



DULLAH OMAR INSTITUTE

FOR CONSTITUTIONAL LAW, GOVERNANCE AND HUMAN RIGHTS

**Strengthening Local Government Legislative Authority in SA:
Implementation of Bylaws
Konrad Adenauer Foundation and Faculty of Law (NWU)**

21 July 2016

**Environmental Health
Introduction to the necessary content of an enforceable by-law**

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Legislative Definition of Municipal Health Services: National Health Act

The National Health Act 61 of 2003 defines 'municipal health services' as comprising **9** sub-components :

- water quality monitoring;
- food control;
- waste management;
- health surveillance of premises;
- surveillance and prevention of communicable diseases, excluding immunisations;
- vector control;
- environmental pollution control;
- disposal of the dead; and
- chemical safety

How do we define 'health' and 'the environment'?



Definition of Environmental Health

- **National Environmental Health Policy (2013)**
- ‘Encompasses those aspects of human health, including quality of life that is determined by physical, chemical, biological, social and psychosocial factors in the environment. It also refers to the theory and practice of assessing, correcting, controlling and preventing those factors in the environment that can potentially affect, adversely, the health of present and future generations.’
- **World Health Organisation Definition (1946):**
- Health – a state of complete physical, mental and social well-being, **not merely the absence of diseases or infirmity.**

Application of EH in intersecting environments

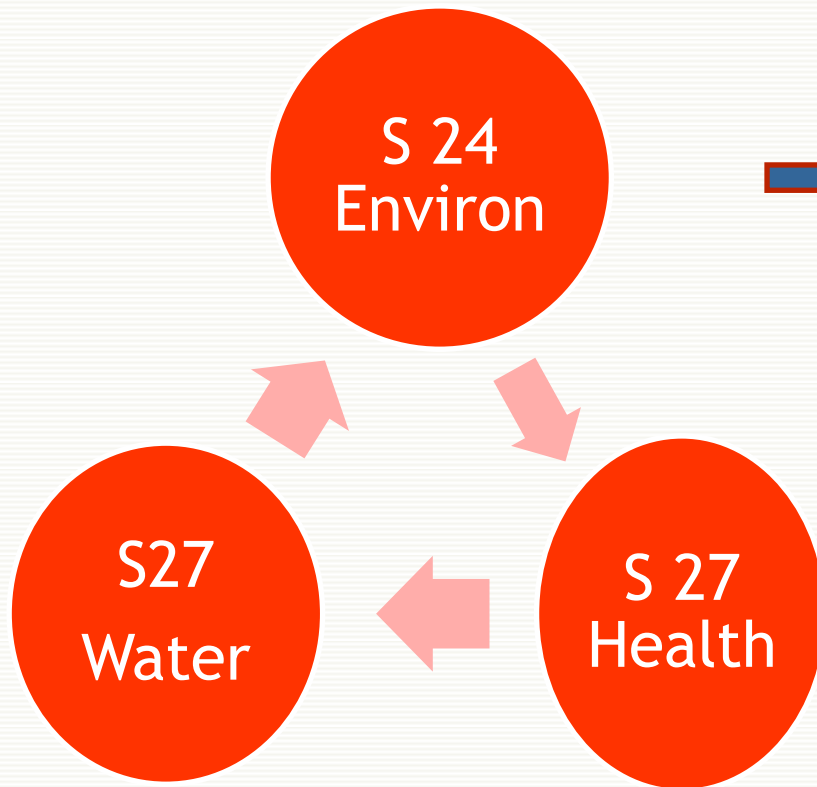


Municipal Health: Intersection between Socio-economic rights (SER) and LG powers and functions

SER in the Bill of Rights



LG Powers and Functions



■ Schedule 4B:

- (a) **electricity** and gas reticulation;
- (b) firefighting services;
- (c) **municipal health services**;
- (d) municipal public transport;
- (e) stormwater management systems;
- (f) water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems; and
- (g) child care facilities.



■ Schedule 5B :

- (a) cemeteries and crematoria;
- (b) cleansing; (c) municipal roads; and
- (d) refuse removal , refuse dumps and solid waste disposal.

Municipal Health: Subject to Reasonableness Test

- **SS (27(2) Constitution):**
- ‘The state must take **reasonable legislative** and other measures, within its available resources, to achieve the progressive realisation of this right.
- Justiciable (subject to judicial scrutiny);
- Applies to individual and communal rights;
- First requirement of reasonableness= ‘**legislative measures**’ must be taken;
- Municipalities **must** pass by-laws within the broader national legislative framework.

Complex Legislative Framework

- National Environmental Management Act
- NEM: Air Quality Act
- NEM: Waste Act
- National Water Act
- Water Services Act
- Foodstuffs, Cosmetics and Disinfectants Act
- Fertilizers, Farm Feeds, Agricultural remedies and Stock Remedies Act
- Cemeteries and Crematoria Act
- Hazardous Substances Act
- Tobacco Products Control Act
- Nuclear Energy Act
- Occupational Health and Safety Act
- National Road Traffic Act

Complex Legislative Framework

- Constitution
- Structures Act (Metros and DM as MHS)
- National Health Act
 - Section 32(1)

‘Every metro and district municipality must ensure that appropriate municipal health services are effectively and equitably provided in their respective areas’
 - Sections 80, 83

Authority to Act, Right of Inspection, Investigation; Powers of a Peace Officer
Right to issue notice to appear in court, etc. (S40, 56 *Criminal Procedure Act*)
- **Key Regulation**
- Health Professions Act – Regulations defining the ***Scope of the Profession*** of environmental health

Complex Policy Framework

- National Environmental Health Policy (NEHP, 2013)

(Sets the national framework for EHS; Synthesis environmental challenges, national health burdens, institutional challenges to the profession, necessary reforms, expands on the duties in the *Scope of Profession*)

- National Norms and Standards relating to Environmental Health (2016)

- Builds on NEHP,
- Creates the criteria against which delivery of environmental health services can be measured;
- Norm = a desired status, standard- a directive.
- Sets out the strategic plan to empower EH practitioners in the field (2016-2020);



An implicit concession that the national norms and standards are not immediately realisable in practice, rather subject to available resources and a 'risk assessment approach' that prioritises the most pressing local needs.

The standard of the reasonable municipality

(1) 'Musts'

- Compliance with legislative **directives** in key areas;
E.g (SANS) 241: Specifications for Drinking Water; Issuing certificates of competence for food undertakings, crematoria etc.
- What are **national priorities**?
 - Reducing quadruple burden of disease, reducing under- 5 mortality rate due to diarrheal diseases, reducing upper respiratory tract infections
 - What does this translate to for MHS = 'surveillance an prevention of communicable diseases'; sanitation, water quality monitoring, pollution control
- An indication that policy directives and norms and standards have been taken into account as far as possible;

(2) Risk Assessment Approach:

- The standard of 'reasonableness' is not an inflexible standard =**context-sensitive**;
- **Environmental Health Policy:**
- 'Do what is possible', 'Risk Assessment Approach'
- =What are the most pressing risks/needs in the municipal area (base line assessments
- Municipality has the task of synthesising national legislative and policy directives and marrying it to the local context;



Result:

- Asymmetrical approach to **local** needs;
- (urban vs rural municipalities, areas of greatest need)
- e.g urban emphasis on air pollution control, rural- water quality monitoring or pesticide control/use of chemical substances

The standard of the reasonable municipality

- A by-law cannot be divorced from the coherence of the executive programme that must give effect to it (the work that needs to be done to achieve legislative objectives)
- **Courts (*Grootboom, Mazibuko*): provide content to ‘reasonableness’**
- **Reasonableness requires:**
 - Comprehensive, coherent and coordinated programme;
 - Clear delineation of duties;
 - Must be capable of achieving long and short term goals;
 - Must cater for the ‘most vulnerable’

Reasonableness

- By-laws must reflect strong implementation systems:
- E.g water quality monitoring must meet the requirements of information gathering (sampling); monitoring, oversight and remedial intervention

Common Challenges

- IGR- Complexity of working with different national sector departments;
- Flow of information from sector departments (no clearing housing for information about new regulations, the repeal of regulations);
- Overlapping mandates within municipalities between different directorates 'grey areas' – 'everyone' and 'no one' is responsible if no clarification;
- Overlapping mandates between district and local municipalities

Legal requirements

- **Purpose of By-Laws:**
- Gives external effect to policies, provides legal certainty both in terms of municipal duties and expectations from the community
- **Authority to Act:**
- Authorisation of EHP (EHP must be registered Health Professions Act, and authorised by the municipality S 80 Health Act,)
- Additional specific authorisation required in terms of legislation outside the National Health Act; E.g Foodstuffs, Cosmetics and Disinfectants Act = municipality and EHP must be authorised to regulate production and sale of (milk)
- S 80= broad enough to cover existing and emerging threats,
- 83 Health Act, inspection and investigative powers,
- Criminal Procedure Act: officer of the peace
- **Legal Certainty:**
- For all stakeholders to which it is applicable;
- Clear requirements for different components of environmental health;
- Inspections (some functions require inspections at more regular intervals than others)
 - E.g child care facilities, versus caravan parks (categorise into high, medium risk)
- Requirements and procedures for issuing/renewing certificates of competence .e.g crematoria
- Clear remedial/ corrective penalties (range: issuing compliance notices- prosecution).

Legal requirements

- **'Meaningful engagement' = Procedural Compliance**

- Engage on the content of the by-law *before* promulgation to gain legitimacy and buy-in;

- **Example from practice: Western Cape EH Working Group:**

- **Comprised:** representatives from different municipalities, provincial sector departments, tertiary institutions, (ad hoc engagement with business) and community engagement.

- **Gains:** standard draft by-laws, rich interaction, knowledge-sharing, authoritative interaction with national government, compromises and assistance during periods of uncertainty.

- Ensure that all **public participation** requirements (Chap 4 Systems Act) are duly fulfilled- particularly where by-laws create sanctions against stakeholders.

- **Engage all relevant stakeholders;**

- If you are dealing with food safety: engage with informal vendors, small eateries, restaurants, school feeding schemes (household level to communal level);

- Be innovative: E.g Mbombela Pesticides Safety Awareness Campaign: education initiatives around household use of pesticides directed at school children after incidents of household poisoning- assisted in educating adults.

- **Include other directorates /municipalities in the formulation state;**

- Clarity on overlaps between sector departments;
- Certainty about the actions of district-based EHP in local municipalities;
- Applicability of their by-laws/policies within your own by-law.

Case Law

Federation for Sustainable Environment and Others v Minister of Water Affairs and Others (2012)

- Increasingly **searching, interrogative standards** of review used by the Courts to measure 'reasonable' action:

Water Services Act 'acceptable quality for human consumption';

- Carolina- contamination of drinking water- due to **acid mine drainage-**
- Approached the Crt to compel the municipality to restore quality supply of water;
- *Crt: 'there is no room for half measures in providing water'*

- **Intragovernmental disputes: District vs local municipality.**
- Crt: Local government primarily responsible 'no passing the buck' :**'intergovernmental disputes should be settled at the political level'**

- ▶ Crt: National and provincial have a role but **'local government is the end-provider of the service'**
- ▶ The court overlooked the specific authority and service provider functions of the municipalities to *order* compliance holding the district and local municipalities **jointly accountable- for providing a clean supply of water.**

- *Crt: refuted the argument of the municipality that water was safe to drink:*
- *'the water still had two exceptionally high substances a ph and aluminium which present health risks, which refuted the allegation that the water is safe to drink' (para 20)*

- **'Meaningful engagement' applied in water cases**
- Municipality ordered to resolve the matter as **'speedily as possible'** to **'engage and inform the community of the steps and progress in doing so'** (para [24]).

Conclusion

- As the reasonableness test indicates, bylaws are just the first step to the efforts that municipalities need to take to ensure the fulfilment of rights.
- A bylaw will remain a paper tiger, will not fulfil its potential as a tool in practice, if not used in conjunction with a coherent executive plan of action, which includes appropriate financial resources.