider role, whether from subsidies, direct transfers from the primary authority or through authority to levy fees for service, or a combination of these mechanisms.*

8 Assignment

General Assignment (Transfer by legislation of a function in the national sphere of government to all provinces or in the provincial sphere of government to all municipalities that fall within a designated category. General assignment is the favoured mechanism for transferring functions)

8.1	Has the function has been comprehensively and unambiguously defined?			
8.2	Has agreement been reached between the parties?			
8.3	Has compliance with financial conditions been ensured?			
8.4	Has compliance with labour requirements been ensured?			
8.5	Has compliance with legislative requirements been ensured?			
8.6	Has the Financial and Fiscal Commission been requested to assess the financial and fiscal implications of the legislation?			
8.7	Has the Financial and Fiscal Commission been informed of the possible impact of such assignment on:			
8.7.1	<i>the future division of revenue between the spheres of government in terms of section 214 of the Constitution?</i>			
8.7.2	<i>the fiscal power, fiscal capacity and efficiency of municipalities or any category of municipalities?</i>			
8.7.3	<i>the transfer, if any, of employees, assets and liabilities?</i>			
8.8	If the function shift involves Local Government, has the Minister of Provincial and Local Government, the Minister of Finance and the South African Local Government Association been consulted with regard to:			
8.8.1	<i>the assessment by the Financial and Fiscal Commission?</i>			
8.8.2	<i>the policy goals to be achieved by the assignment and the reasons for utilising assignment as the preferred option?</i>			
8.8.3	<i>the financial implications of the assignment projected over at least three years?</i>			
8.8.4	<i>any possible financial liabilities or risks after the three-year period referred to above?</i>			
8.8.5	<i>the manner in which additional expenditure by municipalities as a result of the assignment will be funded?</i>			
8.8.6	<i>the implications of the assignment for the capacity of municipalities?</i>			
8.8.7	<i>the assistance and support that will be provided to municipalities in respect of the assignment?</i>			

Function Shift FFC Check-list 2007

8.9 If the shift of a function is from a national to provincial governments:

8.9.1 *Has the approval of the national Treasury and Budget Council been received?*

8.9.2 *Has the Minister for the Public Service and Administration (MPSA) been requested to make a determination regarding the function?*

8.9.3 *Has the Minister of the national department involved been consulted (in terms of section 3(3)(b) of the Public Service Act)?*

8.9.4 *Have the nine Premiers been approached and granted their approval (that they will accept the function within their administrations)?*

PROCESS OF FUNCTION SHIFTS

9 Define the Function

- 9.1 Has the policy of the department been formulated?
- 9.2 Has the policy been captured in the statutes?
- 9.3 Has the function to be shifted been adequately defined so as to eliminate all ambiguity and to attribute authority and responsibility for that specific function?
- 9.4 Is the definition comprehensive and included in the appropriate memorandum of understanding, delegation or the assigning legislation or proclamation?

10 Finance (Resources) Follow Function

Calculating the Financial Implications

- 10.1 Does the Department understand that when the function is shifted the resources employed to render the function must be shifted with the function? (*section 27(2) of the Annual Division of Revenue Act (DORA) which requires that equitable share allocations for the financing of particular functions, and conditional grants, both operating and capital, must be paid to the organ of state which will become responsible for that function following an assignment*)
- 10.2 Has prior written approval of the National Treasury and the national accounting officer responsible for provincial and local government been obtained? (*Section 27(1) of the DORA applies in respect of transfers of functions or obligations from one organ of state in one sphere of government to an organ of state in another sphere of government*)
- 10.3 Has the Minister of Finance directed other than that the transfer of functions must also include the transfer of funds available to the transferring sphere of government for the purpose of performing such transferred function or obligation? (*Section 27(2) of the DORA*)
- 10.4 Have the equitable share allocations in terms of the DORA been recalculated?
- 10.5 Has a revision of the formula used for integrated capital grants (such as the provincial and municipal infrastructure grants) been recalculated?
- 10.6 Has the process for the reallocation of any revenue raising powers associated with the function been documented? (subject to any constitutional or legislative requirement to the contrary)
- 10.7 Has a conditional grant, rather than adjustment of the equitable share been proposed as an alternative route for the funding of the function through a transitional period?
- 10.8 Note that a delegating authority must pay operating or capital funds to a municipality undertaking a service on its behalf through a delegation and that there will be no transfers between spheres of government.

Compliance with Procedures

10.9 Does the shifting of a function comply with the procedures for assignment and delegation set out in:

10.9.1 *the Intergovernmental Fiscal Relations Act*

10.9.2 *the DORA*

10.9.3 *the Local Government: Municipal Systems Act, and*

10.9.4 *any specific public entity legislation as the case may be*

10.10 Has the impact of the planned function shift on equitable share allocations been calculated by the organ of state initiating a general assignment (and been provided to the FFC and to national Treasury)?

10.11 Has the process and timing of the shift of the equitable share allocations for the financing (assigned, but not delegated or deconcentrated functions) to be transferred to the province, municipality or municipalities responsible for the function before the assignment is implemented been understood and is it realistic?

10.12 Did the organ of State contemplating the shift engage with the FFC and national Treasury at least 18 months (one and a half budget cycles) prior to the desired commencement date?

10.13 Has a proper project plan with realistic timelines been developed and aligned with the budget cycle (key decision-taking meetings)?

10.14 Has the Cabinet member in the national or provincial sphere of government responsible for the function to be shifted informed Cabinet of the intention to undertake a shift? (Advisable that the national Minister of Finance and the relevant line function Minister should approve the request for the shift at least 9 months prior to the commencement of the financial year in which it is anticipated that the shift of the function will occur)

10.15 Has written approval been secured from the Minister of Finance?

10.16 Was the proposal submitted to the local Government Budget Forum (as required by the Inter-Governmental Fiscal Relations Act)?

10.17 Has Treasury agreed with the assessment of the impact of the function shift on equitable share allocations?

PFMA Compliance

10.18	Has any "future financial commitment" (as contemplated in section 66 of the PFMA) been authorised clearly defined authorities?	<input type="checkbox"/>	<input type="checkbox"/>	
10.18.1	<i>National Revenue Fund - Minister of Finance</i>	<input type="checkbox"/>	<input type="checkbox"/>	
10.18.2	<i>Issue of a guarantee, indemnity or security - responsible Cabinet member acting with the concurrence of the Minister of Finance</i>	<input type="checkbox"/>	<input type="checkbox"/>	
10.18.3	<i>Provincial Revenue Fund - MEC for Finance in the province</i>	<input type="checkbox"/>	<input type="checkbox"/>	
10.19	Has a plan been documented for settling all contractual obligations and paying all money owing, including intergovernmental claims, within the prescribed or agreed period and before transferring any funds to the entity? <i>(Within or outside government requires a written assurance from the entity that that entity implements effective, efficient and transparent financial management and internal control systems, or, if such written assurance is not or cannot be given, rendering the transfer of the funds subject to conditions and remedial measures requiring the entity to establish and implement effective, efficient and transparent financial management and internal control systems)</i>	<input type="checkbox"/>	<input type="checkbox"/>	
10.20	If the function is to be shifted to a newly created national public entity has the national Treasury authorised the establishment of the entity?	<input type="checkbox"/>	<input type="checkbox"/>	
10.21	If the function is to be shifted to a newly created provincial public entity has the provincial Treasury authorised the establishment of the entity?	<input type="checkbox"/>	<input type="checkbox"/>	

Budget Process Implications

10.22	Does the timing of the intended shift of the function take the budgeting process into consideration? (By the end of September in the year before the commencement date)	<input type="checkbox"/>	<input type="checkbox"/>	
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Implications for Planning

10.23	Has the assignment or delegation been documented in the planning process and specifically in the integrated development planning (IDP) process in the case of municipalities?	<input type="checkbox"/>	<input type="checkbox"/>	
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Transfer of Assets and Liabilities

10.24	Has authority been granted for the assets required for undertaking the function to be transferred? (without compensation unless the parties specifically agree otherwise)			
10.25	Has the authority receiving the function accepted the existing liabilities associated with the function, both of a short and long-term nature? (See due diligence investigations)			
10.26	Are both assets and liabilities listed and valued and is this information included with the assessment report?			
10.37	Has a detailed asset register been provided by the organ of state from which the function is to be shifted?			
10.28	Check that the register is specific and detailed and is included as an annex to the memorandum of understanding that guides the transition process.			
10.29	Has the cut off date for the right to the debts and the responsibility for the collection thereof been resolved and documented?			
10.30	Has a process designed to transfer of deeds in respect of property? (including records and archived materials)			
10.31	Have a process and cut-off dates been developed and documented for the liabilities (include disputes and disciplinary processes, unresolved litigation and outstanding creditors) to be resolved?			

11 Human Resources

11	Has there been a clearly documented process of consulting personnel (Required in terms of section 27 of the Annual Division of Revenue Act and section 6 of Intergovernmental Fiscal Relations Act,1997 (Act No.97 of 1997))?			
11.1	Have the following bodies been consulted:			
11.1.1	<i>the Fiscal and Finance Commission</i>			
11.1.2	<i>Budget Council</i>			
11.1.3	<i>the Minister of Finance</i>			
11.1.4	<i>the Minister of Public Service and Administration</i>			
11.1.5	<i>the Minister of Provincial and Local Government</i>			
11.1.6	<i>the Minister responsible for any other line department affected by the shifting of the function</i>			
11.1.7	<i>the Minister of Provincial and Local Government if the shift involves municipalities</i>			
11.1.8	<i>organised local government if the shift involves municipalities</i>			
11.1.9	<i>organised labour (the relevant bargaining chamber/s).</i>			

Labour Issues - Labour Relations Act (LRA)

The shifting of a function nearly always involves transferring employees. If the function is shifted between national and provincial governments the employees remain in the Public Service. The exception is when SAPS or the Defence Force is involved since the employees do not form a part of the Public Service.

11.2	Is there a personnel transfer plan that complies with the LRA?			
11.3	Is there a detailed plan (backed up by an agreement with organised Labour) to transfer the documented accrued employee benefits?			
11.4	If the department has chosen to apply section 189 of the LRA will new posts be created and advertised, recruitment processes established and criteria published for the information of affected employees? (documented?)			
11.5	Is independent technical assistance available to steer the process?			

Government Employees Pension Fund (GEPF) and Other Pension Funds

	Has the fate of the pensions of transferring employees been planned well in advance of a function shift?			
11.6	Do the planned withdrawals from the GEPF satisfy the requirements laid down in Section 32 of the Government Employees Pension Law, 1996 and Rule 21 of the Rules of the GEPF? (In respect of group transfers from the GEPF the rules require that provision be made in legislation for the transfer of employees to the pension fund arrangements of the new employer.)			
11.7	Has a collective agreement been concluded?			
11.8	Has approval been obtained from the Minister of Finance for the financial arrangements regarding the transfer of members' accrued interest in the GEPF? (in concurrence with the Board of Trustees of the GEPF)			
11.9	Is it clear that each member's interest to be transferred will not exceed the funded position of such member's accrued interest in the Fund?			

Personnel Transfer

11.10	Has the payroll and employee roll been created in the recipient authority (for example PERSAL and BAS) and a process established for the records to be migrated?			
11.11	Has a plan been made for the physical personnel records (files) to be transferred when the employees move?			
11.12	Has a letter from the receiving authority informing him/her of the job title, conditions of employment, transferred benefits, supervisor in the new organisational structure, etc been prepared for every transferring employee?			

12 Service Risk Management

12.1 Is there a documented plan for the function shift that very clearly illustrates the steps that are planned to ensure that there is no disruption to services during the transition?

Dedicated Project team and Budget

12.2 Have a dedicated Project Manager and a Project Team been created?

12.3 Has an adequate budget been set aside to facilitate the project?

12.4 Have the mechanisms been put in place to ensure that the Project Manager has the authority to spend the money?

Legislation

12.5 Are the necessary legislative provisions in place that allow the shift?

12.6 Has a new law been drafted and/or promulgated?

12.6.1 *drafting*

12.6.2 *piloting through Parliament / provincial legislature*

12.6.3 *proclamation*

12.6.4 *National Council of Provinces (NCOP) (s76 only)*

12.6.5 *committees of Parliament*

12.6.6 *State Law Advisers*

12.6.7 *Chief State Law Adviser*

12.7 Has the legislation been translated into at least one other official language than the drafted language?

12.8 Have the necessary Regulations (or Rules in the case of public entities) been drafted?

Personnel secondments

12.7 Has secondment of personnel from the primary authority been planned to bridge a period until permanent personnel can be recruited and competently skilled?

12.8 Transitional management and additional capacity

12.9 Has a plan been made to ensure that competent managers are in place to manage the function immediately once it is shifted?

12.10 Has any additional managerial support been allocated for the period during the initial transition?

Assessing Capacity

- | | | | | |
|------|--|--------------------------|--------------------------|--|
| 13.3 | If the recipient authority has too little capacity to manage the shift then "capacity building initiatives" and expert advice should be made available to the recipient authority to support managers, and to set up training programmes for key staff required to undertake the function. | <input type="checkbox"/> | <input type="checkbox"/> | |
| 13.4 | Has the potential of the recipient authority to undertake the performance of the function been assessed? | <input type="checkbox"/> | <input type="checkbox"/> | |

Monitoring Capacity

- | | | | | |
|------|--|--------------------------|--------------------------|--|
| 13.5 | Has the assigning authority established a monitoring function which must assist in identifying and developing the ability of the new authority to fulfil its mandate following the function shift? | <input type="checkbox"/> | <input type="checkbox"/> | |
|------|--|--------------------------|--------------------------|--|

Nature of the Agreement

- | | | | | |
|------|---|--------------------------|--------------------------|--|
| 13.6 | Has a service level agreement been drafted and signed between the respective parties? | <input type="checkbox"/> | <input type="checkbox"/> | |
|------|---|--------------------------|--------------------------|--|

14 Reporting

- | | | | | |
|------|--|--------------------------|--------------------------|--|
| 14.1 | Does the authority know that besides any line department requirement, any function shift, whether by assignment or delegation of function, must be recorded and reported to the FFC within 3 months of the effective date? | <input type="checkbox"/> | <input type="checkbox"/> | |
|------|--|--------------------------|--------------------------|--|

15 Intergovernmental Dispute

- | | | | | |
|------|---|--------------------------|--------------------------|--|
| 15.1 | Has an intergovernmental dispute been called in terms of the Intergovernmental Relations Framework Act? | <input type="checkbox"/> | <input type="checkbox"/> | |
| 15.2 | Is an intergovernmental dispute likely to occur? | <input type="checkbox"/> | <input type="checkbox"/> | |