



**REVIEW OF REGULATORY, COMPLIANCE AND REPORTING  
BURDENS IMPOSED ON LOCAL GOVERNMENT BY LEGISLATION**

**PROJECT 146**

**ISSUE PAPER 37**

**CLOSING DATE FOR COMMENTS  
31 JULY 2019**

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## **About the South African Law Reform Commission**

The South African Law Reform Commission (Commission) was established by the South African Law Reform Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are:

Judge Narandran (Jody) Kollapen (Chairperson)

Mr Irvin Lawrence (Deputy Chairperson)

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The Secretary of the Commission is Mr Nelson Matibe. The Commissioner designated as chairperson for this project in terms of section 7A(3) of the South African Law Reform Commission Act is Adv Tshepo Sibeko SC. The Commission official assigned to this project is Fanyana Mdumbe.

The Commission has instituted an advisory committee for this inquiry in terms of section 7A(1)(b)(ii) of the abovementioned Act. The members of the committee are:

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## Preface

The purpose of this Issue Paper is threefold:

- (a) first, it is intended to announce the Commission's inquiry into regulatory, compliance and reporting burdens imposed on municipalities through legislation and thus generate a conversation about these issues;
- (b) second, it seeks to delineate the scope of this inquiry; and
- (c) third, to elicit inputs from interested parties, which will serve as a basis for further deliberations.

The Commission wants to hear your views on the issues raised and questions posed throughout this document. This serves to invite you to make written submissions to the Commission by no later than **31 July 2019**.

The Commission will assume that respondents agree to the Commission quoting from or referring to comments or attributing comments to the relevant respondents. Respondents who prefer to remain anonymous should mark their representations 'Confidential'. The Commission will make every effort to protect that information. However, respondents should be aware that the Commission may be required under the Promotion of Access to Information Act, 2000 (Act 2 of 2000) to release information contained in representation submitted to it in respect of this inquiry.

Respondents are requested to respond as comprehensively as possible. Submissions may also include issues stakeholders consider relevant to this review which are not covered in this issue paper.

The Commission, in keeping with its enabling legislation and *modus operandi*, intends consulting extensively during this inquiry. It therefore plans to host workshops, seminars and roundtable discussions to discuss issues raised in this issue paper. In addition, questionnaires will be sent to key stakeholders shortly. The Commission will also publish a discussion paper setting out preliminary proposals and draft legislation, if necessary. The discussion paper will take the responses to this issue paper, and those generated through consultation processes referred to above, into account. It will also test the feasibility of solutions (reform proposals) identified through consultation before it finalises its report. On the strength of these responses, a report will be prepared which will present the Commission's final recommendations. The Commission's Report, with draft legislation attached, if necessary, will be submitted to the Minister of Justice and Correctional Services and the Minister of Cooperative Governance and Traditional Affairs for their consideration.

Respondents are requested to submit written comment, representations to Fanyana Mdumbe by **31 July 2019** at the address/email appearing on page (ii).

**This document is also available on the Commission's website the details of which appear on page (ii).**

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# CHAPTER 1

## BACKGROUND TO THIS INQUIRY INTO REGULATORY, COMPLIANCE AND REPORTING OBLIGATIONS IMPOSED ON LOCAL GOVERNMENT

### A INTRODUCTION

#### 1 What has the Commission been asked to do?

1.1 The former Minister of Cooperative Governance and Traditional Affairs requested the South African Law Reform Commission (Commission),<sup>1</sup> through the Minister of Justice, to:

‘...consider the inclusion within the new Programme of the SALRC a review of all national legislation that impact on local government with the objective of reducing regulatory compliance and reporting burden on municipalities and simplifying implementation.’

1.2 To motivate why such a review is necessary, the Minister of COGTA stated:

‘...service delivery and development is often delayed because of the need to meet the requirements of several different pieces of legislation. The relevant provisions of the different pieces of legislation are sometimes duplication and at other times contradictory.

The consequences of the regulatory environment is that municipalities bear a heavy compliance burden and have to constantly submit reports to both provincial and national government. These reports are in the majority of instances based on the same information, but with different reporting nuances. It is typical in these environments to see instances of malicious compliance whereby municipalities are reporting for reporting sake, without any conscious effort to address the rationale for the reporting requirement.’

#### 2 Preliminary inquiry and findings

1.3 As is customary, the Commission subjected this law reform proposal to a scoping exercise, the purpose of which was to determine, among other things, the extent to which the statutory framework regulating local government is unsatisfactory (that is the extent to which the law is unfair, unclear, unduly complex, or outdated); the scale of the problem; whether law reform would be the appropriate response; whether there was another organ of

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<sup>1</sup> Excerpts of a letter of referral from former Minister of Cooperative Governance and Traditional Affairs, Mr Lechesa Tsenoli, MP, addressed to his Cabinet colleague, Mr JT Radebe, MP, and former Minister of Justice, dated 26 March 2014 are referred to below.

state or body that is better placed to deal with the issues in question; and the potential benefits likely to accrue from undertaking reform. In a nutshell, the Commission needed to establish whether there is a problem, and if there is, its nature. This preliminary investigation revealed, among other things, that:

- (a) An audit conducted by municipalities in the Western Cape in 2009 identified several complex and prescriptive pieces of legislation (both original and subordinate legislation) that ostensibly created unnecessary burden for municipalities.
- (b) The Provincial Government of KwaZulu-Natal recommended that section 105(2) of the Municipal Systems Act<sup>2</sup> which authorises the MEC for local government in a province to instruct municipalities to provide information to provincial organs of state and other national statutes that impose similar obligations on municipalities which place undue burden on municipalities be amended.
- (c) Independent inquiries conducted by the Financial and Fiscal Commission (FFC) found:
  - (i) evidence that corroborated the assertion that some obligations imposed on local government are excessive. This evidence came from municipalities who are at the coalface of implementing the regulatory framework.
    - a. Emakhazeni Municipality in Mpumalanga informed the FFC that it spent R6.8 million to implement, or comply with, the Generally Recognised Accounting Practices (GRAP).<sup>3</sup> As a result, the municipality argued, substantial resources were being diverted from service delivery to comply with audit requirements.
    - b. eThekweni Municipality submitted that municipalities are hardly coping with approximately 75 legislative reporting requirements with monthly, quarterly and annual deadlines.

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<sup>2</sup> Local Government: Municipal Systems Act, 2000 (Act 32 of 2000).

<sup>3</sup> These standards, which apply to municipalities, are set by the Accounting Standards Board in terms of section 91(4) of the Public Finance Management Act, 1999 (Act 1 of 1999), are thus a statutory requirement. See 'Accounting Standards Set by Accounting Standards Boards', in Notice 815 of 2012 published in the Government Gazette No. 35757 of 12 October 2012.

- (ii) that the Municipal Finance Management Act<sup>4</sup> and the Statistics Act<sup>5</sup> contain 40 and 5 reporting requirements respectively.
  - (iv) that there was no structured process in place across national government that ensures collaboration and coordination to deal with duplicate data collection process.
- (d) At a seminar on regulatory burdens on local government hosted by COGTA in 2014, the FFC, without referring to specific provisions, cautioned that the legislative framework applicable to local government could be intrusive, complex, inflexible; difficult to implement uniformly or to enforce; and that it possibly creates unnecessary compliance burden and a barrier to success, performance and development.
- (e) In addition to countless workshops and seminars, formal structures namely the Interdepartmental Legislative Review Committee and Local Government Data Collection Forum, which comprised numerous national government departments and other organs of state, were instituted by national government between 2003 and 2014 in an effort to address these problems and thus improve the efficiency of local government.
- (f) The Local Government Data Collection Forum, whose main purpose was to address multiple reporting (a burden created when local government is required to provide data, sometimes the same data, to multiple entities), established early on in its investigation that:
- (i) the barrage of requests for information came from four organs of state with statutory authority to collect data imposed financial and administrative burden on municipalities;<sup>6</sup>
  - (ii) there was a great deal of duplication in the data requested by three of these entities namely Stats SA, National Treasury, the Department of Provincial and Local Government;
  - (iii) 95% of municipalities received questionnaires from provincial governments for information similar to that asked for by national government; and that

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<sup>4</sup> Local Government: Municipal Finance Management Act, 2003 (Act 53 of 2003).

<sup>5</sup> Statistics Act, 1999 (Act 6 of 1999).

<sup>6</sup> The entities in question are the National Treasury, Stats SA, the Municipal Demarcation Board and the predecessor of COGTA, the Department of Provincial and Local Government.

- (iv) 60% of municipalities do not complete all the questionnaires, among other things, due to lack of adequate resources.
- (g) Undoubtedly, the Intergovernmental Relations Framework Act (IRFA),<sup>7</sup> in general; and in particular the consultative forums it has created, namely the President's Coordinating Council and section 9(1) national intergovernmental forum, both of which are intended, among other things, to provide avenues for local government to air its views with regard to matters relating to the implementation of national legislation; and the mechanism it recommends could be used to regulate the interaction between national and local governments, the implementation protocol, could assist in getting organs of state to work together more, for example, on collection of information. Disappointingly, the IRFA has not delivered in this regard.
- (h) The Organised Local Government Act<sup>8</sup>, which is intended, among other things, to determine procedures by which local government may consult with national government, is another Act that could be used to facilitate communication among municipalities and to ensure that matters of common concern to them are brought to the attention of other spheres of government. Unfortunately, this has also proven ineffective in reducing the regulatory burden on local government.
- (i) Experts in local government law,<sup>9</sup> warned as far back as 2008 that the plethora of laws intended to structure the institutions and processes of local government,<sup>10</sup> and legislation emanating from sector departments intended to manage functional areas in schedules 4B and 5B of the Constitution<sup>11</sup> could be 'strangling' local government. They singled out section 76-84 of the Municipal Systems Act, read in conjunction with section 120 of the Municipal Finance Management Act, and the Public-Private Partnership Regulations<sup>12</sup> issued in terms of the latter Act, which, they argued, renders processes such

<sup>7</sup> Intergovernmental Relations Framework Act, 2005 (Act 13 of 2005).

<sup>8</sup> Organised Local Government Act, 1997 (Act 52 of 1997).

<sup>9</sup> See, for instance, Nico Steytler 'The Strangulation of Local Government' *TSAR* Issue 3 (2008) 518.

<sup>10</sup> They identified the following Acts: the Local Government: Municipal Structures Act, (Act 117 of 1998); the Local Government: Municipal Electoral Act, 2000 (Act 27 of 2000); the Municipal Finance Management Act; the Municipal Systems Act, and the Municipal Fiscal Powers and Functions Act, 2007 (Act 12 of 2007).

<sup>11</sup> For example, the Water Services Act, 1997 (Act 108 of 1997); and the National Health Act, 2003 (Act 61 of 2003).

<sup>12</sup> Municipal Public-Private Partnership Regulations No. R. 309 published in the *Government Gazette* No 27431 of 1 April 2005.

as outsourcing too difficult or costly to undertake. They also cautioned that there is a thin line between regulation and undue control and intervention.<sup>13</sup>

- (j) A comprehensive and thorough stocktaking of regulatory obligations imposed on local government, including reporting and compliance obligations; and regulatory functions undertaken by it on behalf of national government,<sup>14</sup> has never been undertaken, and therefore there is no 'formal register' that the Commission, or municipalities themselves, could use as a resource to identify the nature or extent of these obligations.<sup>15</sup>
- (k) National government is contemplating using differentiation in allocation of powers and functions to municipalities in order to ensure better fit between capacity and responsibilities (an asymmetrical approach to local government).
- (l) The White Paper on Local Government states:

'A number of institutions require accurate and relevant information to enable the monitoring and oversight of local government. For example, such information is required to enable the oversight of municipalities by the National Assembly (required by Section 55(2)(b)(ii) of the Constitution); the monitoring of municipalities by provincial governments (required by Section 155(6)(a) of the Constitution); and to enable the Human Rights Commission to assess the measures municipalities have taken towards the realisation of specific rights. National departments with decentralised policy and implementation programmes also require reliable information from local government with respect to these programmes.'

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<sup>13</sup> Nico Steytler in 'The Powers of Local Government in Decentralised Systems of Government: Managing the Curse of Common Competencies' *Comparative and International Law Journal of Southern Africa* 38 (2005), 271 at 276 discusses this issue in the context of common competencies.

<sup>14</sup> Regulatory obligations arise from section 151(3) and 155(7) of the Constitution; and regulatory functions from sections 99 and 156(4). In Chapter 2, paras 2.5 and 2.6, we discuss how assignment of executive powers and functions in terms of section 99 and 156(4) of the Constitution saddles local government with financial and administrative burdens.

<sup>15</sup> Such a register could be extremely useful, especially to an under-resourced municipality wanting, for instance, to ascertain whether a particular questionnaire has a statutory basis and should therefore be complied with. The Australian Productivity Commission in its report titled *Performance Benchmarking of Australian Business Regulation: The Role of Government as a Regulator* (July 2012) at 81 and 82 listed the following benefits of having a comprehensive public list of laws which delegate a regulatory role to local government: better business understanding of their compliance obligations, clarity for state and local government, better understanding of regulatory burdens placed on business, a clearer understanding of whether local government is adequately resourced to fulfil their regulatory role.



National government should provide a coherent framework to ensure that the reporting requirements placed on municipalities are reasonable, and should also ensure the rationalisation and standardisation of the current multiplicity of local government surveys into a coherent annualised national data collection system, which includes an annual survey of performance in terms of agreed key performance indicators, and a quarterly survey of indicators as required for Project Viability, by the SA Reserve Bank, and so forth.’

1.4 The participation of municipalities in previous initiatives which sought to understand and address the impact of the legislative burdens on municipalities was quite negligible. Between 2003 and 2014, when the decision to refer the matter to the Commission was taken, only 52 out of 257 municipalities, and therefore less than 20%, were consulted and eventually made inputs to the Legislative Review Project, Local Data Collection Forum and to the FFC. Owing to the paucity of input from municipalities which is palpable, the Commission is convinced that the findings by the abovementioned entities, which are alluded to in paragraphs 1.3 (a) to (f) above, are just a tip of the iceberg. Nevertheless, this evidence, coupled with scholarly analysis of the nature, scope, volume and collective impact of the **legislative framework**, was sufficient to persuade the Commission at its meeting held on 17 September 2017 to accede to the request of the Department of Cooperative Governance and Traditional Affairs (COGTA) to investigate the **reporting, compliance and regulatory obligations** imposed on local government by legislation. Due to the centrality of the issues to the developmental mandate of local government to alleviate poverty and eradicate inequality, the Commission also resolved to assign highest priority to this inquiry.

1.5 On 2 November 2017, and pursuant to section 5(3) of the South African Law Reform Commission Act of 1973,<sup>16</sup> the Commission requested the Minister of Justice to formally include this investigation in the Commission’s programme. On 16 May 2018, the Minister acceded to the Commission’s request. Due to the complex nature of the issues raised in this law reform proposal, the Commission decided to institute an advisory committee consisting of experts in local government law and institutional constitutional law to advise it in this inquiry.<sup>17</sup> The Minister of Justice appointed these experts in August 2018.

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<sup>16</sup> This provision reads: ‘The Commission shall, as far as possible in order of preference, investigate matters *appearing on any programme approved by the Minister* and may for that purpose consult any person or body, whether by submission of study documents prepared by the Commission or in any other manner.’

<sup>17</sup> Section 7A(1)(b)(iii) of the South African Law Reform Commission Act provides that ‘The Commission may, if it deems it necessary for the proper performance of its functions, establish a committee which shall consist of members of the Commission and other persons appointed by the Minister for the period determined by the Minister.’

### 3 About the sponsor of the investigation

#### (a) *The mandate of COGTA*

1.6 Over the years, COGTA, has initiated a number of programmes aimed at improving the efficiency of local government,<sup>18</sup> including the Local Government Strategic Agenda (2007-2011)<sup>19</sup> and the Legislative Review Project, the precursor to this inquiry. This should not come as a surprise as all these initiatives fall within the mandate of COGTA which includes: improving coordination across the three spheres of government; making sure that municipalities carry out their service delivery and development functions effectively; developing, promoting and monitoring mechanisms, systems and structures to enable integrated service delivery and implementation within government; developing national policies and legislation with regard to local government; and monitoring the implementation of numerous pieces of legislation.<sup>20</sup>

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<sup>18</sup> These projects are the Consolidated Municipal Infrastructure Programme (2001); Project Consolidate (2004) which sought to improve, inter alia, the coordination of national, provincial and local government; Municipal Infrastructure Grant Programme (2005); Siyenza Manje Programme (2006) which provided operational and strategic capacity in distressed municipalities; Local Government Turnaround Strategy (2009), which introduced the In-Year Management, Monitoring and Reporting System of Local Government which is now being used by national and provincial government to monitor the performance of municipalities; and Back to Basics (2014).

<sup>19</sup> Whose objectives were:

- (a) mainstreaming hands-on support to local government to improve municipal governance, performance and accountability;
- (b) addressing the structure and governance arrangements of the State to better strengthen, support and monitor local government; and
- (c) refining and strengthening the policy, regulatory and fiscal environment for local government and giving greater attention to the enforcement measures.

<sup>20</sup> See Annual Reports of the Department of Cooperative Governance and Traditional Affairs for 2010/2011 and 2014/15 Financial Years at 12 and 27-28 respectively. The legislation COGTA is responsible for is the Disaster Management Act, 2002 (Act 57 of 2002); Fire Brigade Services Act, 1987 (Act 99 of 1987); Intergovernmental Relations Framework Act, 2005 (Act 13 of 2005); Local Government: Municipal Property Rates Act, 2004 (Act 6 of 2004); Local Government: Cross-boundary Municipal Act, 2000 (Act 29 of 2000); Local Government: Municipal Demarcation Act, 1998 (Act 27 of 1998); Local Government: Municipal Finance Management Act, 2003 (Act 56 of 2003); Local Government: Municipal Structures Act, 1998 (Act 117 of 1998); Local Government: Municipal Systems Act 2000 (Act 32 of 2000); National House of Traditional Leaders Act, 1997 (Act 10 of 1997); Organised Local Government Act, 1997 (Act 52 of 1997); Remuneration of Office Public Bearers, 1998 (Act 20 of 1998); The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities Act, 2002 (Act 19 of 2002); Pension Benefits for Councillors of Local Authorities Act, 1987 (Act 105 of 1987); and Traditional Leadership and Governance Framework Act, 2003 (Act 41 of 2003).

## (b) *Entities linked to COGTA*

1.7 The South African Local Government Association (SALGA), a voluntary association of municipalities which derives its mandate from section 163 of the Constitution,<sup>21</sup> reports to the Minister of Cooperative Governance and Traditional Affairs.<sup>22</sup> The following institutions, some of which feature prominently in this document, are also linked to COGTA: the Municipal Demarcation Board; South African Cities Network; and the National House of Traditional Leaders.<sup>23</sup>

## B Context of this investigation

### 1 What prompted this inquiry?

1.8 The provision of services to local communities lies at the heart of local government.<sup>24</sup> That this is the primary responsibility of local government is confirmed, first, by the various provisions of the Municipal Systems Act,<sup>25</sup> and secondly, by the Constitutional Court in *Executive Council of the Western Cape v Minister of Provincial Affairs and Constitutional Development* when it stated:

‘Local government is the closest government can get to the people. That is where delivery must be seen to be taking place’.<sup>26</sup>

1.9 If municipalities are not functioning optimally, 55.6 million South Africans<sup>27</sup> who rely on municipalities for basic services<sup>28</sup> or ‘core services’<sup>29</sup> that local government **provides** are

<sup>21</sup> This provision reads:  
‘An Act of Parliament enacted in accordance with the procedure established by section 76 must-  
(a) provide for the recognition of national and provincial organisations representing municipalities; and  
(b) determine procedures by which local government may-  
(i) consult with the national or a provincial government;  
(ii) designate representatives to participate in the National Council of Provinces; and  
(iii) participate in the process prescribed in the national legislation envisaged in section 221(1)(c).’

<sup>22</sup> SALGA *Annual Report 2015/2016* at 203.

<sup>23</sup> *Cooperative Governance and Traditional Affairs Annual Report 2010/11* at 19.

<sup>24</sup> Section 152(1)(b) of the Constitution.

<sup>25</sup> Sections 4(2)(d), (f), and (j) and 73(1)(a) and (c) of the Municipal Systems Act.

<sup>26</sup> 2000 (1) SA 661 (CC).

<sup>27</sup> See <http://cs2016.statssa.gov.za> (accessed 13 May 2017).

<sup>28</sup> Section 1 of the Municipal Systems Act defines ‘basic municipal services’ as a municipal service that is necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public health or safety or the environment.

<sup>29</sup> These services are defined in a document by the Department of Cooperative Governance and Traditional Affairs titled ‘*Back to Basics: Serving Our Communities Better! Presidential Local Government Summit*’ at 3 as clean drinking water, sanitation, electricity, shelter, waste removal, and roads.

affected. The prevalence and upsurge of service delivery protests, often resulting in the destruction of property; and in certain instances, loss of lives, is indicative, among other things, of local government that is dysfunctional and unresponsive to community needs.<sup>30</sup> Up to now, problems afflicting local government have been attributed to financial difficulties, lack of capacity, inexperience,<sup>31</sup> mismanagement and corruption,<sup>32</sup> among others. The issues raised in this review suggest that obligations arising from legislation too, in particular reporting, compliance and regulatory obligations, inconspicuously, contribute to the crisis in local government. In 2009, the Auditor-General identified, among other things, complex legislation as bedevilling local government's efficacy.<sup>33</sup> At the time, the President asked:

‘Can every municipality be expected to perform the same set of functions? Put differently, can municipalities with vastly different capacities be expected to perform the same function? Answering this question is important because it may well be the case that we have entrusted some responsibilities to certain municipalities which they can never be able to fulfil. It is equally possible that some municipalities, especially metros, can perform more functions than we have given them. All I am suggesting is that we may have imposed a one-size-fits-all arrangement when a differentiated approach is called for.’<sup>34</sup>

1.10 Despite its enhanced constitutional status,<sup>35</sup> local government remains under significant control of national government. Although the Constitution is teeming with

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<sup>30</sup> See Judith February ‘Local Government in South Africa – Mostly Corrupt, Largely Dysfunctional’ *Daily Maverick*, 25 February 2018. Of course, not all discontent can be attributed to functions over which municipalities have control. Municipalities are also blamed for dysfunctional schools, poor services in hospitals, including hospitals and slow pace of building houses all of which are responsibilities residing with other spheres of government. Nevertheless, national government has conceded over the years that there were challenges bedevilling the local sphere of government which needed urgent attention. Programmes and initiatives, such as Project Consolidate, which sought to provide hands-on support to municipalities and to advance service delivery, were some of the responses to these challenges. See also *Opening Address by President Zuma to the Presidential Meeting with Executive Mayors and Mayors to Discuss Improving Service Delivery in Municipalities*, Khayelitsha, Cape Town, 20 October 2009.

<sup>31</sup> See National Planning Commission *National Development Plan 2030* at 45.

<sup>32</sup> Judith February ‘Local Government in South Africa – Mostly Corrupt, Largely Dysfunctional’ *Daily Maverick*, 25 April 2018.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Opening Address by President Jacob Zuma to the Presidential Meeting with Executive Mayors and Mayors to Discuss Improving Service Delivery in Municipalities*, Khayelitsha, Cape Town, 20 October 2009.

<sup>35</sup> Prior to 1994, local government was subject to extensive control by parliament and provinces. In fact, it was one of the subjects (functional areas) under the jurisdiction of provinces. This changed in 1994. For the first time, local government was recognised as a fully-fledged sphere of government; it enjoys representation in the National Council of Provinces; its functional and institutional integrity is protected from intrusion by other levels of government; and other spheres of government have a duty to support and strengthen the capacity of municipalities to manage their own affairs. According to the Constitutional Court this new status and autonomy of local government means that the Constitution prescribes a hands-off relationship between local government and other spheres; local government no longer exercises ‘delegated powers’ as was the case in the past; gives the other spheres power to

provisions envisaging the enactment of laws,<sup>36</sup> two such provisions impose the most conspicuous limitations of the autonomy of local government. The first one empowers local government to govern the affairs of the community *subject to national and provincial legislation*.<sup>37</sup> The second provision gives national and provincial government authority to see *to the effective performance by municipalities of their functions*.<sup>38</sup> Pursuant to these provisions a myriad of laws, referred to in contemporary legal parlance as 'framework', 'institutional' or 'supervisory' or 'local government' legislation, have been enacted by national government.<sup>39</sup> To this compendium, one should add various sectoral laws,<sup>40</sup> including

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create norms and guidelines for the exercise of a power or the performance of a function by local government not the usurpation of the power or the performance of the function itself; national and provincial government are barred from assuming control of municipal functions, except in exceptional circumstances; the executive authority over, and the power to administer, matters in schedule 4B and 5B vests in municipalities; national and provincial governments cannot by legislation give themselves the power to exercise executive municipal powers or the right to administer municipal affairs; exercise by local government of its powers could 'veto' or thwart decisions taken by national government; barring exceptional circumstances, national and provincial government are not entitled to usurp the functions of local government. For these dicta, see *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) paras 372-373; *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) paras 26 and 39; *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) paras 44,47 and 59; *Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC) paras 47 and 48; *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* 2014 (1) SA 521 (CC) para 46; *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and Others* 2014 (4) SA 437 (CC) at para 21-22; *Tronox KZN Sands (Pty) Ltd v KwaZulu-Natal Planning and Development Appeal Tribunal and Others* 2016 (3) SA 160 (CC) para 26. See also *R A Le Sueur v eThekweni Municipality* 2013 JDR 0178 (KZP) where the court adopted a systematic approach (clarifying the meaning of a particular constitutional provision in conjunction with the Constitution as a whole) to interpret various provisions of the Constitution impacting on local government. As stated by Tracy Humby in 'Maccsand: Intergovernmental Relations and the Doctrine of Usurpation: *Maccsand (Pty) Ltd v City of Cape Town* CCT 103/11 [2012] ZACC 7; 2012 7 BCLR 690 (CC)' *Southern African Public Law* (2012) 628, at 635 the implications of this new status of local government are still being worked out.

<sup>36</sup> To define the types of municipalities, establish the criteria for the demarcation and establishment of municipalities and provide for the division of their powers (s155(2) and (3)); particulars of electoral system for local government (s157(2) and (6)); certain aspects in respect of membership of municipal council (s158(1)(a) and (b) and (2)); the terms of municipal councils (s159); participation of members in proceedings (s160(3) and 161); and the recognition of organised local government (s163). National government could make laws on all local government matters that are not dealt with in the Constitution (s151(4)). See Rautenbach and Malherbe *Constitutional Law* Second Edition (1996) at 267.

<sup>37</sup> Section 151(3) of the Constitution.

<sup>38</sup> Section 155(7) of the Constitution provides that:

'The *national government*, subject to section 44, and the provincial governments *have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156(1)*.' Our emphasis. See further Steytler and De Visser *Local Government Law of South Africa* (2018) chap 5, para 3.

<sup>39</sup> This legislation includes the Municipal Structures Act of 1998 (Act 117 of 1998); the Municipal Electoral Act, 2000 (Act 27 of 2000); the Municipal Systems Act, 2000 (Act 32 of 2000); the Municipal Finance Management Act, 2003 (Act 56 of 2003); the Municipal Property Rates Act,

environmental legislation,<sup>41</sup> and national legislation seeking to transfer schedule 4A and 5A functional areas to local government;<sup>42</sup> all of which impact on local government.

**(a) What is the problem with the statutory framework regulating local government?**

*(i) Consequences of the regulatory environment according to COGTA*

1.11 The Minister of COGTA lamented that local government has to contend with duplicative, conflicting, and plain ‘not fit for purpose’ obligations arising from this statutory framework. He stated in this regard:

‘...service delivery and development is often delayed because of the need to meet the requirements of several different pieces of legislation. The relevant provisions of the different pieces of legislation are sometimes duplication and at other times contradictory.

The consequences of the regulatory environment is that municipalities bear a heavy compliance burden and have to constantly submit reports to both provincial and national government. These reports are in the majority of instances based on the same information, but with different reporting nuances. It is typical in these environments to see instances of malicious compliance whereby municipalities are reporting for reporting sake, without any conscious effort to address the rationale for the reporting requirement.’

1.12 COGTA did not provide evidence to substantiate these assertions. However, by virtue of its constitutional mandate, COGTA has become a repository of valuable information and evidence relating to regulatory obligations amassed by other entities over the years, which it has disclosed to the Commission. This evidence is discussed below.

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2004 (Act 6 of 2004); and the Municipal Fiscal Powers and Functions Act, 2007 (Act 12 of 2007).

<sup>40</sup> For example, the Water Services Act, 1997 (Act 108 of 1997) and the National Health Act 2003 (Act 61 of 2003).

<sup>41</sup> Anél Du Plessis describes the duties performed by local government in terms of national environmental legislation such as the National Water Act, 1998 (Act 36 of 1998); the National Water Services Act, 1997 (Act 108 of 1997); the National Heritage Resources Act, 1999 (Act 25 of 1999); the National Environmental Management: Air Quality Act, 2004 (Act 39 of 2004); the National Environmental Management: Waste Management Act, 2008 (Act 59 of 2008), as that of an executory agent. These statutes impose duties on local government. See Anél Du Plessis ‘Local Environmental Governance and the Role of Local Government in Realising Section 24 of the South African Constitution’ *Stell LR Vol 2* (2010) 265, at 266. For a detailed exposition of different environmental law sectors imposing duties and functions on municipalities in South Africa, Anél du Plessis (ed) *Environmental Law and Local Government in South Africa* (2015).

<sup>42</sup> For example, the Disaster Management Act of 2000, (Act 57 of 2000); the Housing Act of 1997, (Act 107 of 1997); the Water Services Act, 1997 (Act 108 of 1997); and the National Health Act 2003 (Act 61 of 2003). For a discussion of the impact of assignment of functions in terms of these Acts, see South African Local Government Association (SALGA) *15 Years of Developmental and Local Government – 2000-2015* at 51 and 113.

(ii) *Submissions to the President by the Western Cape Provincial Government*

1.13 Experts in local government law warned that institutional and sectoral legislation applicable to local government was suffocating this sphere of government.<sup>43</sup> The turning point came in August 2009, when the Premier of the Western Cape informed the President at an intergovernmental meeting that *constraints and bureaucratic red tape created by some national legislation impedes* service delivery in the Western Cape Province.

1.14 Municipalities in that province<sup>44</sup> conducted an audit of legislation that hampered service delivery; determined whether the problem identified was attributable to a national legislative provision; and proposed amendments to relevant legislation.<sup>45</sup> This process culminated in the compilation of a report identifying burdensome provisions which was submitted to the Premier, and subsequently to the President. It was on the basis of this report that the President commissioned *the review of legislation hindering accelerated service delivery* by COGTA in 2009. What did this initial review, conducted jointly by the Legislation Work Stream, the MEC for Local Government, and local government in the Western Cape reveal about the statutory framework for local government? The Western Cape Provincial Government found that:

- (a) Laws constituting the new suite of local government legislation, and regulations made thereunder,<sup>46</sup> are complex; prescriptive;<sup>47</sup> time consuming; vague; difficult to interpret; too costly to comply with;<sup>48</sup> impeding

<sup>43</sup> See Nico Steytler 'Local Government in South Africa: Entrenching Decentralised Government' in *The Place and Role of Local Government in Federal Systems* (2005) at 202; 'The Powers of Local Government in Decentralised Systems of Government: Managing the Curse of Common Competencies' *Comparative and International Law Journal of Southern Africa* Vol 38 (2005) at 276; 'The Strangulation of Local Government' *TSAR* Issue 3 (2008) 518; Anél du Plessis 'Local Environmental Governance and the Role of Local Government in Realising Section 24 of the South African Constitution' *Stell LR* (2010) at 288. See also De Visser 'Cities and Climate Change: *ex abundanti cautela* – 'from excess of caution'?' (2012).

<sup>44</sup> The MEC for Local Government formally requested local government in that province, about 30 municipalities, to make submissions in this regard.

<sup>45</sup> Provincial Government Western Cape *Modernisation Programme Blueprint: Legislation Work Stream* 29 October 2009 at 11.

<sup>46</sup> The Western Cape Government specifically referred to regulations 33 to 46 of the Municipal Asset Transfer Regulations of 2008 published under GN 878 of 22 August 2008 which allegedly prescribe a protracted process for alienating, letting or granting permission to use municipal property.

<sup>47</sup> As examples of these laws, the Western Cape Government cited the Municipal Finance Management Act and Municipal Systems Act which it claimed make it extremely difficult to outsource any municipal services; and regulations framed in terms of the former law namely the Municipal Asset Transfer Regulations whose provision it averred, municipalities are unable to decipher which in turn has led to its provisions being ignored.

<sup>48</sup> It has been argued, for instance, that the Generally Recognised Accounting Practice (GRAP), accounting standards, set by the Accounting Standards Board in terms of section 89(1) of the Public Finance Management Act, 1999 (Act 1 of 1999) to the extent that they apply to municipalities must be revisited, and if necessary scrapped and that a simpler, user-friendly

municipalities' right to govern own affairs;<sup>49</sup> require high level of competencies and skills; and contain provisions relevant in a first world business environment.<sup>50</sup> Consequently, municipalities have great difficulty implementing and complying therewith.

- (b) These laws leave no room for asymmetrical implementation. Invariably, in these laws the legislature adopts the so-called 'one-size-fits-all' approach which fails to take cognisance of limited capacity most municipalities have to contend with.<sup>51</sup> As a result, an inordinate amount of time is spent trying to come to grips with legislation to the detriment of service delivery.
- (b) At times, the regulatory framework applicable to local government is simply ignored. Of course, by doing so the municipalities run the risk receiving qualified audits and facing criminal prosecution.

**Comment:** It appears from the 2016/17 Auditor-General's report that this trend, non-compliance with legislation, is on the rise. The Auditor-General recently reported, inter alia, that material non-compliance with key legislation by local government is currently at 86%, which is the highest percentage since 2012.<sup>52</sup> To curb this inclination, the Auditor-General has recommended that there should be consequences and that corrective measures must be enforced against transgressors.<sup>53</sup>

1.15 To address these challenges, the Western Cape Government recommended that the statutory framework be simplified or that application of certain provisions should depend on whether a municipality has capacity to discharge the obligation (i.e. differentiated

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and cheaper replacement should be considered. It has further been submitted that money spent on compliance and implementation of GRAP could be spent more effectively on service delivery.

<sup>49</sup> An example of such a provision which is alleged to be time consuming, too prescriptive and hampers the right of local government to govern its own affairs is section 33 of the Municipal Finance Management Act.

<sup>50</sup> According to the Western Cape Government, legislation falling into this category is the Municipal Finance Management Act and two regulations made in terms thereof namely the Municipal Supply Chain Management Regulations published under GN 868 of 30 May 2005 and the Municipal Asset Transfer Regulations published under GN 878 of 22 August 2008.

<sup>51</sup> It drew attention to the fact that metropolitan municipalities, on the one hand, have the luxury of skilled technical staff, such as lawyers and accountants whereas smaller municipalities, in most cases, have to rely on its municipal manager to discharge most of their functions including interpretation and implementation of legislation.

<sup>52</sup> Auditor-General of SA *Consolidated General Report on the Local Government Audit Outcomes: MFMA 2016/17* at 2.

<sup>53</sup> *Id* at 63.



application). As mentioned above, to expedite the reform process, it provided draft amendments to statutory provisions found to be onerous, excessive, or unnecessary.

**Comment:** Where onerous obligations were attributed to specific provisions, for example reg 33 to 46 of the Municipal Transfer Regulations, the Commission checked whether any amendments have been effected to the provisions in question to ameliorate their impact on local government. This review has revealed that no amendments have been effected to any of the provisions identified by the Western Cape Government. The impugned provisions are still in their pristine form.

*(iii) National Treasury*

1.16 In the early 2000s, long before the Government of the Province of the Western Cape approached the President, the National Treasury recognised the challenges caused by ‘compliance related legislation’, or an ‘a symmetrical legal regime’ during the implementation of the Municipal Finance Management Act which was promulgated in July 2004. It appreciated that huge gap exists in respect of human and financial resources between municipalities in deep rural areas and those in urban areas and thus made a conscious decision to implement the Municipal Finance Management Act in a staggered fashion, guided by the capacity of, and budget allocated to, a municipality.<sup>54</sup>

*(iv) Financial and Fiscal Commission*

1.17 Over the years, the FFC has stressed the importance of data in monitoring and supporting municipalities; slammed the lack of frequent and useful data;<sup>55</sup> acknowledged that the regulation of local government is a constitutional imperative and that it is intended to serve a useful purpose of ensuring effective and efficient use of public funds, to minimise corruption and maladministration; but at the same time it has not shied away from criticising the impact data collection (by way of reporting requirements), or the statutory framework applicable to local government, has on municipalities.

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<sup>54</sup> The National Treasury classified all municipalities into three groups – high capacity, medium capacity and low capacity. The categorisation was useful in the implementation of the provisions of the aforementioned Act, which was done in three phases. Fifty municipalities classified as high capacity had to comply with the Act forthwith. Other municipalities were given additional time to implement all the provisions of the Act.

<sup>55</sup> Financial and Fiscal Commission *Sustaining Local Government Finances: Final Report on the Financial and Fiscal Commission’s Public Hearings on the Review of the Local Government Fiscal Framework* at 48.

1.18 In 2008, the FFC lamented the dire state of reports emanating from local government and the unsystematic manner in which data was being sought from this sphere of government. It stated:

'The uncoordinated approach to data collection from local government has resulted in poor quality of the data returned. Local government data is not comparable, and is unreliable and often inaccurate as a result of duplicate data requests from various institutions. The lack of coordination has allowed 225 questionnaires from national organs of state to be distributed to municipalities within the course of a year. Many of these questionnaires duplicate amongst themselves similar data requests from national stakeholders. The problem is further exacerbated by numerous provincial requests.'<sup>56</sup>

1.19 In 2009, it observed that there was no structured process in place across national government that ensures collaboration and coordination to deal with duplicate data collection practices.<sup>57</sup>

1.20 A couple of years later, in 2014, the FFC provided a further glimpse of the prevalence and breadth of the reporting obligations on municipalities during a presentation to COGTA's Technical MinMec Seminar.<sup>58</sup> It stated:

- (a) relying on information provided to it by eThekweni Municipality, that there are approximately over 75 legislative reporting requirements with monthly, quarterly and annual deadlines;
- (b) observed that the Municipal Finance Management Act and the Statistics Act have approximately 40 and 5 reporting requirements respectively;<sup>59</sup>
- (c) slated what it called the 'command and control regulations', which are backed by legal sanctions, and which it averred abound in framework legislation applicable to local government;

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<sup>56</sup> Krish Chetty 'Chapter 12, Local Government Data Collection Reforms' in Financial and Fiscal Commission *Technical Report: Annual Submission on the Division of Revenue 2009/10*, 363 at 367 and *The Regulatory Burden of Municipalities: A Concept Paper* at 14.

<sup>57</sup> Krish Chetty 'Chapter 12, Local Government Data Collection Reforms' in Financial and Fiscal Commission *Technical Report: Annual Submission on the Division of Revenue 2009/10*, 363 at 373.

<sup>58</sup> Financial and Fiscal Commission *The Regulatory Burden on Municipalities: Presentation to the Department of Cooperative Governance and Traditional Affairs Technical MinMec Policy Seminar* (6 February 2014).

<sup>59</sup> Financial and Fiscal Commission 'The Regulatory Burden on Municipalities: Presentation to the Department of Cooperative Governance and Traditional Affairs Technical MinMec Policy Seminar' (6 February 2014) at 14.

- (d) submitted that the regulatory framework applicable to local government could be intrusive, authoritative, complex, inflexible, difficult to implement and to enforce; could create unnecessary compliance burden; could be a barrier to success, performance and development; and that
- (e) **huge amounts of money are expended on efforts** to comply with Generally Recognised Accounting Practices, which diverts substantial resources from service delivery to comply with audit requirements.

1.21 Whilst its critique lacks specificity, it listed a myriad of laws it termed ‘compliance related legislation’ to bolster its assertion that local government is disproportionately regulated compared to provincial government.<sup>60</sup> In our endeavour to identify laws imposing regulatory obligations on local government, this list of laws compiled by the FFC **provides a useful starting point.**

1.22 Like the National Treasury, it has also attributed the problems experienced by this sphere of government to resource deficit - human and financial resources and technical support. It has warned that increased regulation in these circumstances leads to: (a) non-compliance and poor service delivery; and (b) variations in terms of compliance.<sup>61</sup> The fact that laws local government must comply with are administered by different government departments makes coordination difficult and increases the administrative burden.

1.23 The FFC has recommended, without specifying what form these measures should take, that to address these deficiencies *a number of instruments should be considered for minimising the regulatory burdens.*

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<sup>60</sup> It listed the Constitution of the Republic of South Africa, 1996; and the following original legislation: Intergovernmental Fiscal Relations Act 97 of 1997; Intergovernmental Relations Framework Act 13 of 2005; Local Government Transition Act 209 of 1993; Local Government: Municipal Demarcation Act 27 of 1998; Local Government: Municipal Finance Management Act 56 of 2003; Local Government: Municipal Property Rates Act 6 of 2004; Local Government: Municipal Structures Act 117 of 1998; Local Government: Municipal Systems Act 32 of 2000; Municipal Fiscal Powers and Functions Act 12 of 2007; Electricity Regulation Act 4 of 2006; and Water Services Act 108 of 1997. It also refer to the following subordinate legislation: Municipal Asset Transfer Regulations; Municipal Regulations and Guidelines on Minimum Competency Levels; Exemptions from the Municipal Finance Management Sections; Updated Exemptions from the Municipal Finance Management Act Sections; Municipal Regulations on Debt Disclosures; Municipal Supply Chain Management Regulations; Municipal Investment Regulations; Municipal Public-Private Partnership Regulations; Municipal Regulations on Financial Misconduct Procedures and Criminal Proceeding; Municipal Budget and Reporting Regulations; and Standard Chart of Accounts for Local Government Regulations.

<sup>61</sup> It points out that the smaller the municipality, the greater the impact of regulations in terms of time and proportion of budget.

(v) *Local Government Data Collection Forum*<sup>62</sup>

1.23 In 2002, municipal officials expressed concerns about the large number of questionnaires municipalities receive from government departments seeking similar information. In 2003, a task team, the Local Government Data Collection Forum (task team or LGDCF) to be convened by the National Treasury was established<sup>63</sup> to address issues of local government information relating to financial (budgets, actual financials reported on a monthly basis, and annual financial statements) and non-financial data. Concerned that data collection imposed financial and administrative burden on local government, the LGDCF embarked on a laborious consultation process with national government and other organs of state with the intention to understand their practices with regard to information systems and data analysis. During this process, 20 municipalities comprising district and local municipalities were surveyed to get some idea about the amount of questionnaires they receive from other spheres of government and other public and private entities. It found, inter alia, that:

- (a) only four organs of state were authorised by legislation to collect data from local government, namely the National Treasury, Stats SA, the Municipal Demarcation Board and the Department of Provincial and Local Government, the predecessor of COGTA;<sup>64</sup>
- (b) collection periods clashed with the compilation of municipal budgets and other functions;
- (c) very few municipalities had a dedicated department that deals with information gathering;
- (d) on average, municipalities dealt with 15-30 queries on a monthly basis, 40-45 on a quarterly basis, and 80-150 on an annual basis.
- (e) SALGA also collected information, with the source of its power to do so being the municipal support initiative;

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<sup>62</sup> For a detailed discussion, see National Treasury *Rationalisation of the Local Government Data Collection Processes Report (Phase I and II)* (21 November 2007).

<sup>63</sup> This task team comprised the South African Reserve Bank, Stats SA, Department of Water Affairs and Forestry, Development Bank of Southern Africa, FFC, and the Municipal Demarcation Board.

<sup>64</sup> The National Treasury derive its mandate from the Municipal Finance Management Act and the Constitution; Stats SA, from the Statistics Act of 1999; the Municipal Demarcation Board from section 85 of the Municipal Structures Act; and the DPLG from the Municipal Systems Act.

- (f) duplication of data collection occurred amongst the entities above with the exception of the Municipal Demarcation Board;
- (g) 60% of municipalities do not complete all questionnaires as a result of:
  - (i) lack of resources;
  - (ii) constant changes in data requirements;
  - (iii) certain questionnaires are considered irrelevant, especially where there is no legislation forcing them to comply;
- (h) municipalities received requests for information from a variety of sources and are required to submit information requested in a number of different formats.

1.24 In order to effectively manage data collection and the dissemination effort, the LGDCF recommended, inter alia, that a designated body, national coordinating body and data centre, needs to be set up with the sole purpose of managing and supporting this process. Although, the sources of these reporting obligations namely, the Statistics Act, the Municipal Systems Act, the Municipal Structures and the Municipal Finance Management Act, did not attract censure from the LGDCF, these laws remain the *condition sine qua non* for these obligations.

**(b) *Earlier efforts to address onerous obligations on local government***

1.25 As can be gleaned from the preceding discussion, the Commission is conducting this inquiry against the backdrop of earlier initiatives, in particular by the Legislative Review Committee and the Local Government Data Collection Forum both of which comprised quite a number of national organs of state, which were aimed at eradicating statutory provisions hindering accelerated service delivery, of which compliance and reporting obligations are components, and thus improving the efficiency and effectiveness of local government. The Commission's insight into the issues raised in this inquiry has to a large extent been shaped by the work undertaken by these entities.

**(c) *Participation of local government in endeavours to improve efficiency***

1.26 The Commission has observed though that first-hand evidence of the impacts (costs and benefits) of the regulatory framework submitted by local government to the initiatives referred to in the preceding paragraph is quite negligible and dated.

1.27 The only inputs made by local government that the Commission has had sight of came from:

- (a) 30 *municipalities* in the Western Cape in October 2009 that were requested by the MEC for Local Government in that province to make input to what later became known as the Legislative Review Project;
- (b) *Emakhazeni Municipality*, which submitted evidence relating to the cost of implementing the Generally Accepted Accounting Practices (GRAP 17) to the Financial and Fiscal Commission (FFC);
- (c) a survey of 20 *district* and *local municipalities* conducted by the Local Government Data Collection Forum in 2005 and 2006 which was intended to provide an idea of the quantity of questionnaires local governments receive from national and provincial governments and other organisations; and
- (d) eThekweni Municipality which confirmed to the FFC that there are over 75 legislative reporting requirements with monthly, quarterly and annual deadlines.

1.28 As stated above, these municipalities constitute a small fraction of municipalities.

1.29 Moreover, although comments generated by the Western Cape municipalities referred to above highlighted the challenges municipalities grapple with in the implementation of national legislation, the purpose of the exercise embarked upon by municipalities in the Western Cape in 2009 was to identify legislative provisions *hindering accelerated service delivery* of which excessive, inefficient and unnecessary obligations are components.

1.30 The paucity of evidence from local government underscores the need for targeted consultations with municipalities to fully understand the sources, nature and extent of regulatory, reporting and compliance burdens imposed on local government by legislation. South Africa, unlike certain states in Australia, does not have a register of local government regulatory functions or a legislative compliance database which identifies legislation that imposes obligations on local government.<sup>65</sup> It is important to tap into municipalities' first-hand

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<sup>65</sup> In New South Wales, the Independent Pricing and Regulatory Tribunal engaged a private law firm (Stenning and Associates) and an audit firm (KPMG) to develop a register that clearly identified the nature and extent of regulatory functions undertaken by local government in NSW in 2012. A comprehensive register based on a thorough legislative stocktake of all regulatory functions conferred on local government was published under cover of a report titled 'Register of Local Government Regulatory Functions' in October 2012. There is also a Legislative Compliance Database established by Local Government Legal (a legal services entity established by Hunter Councils) which identifies the main Commonwealth and NSW legislation that impose obligations on local government. See Stenning and Associates *Register of Regulatory Functions Undertaken by Local Government in NSW Final Report* October 2012 at 1 and New South Wales' Independent Pricing and Regulatory Tribunal

knowledge and experience regarding these obligations. This consultation seeks to establish from municipalities themselves, among other things:

- (a) the nature and extent of regulatory, compliance and reporting obligations imposed on local government by national legislation, including subordinate legislation;
- (b) the rationale (the stated legislative or policy objective) for these regulatory obligations;
- (c) the impacts (costs and benefits) compliance with framework legislation has on local government.<sup>66</sup>

1.31 This process of consultation is also intended to unearth other forms of regulatory burdens worthy of consideration as part of this inquiry.<sup>67</sup>

## **C The scope of this inquiry**

1.32 The terms of reference for this inquiry require the Commission to conduct a review:

‘...of all national legislation that impact on local government, with the objective of reducing regulatory compliance and reporting burden on municipalities and simplifying implementation.’<sup>68</sup>

### **1 What is meant by ‘regulatory, compliance and reporting burden’?**

#### **(a) Test to determine burdensome obligations**

1.33 COGTA has not impugned all regulatory requirements applicable to local government; only those that are burdensome. It is therefore necessary to establish right at the outset what constitutes a ‘burdensome obligation’<sup>69</sup> or burdensome regulatory,

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*Review of Reporting and Compliance Burdens on Local Government Draft Report* January 2016 at 27.

<sup>66</sup> Information the Commission seeks to garner under this rubric includes qualitative and quantitative impacts of the identified regulatory burdens, including the details of the average annual compliance costs in terms of staff, training, IT systems, delays as well as any cost recovery mechanisms for these obligations. See IPART Draft Report at 28.

<sup>67</sup> For instance, SALGA has complained that the transfer of powers and functions to local government in terms of section 99 and 156(4) of the Constitution without, or with insufficient, concomitant funding creates burdens for under-resourced municipalities.

<sup>68</sup> Excerpt of a letter from the Ministry of Cooperative Governance and Traditional Affairs.

<sup>69</sup> Various terms are used to describe the phenomenon which is the subject matter of this inquiry. The Financial and Fiscal Commission refers to it simply as ‘regulation’ of local government. Nico Steytler, in two of his articles on the subject, namely ‘The Strangulation of Local Government’ *TSAR* Issue 3 (2008) 518 at 520 and ‘The Strangulation of Local

compliance or reporting obligations. The New South Wales' Independent Pricing and Regulatory Tribunal (IPART) which, like the Commission, was tasked with the whole-of-government review of the regulatory, compliance and reporting burdens imposed on councils through legislation,<sup>70</sup> has proposed the following useful criteria:

'A regulatory obligation typically imposes costs on the regulated entity to comply with the regulation and achieve its objectives. *If the benefits of the particular obligation exceed these costs it may be justified.* However, regulation that is poorly designed or implemented can impose unnecessary and excessive costs on those being regulated. These excessive costs or burdens are the focus of this review.

In considering whether a regulatory obligation is a burden for local government we assessed whether it is excessive, inefficient or unnecessary.<sup>71</sup>

1.34 Moreover, it provides the following examples of excessive, inefficient or unnecessary regulatory obligations:<sup>72</sup>

Excessive	Inefficient	Unnecessary
Onerous	Overlapping	Unclear purpose
Complex	Duplicative	Data collected but not used
	Causes delay	
	Unclear provisions	
	Inconsistent	
	Others better placed to perform function	

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Government: Stifling Innovation, Experimentation and Local Responsiveness' *Local Government Bulletin* 10 (2008) at 6 refers to this phenomenon as 'strangulation' and 'overregulation' of local government. Further, he draws a distinction between two forms of overregulation with a direct command, which effectively eliminates discretion, being the clearest form; and the more invidious form where it is indirect, for example, where the sheer complexity or cost of regulation stifles initiative.

<sup>70</sup> New South Wales, Independent Pricing and Regulatory Tribunal *Review of Reporting and Compliance Burdens on Local Government: Issue Paper* July 2015 at 2. The scope of the New South Wales investigation, defined in a one-page letter the Premier of New South Wales, addressed to the Tribunal which is attached to the aforementioned report on page 33, bears striking resemblance to the terms of reference of this investigation. First, the Premier states that he is referring to the Tribunal for investigation and report 'Review of regulatory reporting and compliance burdens on local government'. In the penultimate paragraph, the Premier states '...the government has agreed to commission a review identifying opportunities to streamline the regulatory, compliance, and reporting requirements on councils to improve outcomes for communities.'

<sup>71</sup> New South Wales, Independent Pricing and Regulatory Tribunal *Review of Reporting and Compliance Burden on Local Government: Local Government Draft Report* January 2016 (IPART Draft Report) at 26. Our emphasis.

<sup>72</sup> *Ibid.*



1.35 'Antiquated' requirements have been added to these criteria.<sup>73</sup> The criteria set out above provide an accurate description of regulatory obligations the Commission seeks to identify, streamline or repeal as part of this inquiry.

## 2 Issues that fall outside the ambit of this investigation

1.36 In contrast to the work of the Legislative Review Committee which sought to *address all impediments in the legislative framework that rendered local government inefficient and diminished its ability to deliver services to communities*, the scope of this investigation is quite narrow. It entails a comprehensive and meticulous review of *national legislation* to determine whether it imposes onerous reporting, compliance and regulatory obligations on local government. If it does, the Commission would, as it authorised to do by its enabling legislation, propose appropriate measures for the reform thereof.<sup>74</sup>

1.37 What this means is that the Commission will focus exclusively on regulatory, reporting and compliance obligations contained in legislation passed by Parliament in terms of section 44 of the Constitution,<sup>75</sup> old order legislation passed by erstwhile Parliament that is not at variance with Constitution,<sup>76</sup> and regulations enacted pursuant to these Acts of

<sup>73</sup> Local Government NSW *LGNSW Submission to IPART – Review of Reporting and Compliance Burdens on Local Government* (August 2015) at 5.

<sup>74</sup> Section 4 of the SA Law Reform Commission Act.

<sup>75</sup> Section 44 of the Constitution states the following with regard to national legislative authority:  
'(1) The national legislative authority as vested in Parliament-  
(a) confers on the National Assembly the power-  
(i) to amend the Constitution;  
(ii) to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5; and  
(iii) to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government; and  
(b) confers on the National Council of Provinces the power-  
(i) to participate in amending the Constitution in accordance with section 74;  
(ii) to pass, in accordance with section 76, legislation with regard to any matter within a functional area listed in Schedule 4 and any other matter required by the Constitution to be passed in accordance with section 76; and  
(iii) to consider, in accordance with section 75, any other legislation passed by the National Assembly.'

<sup>76</sup> Paragraph 2 of Schedule 6 of the Constitution provides that:  
'(1) All law that was in force when the new Constitution took effect, continues in force, subject to-  
(a) any amendment or repeal; and  
(b) consistency with the new Constitution.  
(2) Old order legislation that continues in force in terms of subitem (1)-

Parliament. It will thus not consider provincial legislation, which has in any event been modest in regulating local government;<sup>77</sup> municipal by-laws; legislation of former homelands and TBVC states;<sup>78</sup> the plethora of old provincial ordinances, some of which have been slated by the Western Cape Provincial Government for prescribing rigid procedures which cause delays, for example, in planning applications,<sup>79</sup> and which continue to cling tenaciously to the statute book; and obligations emanating from non-statutory sources, for example, policy decisions.

1.38 Also excluded from this review are regulatory and compliance burdens imposed by law on businesses, individuals and communities.

1.39 Furthermore, this inquiry will therefore not seek to address the following 'subsidiary' issues bedevilling local government, which the Minister of COGTA also alluded to in his referral letter to the Commission:

- (a) the splitting of regulatory, planning, financing and monitoring components of service delivery between the three spheres of government, which it is alleged, creates risk of public resources being used inefficiently, intergovernmental conflicts and service delivery failure;
- (b) arrogation or usurpation of powers and functions allocated to one sphere of government by another which gives rise to confusion and overlap;
- (c) definitional ambiguities emanating from definitions in Schedules 4 and 5 of the Constitution; and
- (d) alignment of pre-1994 legislation with the ethos, values and provisions of the Constitution.

1.40 The decision to exclude the aforementioned matters from the purview of this inquiry was not arrived at lightly. First, reviewing all these matters in one go would stretch the

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- (a) does not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect unless subsequently amended to have a wider application; and
  - (b) continues to be administered by the authorities that administered it when the new Constitution took effect, subject to the new Constitution.'

<sup>77</sup> Nico Steytler in 'The Strangulation of Local Government' *TSAR* Issue 3 (2008) at 518.

<sup>78</sup> In any event, although this legislation remains valid as part of South African law in areas where it previously applied because the states have been incorporated into the Republic, it has the same force of law as provincial Acts or provincial ordinances. See Botha Christo *Statutory Interpretation: An Introduction for Students* 3<sup>rd</sup> Ed (1998) at 10-11.

<sup>79</sup> At the time, the Provincial Land Use Planning Ordinance 15 of 1985 was a case in point. It has since been repealed. *The White Paper on Local Government* at 40 also highlighted this problem and added that in many instances old ordinances contradict the Constitution.

resources of the Commission, both human and financial resources, to the limit and would take years to complete. Second, in respect of all these matters, the Commission could not find demonstrable *lacuna* in the law that needed to be addressed through law reform. Instead, it found that there is either a statute or settled jurisprudence that adequately addresses these issues. For example:

- (a) the Constitution<sup>80</sup> and rules of interpretation<sup>81</sup> prescribe how conflicting legislation should be handled;
- (b) the principle that has emerged from the jurisprudence of the Constitutional Court<sup>82</sup> is that if a sphere of government exercises a power or performs a function that falls outside its defined space, it acts *ultra vires*, offends the rule of law and the principle of legality, and that such law or conduct, as the case may be would be invalid;
- (c) the exercise of legislative powers, and concomitant executive powers in respect of schedules 4 and 5, contemporaneously or asynchronously cannot be faulted as it is sanctioned by the Constitution itself;
- (d) the purpose of sections 9 and 10 of the Municipal Systems Act is to prevent unfunded mandates; and
- (e) the efficacy of statutory definition of competencies is doubtful. **Experts in local government law** have argued that no definition, whether in the form of a guideline or statute, will resolve all definitional ambiguities arising from schedule 4 and 5 of the Constitution.<sup>83</sup>

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<sup>80</sup> Sections 146(1)-(3) and 156(3) of the Constitution.

<sup>81</sup> These rules of construction dictate, for instance, that officials must read legislation in a manner that avoids absurdity; when confronted with a myriad of laws on the same subject-matter, the official must make an effort to read them together and reconcile them. The latter rule was endorsed by the court in *Shozi v Minister of Justice, KwaZulu* 1992 (2) SA 338 (NPD) 343D. If such reconciliation is impossible, it has to be presumed by necessary implication that the latter of the two Acts or provisions, as the case may be, prevails.

<sup>82</sup> *Minister for Justice and Constitutional Development v Chonco and Others* 2010 (4) SA 82 (CC) in para 27 and *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2007 (1) SA 343 (CC) at para 68; *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 49; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at para 58; and *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at para 20.

<sup>83</sup> Nico Steyler and Yonatan Tesfaye Fessha 'Defining Local Government Powers and Functions' *South African Law Journal*, Volume 24, Issue 2, Jan 2007, 320 at 337.

## D Overarching objective of this review

1.41 National government is aware of the challenges confronting local government, most importantly of the need to ensure that the three spheres of government work together more effectively (coordination);<sup>84</sup> and for a coherent framework that would ensure that the requirements placed on municipalities are reasonable.<sup>85</sup> It comes as no surprise therefore that it has stated in its policy statements that:<sup>86</sup>

- (a) it would differentiate between municipalities when allocating powers and functions to ensure better fit between capacity and responsibilities (asymmetrical approach); and that
- (b) national government should ensure that the current multiplicity of local government surveys are rationalised and standardised into a coherent annualised national data collection system.

1.42 The golden thread running through the intervention strategies proposed above, precursors to this inquiry namely Legislative Review Project, the review of local government data collection practices by the Local Government Data Collection Forum, initiatives referred to in para 1.6 above, and what this inquiry seeks to achieve, is to **establish an effective and efficient regulatory system for local government** that would enhance its ability to focus on delivering services to communities whilst maintaining accountability and good governance. And, this is the primary objective of this inquiry.

## E The approach the Commission intends adopting

1.43 First, at this rudimentary stage of the investigation, the Commission does not want to be bogged down in semantics parsing by attempting to define in minute detail the scope of each of the forms of obligations referred to it for investigation namely 'regulatory', 'compliance' and 'reporting' obligations. Instead, its focus is on establishing:

- (a) whether regulatory, compliance and reporting obligations imposed on municipalities through legislation are burdensome;
- (b) if so, how the said obligations could be streamlined, improved, reduced or repealed; and

<sup>84</sup> National Planning Commission *National Development Plan 2030* at 45, 46 and 64.

<sup>85</sup> Department of Provincial Affairs and Constitutional Development *The White Paper on Local Government* (9 March 1998) at 39.

<sup>86</sup> For a detailed discussion, see sources in fn 84 above.

- (c) the impact repealing or amending legislative provisions found to be imposing burdensome obligations would have on municipalities, other spheres of government, public entities, community, and on municipalities themselves.

1.44 To this end, and through responses to this issue paper, call for submissions that the Commission has published simultaneously with this paper and questionnaires; and information gathered during workshops, roundtable discussions, interviews; and public hearings; and other consultative processes the Commission intends embarking upon during the course of this inquiry, in particular with local government, national government departments, SALGA, and the SA Cities Network, the Commission intends:

- (a) compiling a schedule of all regulatory, compliance and reporting obligations imposed on local government by *national legislation*.
- (b) identifying burdensome regulatory, compliance and reporting obligations - obligations that municipalities consider antiquated,<sup>87</sup> unnecessary, excessive or inefficient. In other words, obligations that exhibit the traits referred to in paras 1.33 and 1.34 above and/or the following characteristics:<sup>88</sup>
  - (i) regulatory, compliance or reporting obligations that do not meet their objectives (obligations that are not fit for purpose);
  - (ii) obligations that are unclear or unduly complex;
  - (iii) duplicative or overlapping reporting, compliance and regulatory obligations;
  - (iv) obligations that create unintended or unexpected workload;
  - (v) overly prescriptive or onerous requirements requiring costly processes;
  - (vi) provisions authorising collection of data that that is not used;
- (c) Establishing the purpose (legislative and/or policy objective) of these onerous obligations.

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<sup>87</sup> Local Government NSW *LGNSW Submission to IPART – Review of Reporting and Compliance Burdens on Local Government* (August 2015) at 5.

<sup>88</sup> IPART *Review of Reporting and Compliance Obligations on Local Government* (July 2005) at 13.

- (d) Establishing the costs and benefits of complying with these obligations on local governments. These could be administrative costs, compliance costs or social impacts.<sup>89</sup>
- (e) Elicit inputs from stakeholders with regard to options for reforms, i.e. on whether amendment or repeal of a legal provision found wanting would address the problem identified.

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<sup>89</sup> Examples include developing and maintaining reporting systems, obtaining professional advice, educating or training staff about new regulatory requirements and procedures, purchasing equipment or changing production processes and other activities involved in complying with regulation; and considerations as quality of life, equity, achieving community norms, ensuring public health and safety, reducing crime and protecting human rights. The latter category, social impacts, will be difficult to quantify.

## **F Questions to which we need comments**

1. The Commission has, through submissions made by the Provincial Government of the Western Cape to the President; the work of the Inter-departmental Legislative Review Committee, the Local Government Data Collection Forum, the National Treasury, and the Financial and Fiscal Commission; and analysis by experts in local government law and institutional constitutional law, been able to identify quite a sizable number of laws administered by various departments that impose **regulatory obligations** on local government, as well as establishing the breadth of these obligations. These laws are set out in **Annexure A**.

### **Questions:**

- (a) Are there any other laws that, in your view, impose unnecessary, excessive or inefficient obligations on local government that have been omitted in the aforesaid Annexure?
- (b) Which *provision or provisions* in the laws itemised in Annexure A, or any other law, place regulatory, compliance or reporting obligations on local government and should thus be reviewed as part of this inquiry?
- (c) What in your view are costs of complying with the obligations contained in legislation identified on municipalities?
- (d) Should the obligation imposed by the law or provision identified in (a) and (b) above be removed, streamlined or maintained? If you believe the requirement should be reduced in some way, please propose how this could be achieved. If you believe obligation placed on local government by the aforementioned provision or law should be removed or maintained, please substantiate why you believe this would be the most appropriate course of action to take.
- (e) What adverse consequences could result from the removal or streamlining of unnecessary, inefficient or excessive obligations identified above?

2. Section 41(1)(h)(ii) and 154(1) of the Constitution require the three spheres of government to assist and support one another; and the national and provincial governments to support and strengthen the capacity of municipalities.

**Questions:**

(a) Would support from national government alleviate some of the challenges faced by municipalities when implementing regulatory obligations emanating from national legislation? If so, what type of support should be provided and in respect to which provision or obligation?

(b) Are there non-statutory interventions that could be introduced *forthwith* to address challenges faced by local government in relation to overregulation? What form should such interventions take and in respect of which obligation should the proposed intervention be introduced? For example, the FFC recommended that a division be established at COGTA to spearhead 'better regulation'.

3. The Intergovernmental Relations Framework Act and the Organised Local Government Act were enacted to promote and facilitate intergovernmental relations and to provide avenues where issues such as the ones raised in this inquiry could be resolved.

**Question:** How effective has the Intergovernmental Relations Framework Act and the Organised Local Government Act, or structures created by them, been in dealing with excessive, unnecessary and inefficient obligations on local government? What amendments, if any, should be effected to these laws and why? Please elaborate.

4. **Question:** What value do you think the development of a compendium or a register of all national laws that impose regulatory obligations and that clearly identifies the nature and extent of these obligations, including compliance and reporting obligations would have, in particular for under-resourced municipalities? Would such a register for example expedite consideration whether a request for information has statutory basis and should thus be complied with?



## CHAPTER 2

# BRIEF EXPOSITION OF THE CONSTITUTIONAL AND STATUTORY FRAMEWORK APPLICABLE TO LOCAL GOVERNMENT AND ITS DEFICIENCIES

## A INTRODUCTION

2.1 The structures at the centre of this inquiry, the national and local spheres of government are edifices of the Constitution. Their powers and functions are circumscribed in the Constitution. It is therefore fitting to consider, even if cursorily, constitutional provisions that regulate the interplay between these spheres of government. Undoubtedly, provincial government, as a partner in the system of cooperative government envisaged in the Constitution alongside national and local government, has a stake in the outcome of this investigation. However, COGTA has explicitly urged the Commission to confine its review to laws promulgated by the national sphere of government. In any event, provinces have been modest in regulating local government.<sup>90</sup>

## B CONSTITUTIONAL FRAMEWORK

### 1 Constitutional status of local government

2.2 South Africa comprises the national, provincial and local spheres of government,<sup>91</sup> operating in a system of cooperative governance.<sup>92</sup> What this means is that local government is no longer the lowest tier of government in a hierarchical structure; a creature of statute that derived its powers from national government and served as its administrative arm as was the case before 1994. It is now a constitutionally recognised sphere of

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<sup>90</sup> Nico Steytler 'Strangulation of Local Government' *TSAR* Vol 3 (2008) 518.

<sup>91</sup> Section 1 of the Constitution, read with section 40(1), make it clear that South Africa is one sovereign and democratic state that comprises national, provincial and local spheres of government which are distinctive, interdependent and interrelated.

<sup>92</sup> Section 40(2) of the Constitution requires the three spheres of government to adhere and observe the principles of cooperative governance set out in Chapter 3 of the Constitution.

government alongside national and provincial spheres of government.<sup>93</sup> As Steytler puts it, it is no longer subject to their absolute control.<sup>94</sup>

2.3 The improved status of local government finds expression in other provisions of the Constitution. The Constitution stipulates that local government must be established for the whole of the Republic. Further, it gives this sphere of government the right to ‘govern **the affairs** of the community as provided in the Constitution’.<sup>95</sup> Pursuant to these provisions, local government comprising 8 metropolitan municipalities; and 44 district municipalities, which are further divided into 205 local municipalities has been put in place. All in all, there are 257 municipalities.<sup>96</sup>

## 2 What are the functions of local government?

### (a) *Miscellaneous responsibilities entrusted to local government by the Constitution*

2.4 The Constitution has entrusted a number of complex tasks to local government which have a direct impact on the welfare of citizens. First, like other organs of state, it has a responsibility to ensure that the rights in the Bill of Rights become attainable.<sup>97</sup> Second, it must ensure, among other things, that services are provided to communities in a sustainable manner.<sup>98</sup> Third, it must structure its administration, budget and planning to give priority, *inter alia*, to the basic needs of communities.<sup>99</sup> Fourth, and most importantly, local government

<sup>93</sup> Nico Steytler ‘Local Government in South Africa: Entrenching Decentralised Government’ in Steytler (ed) *The Place and Role of Local Government in Federal Systems* (2005) 183, 183-184.

<sup>94</sup> *Ibid.*

<sup>95</sup> Section 151(1) and (3) of the Constitution.

<sup>96</sup> See <http://www.municipalities.co.za> (accessed 11 March 2019).

<sup>97</sup> Section 7(2) of the Constitution.

<sup>98</sup> Section 152 of the Constitution lists the objects of local government as being:

- ‘(1) The objects of local government are-
- (a) to provide democratic and accountable government for local communities;
  - (b) to ensure the provision of services to communities in a sustainable manner;
  - (c) to promote social and economic development;
  - (d) to promote a safe and healthy environment; and
  - (e) to encourage the involvement of communities and community organisations in the matters of local government.
- (2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).’

<sup>99</sup> Section 153 of the Constitution dealing with developmental duties of local government states: ‘A municipality must-

- (a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and
- (b) participate in national and provincial development programmes.’

has to administer the following 38 matters listed in Parts B of both Schedules 4 and 5 of the Constitution:<sup>100</sup>

2.4.1 Schedule 4B lists the following matters of concurrent national and provincial legislative competence:

- Planning and building regulations
- Household services (electricity, gas, water, and sanitation)
- Social services (child-care facilities, health care)
- Protection services (firefighting)
- Economic activities (tourism, trading regulations)
- Transport (airports, public transport, ferries, traffic)
- Infrastructure (stormwater management, public works)
- Environment (air pollution).

2.4.2 Schedule 5B lists the following matters of exclusive legislative competence:

- Economic regulations (bill boards, liquor sales, food sales, street trading, markets, abattoirs)
- Infrastructure (roads)
- Household services (waste removal)
- Social services (cemeteries)
- Public spaces (public places, cleansing, public nuisance, fences, amenities, street lighting, noise pollution, traffic and parking)
- Recreation (beaches and amusement facilities, sport facilities, parks)
- Animals (care, pounds, impounding, licensing of dogs).

**(b) *Assignment of functions to local government***

2.5 National government may also increase the executive powers and functions of municipalities by assigning matters that fall outside of schedule 4B and 5B or their own powers to local government sphere by means of legislation or agreement;<sup>101</sup> delegation and agency arrangements.<sup>102</sup> Only the first of these methods, namely transfer of power through

<sup>100</sup> The classification of these local government competences by Nico Steytler 'Local Government in South Africa: Entrenching Decentralised Government' in Nico Steytler (ed) *The Place and Role of Local Government in Federal Systems* (2005) at 195 is used.

<sup>101</sup> Section 99 and 156(1)(b) and (4) of the Constitution. See also Nico Steytler 'Local Government in South Africa: Entrenching Decentralised Government' at 196.

<sup>102</sup> Section 238 of the Constitution provides:  
'An executive organ of state in any sphere of government may—

legislation, has been slated for saddling local government with intolerable financial and administrative burden.<sup>103</sup> The argument goes that although legislation has been enacted to obviate unfunded mandates,<sup>104</sup> assignment of functions to local government is still beset with lack of consultation, placing a burden on local on local governments without the necessary supporting resources.<sup>105</sup>

2.6 The persistence of the problems alluded to above has also been attributed to the fact that assignments are not always explicitly formulated as such.<sup>106</sup> To illustrate, a recommendation by the Commission following the review of the Child Care Act is often cited. The Commission proposed that local government should 'keep a register of the total number of children and record their ages, in its area of jurisdiction.' It was argued that this obligation on local government falls outside of its original power to regulate and administer 'child care facilities'. Consequently, an assignment would be necessary. However, the Commission did not refer to or acknowledged the need for assignment. It was further argued that the imposition of such a duty on local government would have enormous administrative and financial implications.

### 3 Tension in the system

#### (a) *Local government autonomy vis-à-vis regulatory and supervisory powers of national government*

2.7 On the one hand, the Constitution protects institutional and functional integrity of local government.<sup>107</sup> On the other hand, it entrusts regulatory, supervisory and monitoring powers over local government to national government.<sup>108</sup> Du Plessis summarises up the effect of these two seemingly conflicting constitutional principles as follows: local government is a regulator, by virtue of being responsible for monitoring and regulation in a community, and conversely a regulated entity, as a result of being subject to the monitoring of and regulation by other entities such as other spheres of government and enforcement

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- (a) delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed; or
  - (b) exercise any power or perform any function for any other executive organ of state on an agency or delegation basis.'

<sup>103</sup> SALGA *15 Years of Developmental and Democratic Local Government: 2000-2015* at 53.

<sup>104</sup> Section 9(1) of Local Government: Municipal Systems Act, 2000 (Act 32 of 2000).

<sup>105</sup> See fn 103 above.

<sup>106</sup> For a detailed discussion of 'explicit assignment', see Jaap de Visser 'The Powers of Local Government' in *Local Government Working Paper Series No. 2* (2002) at 19.

<sup>107</sup> Section 41(1)(e)-(g) and 151(4) of the Constitution.

<sup>108</sup> Section 151(3) and 155(7) of the Constitution.

bodies.<sup>109</sup> The conclusion that local government is subordinate to the other two spheres of government;<sup>110</sup> or that its autonomy is considerably limited,<sup>111</sup> is therefore inescapable. This view was endorsed by the Constitutional Court in *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development and Another, Executive Council, KwaZulu-Natal v President of the Republic of South Africa and Others* when it stated:

‘This general power [to govern local government affairs] is “subject to national and provincial legislation”. The powers and functions of municipalities are set out in section 156 but it is clear from sections 155(7) and 151(3) that these powers are subject to supervision by national and provincial governments, and that national and provincial legislation has precedence over municipal legislation. The powers of municipalities must, however, be respected by the national and provincial governments which may not use their powers to “compromise or impede a municipality’s ability or *right* to exercise its powers or perform its functions”.<sup>112</sup>

**(b) What does the power to regulate entail?**

2.8 The term ‘regulating’ in the context of section 155(7) of the Constitution was considered by the Constitutional Court to mean ‘a broad managing or controlling rather than direct authorisation function.’<sup>113</sup> It has been submitted, on the basis of this decision, that the powers entrusted to national government by the abovementioned provision does not extend to the ‘core’ of schedule 4B matter, but rather deal with the framework within which local government is to exercise powers entrusted to it by schedules 4B and 5B of the Constitution.

<sup>109</sup> Anél Du Plessis ‘Local Environmental Governance and the Role of Local Government in Realising Section 24 of the South African Constitution’ *Stell LR Vol 2* (2010) 265, at 272. This aspect is also dealt with more comprehensively in Du Plessis (ed) *Environmental Law and Local Government in South Africa* (2015) at 43-55.

<sup>110</sup> This relationship of inequality is entrenched in the Constitution. Section 155(6)(a) provides that provinces must through legislation or other means provide for the *monitoring* of local government in the province; and section 155(7) requires national and provincial governments *to see to the effective performance by municipalities of their functions* in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority. See also Anél Du Plessis ‘Local Environmental Governance and the Role of Local Government in Realising Section 24 of the South African Constitution’ *Stell LR Vol 2* (2010) 265, at 277.

<sup>111</sup> Nico Steytler ‘Local Government in South Africa: Entrenching Decentralised Government’ at 183.

<sup>112</sup> *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development and Another, Executive Council of KwaZulu-Natal v President of the Republic of South Africa and Others* 2000 (1) SA 661 (CC); 1999 (12) BCLR 1360 (CC) at para 29.

<sup>113</sup> *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996, 1996 (4) SA 744 (CC) at para 377.

In other words, the regulatory power enables national government to set essential standards, minimum requirements, monitoring procedures and so on.<sup>114</sup>

**(c) Constraints upon regulatory and supervisory functions of national government**

*(i) Constitutional restraints*

2.9 The Constitutional Court emphasised in the *Executive Council of the Western Cape* matter referred to above,<sup>115</sup> that both the national and provincial governments do not have *carte blanche* in their exercise of supervisory and supporting powers. It stated that they are required to ensure that they do not contravene three very important constitutional constraints which underpin all relationships between local government and other two spheres of government, namely:

- (a) they must not impede or compromise the municipalities' ability or right to exercise their powers or perform their functions;
- (b) they must respect constitutional status, institutions, powers and functions of local government;
- (c) they must not assume power or function except those conferred on them; and
- (d) they must exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional and institutional integrity of local government.<sup>116</sup>

2.10 Moreover, the Constitution requires national government to consult with municipalities prior to the enactment of legislation that could impact on the latter's status, powers or functions.<sup>117</sup>

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<sup>114</sup> For a detailed discussion of this aspect, see Steytler and De Visser *Local Government Law in South Africa* (2018) chap 5, para 3. See also Jaap de Visser 'The Powers of Local Government' in *Local Government Working Paper Series* No. 2 (2002) at 6 and 10. Interestingly, Visser introduces a qualification to the exercise of regulatory powers in respect of functional areas in schedule 5B. He states that regulatory powers in relation to these matters are 'restricted to the grounds of section 44(2) and the necessity requirement in that provision.' *Ibid.*

<sup>115</sup> *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development* at para 29.

<sup>116</sup> Section 41(1)(e) -(g) and 151(4) of the Constitution.

<sup>117</sup> Section 154(2) of the Constitution.

(ii) *Legislative duty to consult – Intergovernmental Relations Framework Act<sup>118</sup> and Organised Local Government Act<sup>119</sup>*

2.11 The duty to consult local government has been incorporated into the Intergovernmental Relations Framework Act (IRFA),<sup>120</sup> and the Organised Local Government Act (OLGA),<sup>121</sup> both of which are constitutionally mandated pieces of legislation.<sup>122</sup>

2.11.1 To foster consultation between national and local government, the IRFA requires:

- (a) national government, when exercising its constitutional or statutory powers or functions, to consult with local government directly or through intergovernmental forums and to coordinate its actions with local government when implementing legislation that affect material interests of the latter sphere of government;<sup>123</sup>
- (b) local government to take steps to ensure that it has sufficient institutional capacity and effective procedures to consult, cooperate and share information with national government and to respond promptly to requests by national government for consultation, cooperation and information sharing;<sup>124</sup>
- (c) SALGA to elect a municipal councillor to represent local government in the President's Coordinating Council (PCC), a vehicle for the President to consult with organised local government, inter alia, on the implementation of national legislation and to consider reports dealing with performance of municipalities;<sup>125</sup> and
- (d) SALGA to designate a municipal councillor to represent organised local government at national intergovernmental forums if such forums deals with matters assigned to local government in terms of schedule 4B or 5B to the Constitution or national legislation.<sup>126</sup>

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<sup>118</sup>

Act 13 of 2005.

<sup>119</sup>

Act 52 of 1997.

<sup>120</sup>

Section 5 of IRFA.

<sup>121</sup>

Section 4 of OLGA.

<sup>122</sup>

By sections 41(2) and 163 of the Constitution respectively.

<sup>123</sup>

Section 5(a) and (b) of IRFA.

<sup>124</sup>

Section 5(e)(i) and (ii) of IRFA.

<sup>125</sup>

Section 7(b)(1) and (b) of IRFA.

<sup>126</sup>

Section 10(1)(d) of IRFA.

2.11.2 The Organised Local Government Act merely provides that consultation between national government and SALGA, the national organisation representing the majority of municipalities that is recognised in terms of this Act by the Minister of COGTA,<sup>127</sup> should take place at a meeting convened by the Minister of COGTA and that SALGA is not precluded from meeting with any other organ of state.<sup>128</sup>

2.12 These laws themselves could also add to the overregulation of local government. The Intergovernmental Relations Framework Act, for instance, authorises the PCC to consider *reports* dealing with the performance of municipalities.<sup>129</sup>

(iii) *Deficiencies in the Intergovernmental Relations Framework Act*

2.13 The effectiveness of the Intergovernmental Relations Framework Act is the subject of a separate Commission investigation. In respect of issues raised in this inquiry, the Commission's preliminary inquiry concluded that the fact that consultative forums, in particular the President's Coordinating Council, that is intended to be used as an avenue, inter alia, to consult with local government on the implementation of national legislation in municipalities, lack coercive powers renders the provisions of this Act nugatory.<sup>130</sup> The Commission also found, on the basis that this tool was nothing more than a 'gentlemen's agreement', that implementation protocol prescribed by the Act would not address the reporting and compliance burden confronting local government. This is understandable in the light of 'cooperative model' of intergovernmental relations and cooperative governance espoused by Chapter 3 of the Constitution, which chapter this legislation seeks to give effect to. This model assumes relative parity of power between national, provincial and local spheres of government.<sup>131</sup>

2.14 COGTA, local government and other organs of state that made submissions to the Legislative Review Committee, Local Government Data Forum or other entities tasked with finding ways to improve efficiency in local government, neither alleged that framework legislation contravened any of the principles referred to in para 2.9 above; nor that national government did not have the competency to enact such legislation. Therefore, the Commission proceeds from the premise that the legislation that is the subject of this review is valid. If the concern was that the impugned legislation contravened provisions of section

<sup>127</sup> Section 2(1)(a) of OLGA.

<sup>128</sup> Section 4(1) and (8) of OLGA.

<sup>129</sup> Section 7(d)(ii) of IRFA.

<sup>130</sup> Section 32 of IRFA provides that forums created in terms of this Act are not executive decision-making bodies.

<sup>131</sup> Tracy Humby in 'Maccsand: Intergovernmental Relations and the Doctrine of Usurpation: *Maccsand (Pty) Ltd v City of Cape Town* CCT 103/11 [2012] ZACC 7; 2012 7 BCLR 690 (CC)' *Southern African Public Law* (2012) 628, at 635 and 638.



41 or section 151(4) of the Constitution, the most ideal, and expeditious, way to address the matter would have been for an aggrieved organ of state to approach the courts for an order of constitutional invalidity.<sup>132</sup>

## **C SUITE OF LEGISLATION REGULATING LOCAL GOVERNMENT**

### **1 Institutional legislation**

2.15 Since the dawn of constitutional democracy, and pursuant to the constitutional provisions referred to above, a myriad of statutes have been enacted by national government to structure the institutions and processes of local government (in other words, to regulate the exercise of their competencies and to monitor the exercise of those competencies) and thus give effect to the vision of developmental local government envisaged in Chapter 7 of the Constitution.<sup>133</sup> This institutional legislation, most of which is administered by COGTA and the National Treasury include:

- (a) Disaster Management Act, 2002 (Act 57 of 2002)
- (b) Intergovernmental Fiscal Relations Act, 1997 (Act 97 of 1997)
- (c) Intergovernmental Relations Framework Act, 2005 (Act 13 of 2005)
- (d) Local Government Transition Act, 1993 (Act 209 of 1993)
- (e) Local Government: Municipal Demarcation Act, 1998 (Act 27 of 1998)
- (f) Local Government: Municipal Electoral Act, 2000 (Act 27 of 2000)
- (g) Local Government: Municipal Finance Management, 2003 (Act 56 of 2003)
- (h) Local Government: Municipal Property Rates Act, 2004 (Act 6 of 2004)
- (i) Local Government: Municipal Structures Act, 1998 (Act 117 of 1998)
- (j) Local Government: Municipal Systems Act, 2000 (Act 32 of 2000)
- (k) Municipal Fiscal Powers and Functions Act, 2007 (Act 12 of 2007).

2.16 These are lengthy pieces of legislation. For example, the Systems Act contains 120 sections and 30 items in the Schedules that, when divided into individual provisions, amount

<sup>132</sup> Jaap De Visser persuasively argues, on the basis of the Constitutional Court's approach in *Premier of the Province of the Western Cape v President of the RSA* 1999 (4) BCLR 382 (CC) at 57 and *Executive Council of the Western Cape* case above, para 58, that legislation that falls foul of sections 41(1)(e) – (g) and 151(4) of the Constitution is not just inoperative but invalid. Jaap de Visser 'The Powers of Local Government' in *Local Government Working Paper Series No. 2* (2002) at 13.

<sup>133</sup> Nico Steytler 'The Strangulation of Local Government' *TSAR* (2008) at 518.

to more than a thousand. The Municipal Finance Management Act tops this with 180 sections comprising over one thousand provisions.<sup>134</sup>

2.17 On the heels of these Acts came a barrage of regulations which further sought to regulate matters covered in the aforementioned principal Acts, namely the Municipal Asset Transfer Regulations, the Municipal Regulations and Guidelines on Minimum Competency Levels, the Municipal Regulations on Standard Chart of Accounts, the Municipal Budget and Reporting Regulations, the Municipal Regulation on Debt Disclosure, the Municipal Financial Misconduct Regulations, the Municipal Investments and Municipal Public Private Partnerships Regulations, and the Municipal Supply Chain Management Regulations.<sup>135</sup>

## 2 Sectoral legislation

2.18 Thereafter, came numerous sectoral legislation, emanating from national government departments, designed to regulate the functional areas of schedules 4B and 5B of the Constitution such as, but not limited to:

- the Water Services Act, 1997 (Act 108 of 1997);
- the National Health Act, 2003 (Act 61 of 2003);
- the Electricity Regulation Act, 2006 (Act 4 of 2006);
- the National Water Act, 1998 (Act 36 of 1998);
- the National Heritage Resources Act, 1999 (Act 25 of 1999);
- the National Environmental Management: Air Quality Act, 2004 (Act 39 of 2004);
- the National Environmental Management: Waste Management Act, 2008 (Act 59 of 2008);
- the Spatial Planning and Land Use Management Act, 2013 (Act 16 of 2013);
- the National Environmental Management: Integrated Coastal Management Act, 2008 (Act 24 of 2008); and
- the National Environmental Management: Biodiversity Act, 2004 (Act 10 of 2004).

## 3 Rationale for institutional and sectoral laws

2.19 Besides the obvious answer that the legislative framework referred to above is mandated by the Constitution, theories abound why these laws are necessary. On the one hand, these laws seem completely innocuous, necessary, and any hardship and distress

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<sup>134</sup> *Id* at 519.

<sup>135</sup> Financial and Fiscal Commission *The Regulatory Burden on Municipalities: Presentation to the Department of Cooperative Governance and Traditional Affairs Technical MinMec Policy Seminar* 6 February 2014 at 9.

arising from implementation thereof are unintended. These views find support among those who believe that:

- (a) this legislative framework is intended to inform the operations of, and to protect the autonomy of local government; to ensure the effective use of public funds and to minimise corruption and maladministration.<sup>136</sup>
- (b) since local government is crucial to the development and well-being of a country, it cannot be left entirely to its own devices and thus intergovernmental supervision is crucial.<sup>137</sup>
- (c) the outpouring of these laws was driven by the need to construct a new legal edifice for local government that was consonant with its new constitutional status.<sup>138</sup>

2.20 On the other hand, it has been argued that the depth of regulation reveals a deeper project:

- (a) little trust in the incumbents in municipal councils and offices to realise the constitutional promise of the developmental state;
- (b) the reality that new councillors and officials have no or little experience in local government;
- (c) a belief that law can solve governance problems;<sup>139</sup> and
- (d) the ambivalent acceptance by national government of the concept of spheres of government, while in reality still clinging to the notion of ‘tiers of government’.<sup>140</sup>

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<sup>136</sup> *Id* at 3.

<sup>137</sup> Anél Du Plessis ‘Local Environmental Governance and the Role of Local Government in Realising Section 24 of the South African Constitution’ *Stell LR* Vol 2 (2010) 265, at 274.

<sup>138</sup> Nico Steytler ‘The Strangulation of Local Government’ *TSAR* Vol 3 ((2008) 518, at 519.

<sup>139</sup> Steytler explains that **usually** the answer to mismanagement is **often** more law, rather than to seek to solve the problem by other means, such as support or supervision. When councils routinely appoint political cronies to key positions, for instance that of municipal manager or chief financial officers, the reaction is yet further regulation pertaining to qualifications, placing faith in the external and neutral criteria of qualifications rather than the mature judgment of the council. The response to delivery failures has been a stronger, more hierarchical state. *Id* at 520.

<sup>140</sup> Steytler refers to Schmidt who has argued that the 1996 Constitution, establishing spheres of government is an expression of the so-called “network governance” model, a model in competition with the earlier models of the traditional public administration approach and the “new” public management. The traditional public management paradigm, with its emphasis on hierarchy, rules and procedures, was complemented by the “new” public management emerging in the 1970s which sought to introduce private sector management practice and

## 4 Impact of the statutory framework

2.21 Snippets of the impacts of the regulatory framework to which local government is subject have been provided in the previous chapter. In Chapter 3, excessive, unnecessary and inefficient requirements, ostensibly, arising from these laws is considered in more detail. In this section, we deem it imperative to highlight two important consequences of this elaborate statutory framework that local government has to grapple with.

### (a) *Need for more human and financial resources*

2.22 As a result of these laws, local government requires considerable skills and resources to meet the various legislative prescripts.<sup>141</sup> In fact, the Intergovernmental Relations Framework Act *requires* municipalities to take steps to ensure that they comply with regulatory obligations emanating from these laws.<sup>142</sup>

### (b) *Problems associated with a symmetrical legal regime*

2.23 The other drawback of the legislative framework referred to above is that it applies uniformly to all municipalities. The same rules regarding institutional structures, administrative and financial duties and processes apply to all municipalities. It is common cause that huge gaps exist in respect of human and financial resources found in municipalities in deep rural as compared to those in urban areas.<sup>143</sup> The imposition of symmetrical legal regime on municipalities places strain on the poorly resourced and skilled municipalities to comply with the rigours of this regime.<sup>144</sup> Of course, one should not overlook differences between some metropolitan municipalities – all of which are urban. The call for differentiation should not be based on a simple rural/urban divide but should be expanded to include differences among metropolitan, district and local municipalities.

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private involvement in the provision of services. Interest in new public management waned in the face of complex and diverse governance challenges. Network governance, emerging in the early 1990s during the information era, sought to address the limitations of the state and the market to tackle complex challenges facing society, utilising partnership with civil society, co-innovation and civic leadership. The three paradigms did not replace one another over time. Rather they built on each other and consequently exist simultaneously today. Accordingly, modern network governance requires a foundation of sound administrative practice. Steytler adds that in reviewing the way the national government has regulated local government, Schmidt thus argues that the traditional public administration approach still prevails. While the Systems Act may have reflected the new public management ethos with an emphasis on public private partnerships, Act 56 of 2003 was pure old-style bureaucracy.

<sup>141</sup> Nico Steytler 'Local Government in South Africa: Entrenching Decentralised Government' at 202.

<sup>142</sup> Section 5(e) of IRFA.

<sup>143</sup> For a detailed discussion of this aspect, see Nico Steytler 'The Strangulation of Local Government' at 522

<sup>144</sup> Nico Steytler 'Local Government in South Africa: Entrenching Decentralised Government' at 194.

## CHAPTER 3

# AN IN-DEPTH LOOK AT THE IMPACT OF REGULATORY BURDENS ON MUNICIPALITIES IN SOUTH AFRICA AND LESSONS FROM OTHER JURISDICTIONS

### A Introduction

3.1 The former Minister of COGTA prefaced his request to the Commission to initiate an inquiry into compliance and reporting obligation on local government with the following assertions to emphasise and to impress upon the Commission the severity and debilitating effect these obligations have on municipalities:

‘...service delivery and developed is often delayed because of the need to meet the requirements of several different pieces of legislation. The relevant provisions of the different legislation are sometimes duplication and at other times contradictory.

‘The consequence of the regulatory environment is that municipalities bear a heavy compliance burden and have to constantly submit reports to both provincial and national government. These reports are in the majority of instances based on the same information, but with different reporting nuances. It is typical in these environments to see instances of “malicious compliance” whereby municipalities are reporting for reporting sake, without any conscious effort to address the rationale for the reporting requirement.’

3.2 However, COGTA did not provide any evidence to the Commission to corroborate that municipalities were buckling under pressure to comply with these statutory obligations. The Commission has *mero motu* found *prima facie* evidence of the impacts of regulatory burdens on local government which lends credence to the assertions above. This evidence is discussed in detail below.

3.3 Furthermore, over-regulation of local government is not unique to South Africa. Countries such as the Netherlands, United Kingdom and several states in Australia are introducing measures to ameliorate the impact of excessive application of rules and regulations to local government.

## **B Impacts of regulatory and reporting burdens**

### **1 Regulatory burdens in general**

#### **(a) The Financial and Fiscal Commission**

##### **(i) *Adverse effects of the legislative framework on local government***

3.4 The most scathing criticism to date of the deluge of laws from national government and regulations made in terms thereof came from the Financial and Fiscal Commission (FFC). In its presentation on regulatory burdens on municipalities at a seminar arranged by COGTA,<sup>145</sup> the FFC decried the regulation of local government through these laws.

3.5 Whilst acknowledging that the regulation of local government is a constitutional imperative;<sup>146</sup> serves a useful purpose of ensuring efficient and effective use of public funds; and that it is intended to minimise corruption and maladministration;<sup>147</sup> the FFC pointed out that these laws and regulations, can be intrusive, authoritative, complex; inflexible; difficult to implement and to enforce; can create unnecessary compliance burden; can be a barrier to success, performance and development; and that they have done very little to address the prevalence of corruption and mismanagement at local government level.

3.6 It stressed that local government is a poorly resourced sector in terms of human resources, financial and technical support. Consequently, increased regulation:

- (a) Inevitably leads, at best, to varied compliance; and at worst, to non-compliance and poor service delivery;
- (b) Disproportionately depletes budgets of smaller municipalities; and
- (c) Because these laws are administered by different government departments, lack of coordination increases administrative burden on municipalities.

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<sup>145</sup> Financial and Fiscal Commission *The Regulatory Burden on Municipalities: Presentation to the Department of Cooperative Governance and Traditional Affairs Technical MinMec Policy Seminar* (6 February 2014).

<sup>146</sup> This was probably a reference to section 155(7) of the Constitution which provides that: 'The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in section 156 (1).'

<sup>147</sup> Financial and Fiscal Commission *The Regulatory Burden on Municipalities: Presentation to the Department of Cooperative Governance and Traditional Affairs Technical MinMec Policy Seminar* at 3.

a. *Command and control regulations*

3.7 The FFC slated in particular the prevalence and use of the so-called ‘command and control regulations’.<sup>148</sup> According to Steytler, this is the most common form of regulatory control applicable to local government; it completely eliminates discretion; commands a municipality and/or its functionaries to behave in a prescribed manner; and is often couched in peremptory language and backed by legal sanction.<sup>149</sup>

b. *Cost of compliance*

3.8 The FFC observed that research on the cost of compliance, the impact of individual regulations and the cumulative impact of all regulations, is limited. Nonetheless, in its endeavour to understand the cost involved in complying with some of these regulatory obligations it conducted a review which revealed that Emakhazeni Municipality, for instance, spent R6.8 million on the implementation of the Generally Recognised Accounting Practices (GRAP 17). These standards, which apply to local government, are set by the Accounting Standards Board in terms of section 91(4) of the Public Finance Management Act<sup>150</sup> and are thus a statutory requirement. Emakhazeni Municipality submitted that substantial resources were thus diverted from service delivery to comply with audit requirements.

**(ii) *What needs to be done to address these challenges?***

3.9 Without specifying what form the measures should take, the FFC proposed that ‘a number of instruments should be considered for minimising the regulatory burdens’ to:

- (a) improve existing regulations;
- (b) modify or abolish regulatory obligations;
- (c) set threshold for obligations;
- (d) enhance coordination between organs of state involved;
- (e) improve communication and provide guidance; and
- (f) to foster the use of ICT for easier compliance.

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<sup>148</sup> Other forms of regulations are the following: ‘self-regulation’, which is a self-imposed; ‘incentive based regulation’, intended to promote good behaviour by providing incentives; and ‘market based incentives’ which uses markets mechanisms.

<sup>149</sup> Steytler ‘The Strangulation of Local Government’ *TSAR* 520, 521 and 524.

<sup>150</sup> 1 of 1999.

3.10 In addition, it proposed that:

- (a) there was a need to streamline and simplify regulations to minimise the red tape or administrative burdens associated with local government regulations;
- (b) capacity constraints in the sector needed to be addressed;
- (c) research was necessary to establish and understand the cumulative impact of all local government regulations;
- (d) the adoption of an asymmetrical approach should be considered when new regulations are proposed;
- (e) a cost benefit analysis on local government regulations to properly interrogate costs and benefits of local government regulations should be undertaken;
- (f) the Regulatory Impact Analysis (RIA) be rendered mandatory to assess the financial, administrative, economic impacts of regulations not only on government *inter se* but also on companies and citizens; and
- (g) COGTA considers setting up a division that would spearhead 'better regulation' as part of government's strategy to improve regulations.

3.11 The FFC put a strong case why RIA needed to be compulsory. It argued that it could be used to compare the impacts of regulatory and other feasible non-regulatory interventions and choose the best, effective and efficient alternative; to assess the costs and **quality of regulation** (as poor quality regulation could increase compliance costs and reduce government's ability to achieve its objectives); and that it could improve the effectiveness and efficiency of regulations, public decision-making, government transparency and accountability.<sup>151</sup>

3.12 Disappointingly, these recommendations were never acted upon.

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<sup>151</sup> In February 2015, Cabinet endorsed the Socio-Impact Assessment System the aim of which is to minimise unintended consequences of policy initiatives, regulations and legislation, including unnecessary costs of implementation and compliance and to anticipate implementation risks and adopt measures to mitigate them. See Department of Planning, Monitoring and Evaluation *Socio-economic Impact Assessment System (SEIAS) Guidelines* Version: May 2015 at 4. However, SEIAS is not imbedded in legislation as yet, which would render it compulsory.



## 2 Reporting Burdens

### (a) *Difficulties associated with reporting obligations of municipalities*

3.13 Government has been trying to address difficulties faced by local government relating to reporting requirements since the matter was first raised by municipal officials at a workshop on financial statistics which was conducted by Statistics South Africa (Stats SA), the South African Reserve Bank (SARB) and the predecessor of COGTA, the Department of Provincial and Local Government (DPLG) in 2002. The issues relating to local government data collection are legion; they include the magnitude of requests for information; lack of coordination amongst entities requiring such information; financial and administrative burdens involved in processing requests for information; and duplication.

3.14 During the legislative review process, the scope of which was broader than the current investigation in that it focused on all statutory provisions *hindering accelerated service delivery*, the Provincial Government of KwaZulu-Natal recommended that section 105(2) of the Municipal Systems Act,<sup>152</sup> which authorises the MEC for local government in a province to instruct municipalities to provide information to provincial organs of state; and other national statutes that impose a similar obligation on municipalities which places undue burden on municipalities, be amended. COGTA's response was that the National Treasury had a forum dealing with streamlining of financial issues and that streamlining of non-financial reporting issues was receiving the attention of the Deputy Minister's Forum. In response to the criticism of multiple external reporting duties imposed on local government by the Public Finance Management Act (PFMA)<sup>153</sup> which, it was alleged, divert resources away from service delivery, COGTA adopted a different approach; it supported the recommendation that the matter be looked into and assigned to its decision 'priority'.<sup>154</sup> At the time this investigation was referred to the Commission, no amendments had been effected to the PFMA in line with the aforementioned decision.

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<sup>152</sup> Section 105(2) of the Municipal Systems Act 32 of 2000 reads: 'The MEC for local government in a province may by notice in the Provincial Gazette require municipalities of any category or type specified in the notice or of any other kind described in the notice, to submit to a specified provincial organ of state such information as may be required in the notice, either at regular intervals or within a period as may be specified.'

<sup>153</sup> Public Finance Management Act, 1999 (Act 1 of 1999).

<sup>154</sup> Annexure A to the letter of the Director-General of the Department of Cooperative Governance, Mr V Madonsela, to the Director-General of National Treasury at 1.

**(b) Efforts to address reporting burdens placed on local government**

*(i) Local Government Data Collection Forum*

3.15 To address the concerns relating to the collection of financial and non-financial data, the Local Government Data Collection Forum (task team) was established in 2003 which comprised the National Treasury (Convener), FFC, South African Reserve Bank, Statistics SA, Department of Water Affairs and Forestry, Development Bank of South Africa (DBSA), and the Municipal Demarcation Board (MDB). Its mandate was to:

- (a) Identify the providers, collectors and users of data.
- (b) Over the short-term, to raise and maintain awareness amongst providers, collectors and users of existing data relating to local government sphere.
- (c) Identify areas of data duplication amongst stakeholders.
- (d) Identify and recommend ways of eliminating duplicate activities related to local government data.
- (e) Suggest a process for coordinating data collection and utilisation.
- (f) Propose a long-term programme for institutionalising collaboration.
- (g) Explore ways in which local government statistics can be shared amongst stakeholders.

*a. The approach adopted by Data Collection Forum*

3.16 Between 2005 and 2006, the task team consulted extensively with national government and other entities with a view to understand their practices in relation to information systems and data analysis. As part of this inquiry, it collected and analysed data collection forms (spreadsheets, tables and questionnaires) used by government departments. To get a sense of the quantities of questionnaires municipalities received, it contemporaneously conducted a survey of 20 district and local municipalities.<sup>155</sup> And, with the assistance of the National Statistical Systems, it developed a matrix which outlined the mandate, type of data collected, purpose or use of the data, the frequency of the collection or use, classification of data, and the sources.

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<sup>155</sup> The municipalities surveyed were: Ugu, Buffalo City, Mangaung, Matjhabeng, Emfuleni, Msunduzi, Newcastle, Umhlathuze, Govan Mbeki, Emalahleni, Mbombela, Sol Plaatjie, Polokwane, Madibeng, Rustenburg, City of Klerksdorp, Drakestein, Stellenbosch, George and Mogale City.

3.17 Furthermore, it captured information received from stakeholders into two databases, one for financial information and the other for all other information. The information in the financial database was structured into the following categories: Capital Budget (expenditure and funding); Operating Budget (budget and actual expenditure); Operating Budget (budget and actual revenue); and Financial Statements (assets, liabilities, and other balance sheet items); whilst the other database was divided into information that related to service delivery process (non-financial) and information of a strategic or corporate governance nature. The task team noted that there were more than 15 400 line items in the financial database while the other database had in excess of 2300 line items.

*b. Its findings*

3.18 The work undertaken by the task team revealed, inter alia, that:

- (a) sources of requests for information included the DPLG, the predecessor of COGTA; Stats SA; the Financial and Fiscal Commission; the South African Local Government Association (SALGA), the MDB, the DBSA, and various research institutions;
- (b) of the aforementioned entities, only four were authorised by legislation to collect data from local government namely, the National Treasury,<sup>156</sup> which collects primarily financial information monthly, quarterly and annually; Stats SA,<sup>157</sup> which collects financial and non-financial information on a quarterly and annual basis; the MDB,<sup>158</sup> which collects capacity information on an annual basis; and the DPLG which collects information relating to Municipal Infrastructure Grant and issues municipal monitoring questionnaire;
- (c) duplication of data occurred in respect of Stats SA, National Treasury, DPLG and SALGA,<sup>159</sup> and between data collected by national government provincial government;

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<sup>156</sup> In terms of the Local Government: Municipal Finance Management Act, 2003 (Act 56 of 2003) and the Constitution.

<sup>157</sup> Under the Statistics Act, 1999 (Act 6 of 1999).

<sup>158</sup> In terms of section 85(2) of the Local Government: Municipal Structures Act, 1998 (Act 117 of 1998) which requires the MDB to undertake an annual capacity assessment of all district and local municipalities in South Africa. The capacity assessment is undertaken in terms of the local government functions listed in Schedules 4 and 5 of the Constitution.

<sup>159</sup> To illustrate the duplication of data collection and the interconnectedness of the issues raised in this investigation, it is necessary to refer to some of the findings of the task team. In respect of the National Treasury and Stats SA, the task team found that both institutions group the functions and activities of municipalities into two categories: (a) rates and general services,

- (d) data requests imposed financial and administrative burdens on municipalities;<sup>160</sup>
- (e) key areas of duplication included data relating to integrated development plans, service delivery information (financial and non-financial); infrastructure backlogs; and actual financials which were required monthly, quarterly and annually;
- (f) requests fell into either of two categories: financial information or information that is not of a financial nature;
- (g) the collection period clashed with the compilation of municipal budgets and other functions;
- (h) very few, if any, municipalities had a dedicated department that deals with information gathering;
- (i) the number of forms received by municipalities varied;
- (j) on average municipalities dealt with 15-30 queries on a monthly basis, 40-45 on a quarterly basis, and 80-150 on an annual basis;
- (k) 95% of municipalities received questionnaires from provincial governments for information similar to that asked for and provided to the national government;
- (l) 60% of municipalities do not complete all forms due to lack of adequate resources, constant changes in data requirements which impedes data extraction routines from financial systems, decentralisation of the collection

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and (b) trading services. In the case of National Treasury, waste and water management and waste management are included under the trading services category of municipal functions. Stats SA, on the other hand, in both the annual financial census and the survey of quarterly financial statistics questionnaires, include sewerage and sanitation (waste water management) and refuse removal (waste management) under the rates and general services category of municipal functions. Further, municipal health services are listed in Schedule 4 of the Constitution as a function of local government. However, the National Health Act defines municipal health services as being environmental health service. As a consequence, the responsibility of primary health care services is that of provincial health departments. However, Stats SA reflects health and ambulance services as one of the rates and general services of municipalities. This is confusing because both primary health care (clinics) and the operation of ambulance services fall outside the definition of municipal health services in the National Health Act.

<sup>160</sup> National Treasury *Rationalisation of the Local Government Data Collection Processes Report (Phase I and II)* 21 November 2007 at 9.

process, and some questionnaires were considered irrelevant, for instance, where there was no statutory basis forcing the municipality to comply;

- (m) a formal and coordinated data collection process was required;
- (n) there was a lack of alignment in the data reporting periods;
- (o) there was lack of skills to utilise the available Information Systems productively;
- (p) there was a need for dedicated personnel to deal with information collected at municipal level;
- (q) possible reasons for non-completion of questionnaires should be identified;
- (r) there was a lack of alignment between In-Year and Annual Requests;
- (s) there was a need for the appointment of information officers at municipal level;
- (t) there was a need for the adoption of a National Coordinating Body;
- (u) there were many case of ambiguous questions that were posed to municipalities;
- (v) there was a need for the introduction of the Statistical Quality Assessment Framework to local government data collection;
- (w) there was need for a complete assessment of data reporting at local government level.

*c. Recommendations*

3.19 To address all these challenges and to effectively manage data, the task team recommended that a designated body, it simply called the 'Coordinating Body', be established with the sole purpose of managing and supporting data collection process.

3.20 As COGTA recently observed, not much progressed has been made since these findings were made and quite a number of them, if not all, must still be addressed.<sup>161</sup>

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<sup>161</sup> *The Regulatory Burden of Municipalities: A Concept Paper* and dated 24 October 2013 at 15.

(ii) *Financial and Fiscal Commission*

a. *What are the challenges?*

3.21 In 2008, the Financial and Fiscal Commission (FFC) lamented the dire state of reports emanating from local government and the unsystematic manner in which data was being sought from this sphere of government. It stated:

‘The uncoordinated approach to data collection from local government has resulted in poor quality of the data returned. Local government data is not comparable, and is unreliable and often inaccurate as a result of duplicate data requests from various institutions. The lack of coordination has allowed 225 questionnaires from national organs of state to be distributed to municipalities within the course of a year. Many of these questionnaires duplicate amongst themselves similar data requests from national stakeholders. The problem is further exacerbated by numerous provincial requests.’<sup>162</sup>

3.22 It further observed that there was no structured process in place across national government that ensures collaboration and coordination among line functionaries to deal with duplicate data collection practices.<sup>163</sup>

3.23 Six years later, the FFC provided further evidence of the prevalence and breadth of the reporting obligations on municipalities at COGTA’s Technical MinMec Seminar. It stated, referring to information provided to it by eThekweni Municipality, that there are approximately over 75 legislative reporting requirements with monthly, quarterly and annual deadlines. It added that the Municipal Finance Management Act and the Statistics Act 6 of 1999 have approximately 40 and 5 reporting requirements respectively.<sup>164</sup>

3.24 Whilst the FFC acknowledges the burden of several data requests to municipalities, it has also stressed the significance of such data in monitoring and supporting municipalities. It has strongly argued, first, that the current data available at the local government level is not sufficient to support the design of a responsive and accurate Local Government Fiscal Framework; and second that the lack of frequent and useful data is one of the most

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<sup>162</sup> Krish Chetty ‘Chapter 12, Local Government Data Collection Reforms’ in Financial and Fiscal Commission *Technical Report: Annual Submission on the Division of Revenue 2009/10*, 363 at 367 and *The Regulatory Burden of Municipalities: A Concept Paper* at 14.

<sup>163</sup> Krish Chetty ‘Chapter 12, Local Government Data Collection Reforms’ in Financial and Fiscal Commission *Technical Report: Annual Submission on the Division of Revenue 2009/10*, 363 at 373.

<sup>164</sup> Financial and Fiscal Commission ‘The Regulatory Burden on Municipalities: Presentation to the Department of Cooperative Governance and Traditional Affairs Technical MinMec Policy Seminar’ (6 February 2014) at 14.

fundamental constraints in the Local Government Fiscal Framework and local government in general.<sup>165</sup>

3.25 There seems therefore to be a lack of consensus between COGTA and the FFC. Whilst COGTA categorically wants the obligations to be ameliorated somehow, the FFC seem to argue that more data should be made available.

### **3 Expert critique of legislation regulating local government**

3.26 To gain better insight into the issues from a legal perspective, we consider briefly the views of Prof Nico Steytler, an expert in local government law who has written extensively on regulatory obligations on local government and has been involved in numerous initiatives instituted by government which sought to find solutions.

#### **(a) Delineating the problem**

3.27 Steytler argues that the plethora of laws intended to structure the institutions and processes of local government namely the Municipal Structures Act, the Municipal Electoral Act, the Municipal Systems Act, Municipal Finance Management Act, the Municipal Property Rates Act, the Municipal Fiscal Powers and Functions Act; and legislation emanating from sector departments which is directed at managing the functional areas of schedules 4B and 5B of the Constitution such as the Water Services Act and the National Health Act *may be* suffocating, or overregulating, local government and thus preventing it from executing its constitutional mandate.<sup>166</sup>

3.28 He identified the following features of the legislative framework referred to above as problematic:

- (a) The long-windedness and minute detail contained in these pieces of legislation, which he argues, leave little room for innovation, experimentation, local responsiveness and discretion.<sup>167</sup> He points out that this approach is indicative of a government that views local government as a delivery arm of government; that still clings to the notion of 'tiers of government'; that has little

<sup>165</sup> Financial and Fiscal Commission 2012. *Sustaining Local Government Finances: Final Report on the Financial and Fiscal Commission's Public Hearings on the Review of the Local Government Fiscal Framework* 48.

<sup>166</sup> Nico Steytler in 'The Strangulation of Local Government' *TSAR* Issue 3 (2008) at 518-519.

<sup>167</sup> Nico Steytler 'The Strangulation of Local Government: Stifling Innovation, Experimentation and Local Responsiveness' *Local Government Bulletin* 10 (2008) 6, at 6 and 7.

trust in incumbents in municipal councils; or could be a recognition that councillors lack experience.<sup>168</sup>

- (b) The 'one-size fits all' approach which underlies all local government legislation. The problem with this approach is that the same set of rules regarding institutional structures, administrative and financial duties and processes apply to all municipalities; there is thus no distinct set of rules for giant metros commensurate with their status, role and functioning in the South African society and economy. The same set of laws which apply to Johannesburg Metropolitan Municipality, with over 200 councillors and a budget running into several billion rands, also apply to Jozini local municipality in the northeast of KwaZulu-Natal, or Mier in the northwest of the Northern Cape with budgets amounting to no more than a few million rands. This is the case, despite the huge gaps that exist in respect of the human and financial resources between municipalities in the deep rural areas of the former homelands and those in urban areas.<sup>169</sup>

**(b) Examples of overregulation**

3.29 Most importantly, Steytler refers to the following statutory provisions as examples of overregulation which have rendered certain processes too difficult and/or costly to undertake:<sup>170</sup>

- (a) the complex set of rules contained in sections 76-84 of the Municipal Systems Act which have been compounded by section 120 of the Municipal Finance Management Act; and
- (b) the Municipal Public-Private Partnership Regulations (PPP Regulations) issued in terms of the latter Act.<sup>171</sup>

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<sup>168</sup> Nico Steytler 'The Strangulation of Local Government 519 and 520.

<sup>169</sup> *Id* at 522.

<sup>170</sup> *Id* at 521.

<sup>171</sup> Municipal Public-Private Partnership Regulations No R 309 GG 27431 (1 April 2005) which came into effect on 1 May 2005.



**(c) Consequences of overregulation<sup>172</sup>**

3.30 According to Steytler, overregulation could lead to the following situations:

- (a) Processes prescribed by legislation could prove too costly or difficult to undertake for some municipalities. Municipalities would need legal practitioners to guide them in their effort to comply with an elaborate legal framework. Metros and large municipalities have substantial legal sections devoted to the legal niceties of the framework. Other municipalities, however, do not have these resources. These in-house legal services come at a price. The second form of costs is the transaction costs of implementing complex procedures. For example, the cost of outsourcing municipal services in terms of section 78 of the Municipal Systems Act and the Municipal Finance Management Act, including conducting elaborate feasibility studies, has rendered public-private partnerships for all but large scale projects too costly in terms of time and money.
- (b) A municipality may choose to outsource to the private sector key processes that are difficult for it to carry out itself. This takes place where the complexities and demands of the legal requirements overwhelm administrators that they inevitably haul in the consultants to ensure compliance. For example, municipalities outsourced the drafting of the first Integrated Development Plans. Consultants were employed to do the entire process, including public participation process. The weight of the legal obligation can have a profound disempowering effect on smaller, more poorly resourced municipalities, forcing them to opt out of self-governing. This trend by municipalities to use of consultants for financial and performance reporting and a host of other services, including information and technology services and Municipal Standard Chart of Accounts implementation, has not dissipated. It has been identified by the Auditor-General as one of the major contributors to accountability failures and regression in audit outcomes.<sup>173</sup> The Auditor-General has expressed shock that for 2016/17 financial year municipalities paid consultants a staggering R757 million to prepare financial statements which in the end did not have the desired effect.<sup>174</sup>

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<sup>172</sup> Nico Steytler in 'The Strangulation of Local Government' at 527.

<sup>173</sup> Auditor-General Media Release Auditor-General Laments Lack of Accountability as he Releases Declining Local Government Audits Results 23 May 2018 at 8. See also in general, Auditor-General, South Africa *Consolidated Auditor-General Report on Local Government Audit Outcomes: MFMA 2016/17*.

<sup>174</sup> Consolidated Auditor-General Report on Local Government Audit Outcomes at 14.

- (c) Overregulation stifles innovation, experimentation and local initiative, the lifeblood of decentralisation.<sup>175</sup>
- (d) Compliance with the rules could become more important than achieving the object behind the rules. Where there is over prescription of procedural requirements, an obsessive-compulsive administration can be reduced to ticking off boxes for every procedural element prescribed thus replacing substance with form.

**(d) Solutions**

3.31 Steytler warns that in an effort to address overregulation of local government, it would be easy but simplistic to say there should be less law and that the law in place should allow sufficient scope for municipalities to fulfil their constitutional mandate. According to him, to address the aforementioned challenges would require:

- (a) identifying legal provisions that strangle local government,
- (b) determining whether they should be amended, and
- (c) ascertaining whether municipalities have the maturity to cope with greater freedom.<sup>176</sup>

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<sup>175</sup> To illustrate, he refers to Sustainable Energy Africa, a section 21 company working in the field of sustainable energy development with a particular focus on city energy planning. In exploring the use of alternate sources of energy, municipalities, they contend, will bump their heads against Municipal Finance Management Act 56 of 2003. This Act, they argue, places the emphasis on reducing short-term financial risk. Exploring alternative forms of sustainable energy sources requires more long-term sustainability and risk. The crux of the problem is that alternative sources of renewable energy may be more costly at the outset and only become cost-effective in the future (also given other environmental advantages of a non-carbon energy generation for climate change). Sustainable Energy Africa thus argues as follows: prevailing interpretation of “wasteful expenditure” prohibits medium- to longer-term efficiency within local government. Many energy efficiency measures, such as efficient lighting, efficient water pumps, etc, may require an initial upfront cost higher than other existing technologies, but are proven to be more cost effective over 5-20 years. It would appear that financial decision making in local government does not feel able to take this kind of “value for money” into account. Retrofitting buildings or functions for energy efficiency is typically undertaken by energy services specialist companies, who operate by taking on the upfront capital cost which they then offset by being paid out a percentage of the savings achieved through the energy efficiency interventions (a win-win framework). Local government bumps up against the interpretation of Act 56 of 2003 that argues that private companies may not benefit from municipal assets. Many energy efficiency interventions may require fairly long-term contracts due to payback timeframes. Act 56 of 2003 makes this difficult. Their plea is thus that local government should be allowed a greater degree of flexibility to be able to fulfil the sustainability aspects of its service delivery functions.

<sup>176</sup> Nico Steytler ‘Strangulation of Local Government’ at 532.

3.32 He submits that in an endeavour to find solutions to the problem of overregulation of local government, the following principles should be borne in mind:

- (a) There must be an appreciation of the limits of law to direct and influence human and organisational behaviour. More law does not necessarily solve social or organisational problems. In certain instances political solutions are required. It is of course a question of judgment whether a legal response is the appropriate one, depending on a proper analysis of the problem that is being addressed.
- (b) Law should be used in a restrained manner in order to allow the appropriate scope for local discretion. This should, however, not be equated with a minimalist approach: a clear distinction should be made between areas requiring detailed regulations and other areas where greater flexibility would be beneficial. Key areas where detailed rules would be appropriate are those relating to the democratic processes that underpin local democracy. Elections, openness in government, and accountability procedures and processes, and accounting for the expenditure procedures should be clear and precise.
- (c) Top 30 municipalities, which are the sites of economic development in the country and all of which are capable of complying with the rigours of the current legal regime should be less regulated. Ironically, it is poor rural municipalities, currently struggling to keep to the letter of the law, that require more guidance rather than less. While cities need greater flexibility to flex their muscles, smaller municipalities lacking strong administrative capacity are sustained by a set of clear rules. However, a simplified set of rules would facilitate compliance.
- (d) To enforce good administration, there should be support and training for administrators in the application of new law; increase the practice of accountability of the administration to the council; and sanctions for failure to comply with compliance regulation should lie within the system itself. For example, failure to adopt a budget is sanctioned within the system by the automatic dissolution of the council. Criminal sanctions, currently used as the enforcement mechanism for compliance,<sup>177</sup> should be concerned with fraudulent or corrupt practices.

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He laments the use of criminal sanctions in sections 61(2)(b);62(1)(a); 63(2)(a) and (c); 64(2)(a) and (d); 65(2)(a), (b), (c), (d), (f) and (i) and 111 of the Municipal Finance Management Act 56 of 2003 to ensure good financial administration. The act criminalises a municipal manager who fails to disclose to the council and mayor all material facts available to or reasonably discoverable by the municipal manager, and which may in any way influence their decisions or actions. Although there could be an element of fraud involved, it essentially criminalises a breakdown in relations between the two parties. A more far-reaching offence is the municipal manager's failure, when executing his or her financial administration duties, to take all reasonable steps to ensure, among others things, "that the resources of the

3.33 Most importantly, Steytler has argued that adopting an asymmetrical approach to the implementation of laws impacting on local government as opposed to *ad hoc* exemption of municipalities from the application of certain provisions, could address some of the challenges alluded to above. He states in this regard:

‘While the laws remain uniformly applicable, the differences between municipalities could be recognised in the regulations implementing the laws. In the Systems Act, for example, the minister for local government in issuing regulations or guidelines may differentiate between “different kinds of municipalities which may, for the purpose of the regulations, be defined in the regulation either in relation to categories or types or municipalities or *in any other way*”. This provision, while leaving the principal legal framework intact, may accommodate the diversity of capacity found in municipalities by issuing asymmetrical regulations. It would appear, however, that the minister has not yet made use of this power.’<sup>178</sup>

## C Safeguards against overregulation

### 1 Constitutional remedies

3.34 As hinted at in the previous chapter, many of the difficulties faced by local government have been partly attributed to the Constitution. It is therefore not surprising that a call to review, inter alia, the Constitution to address the crisis at local government level has been gaining momentum.<sup>179</sup> In the context of **regulatory obligations**, the problem created by the Constitution has been described in the following terms:

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municipality are used effectively, efficiently and economically”. Not only is the criminal conduct, which may attract a five-year jail sentence, premised on the vague standard of “failing to take all reasonable steps”, but the “effective, efficient and economic” elements are even more obtuse. Equally vague are the offences punishing poor administration, namely the failure to establish a system for asset and liability management, revenue management, expenditure control, and supply chain management.

<sup>178</sup>

Nico Steytler ‘Strangulation of Local Government’ at 523.

<sup>179</sup>

In SALGA *15 Years of Developmental and Democratic Local Government: 2000-2015* (December 2015) at 115 this call is expressed as follows:

As the local government system in South Africa has matured, it has become evident that a review of the legislation is necessary which would include the Constitution, the Structures Act, and the Systems Act.

Key issues to be considered would include:

- Variations in municipal categorisation including a mechanisms for strengthening the two tier system of local government;
- Resolving the overlap, and lack of definitions, of the powers and functions of the three spheres of government, and, in particular, those of district and local municipalities – attention will need to be given to reviewing and amending the wording of the district functions in section 84(1);
- The usefulness of authorisations by the Minister, and adjustments of powers and functions by MECs which initially was seen as temporary transitional arrangements to ensure the provision of services;

‘...there is a fundamental tension in the system which is encapsulated in two opposing constitutional principles underpinning local government: the first one, articulated in section 151(3) of the Constitution, entrenches a municipality’s “right to govern, on its own initiative, the local government affairs of the community”. The second, competing, principle is the duty of both the national and provincial governments to oversee local government through regulation, monitoring and supervision. The power to regulate may not, however, “compromise or impede a municipality’s ability or right to exercise its powers or perform its functions.” There is thus a balance to be struck between letting the thousand flowers of decentralised local initiative and innovation bloom, and preventing the weeds of mismanagement, incompetence and corruption from taking over the flower beds.’<sup>180</sup>

**(a) The constitutional duty to consult and support**

3.35 The Constitution does not prescribe how the tension referred to above should be addressed. It does provide though that there must be *consultation* with local government before a law that will impact on it is enacted.<sup>181</sup> Of course, as the organisation for local government in New South Wales has warned, for any such consultation to be effective it must be genuine, not a tick-a-box or send your comments within 10 days exercise.<sup>182</sup>

3.36 Secondly, although there is no express duty on national government to support local government,<sup>183</sup> such a duty flows from principles of cooperative government entrenched in Chapter 2 of the Constitution.<sup>184</sup> It appears that consultation and support contemplated in the aforementioned constitutional provisions have not yielded positive results in respect of regulatory obligations imposed on local government.

3.37 Thirdly, the provisions referred to above, and many other provisions in the Constitution, intended to regulate the interplay between national and local government, are drafted in broad terms (in skeleton form). The drafters envisaged that legislation would be

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- The need to review institutional and other arrangements to prevent conflicting and/or overlapping responsibilities, or to align them;
  - A revisit of the determination of service delivery mechanisms in the Municipal Systems Act; and
  - Improving municipal monitoring and accountability.

<sup>180</sup> Nico Steytler ‘Strangulation of Local Government’ at 534.

<sup>181</sup> This duty is contained in section 154(2) of the Constitution and reads:

‘Draft national or provincial legislation that affects the status, institutions, powers or functions of local government must be published for public comment before it is introduced in Parliament or a provincial legislature, in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to the draft legislation.’

<sup>182</sup> Local Government NSW *LGNSW Submissions to IPART – Review of Reporting and Compliance Burdens on Local Government* at 7.

<sup>183</sup> In respect of provincial government, the Constitution expressly provides in section 155(6) that this sphere of government must by legislative or other measure, provide for the monitoring and support of local government in the province.

<sup>184</sup> Section 41(1)(h)(ii) of the Constitution expressly provides that all spheres of government must cooperate with one another, among other things, by assisting and supporting one another.

necessary to add flesh, hence they included two provisions which require the enactment of two pieces of legislation that would: (a) facilitate intergovernmental relations and provide mechanisms and procedures to settle disputes between organs of state and spheres of government; and (b) determine, inter alia, procedures by which local government may consult with national and provincial government.<sup>185</sup> These laws have been enacted in the form of the Intergovernmental Relations Framework Act (IRFA)<sup>186</sup> and the Organised Local Government Act (OLGA).<sup>187</sup> The extent to which these Acts address the issues raised in this review is considered in detail below.

(i) *Intergovernmental Relations Framework Act*

3.38 The object of this Act is, inter alia, to facilitate coordination in the implementation of policy and legislation and is consequently crucial to the issues at hand.<sup>188</sup>

a. *Cooperation and coordination*

3.39 Literal interpretation of the provisions of this Act,<sup>189</sup> which are couched in peremptory language, seem to place an obligation on national government, on the one hand, to:

- (a) take into account the circumstances, material interests and budgets of local government;

<sup>185</sup> Sections 41(2) and 163 of the Constitution.

<sup>186</sup> Act 13 of 2005.

<sup>187</sup> Act 52 of 1997.

<sup>188</sup> Section 4 of IRFA.

<sup>189</sup> See in this regard, section 5 of IRFA which provides:

'In conducting their affairs the national government, provincial governments and local governments *must* seek to achieve the object of this Act, including by-

- (a) taking into account the circumstances, material interests and budgets of other governments and organs of state in other governments, when exercising their statutory powers or performing their statutory functions;
- (b) consulting other affected organs of state in accordance with formal procedures, as determined by any applicable legislation, or accepted convention or as agreed with them or, in the absence of formal procedures, consulting them in a manner best suited to the circumstances, including by way of-
  - (i) direct contact; or
  - (ii) any relevant intergovernmental structures;
- (c) co-ordinating their actions when implementing policy or legislation affecting the material interests of other governments;
- (d) avoiding unnecessary and wasteful duplication or jurisdictional contests;
- (e) taking all reasonable steps to ensure that they have sufficient institutional capacity and effective procedures-
  - (i) to consult, to co-operate and to share information with other organs of state; and
  - (ii) to respond promptly to requests by other organs of state for consultation, co-operation and information sharing; and
- (f) participating-
  - (i) in intergovernmental structures of which they are members; and
  - (ii) in efforts to settle intergovernmental disputes.'

- (b) consult with local government directly or through intergovernmental forum;
- (c) coordinate its actions with local government when implementing policy or legislation that affects material interests of the latter;
- (d) avoid unnecessary and wasteful duplication or jurisdictional contests.

3.40 On the other hand, it appears that local government has a duty to ensure that it has sufficient institutional capacity and effective procedures to consult, cooperate and to share information with other organs of state and to respond promptly to requests by other organs of state for consultation, cooperation and information sharing.

3.41 Despite the use of the word 'must' in section 5 of IRFA, which suggests that non-compliance with this provision would leave the ensuing act null and void, it appears that no consequences would follow if the provisions referred to above are not adhered to. This inference is based on the fact that this Act itself does not define what the consequences would be if its provisions are ignored. This provision appears to be a hollow command without bite.<sup>190</sup> The complete disregard of sections 9 and 10 of the Municipal Systems Act which makes consultation obligatory before a function or power is assigned to local government, was referred to earlier. According to SALGA, assignments of powers and functions in contravention of this provision are commonplace.

*b. Effectiveness of intergovernmental forums in addressing regulatory obligations*

3.42 This Act makes provision for the institution of diverse intergovernmental forums.<sup>191</sup> However, since the main focus in this investigation relates to the relationship between national and local government, only provisions relating to the President's Coordinating Council and forums established by ministers to promote and facilitate intergovernmental relations in the functional areas for which they are responsible will be considered.<sup>192</sup>

3.43 Both the President's Coordinating Council<sup>193</sup> and the section 9(1) intergovernmental forums<sup>194</sup> are consultative forums with broad mandates that could be used by local

<sup>190</sup> Nico Steytler 'The Strangulation of Local Government' 524.

<sup>191</sup> These are: the Premiers intergovernmental forum, a provincial intergovernmental forum for a specific functional area, an interprovincial forum, a district intergovernmental forum, and an intermunicipal forum, contemplated in sections 16, 21, 22, 24 and 28 of IRFA.

<sup>192</sup> Sections 6 and 9(1) of IRFA.

<sup>193</sup> Section 7 of this Act describes the role of the President's Coordinating Council in the following terms:

'The Council is a consultative forum for the President-

- (a) to raise matters of national interest with provincial governments and organised local government and to hear their views on those matters;
- (b) to consult provincial governments and organised local government on-

government or COGTA to raise issues relating to the impact of compliance and reporting obligations with the President or Cabinet member responsible for the functional area to which the impugned legislation relates as local government should be represented in both these forums by a municipal councillor designated by SALGA.<sup>195</sup>

3.44 These structures lack coercive powers and therefore cannot instruct any of the functionaries or spheres of government to act, or to desist from acting, in a particular way. This is confirmed by section 32 of this Act which emphasises that these forums are intended for consultation and discussion and they can adopt resolutions and make recommendations, but they are not executive decision-making bodies.<sup>196</sup> What this means is that the decisions taken in these forums can be ignored and there would be no consequences.

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- (i) the implementation of national policy and legislation in provinces and municipalities;
  - (ii) the co-ordination and alignment of priorities, objectives and strategies across national, provincial and local governments; and
  - (iii) any other matters of strategic importance that affect the interests of other governments;
  - (c) to discuss performance in the provision of services in order to detect failures and to initiate preventive or corrective action when necessary; and
  - (d) to consider-
    - (i) reports from other intergovernmental forums on matters affecting the national interest, including a report referred to in section 21; and
    - (ii) other reports dealing with the performance of provinces and municipalities.’
- <sup>194</sup> ‘(1) A national intergovernmental forum established in terms of section 9(1) consists of-
- (a) the Cabinet member responsible for the functional area for which the forum is established;
  - (b) any Deputy Minister appointed for such functional area;
  - (c) the members of the Executive Councils of provinces who are responsible for a similar functional area in their respective provinces; and
  - (d) a municipal councillor designated by the national organisation representing organised local government, but only if the functional area for which the forum is established includes a matter assigned to local government in terms of Part B of Schedule 4 or Part B of Schedule 5 to the Constitution or in terms of national legislation.
- (2) The relevant Cabinet member is the chairperson of the forum.
  - (3) The relevant Cabinet member may invite any person not mentioned in subsection (1) to a meeting of the forum.’
- <sup>195</sup> In terms of section 6(1) of the Act, the PCC consists of the President, the Deputy President, the Minister in the Presidency, the Minister of Cooperative Governance and Traditional Affairs, the Minister of Finance, the Minister of Public Service and Administration, the Premiers of Nine Provinces and a Municipal Councillor designated by the national organisation representing organised local government. Section 10(1), on the other hand, provides that a section 9(1) intergovernmental forum consists of the Cabinet member responsible for the functional area for which the forum is formed, the Deputy Minister for the functional area, MECs of provinces who are responsible for similar functional areas, a municipal councillor designated by organised local government.
- <sup>196</sup> Section 32(1) and (2) of IRFA.



c. *Implementation Protocol*

3.45 It is also necessary to consider briefly whether the implementation protocol contemplated in section 35 of this Act could be of any assistance to local government trying to ameliorate the impact of regulatory obligations.<sup>197</sup> An implementation protocol is an agreement, or a code of conduct, between organs of state.<sup>198</sup> A municipality could initiate the process for the conclusion of an implementation protocol.<sup>199</sup> To trigger this process it would be sufficient if either the national or local government showed that the implementation protocol could materially assist the national or provincial government in complying with its constitutional obligations to support the local sphere of government or to build capacity in that sphere.<sup>200</sup> Local government could specify in this instrument the challenges it is confronted with when implementing compliance and reporting obligations, and propose how these should be addressed. The implementation protocol could also provide oversight mechanisms and procedures for monitoring the effective implementation of the protocol and dispute settlement procedure.<sup>201</sup> This instrument could be used to identify challenges

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<sup>197</sup> Section 35(1) of the Act provides that:

'Where the implementation of a policy, the exercise of a statutory power, the performance of a statutory function or the provision of a service depends on the participation of organs of state in different governments, those organs of state must coordinate their actions in such a manner as may be appropriate or required in the circumstances, and may do so by entering into an implementation protocol.'

<sup>198</sup> Section 35(4)(b) of this Act read in conjunction with the Implementation Protocol Guidelines and Guidelines for Managing Joint Programmes published by the Minister of Provincial and Local Government in terms of section 47(1)(d) of this Act in GN 696, GG 30140 of 3 August 2007.

<sup>199</sup> Section 35(5) provides that: 'Any organ of state may initiate the process for the conclusion of an implementation protocol after consultation with the other affected organs of state.'

<sup>200</sup> In terms of section 35(2) an implementation protocol must be considered when:

- (a) the implementation of the policy, the exercise of the statutory power, the performance of the statutory function or the provision of the service has been identified as a national priority;
- (b) an implementation protocol will materially assist the national government or a provincial government in complying with its constitutional obligations to support the local sphere of government or to build capacity in that sphere;
- (c) an implementation protocol will materially assist the organs of state participating in the provision of a service in a specific area to co-ordinate their actions in that area; or
- (d) an organ of state to which primary responsibility for the implementation of the policy, the exercise of the statutory power, the performance of the statutory function or the provision of the service has been assigned lacks the necessary capacity.'

<sup>201</sup> Section 35(3) of this Act provides that:

'An implementation protocol must-

- (a) identify any challenges facing the implementation of the policy, the exercise of the statutory power, the performance of the statutory function or the provision of the service and state how these challenges are to be addressed;

relating to the implementation of a policy, the exercise of a statutory power, the performance of a statutory function or the provision of a service and state how these challenges are to be addressed.<sup>202</sup>

3.46 On 3 August 2007, and pursuant to section 47(1)(d) of IRFA,<sup>203</sup> the then Minister for Provincial and Local Government published an implementation protocol template in the Government Gazette to assist organs of state faced with the challenge of developing protocols. Clause 8(2) that the Minister proposed should be included in every protocol is germane to the issues at hand, and puts it beyond any doubt that the conclusion of an implementation protocol by local government and national government would not resolve the reporting and compliance challenges confronting local government. This clause provides:

‘This protocol does not make any legal or otherwise enforceable commitments on behalf of any of the Parties, nor does it in any way limit any statutory powers and functions of the Parties’.

3.47 As stated elsewhere in this report, what this means is that the implementation protocol is nothing more than a ‘gentlemen’s agreement’.

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- (b) describe the roles and responsibilities of each organ of state in implementing policy, exercising the statutory power, performing the statutory function or providing the service;
  - (c) give an outline of the priorities, aims and desired outcomes;
  - (d) determine indicators to measure the effective implementation of the protocol;
  - (e) provide for oversight mechanisms and procedures for monitoring the effective implementation of the protocol;
  - (f) determine the required and available resources to implement the protocol and the resources to be contributed by each organ of state with respect to the roles and responsibilities allocated to it;
  - (g) provide for dispute-settlement procedures and mechanisms should disputes arise in the implementation of the protocol;
  - (h) determine the duration of the protocol; and
  - (i) include any other matters on which the parties may agree.’

<sup>202</sup>

Section 35(3)(a) of the Act.

<sup>203</sup>

Section 47(1)(d) of this Act provides that the Minister may by notice in the Gazette issue regulations or guidelines not inconsistent with this Act regarding the implementation protocols.

- Questions:**
1. What more should be done, from a law reform perspective, to ensure that the consultation process envisaged in section 154(2) of the Constitution obviates the type of problems that have given rise to this inquiry? For example, should legislation expressly require national government to consult with local government with a view to establish the impact of regulatory proposals on local government?
  2. What kind of support should national government provide to assist municipalities to manage regulatory, reporting and compliance requirements? Please provide details of the type of support you believe could be provided, and in relation to which regulatory, reporting or compliance requirement/s.
  3. How effective is the Intergovernmental Relations Framework Act and the Organised Local Government Act, or structures created by these laws, in dealing with excessive, unnecessary and inefficient obligations on local government? What amendments, if any, should be effected to these laws and why? Please elaborate.

## D Developments in other jurisdictions

3.48 As is the case in this country, the Netherlands,<sup>204</sup> United Kingdom<sup>205</sup> and various states in Australia,<sup>206</sup> have been grappling with increasing regulatory requirements on local

<sup>204</sup> Among innovations introduced by the Government of Netherlands to reduce the burden placed by regulation on local government include introducing new legislation at specific agreed times so that municipalities are no longer taken by surprise; simplifying government supervision practices, for example by requesting information less frequently from local government; making it easier for local government to meet its accountability obligations to central government. It has also reduced the regulatory burden by improving the quality of legislation; through customised approaches; and smarter, better and efficient supervision. See Ministry of Economic Affairs, Netherlands *Better Regulation: Towards a Responsible Reduction in the Regulatory Burden Between 2012-2017* at 5.

<sup>205</sup> In the United Kingdom, the Lifting the Burdens Task Force was set up to review the bureaucratic and performance management burdens that exist as a consequence of the current relationship between central and local government and to identify requirements that cause the most difficulty. The Task Force has described the central-local interaction as a 'parent-child' which necessitates guidance, uses language such as 'earned autonomy' and limits participation to commenting on evolving or existing policy thereby perpetuating the level of burden. The task force hopes to reduce the volume of reporting by at least 50 percent by recommending the elimination, consolidation or automation of data requests and reporting information. It also emphasised the value of practitioner perspective to the project. Most notably, the task force has urged central government to recognise that one size does not and cannot fit all and command and control is not the best way to get results. See Lifting the Burdens Task Force *Bringing About a New Relationship Between Central and Local Government and Citizens- Progress Report 2006-2007* at 2,3, 5 and 7.

government. Overregulation of local government in some Australian states has been attributed to the fact that local government is perceived to be an agency of the state; it is not afforded the same respect and trust as it is in other jurisdictions; and councils are treated as branch offices of the state.<sup>207</sup> To address this phenomenon, reviews have been instituted in New South Wales, Victoria, Queensland and Western Province the purpose of which are to:

- (a) establish a regulatory system that is effective, equitable and efficient;
- (b) ease the burden by removing or streamlining antiquated, duplicative or unnecessary reporting and compliance requirements; and
- (c) free up to the maximum extent possible council resources to enable them to **focus on providing services to meet local needs than being bogged down** in process and compliance activities.

## 1 New South Wales

### (a) *IPART Review of Reporting and Compliance Burdens on Local Government*

3.49 In April 2015, the New South Wales government commissioned the Independent Pricing and Regulatory Authority, New South Wales (IPART) to:

‘...undertake a whole-of-government review of the regulatory, compliance and reporting burden on councils.’

3.50 The overarching objective of this review was to remove unnecessary or excessive regulatory burdens so as to free up time and funds to enable councils to focus on delivering services to their communities effectively.

#### (i) *Criteria to identify burdensome obligations*

3.51 The Commission has found the approach adopted by IPART in this review, and in particular the test to identify burdensome obligations placed on local government, quite useful. According to IPART, all regulations involve costs and burdens on the regulated entity.<sup>208</sup> If the benefits of a particular regulation exceed the costs, it may be justified. However, if it is poorly designed or implemented, it may impose unnecessary or excessive

<sup>206</sup> The states where reviews have been conducted are New South Wales, Victoria, Queensland and Western Province.

<sup>207</sup> LGNSW Submission to IPART – Review of Reporting and Compliance Burdens on Local Government (August 2015) at 7.

<sup>208</sup> Independent Pricing and Regulatory Tribunal, New South Wales *Review of Reporting and Compliance Burdens on Local Government* Issue Paper (July 2015) at 12.

costs or burdens which exceed the benefit. It is the latter category of regulatory obligations imposed on local government, according to IPART, that one must look out for. But, how does one identify unnecessary, inefficient or excessive regulatory obligations? IPART proposed the following criteria:<sup>209</sup>

- (a) Planning, reporting or compliance obligation that does not meet its objective;
- (b) an unclear or unduly complex obligation;
- (c) an obligation that creates unintended or unexpected workloads;
- (d) duplicative or overlapping requirements
  - (i) lack of coordination amongst government agencies resulting in councils being asked for similar information in a different format or at different time, or
  - (ii) council being asked to produce similar information under different legislative requirements;
- (e) overly prescriptive or onerous requirements requiring costly processes;
- (f) requested information not being used or the use thereof is sub-optimal;
- (g) inconsistent interpretation or application of reporting or compliance obligations; and
- (h) obligation in respect of which government agencies are failing to give guidance, advice or assistance.

*(ii) Determining costs of complying with unnecessary or excessive obligation*

3.52 Turning its attention to the costs of complying with onerous obligations, IPART, like Steytler did 10 years ago, highlighted the downside of uniformity of regulation. It stated, as is the case in South Africa, that the impacts of regulatory burdens on councils vary as a result of **varying fiscal capacity, demographic characteristics, resources**, and skills. Consequently, smaller or remote councils may struggle to comply with state imposed obligations such as providing reports than larger metropolitan-based councils. But most importantly for our purpose, it distinguished between the following types of costs and benefits of regulations which could either be quantitative or qualitative:

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<sup>209</sup>

*Id* at 13.

- (a) compliance costs (administrative and substantive compliance costs) – these are costs relating to the time it takes to comply with the reporting or compliance requirement; capital and production costs that are incurred to comply with the regulation, which can include the purchase and maintenance of new equipment and the training of staff in order to be able to meet the regulatory requirement)
- (b) economic impacts – affect the allocation of resources productivity, competition and innovation.
- (c) social impacts - include considerations such as quality of life, equity, achieving community norms, ensuring public health and safety, reducing crime and protecting human rights.
- (d) environmental impact, for instance improvement to air quality. This category of impacts of regulations can be difficult to quantify.

*(iii) Options for reform – government assistance*

3.53 Interestingly, IPART also explored whether non-legislative reforms would address the problem. It asked whether greater support from government such as funding, guidance materials, developing reporting templates or establishing centralised databases would not ease obligatory burdens on municipalities.<sup>210</sup>

*(iv) Risks of removing obligations*

3.54 Another important aspect that IPART focused on was the unintended consequences that removing compliance and reporting obligations deemed unnecessary or inefficient could have for government and the community. According to IPART, some of the risks to the community could include: less transparency regarding council performance or activities and less information available that is of interest to the community, for example environmental reporting; and some of the risk to state government could include insufficient information for the state to properly manage issues or the objectives of state legislation not being met.<sup>211</sup>

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<sup>210</sup> *Id* at 22.

<sup>211</sup> *Id* at 28.

**(b) Submissions by Local Government NSW**

3.55 Among the entities in **that state** that made submissions to IPART was Local Government New South Wales (LGNSW),<sup>212</sup> the equivalent of SALGA in South Africa, whose recommendations merit mention. The LGNSW recommended, inter alia, that:

- (a) Regulation should be periodically reviewed, and if necessary, reformed to ensure its continued efficiency and effectiveness.
- (b) The Better Regulation Guide, the equivalent of Socio-Economic Impact Assessment System in South Africa, and the Subordinate Legislation Act of 1989, should be amended to incorporate explicit requirement that regard should be had to the impact on regulatory proposals on local government, as distinct from government in general.
- (c) The cost involved with all regulation need be accurately quantified and the parties that will bear the costs need to be clearly identified. Regulatory requirements should be funded by the sphere of government imposing the burden or alternatively, be accompanied by a funding mechanism, for example, provision for cost recovery through fees and charges, levies or rates.
- (d) Data collected by one government agency should be available for use by other government agencies. Government agencies should not require councils to provide reports containing the same or similar information already provided to a different agency. Where the same information is required in different time frames, government agencies should liaise and coordinate to determine what time frame would best ensure information is only reported once.
- (e) Government agencies should thoroughly scan all government databases to ensure that the desired data has not already been collected before they request submit a request for information.
- (f) To help manage reporting and compliance requirements, there should be:
  - Early and genuine consultation;
  - Clear, concise and accessible information;

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<sup>212</sup> See in general LGNSW *Submission to IPART – Review of Reporting and Compliance Burdens on Local Government* (August 2015).

- Provision of training where appropriate;
- Provision of templates and resource material;
- A reasonable notice period for the introduction of new requirements to enable councils to understand the new requirements, make software changes etc; and
- Provision of funding mechanisms where additional costs are involved

## 2 Queensland

3.56 Although information emanating from Queensland in relation to the impact of regulation on local government is negligible, an investigation into the framework for measuring and reducing the burden of regulation in general<sup>213</sup> has revealed that:

- (a) As is the case in South Africa, capacity constraints is largely responsible for delays in accomplishing tasks for which they are responsible by Queensland local government;
- (b) Local government supports the idea that existing regulation should be subjected to periodic review; and
- (c) Because regulation is introduced, inter alia, to advance public interest safety and welfare, any process seeking to reduce regulation needs to follow a set of principles and a clearly defined process that includes a risk-assessment element.<sup>214</sup>

## 3 Victoria

3.57 It appears that there has been few inquiries in Victoria that are relevant to the matters at hand. The first such inquiry was undertaken by the Essential Services Commission. It found that councils publish council plans, annual budgets, annual reports and report extensively to state departments and agencies about specific services or activities. As far as council reporting obligations are concerned, it identified over 100 separate reporting requirements. It recommended that the Victorian Government should initiate a streamlining review of reporting requirements imposed on local government by state government. According to IPART, the aforementioned review has been finalised but is yet to be

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<sup>213</sup> See in this regard, Queensland Competition Authority, Office of Best Practice Regulation *Interim Report: Measuring and Reducing the Burden of Regulation* (October 2012).

<sup>214</sup> *Id* at 37, 41 and 53.



published.<sup>215</sup> The Commission will be on the lookout for recommendations emanating from this investigation.

3.58 The second inquiry was conducted by the Victorian Competition and Efficiency Commission (VCEC). Amongst the issues looked into, and reported on, by the VCEC were:

- (a) the scope for streamlining the practices adopted by local government to administer state government regulation, and options for both levels of government to support best regulatory practice; and
- (b) the extent of costs incurred by local government in administering regulation, and options for councils to reduce these costs.

3.59 How the two issues referred to above are addressed in Victoria is relevant to this inquiry for two reasons. First, the Constitution makes provision for local government to provide regulatory services on behalf of national government through assignment.<sup>216</sup> This assignment takes place, among other things, by means of legislation; and most importantly, the municipality must have capacity to administer the matter in question. In South Africa, there is no database of legislation that has been assigned to local government. Consequently, it is difficult to establish the extent of these assignments. In Victoria, local government argued that the resources available to councils and the effectiveness with which they deliver regulatory services are linked. The level of funding affects council's capacity to undertake regulation<sup>217</sup> Further, and most importantly for our purpose, it is generally acknowledged in Victoria that regulatory responsibility requires additional capacity, the provision of which imposes additional burdens on the local government.<sup>218</sup>

## 4 Western Australia

3.60 In 2009, the Government of Western Australia formed the Red Tape Reduction Group to identify and report on opportunities to reduce the burden of existing state regulation and red tape on business, consumers and local government.<sup>219</sup>

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<sup>215</sup> New South Wales, Independent Pricing and Regulatory Tribunal *Review of Reporting and Compliance Burdens on Local Government: Issue Paper* at 16.

<sup>216</sup> Section 156(4)(a) and (b) of the Constitution.

<sup>217</sup> Victorian Competition and Efficiency Commission *Local Government for a Better Victoria: An Inquiry into Streamlining Local Government Regulation – A Draft Report for Further Consultation and Input* (April 2010) at 30.

<sup>218</sup> *Id* at 247.

<sup>219</sup> In discharging its mandate, the Red Tape Reduction Group was required to identify specific areas of existing regulations and red tape which were unnecessarily burdensome, complex or redundant; identify regulations and red tape that had to be removed or significantly reduced as a matter of priority; and recommend practical measures to alleviate the compliance costs

**(a) Area of concern for local government**

3.61 The Red Tape Reduction Group found that local governments are required to complete Compliance Audit Returns (CAR) reports each year, pursuant to the Local Government Act of 1995, to indicate that they have complied with all regulatory requirements. These reports, which can be submitted online, are used by the Department of Local Government in Western Province as a means to assess local governments' level of compliance with over 200 regulations and legislative clauses. And, all local governments are required to complete the same CAR regardless of their size or location.<sup>220</sup>

3.62 A recurring theme during the consultation process was the significant burden CARs imposed on local governments. Smaller municipalities in regional areas with limited resources found the CAR process particularly onerous. Some local governments complained that it was a time consuming reporting requirement that is used to identify non-compliance and not to improve local government activities.<sup>221</sup> One of the respondents stated in respect of this audit return process:

'The annual local government compliance audit measures 'compliance' rather than 'performance' which is its major design flaw. Compliance is only a part of overall performance of local government. It is a tick a box process and feedback from the department is minimal. The audit is on top of other compliance required such as the 10 year financial plan, 5 year business plan and on-going due diligence on projects.'

**City of Rockingham, Consultation, 26 March 2009.'**

3.63 **A matter we can relate to because it was highlighted by the Auditor-General recently, and that seems not to be unique to South Africa** was also highlighted in this inquiry. The City of Freemantle submitted that it opts to use consultants who charge exorbitant fees. It stated in this regard:

'The Annual Compliance Audit costs the Council approximately \$10,000 per year in consultant's fees to complete the report. This does not include the officer's time. The external consultants are used as the audit is one of the KPIs for the CEO and as a result he is required to get it externally assessed.'

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of red tape on businesses, government and community. See The Government of Western Australia *Reducing the Burden: Report of the Red Tape Reduction Group* (2009) at 24.

<sup>220</sup> For a discussion of challenges and recommendations emanating from this review, see the Government of Western Australia *Reducing the Burden: Report of the Red Tape Reduction Group* (2009) at 147-149.

<sup>221</sup> *Ibid.*

**(b) Recommendation**

3.64 The Red Tape Reduction Group found that replacing the CAR requirement with a targeted regulatory process that audits specific problem areas would result in savings of \$2,177,000

**5 Concluding remarks**

3.65 Although no concrete recommendations have emerged from these studies as yet, their perspectives, opinions and approach to regulatory burdens have definitely broadened our insights and understanding of regulatory obligations. As can be gleaned from the preceding discussion, the Commission has found the criteria developed by IPART to identify unnecessary and excessive obligations very useful and has adopted it.

## Sources of unnecessary and excessive obligations

### A *Original Legislation*

Legislation Imposing Regulatory Obligations on Local Government	Specific Provision Imposing Unnecessary, Excessive Or Inefficient Obligation
Disaster Management Act, 2000 (Act 57 of 2000)	
Electricity Regulation Act, 2006 (Act 4 of 2006)	
Housing Act, 1997 (Act 107 of 1997)	
Intergovernmental Fiscal Relations Act, 1997 (Act 97 of 1997)	
Intergovernmental Relations Framework Act, 2005 (Act 13 of 2005)	
Local Government: Municipal Demarcation Act, 1998 (Act 27 of 1998)	
Local Government: Municipal Electoral Act, 2000 (Act 27 of 2000)	
Local Government: Municipal Finance Management Act, 2003 (Act 56 of 2003)	ss33, 120
Local Government: Municipal Property Rates Act, 2004 (Act 6 of 2004)	
Local Government: Municipal Structures Act, 1998 (Act 117 of 1998)	s85
Local Government: Municipal Systems Act, 2000 (Act 32 of 2000)	ss 76-84 , 105(2)
Municipal Fiscal Powers and Functions Act, 2007 (Act 12 of 2007)	
National Environmental Management: Air Quality Act, 2004 (Act 39 of 2004)	
National Environmental Management: Biodiversity Act, 2004 (Act 10 of 2004)	
National Environmental Management: Integrated Coastal Management Act, 2008 (Act 24 of 2008)	
National Environmental Management: Waste Management Act, 2008 (Act 59 of 2008)	
National Health Act, 2003 (Act 61 of 2003)	
National Heritage Resources Act, 1999 (Act 25 of 1999)	
National Water Act, 1998 (Act 36 of 1998)	
National Water Services Act, 1997 (Act 108 of 1997)	
Spatial Planning and Land Use Management Act, 2013 (Act 16 of 2013)	
Statistics Act, 1999 (Act 6 of 1999)	

## **B Subordinate Legislation**

<b>Subordinate Legislation Regulatory Obligations on Local Government</b>	<b>Specific Provision Imposing Unnecessary, Excessive Or Inefficient Obligation</b>
Exemptions from the Municipal Finance Management Sections	
Generally Recognised Accounting Practices i.t.o s91(4) of the PFMA	
Municipal Asset Transfer Regulations	reg 33-46
Municipal Budget and Reporting Regulations	
Municipal Investment Regulations	
Municipal Public-Private Partnership Regulations	
Municipal Regulations and Guidelines on Minimum Competency Levels	
Municipal Regulations on Debt Disclosures	
Municipal Regulations on Financial Misconduct Procedures and Criminal Proceeding	
Municipal Regulations on Standard Chart of Accounts	
Municipal Supply Chain Management Regulations	
Updated Exemptions from the Municipal Finance Management Act Sections	
Local Government: Disciplinary Regulations for Senior Managers	reg 5(2)
Local Government: Municipal Planning and Performance Management Regulations	
Local Government: Municipal Performance Regulations for Municipal Managers and Managers Directly Accountable to Municipal Managers	
Local Government: Regulations Regarding Participation of Municipal Staff Members in Elections	
Spatial Planning and Land Use Management Regulations: Land Use Management and General Matters	