ANNEXURE E – Legal Framework for Role of National,
Provincial and Local Government

The scope of responsibility for provision of safety and security is articulated, in terms of Schedule 4 and Schedule 5 of the Constitution of the Republic of South Africa. Further, Chapter 3 of the Constitution emphasises the distinctive, interdependent and interrelated nature of government in these spheres and articulates clear principles of co-operative government and intergovernmental relations, which requires ‘All spheres of government and all organs of state within each sphere must - (a) preserve the peace, national unit and the indivisibility of the Republic; (b) secure the well-being of the people of the Republic’.

1. Imperatives for co-operative government

Chapter 3 of the Constitution acknowledges the distinct, yet interdependent and interrelated spheres of government, and provides clear principles for the coordination of their activities. Section 41 obligates all spheres of government and organs of the state to preserve the peace, national unity and the indivisibility of the Republic and secure the well-being of its people by providing an effective, transparent, accountable and coherent system of government as a whole. Additionally, Section 41(1)(h) requires government to cooperate in mutual trust and good faith by fostering friendly relations; assisting and supporting one another; informing one another of, and consulting one another, on matters of common interest; coordinating actions and legislation with one another; adhering to agreed procedures’ and avoiding litigation against one another. Further, the Constitution requires Parliament to enact legislation that establishes or provides for structures and institutions to promote and facilitate intergovernmental relations, and provides for appropriate mechanisms and procedures to resolve intergovernmental disputes.

2. Institutional mechanisms to facilitate intergovernmental relations

The Intergovernmental Relations Framework Act in 2005 (IGRFA) gives effect to Section 41(2) of the Constitution by providing a series of mechanisms to facilitate cooperative governance and intergovernmental relations between different spheres of government and organs of state. Specifically, the object of the IGRFA is to provide a framework to
facilitate the coordination of government in the implementation of policy and legislation that is grounded upon coherent government, effective provision of services, monitoring implementation of policy and legislation and the realisation of national priorities (IGRFA, sec 4).

To promote the object of the IGRFA, Section 5 requires national, provincial and local government to consider the circumstances, material interests, and budgets of different spheres of government and organs of state and to consult affected organs of state using intergovernmental structures. Section 31 of the IGFRA specifically states that where a specific Act or piece of legislation requires consultation with organised local government, such consultation must take place through an appropriate inter-governmental structure, and that organised local government must be represented in said structure. In addition, Section 5 requires national, provincial and local government to coordinate actions when implementing policy or legislation that affects the material interests of other governments; (iv) avoid unnecessary and wasteful duplication or jurisdictional contests; (v) take reasonable steps to ensure they have sufficient institutional capacity and effective procedures to consult, cooperate and share information, and to respond promptly to requests from other organs of state for information sharing; (vi) and participate in intergovernmental structures to which they are members. In addition, Chapter 2 of the IGRFA provides a range of intergovernmental structures composed of members of different spheres of government, such as the President’s Coordinating Council, National Intergovernmental Forums, Provincial Intergovernmental Forums, Municipal Intergovernmental Forum (including both district intergovernmental forums and inter-municipality forums), and Intergovernmental Technical Support Structures.

2.1 Obligations and responsibilities of national government

Both the IGRFA and the Local Government Municipal Systems Act (MSA) confer the power to make regulations and guidelines relating to provisions of both Acts to the Minister of the Department of Cooperative Governance and Traditional Affairs (COGTA). In terms of Section 47 of the IGRFA, the Minister may issue regulations relating to: (i) any matter prescribed in terms of the IGRFA; (ii) frameworks for the coordinating and aligning of development priorities and objectives amongst the three spheres of government; (iii) frameworks for co-ordinating intergovernmental conduct and actions affecting municipal functions; (iv) implementation protocols; (v) indicators for monitoring and evaluating the implementation of the IGRFA; and (vi) any other matter that may facilitate the administration of the IGRFA. In terms of the MSA, the Minister of COGTA may make
regulations or issue guidelines relating to: (i) community participation (sec 22); (ii) integrated development planning (sec 37); (iii) performance management (sec 49); and (iv) municipal services and sectoral matters (sec 94). In addition, Section 48 of the MSA requires the Minister of COGTA to develop a consolidated report containing Key Performance Indicators (KPIs) applicable to all municipalities, and to compile an annual report on the activities of local government which is based upon those KPIs and submit to Parliament and the Member of the Executive Council (MECs) for local government.

The power to assign functions to local government arises from Section 156(4) of the Constitution, which requires national government to assign to a municipality the administration of matter which necessarily relates to local government, if the matter would be most effectively administered locally, and if the municipality has the capacity to administer it. Further, Sections 9 and 10 of the IGRFA provide procedures governing the assignment of functions from national to local government, which first requires national government to consult with the National Minister of Finance and MEC for local government and to consider assessments by the Financial and Fiscal Commission; and second, requires national government to ensure the existence of sufficient funding and capacity building initiatives that are needed for local government to perform the assigned function. These procedural safeguards are also provided in terms of Section 9 of the Municipal Structures Act.

2.2 Obligations and responsibilities of provincial government

The Constitution confers provincial government with the power to oversee and intervene in the affairs of local government in ways prescribed by the Constitution and corresponding legislation (Constitution, sec 139). These obligations and responsibilities include:

- Monitoring and reporting on the affairs of local government to enhance the capacity of local government and to perform its functions and manage its own affairs.³
- Conducting reports on the financial status of municipalities.⁴
- Securing sufficient funding and capacity building initiatives on behalf of municipalities to the extent required for the performance of their functions.⁵
- Providing support services to municipalities, which includes the drafting of by-laws.⁶
- Assigning functions to municipalities in terms of provincial legislation.
- Coordinating intergovernmental relations between provinces and local
government.
- Overseeing the development and drafting of integrated development plans (IDPs)
by the municipalities.
- Intervening in the affairs of local government when a municipality has not
performed its statutory obligations.

The monitoring and reporting obligations of provincial government to local government
form a critical component of cooperative governance and intergovernmental relations
between the two spheres of government. For example, Section 46 of the MSA requires
every municipality to prepare an annual report at the end of each financial year which
must be submitted to the MEC for local government in the province. Section 46(3)(b)
allows representatives of the MEC for local government to then attend and speak at
meetings of Municipal Councils, and to pose questions relating to the affairs of the
municipality and issues contained in the annual reports; municipal managers are then
required to answer to questions raised in relation to the annual reports. Once all annual
reports have been received, the MEC for local government in the province must compile
and submit a consolidated report to the provincial legislature and Minister (sec 47(1)
MSA).

In addition, the MEC for local government is required by Section 105(1) of the MSA to
establish mechanisms and procedures to allow for the monitoring of municipalities in the
management of their affairs, the exercise of their powers, and the performance of their
functions. Additionally, Section 105(1) requires the MEC for local government to create
mechanisms for monitoring the development of local government capacity in the
province, and for assessing the support needed by municipalities for the strengthening of
their capacity to manage their own affairs, exercise their powers and performance their
functions (sec 105(1)(a)-(c) MSA). Further, Section 105(3) authorises MEC for local
government to require municipalities to submit any information to a specified provincial
organ of state either at regular intervals or within a period specified, which is subject to
the proviso that the request is not too onerous or that it places additional burdens on
municipalities. If the MEC sees that a municipality is not fulfilling a statutory obligation,
Section 106 of the MSA confers it with the power to intervene in the affairs of local
government.
As with national government, the power to assign functions from provincial to local government arises from Section 156(4) of the Constitution, which obligates provincial government to assign to a municipality the administration of matter which necessarily relates to local government, if the matter would be most effectively administered locally, and if the municipality has the capacity to administer it. Sections 9 and 10 of the IGRFA provide procedures governing the assignment of functions from provincial government to local government, which first requires provincial government to consult the MEC for finance, local government, and organised labour, and consider assessments made by the Financial and Fiscal Commission when assigning a function in terms of provincial legislation; and second, ensuring the existence of sufficient funding and capacity building initiatives that are needed to ensure the effective performance of the assigned function by a municipality. These procedural safeguards are also provided in terms of Section 9 of the Municipal Structures Act.

2.3 Obligations and responsibilities of local government

Section 151 of the Constitution confers municipalities with the power to govern the local government affairs of its communities, subject to national and provincial legislation. Further, Section 155 of the Constitution provides for three distinct categories of municipalities: metropolitan municipalities (Category A); District Municipalities (Category C); and Local Municipalities (Category B). Unlike metropolitan municipalities, district municipalities are required to make divisions in the functions and powers between district and local municipalities, with district municipalities working towards the achievement of integrated, sustainable, and equitable social and economic development by: (i) ensuring integrated development planning within the district; (ii) promoting bulk infrastructural development and services for the district as a whole; (iii) building the capacity of local municipalities in its areas to perform their functions and to exercise their powers where such capability is lacking and (iv) promoting the equitable distribution of resources between local municipalities in its district to ensure services are delivered (Municipal Structures Act, sec 83(3)).

Section 153 of the Constitution obligates municipalities to structure and manage their administration, budgeting and planning processes to prioritise the basic needs of the community and to promote the social and economic development of the community. In accordance with the principles of cooperative governance, Section 154 of the Constitution obligates national and provincial governments to support and strengthen the capacity of
municipalities to manage their affairs, exercise their powers and perform their functions, which includes promoting a safe and healthy environment. (Constitution, sec 152, 153, and 154). Municipalities fulfil their constitutional obligations by developing and adopting Integrated Development Plans (IDP) which must align with national and provincial development plans and strategies, and link to, integrate, and coordinate with the IDPs of other municipalities, (Municipal Systems Act, sec 24). The IDP serves as the single, strategic plan guiding the development of the municipality, and municipalities are required to align their resources and budgets to its implementation (Municipal Systems Act, sec 25).

In addition to promoting a safe and healthy environment and the social and economic development of a municipality, local government also retains executive authority and the right to administer any matter assigned to it by national or provincial legislation. (Constitution, sec 156) The power to assign functions to local government arises from Section 156(4) of the Constitution, which requires national and provincial government to assign to a municipality the administration of matter which necessarily relates to local government, if the matter would be most effectively administered locally, and if the municipality has the capacity to administer it. Further, Sections 9 and 10 of the IGRFA provide procedures governing the assignment of functions to local government, which includes: (i) consulting with the National Minister of Finance and MEC for local government and consider assessments by the Financial and Fiscal Commission when assigning a function by way of national legislation; (ii) consulting the MEC for finance, local government, and organised labour, and consider assessments of by the Financial and Fiscal Commission when assigning a function by way of provincial legislation; and (iii) ensuring the existing of sufficient funding and capacity building initiatives as needed for the performance of the assigned function. These procedural safeguards are also provided in terms of Section 9 of the Municipal Structures Act, which also deals with the assignment of functions.

Local government plays a key role the safety, crime and violence prevention needs of communities. In this regard, national and provincial governments are legally obligated to equip municipalities with the resources and capacity to plan, implement and monitor these services.