

**TOWARDS A
WATER SERVICES WHITE PAPER**

Issues and Options Discussion Paper

April 2002

Please note:

This document is not a policy document but has been written with the intention of stimulating discussion and debate around key issues and policy options.

For details of the process towards the development of a revised White Paper please consult the box on page 2.

Comments and policy proposals to be submitted to the Department of Water Affairs and Forestry before 31 May 2002, marked for attention of Ms Thuli Khambule at 012- 336 6572 (tel), 012-323 3877 (fax) or khambulet@dwaf.gov.za (e-mail).

Glossary

BOTT	Build Operate Train and Transfer, a form of contract entered into between DWAF and private sector partners with the objective of delivering cost-effective water services to rural areas rapidly.
CBO	Community-based organisation.
CMA	Catchment Management Agency.
CMIP	Consolidated Municipal Infrastructure Programme.
CWSSP	Community water supply and sanitation programme.
DPLG	Department of Provincial and Local Government.
DORA	Division of Revenue Act, Act 5 of 2002.
DWAF	Department of Water Affairs and Forestry.
IDP	Integrated Development Plan, a local government plan in terms of the Municipal Systems Act 32 of 2000.
MIG	Municipal Infrastructure Grant, a proposed consolidated grant from national government to support investments in municipal infrastructure.
NGO	Non-government Organisation.
TLC	Transitional Local Council.
water services	Water supply and sanitation services, as defined on Page 3.
WSA	Water Services Authority, as defined in Water Services Act 108 of 1997.
WSDP	Water Services Development Plans, a plan for water and sanitation services in terms of the Water Services Act 108 of 1997.
WSI	Water Sector Institution.
WSP	Water Service Provider, as defined in the Water Services Act 108 of 1997.

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ANNEXURE 1: Reflections on the 1994 White Paper guiding principles

ANNEXURE 2: Legislative issues: a preliminary and incomplete list

1. Introduction

1.1 Why a new Water Services White Paper?

It is now more than seven years since the first water and sanitation White Paper was published in November 1994: “Water – an indivisible national asset: Water Supply and Sanitation Policy White Paper” (referred to hereafter as the 1994 White Paper). Much has been achieved in these seven years and the 1994 White Paper played a key part in establishing an enabling policy framework. For this reason, the 1994 White Paper was focussed on the establishment of a new national water department and the role of this new department is assuming a direct delivery function on behalf of national government to provide basic water and sanitation (water) services rapidly to people living primarily in rural areas.

Since 1994, the context has changed significantly. It is now possible for local government to assume full operational responsibility for water and sanitation services as provided for in the constitution (Act 108 of 1996). This means that the role of the Department of Water Affairs and Forestry (DWAF) must change from a direct provider to that of a sector leader, supporter and regulator. The 2002 Division of Revenue Act provides a timetable for the phasing out of DWAF’s operational role over the next three years.¹

Local government, which is responsible for water and sanitation services in terms of the constitution, has undergone a fundamental transformation since 1994. A White Paper on Local Government (March 1998) was published and a suite of municipal legislation promulgated (including the Local Government Municipal Demarcation Act 27 of 1998, the Municipal Structures Act 117 of 1998, the Municipal Structures Amendment Act 33 of 2000, and the Municipal Systems Act 32 of 2000). The 1994 White Paper focussed largely on the role of DWAF and basic services for households. The new water services White Paper needs to be much more focussed on the role of local government with respect to water and sanitation services for all consumers (urban and rural, domestic and non-domestic), and on the nature of the regulatory, leadership and support role that DWAF and other institutions can and should play.

Important new government policies have been developed and implemented since the 1994 White Paper and these need to be reflected in a new water services White Paper. The Water Services Act (Act 108 of 1997) made important policy advances specifically with respect to the institutional framework. The Free Basic Water policy represents a further policy development within broad municipal and inter-governmental policy towards the goal of access to basic water by all. Water resources policies have been fundamentally overhauled subsequent to the 1994 White Paper (reflected in the Water Policy White Paper of 1997 and the National Water Act 36 of 1998). A new White Paper on Basic Household Sanitation (2001) (referred to hereafter as the Sanitation White Paper) has been produced overtaking the sanitation

¹ According to the Act DWAF owned and/or operated schemes will be transferred to the recipient municipalities during the period from 2002/3 to 2004/5. By 2005/6 their role as service provider should have ended with the transfer of all schemes. Schemes which have not been transferred to local government by this stage will be handed over to and “managed by service providers contracted by DWAF but funded and supervised by other appropriate institutions.”

related policies in the 1994 White Paper. The White Paper on Municipal Service Partnerships (2000) sets out policies and procedures for engaging with public and private agencies. These overtake (and to some extent may conflict with) the policies embedded in the Water Services Act (Act 108 of 1997).

The financial framework for water and sanitation services has changed significantly since 1994. Whereas during the past seven years DWAF has been an important financier of water investments, this responsibility will increasingly shift to national government support in the form of a consolidated municipal infrastructure grant (MIG) and the equitable share subsidy.

The 1994 White Paper itself notes that policy is dynamic and further that: “It is created to serve the people and we must continually be reassessing it to ensure that it is performing its role” (1994 White Paper: 38). There has been seven years of delivery of water and sanitation services and it is an appropriate time to take stock of what has been achieved in this period, and to reflect on how improvements can be made to both the policy framework itself as well as the implementation of this policy framework.

Whilst much of the focus of the 1994 White Paper was on delivery, it is now appropriate to place more focus on ensuring that water and sanitation projects and the agencies that manage water and sanitation services are sustainable and can maintain as well as expand access to water and sanitation services in the future.

1.2 Objectives and scope

This document has been prepared with the intention of supporting the development of a new Water Services White Paper. The purpose of this document is twofold:

- To table the key issues facing the sector which need to be considered in developing new policy.
- Based on an analysis of these issues, to propose an initial set of policy options.

This document will be used as the basis for dialogue with key stakeholders in the sector. It is in no way prescriptive, but is written with the intention of stimulating discussion and debate around key issues and policy options. The process to be followed in developing the White Paper is shown in the Box.

The Policy Review / White Paper Process

1. Publish issues paper (this document) in Government Gazette for public comment (April 2002).
2. Regional workshops and bilateral discussions (April and May 2002).
3. Consolidate comments and inputs received from workshops and bilateral discussions (May 2002).
4. Finalise draft policy, that is, Draft White Paper (June 2002).
5. Table Final Draft White Paper to Cabinet for approval (July 2002).
6. Publish White Paper in Government Gazette (July 2002).

This document should be seen as providing an initial skeleton of issues and options which can be added to and adapted during the White Paper process outlined above.

Scope of the White Paper. While the scope of the White Paper is restricted to water services (water supply and sanitation), *it will necessarily review the role of all government institutions* and not just the role of DWAF. Water Resources will not be dealt with except in so far as the interfaces between water resource management and water services need to be defined. A White Paper on Basic Household Sanitation (2001) has recently been published. The Water Services White Paper will not duplicate this, but rather focus on the relationship between basic household sanitation and the full spectrum of water supply and sanitation services as well as the overarching policy issues pertaining to the institutional framework, the regulatory framework, the financial framework and integrated planning. (A separate basic household sanitation policy was motivated on the basis that when sanitation is combined with water, water inevitably gets the priority attention to the detriment of sanitation.)

Definition of water services. Water services are defined for the purposes of this Discussion Paper as follows: the development of water resources, abstraction of water from the resource, its treatment, storage and conveyance to the point where it is delivered to consumers, where such consumers include households and commercial, industrial, and institutional bodies, as well as the collection and disposal of human waste, grey water and other wastewater. It includes all the organisational arrangements needed to run the service effectively, *inter alia* consumer services, metering, billing and collection.

Interface with other government policy initiatives. The Water Services White Paper will provide an overall policy orientation of government towards the water supply and sanitation sector. It is therefore important to identify and align as far as possible other government initiatives with the White Paper process. These include the review of the future role of Water Boards, the development of regulations as well as the process to review the Powers and Functions of local government and the establishment of a Municipal Infrastructure Grant.

2. Vision and objectives

It is important that the key goals of the water services sector as a whole be clear. The Water Services White Paper needs to answer questions such as: Why should national government be concerned and active in the area of water and sanitation services? What vision does government have for the water services sector? And, what outcomes does government wish to encourage and facilitate?

A proposed vision, set of development outcomes and sector objectives are set out below. These originate in large part from the Constitution and the broad development policies of government but should be reviewed and confirmed.

Sector vision

All people living in South Africa have access to an adequate, safe and affordable supply of potable water, live in a healthy environment with safe and acceptable sanitation, are able to engage in sustainable livelihoods, are economically empowered and are able to participate actively in a vigorous and healthy civil society. All people are knowledgeable about healthy living practices and use water wisely. There is adequate water available for economic development. Water supply and sanitation services are sustainable and are provided by efficient and effective service providers who are accountable and responsive to the customers they serve.

This vision is intended to capture, in a discursive form, an overall vision for the sector.

Development outcomes

1. A healthy population.
2. A healthy environment.
3. Economic growth which improves the quality of life and livelihoods of all of the population, especially the poorest.
4. A society based on democratic values, social justice, fundamental human rights and respect for human dignity.

The development outcomes, derived from the constitution are high level outcomes to which a successful water and sanitation services sector should contribute. These outcomes are not necessarily under the direct control of the sector, their achievement is nevertheless dependant on good performance in the sector. The outcomes should be measurable, so that it is possible to determine in years to come whether or not we are improving and realising these outcomes.

Sector goals

1. All people living in South Africa have access to an appropriate, acceptable, safe and affordable basic water and sanitation service.
2. All people living in South Africa are educated in healthy living practices (specifically with respect to the use of water and sanitation services) and the wise use of water.
3. Water and sanitation services are provided:
 - equitably (adequate services to all people, fairly)
 - affordably (no one is excluded from access to basic services because of their cost)
 - effectively (the job is done well)
 - efficiently (resources are not wasted)
 - sustainably (there are adequate resources to operate, maintain, rehabilitate and expand services as necessary).
4. All water service authorities (local government) are accountable to their citizens and have adequate capacity to make wise choices (related to water service providers) and are able to effectively regulate water services provision.
5. Water and sanitation services are priced to reflect the fact that they are both social and economic goods (that is, promoting access to a basic safe service, encouraging the wise use of resources) and to promote the sustainable and wise use of resources.
6. Water and sanitation services are effectively regulated nationally to monitor and support the ongoing achievement of these goals.

The sector goals are more specific measurable goals which are within the control of the water and sanitation services sector. It should be possible to measure over time the extent to which the sector is improving and achieving the defined sector goals.

3. Guiding principles

The 1994 White Paper proposed a set of guiding principles which are discussed in Annexure 1. To a large extent, these principles have been overtaken by overarching policies and legislation as reflected, for example, in the Constitution and municipal policies and legislation (for example, the Local Government White Paper and the Municipal Systems Act). Nevertheless, it may be useful to propose a set of guiding principles which can be used to inform the development of the new Water Services White Paper.

Proposed guiding principles

- **Universal access to basic services.** Government to take reasonable legislative and other measures, within its available resources, to provide universal access to a basic level of water services in an equitable manner. (Constitution)
- **Service delivery by Local Government.** Local Government is responsible for service delivery but is supported by other spheres of government. (Constitution and Water Services Act)
- **DWAF to support and monitor performance.** The Department of Water Affairs and Forestry to support local government, to set national norms and standards and to monitor performance of all water services institutions. (Water Services Act)
- **Clear allocation of roles and responsibilities.** The institutional framework provides clear and funded mandates, with no (or minimal) overlapping of roles and responsibilities. (Principles of good governance)
- **Community participation and the planning process:** Community participation is a statutory requirement in Water services Development Plans (WSDP) and Integrated Development Plans (IDP) as well in the implementation of such plans. (Water Services Act, Municipal Systems Act and Batho Pele Principles)
- **Sustainable service providers.** Water Services Providers are sustainable and have adequate resources to maintain, operate, rehabilitate and expand water services as necessary and appropriate. (Constitution)
- **Effective and efficient service provision.** Water services are provided effectively and efficiently with the minimum waste of resources. (Constitution, Municipal Systems Act and Water Services Act)

These guiding principles are intended to inform the development of policy. They are not necessary measurable but reflect an overall approach and orientation.

Key issues

- Should the White Paper put forward a set of guiding principles?
- Are the proposed guiding principles acceptable?

4. Reflecting on past experience

Much has been achieved in the water services sector in the past eight years. More than ten million people have been provided with a water service (though significantly fewer with sanitation services) and it is estimated that some 26 million people have access to a free basic water allocation. This is a significant achievement by any standards. Yet much remains to be done and there is room for improvement. In this context, it is useful to reflect on the 1994 White Paper, to review the performance of the sector over the last eight years and to learn from experiences in other developing countries.

4.1 Reflections on the 1994 White Paper

A new department. The 1994 White Paper was written at the time of the amalgamation of a fragmented set of institutions into a new national department of Water Affairs and Forestry (DWAF). DWAF is still undergoing transformation.

Comment: The new Water Services White Paper will provide the framework for the ongoing internal transformation. It should provide more clarity on some of the new roles for DWAF.

A focus on equity. In 1994 it was estimated that 12 million people could not access water within 200m of their homes and more than 17 million people were without access to piped water supplies in their yards. This immediately defined the short and long term policy goal. A key focus of the 1994 White Paper was on extending access to basic water and sanitation services.

Comment: The priority focus on equity is likely to remain as a priority issue in the new White Paper.

Consolidation of institutions. The failure to effectively deliver services was attributed to institutional fragmentation, the absence of coherent policy, absence of a coherent institutional framework, overlapping institutional boundaries, lack of political legitimacy and will, and the failure to allocate resources to where they were most needed. A key driving force behind the 1994 White Paper was the consolidation of institutions and the development of a coherent institutional and policy framework.

*Comment: The new, permanent local government framework was only put in place in December 2000 and it still in the process of establishment. Issues such as the resolution of the powers and functions debate are critical to the successful development of the sector over the next few years. **This is a key strategic issue.***

Long term institutional vision. “The goal is that the provision of services to consumers should be the function of competent, democratic local government supported by provincial governments. Where necessary and appropriate, second tier institutions (such as Water Boards) will provide bulk water and wastewater services to local authorities.”

Comment. The long term vision for local government still holds although the role for provinces is less clear (see below). The role and functions of Water

Boards will increasingly depend on their acceptability as service providers by local government. (See separate discussion of the Role of Water Boards below.)

The role of national government. The 1994 White Paper identified the key roles of national government to be the custodian of the water resource (ensuring it is managed in the public interest) and to ensure that all citizens have access to adequate water and sanitation services.

Comment: The role of national government with respect to water resources is not within the scope of this White Paper. In terms of ensuring adequate access to basic water and sanitation services, DWAF originally played an important role in financing and investing in new schemes, and running existing schemes. A key challenge for DWAF over the next few years will be the process of withdrawing from a direct role in water and sanitation services provision yet maintaining and developing important leadership, supportive and regulatory roles with respect to all water and sanitation services.

The role of provincial governments. The 1994 White Paper envisaged Provinces playing an important support role to local governments in support of the local government constitutional responsibility to provide water and sanitation services to households. To this end, Provincial Water Liaison Committees were established with the functions of liaising with DWAF, the identification of priorities and critical areas of need, and advising on the implementation of water and sanitation services investments.

Comment. Provincial government continues to play a key role in establishing and supporting the structure of local government. Water and sanitation services (as limited to potable water services and domestic sanitation and sewage systems) are listed in Schedule 4B of the constitution as a concurrent National and Provincial Legislative competence, limited by Clause 155(6)(a) and (7) which sets out monitoring and support responsibilities of provincial government vis-à-vis local government and national government authority to oversee the effective performance of local government. Provincial Water Liaison Committees have not always functioned effectively to date, an issue which needs to be addressed in the new White Paper.

The role of local government. Local government has the primary constitutional responsibility to provide basic water and sanitation services to people living within its boundary.

Statutory water committees. The 1994 White Paper provided for statutory Local Water Committees to undertake the task of water and sanitation provision in the absence of capacitated local government.

Comment: No statutory local water committees have been formed in the period 1994 to 2001 and hence this provision is obsolete and should not be reinserted into the new White Paper. This should not be confused with community-based organisations (CBOs) acting as WSPs in small / rural communities, operating with the agreement and support of the relevant local government.

National Water Advisory Council. The 1994 White Paper provided for the establishment of a National Water Advisory Council.

Comment: This Council has been formed and has worked well, but deals with both resource and service issues. Should the Council continue as a single body?

The role of the private sector. The 1994 White Paper cautiously welcomed the involvement of the private sector, recognising that it had a role to play, but conscious of the need to minimise the risks associated with private sector involvement, namely poor performance and failure (emphasising the need to understand why some projects have performed poorly or failed in the past), the need for the private sector to transfer skills and build capacity in both communities and public sector delivery agencies, and the need for professionals in the private sector to work differently, that is, be more community orientated.

Comment: DWAF has used the private sector extensively in its roll out programme to provide basic services. The BOTT contracts used by DWAF did not achieve the desired results in terms of training and transfers and unit costs were significantly higher than conventionally implemented projects, leading to the closure of the programme. In-service management success is dependent on properly structured contracts, the appropriate distribution of risks and incentives, and adequate capacity to manage the contracts. The role of the private sector should be well structured in terms of national policy frameworks and the water sector policies and legislation should align with these national policy frameworks, ensuring that private involvement contributes effectively to national priorities, in particular, to meeting the needs of the poor and unserved.

The role of NGOs. The 1994 White Paper stated unequivocally that government is committed to working with NGOs.

Comment: This principle should be retained in the new White Paper. NGOs have a critical role to play in influencing policy development and assisting all spheres of government with implementation of projects at community level. They can play an important role in advocacy and in creating a link between government and local communities. The current environment in South Africa presents some threats to the future role of NGOs. The main threat being that of declining foreign donor funding. The new White Paper should consider options that will create a conducive environment for NGOs to operate in and indicate areas in which they could most usefully focus their efforts.

Definition of basic services. Basic services are defined in the 1994 White Paper and subsequent legislation.

Comment: The compulsory national standards as a set of regulations promulgated in 2001 in terms of section 9 of the Water Services Act now defines basic services. Do these definitions need to be revisited in light of the Sanitation White Paper, the recommendations coming from the Appropriate Technology Conference and broader policy discussions? Should a phased approach be proposed whereby the level of basic services is raised once reasonable coverage is achieved at existing levels?

Training and capacity building. The 1994 White Paper provided for a National Community Water Supply and Training Institution (NCSWSTI) at the University of the North. The 1994 White Paper also identified various training needs.

Comment: To what extent should a policy and strategy related to training be part of the new White Paper? Look at implications of Sector Education and Training Authority (SETA). Should we be supporting universities or doing it through SETA? How well has the NCSWSTI functioned?

Financial policy. “The basic policy of government is that services should be self-financing at a local and regional level. The only exception to this is that, where poor communities are not able to afford basic services, Government may subsidise the cost of construction of basic minimum services but not the operating and maintenance or replacement costs.” (1994 White Paper: 19)

Comment: The financial policies set out in the 1994 White Paper have been superseded and become obsolete. The financial policy framework needs to be substantially revised taking into account, inter alia, the statutory financial framework for local government, including indigent (or Pro-poor) policies, the free basic water services policy, the role and financing of Water Boards, the role of private sector financing, and the financing of water schemes in terms of the national pricing strategy and water tariff regulations. Affordability is still an issue that must be addressed in the financial framework.

Financing higher service levels. The 1994 White Paper indicated that Government would support local government and other agencies to arrange finance where communities choose higher levels of service than the minimum levels and where communities can afford the finance costs.

Comment: This issue needs to be addressed much more explicitly and in a more practical way in the new White Paper in the context of the local government financial framework. This is a key strategic issue.

Tariff policy. The 1994 White Paper asserted that “communities must pay for their operating and maintenance costs to ensure both equity and sustainability” (1994 White Paper: 23). The 1994 White Paper rejected uniform national tariffs. A three-tier rising block domestic tariff was proposed, comprising a life-line tariff for consumption of less than 25 lcd, a normal tariff based on average historic costs for consumption between 25 lcd and 250 lcd, and a marginal tariff based on long-run marginal costs for consumption in excess of 250 lcd. Communal tariffs were provided for in the case of local communal sources (such as a borehole or spring).

Comment: The Free Basic Water policy has superseded the 1994 White Paper policy with respect to life-line tariffs and the recovery of operating and maintenance costs, effectively requiring that the life-line tariff be set to zero for domestic supplies (at least for those who cannot afford the service). Apart from this change, the concept of a rising block tariff based on these principles could be retained in the new White Paper. These and other issues have already been addressed in the tariff regulations which were gazetted in 2001. Some key issues to be addressed are the following: Are the regulations adequate or do they need revision? Is provision needed for cases such as large household size? Are alternative systems – such as a lump-sum credit – feasible and are they likely to lead to a better result from an equity point of view?

Credit control. Although the White Paper implored people to pay for their services and to regularise their connections (where they were illegal), the White Paper was silent on the issue of credit control, how this could be achieved, what the

consequences would be for illegal connections (beyond a “grace period” of 2 years) and non-payment for water and sanitation services.

*Comment: The Municipal Systems Act states, in general terms, what should be included in a credit control policy. Should water and sanitation services policy seek to go further? Effective credit control is critical to the sustainability of the water and sanitation services sector. Do the existing laws and regulations (for example, Section 4 of the Water Services Act) need to be clarified? Whilst a Free Basic Water policy should make credit control easier (as people no longer have an excuse not to pay), there remains a need to educate people as to their reciprocal civil responsibility to pay for services rendered where these are over and above that provided for in the Free Basic Water Policy. Is disconnection or restriction an acceptable form of credit control? **This is a key strategic policy issue.***

Performance and monitoring. The White Paper made commitments to the effective monitoring of sector performance to ensure that universal access to basic services is progressively achieved, that financial resources (especially subsidies) are used efficiently and effectively, that water services institutions (authorities and providers)² are accountable to local communities and that standards are maintained. To facilitate this process, the Water Services Development Planning process was initiated and a National Water Supply and Sanitation Information Management System was proposed. This system was to provide useful, accessible and reliable information for communities, local government, Water Boards, provincial governments, consultants, NGOs and national government.

Comment: An evaluation of the performance of the sector is provided in the following section. This review indicates that whilst monitoring has been undertaken, it appears to have focussed on the wrong things, with too much emphasis on technical and output details (for example, number of projects built) and not enough on the measurement of outcomes (such as sustainable, safe water systems) and on the efficiency of delivery (cost-efficiency of inputs to outputs). Is their a justification for a separate national water information system? Is it adequately linked to the Integrated Development Plans and Water Services Development Plans as these are the core planning and monitoring systems at local government level?

² These terms only came into use after the implementation of the Water Services Act, nevertheless, the intention is clearly there in the 1994 White Paper, where it refers to all institutions engaged in water services.

SUMMARY: Key points of departure for the new White Paper

- Local government is now the key locus of delivery (before it was DWAF in the rural areas).
- The roles afforded Water Boards in the 1994 White Paper should be reviewed.
- DWAF to transform itself into a sector leader, supporter and regulator (rather than a player).
- The role of Provincial Water Liaison Committees to be reviewed.
- The role of Statutory Water Committees to be reviewed.
- The role of the private sector to be clarified.
- Definitions of basic services to be reviewed?
- The financial policy framework to be reviewed and revised.
- Free basic water and sanitation services are a key policy goal (previously the emphasis was on cost recovery of operating and maintenance costs).
- The implications of free basic water and sanitation services for sustainability, credit control and financial viability of water service providers to be examined.
- The monitoring and evaluation framework should focus on outcomes and resource management rather than on inputs, be closely linked to WSDPs and IDPs and integrated with the regulatory framework.

4.2 Reflections on sector performance from 1994 to 2001

Delivery focus. The period from 1994 to 2001 in the water services sector can be broadly split up into three different stages. The first, from 1994 to 1997, saw the launch of the new government's RDP programme, and the presidential lead projects. This was a period characterised by an emphasis on delivery, and rapid roll-out of the government Community Water Supply and Sanitation (CWSS) programme as well as service provision through the national housing subsidy mechanism and the Consolidated Municipal Infrastructure Programme (CMIP).

Water Service Act. The Water Service Act (108 of 1997) established the basic framework within which water and sanitation services would be provided in future. Specifically, the role of local government as the Water Service Authority, the distinction between the Water Service Authority and the Water Service Provider, and the creation of the mechanism of Water Services Development Plans which were set up as a key planning, management and monitoring instrument.

From late 1996, starting with an external review of Mvula Trust, and culminating in the DWAF Appropriate Practices Conference in East London in March 1999, several evaluations into the water and sanitation service sector were conducted. From the various studies, a broad consensus seemed to be appearing, acknowledging the achievements since 1994, but highlighting the need to shift the emphasis away from

rapid delivery in rural basic needs schemes, towards a much greater focus on achieving sustainability, and creating the right incentives to do so. Improved cost recovery and decentralised management were seen as key components required for the creation of sustainable water schemes.

Local government and free basic services. The next period is characterised by the establishment of permanent local government structures and the introduction of the government's Free Basic Water (FBW) policy that coincided with the local government elections in December 2000. Sustainability is still a key concern, but with the introduction of FBW, this now translates into designing schemes that are affordable to the local municipality, rather than the household. The focus has shifted away from "communities" towards local government and delivery is increasingly being implemented by local government. Due to the changed playing field, many of the lessons learnt from late 1996 to the Appropriate Practice conference in March 1999 (for example, DWAF's experience with BOTTs) are not directly relevant in their original form, but need to be adapted to the new context. Emphasis on rapid delivery still remains, increased attention is being paid to creating sustainable schemes, with local government the key focus. In other words, the key question has become: how can local government deliver sustainable services to its residents effectively, efficiently and equitably? It should be noted that very little attention has been given to date to free basic sanitation services.

Key challenges: backlogs and sustainability. There have been two main challenges facing the water services sector since 1994: addressing the service backlog, and creating technically and financially sustainable water supply schemes. While the first period emphasised delivery, the second highlighted the merits of sustainability through demand-based delivery, increased cost-recovery and delegated management. With the end of cost-recovery from users (for small basic amounts of water) there is a need to re-examine the implications of this for sustainability, and how best to achieve it under the current policy framework.

A performance evaluation framework. A key underlying theme revealed in the reflection on sector performance is the absence of an adequate monitoring and evaluation framework and system. Information on sector performance as a whole is not readily available. Available information typically focuses on inputs (number of schemes built, taps installed etc) rather than outcomes (people living in a healthy environment, for example) and the effectiveness or efficiency of resource measurement (the unit cost of water, service reliability, water loss management and income collection, for example).

Key challenges

Promoting equity through the provision of basic services.

Ensuring sustainability of water services and water service providers.

Monitoring and evaluating sector outcomes.

4.3 Reflections on international experience

It is useful to reflect on key trends and lessons emanating from international experience. These are highlighted below based on a perfunctory literature review.

Decentralisation of operations. Previously centralised operation of water supply to, and wastewater disposal/treatment from, households is being decentralised so that the integrated management of the water cycle is balanced with operations that are undertaken closer to users and which are more responsive to their needs.

Comment: Note that the aims of decentralisation are greater accountability of the service provider to the user (customer) and more responsiveness to user needs. These benefits need to be balanced with possible economies of scale in the provision of services.

Greater public participation. User and consumer groups are beginning to have more input into the policy making process and exert influence on the way in which agencies operate. This increases accountability and responsiveness to local needs and also allows women, who are most affected by inadequate water and sanitation facilities, to have greater influence.

Comment: In terms of developmental local government, the philosophy underpinning the new local government policy, public involvement is now a statutory requirement for service and project planning and implementation in terms of the Integrated Development Planning and Water Service Development Planning processes.

A demand-responsive approach rather than a supply driven approach. International experience points out the pitfalls of a supply driven approach which risks over-providing infrastructure, creating costly and unsustainable schemes and is typically wasteful of resources. Demand-responsive approaches, although more difficult to implement, are more likely to lead to the appropriate choices of technology based on local conditions, lower costs, better use of resources and more sustainable schemes.

Comment: An important question in the South African context is the extent to which the processes of Water Service Development Planning and Integrated Development Planning adequately incorporate a demand responsive approach. The answer probably lies in how this planning is undertaken.

Increasing use of cost-reflective pricing. Whereas in the past most countries subsidised their water and sanitation services heavily, many countries are now beginning to base their water supply and wastewater charges on actual costs. Raw water abstraction costs are being implemented, recognising water as an economic resource and the opportunity cost of taking water away from natural systems. Effluent charges are being used to reflect costs of pollution on the environment and downstream uses of the water.

In South Africa, the key challenge is to balance the social good nature of water (making basic water services affordable) with the economic good nature of water (the need to encourage the efficient and sustainable use of the resource).

Improved management incentives. Performance management techniques, management and employee incentives, greater reliance on commercial accounting

practices and "ring-fencing" within local authority bodies³ are being used to improve accountability and budgetary control and improve institutional efficiency and performance.

Comment: The development of performance management systems is now required in terms of the Municipal Systems Act. Some large water service authorities have begun to ring-fence their operations for more robust accounting of the water services function.

Greater private sector involvement. An increase in private sector involvement is occurring particularly in large systems serving urban areas. Mechanisms used include: contracting out of services, build-operate-transfer (BOT) operations, build-own-operate (BOO) operations, management contracts, leases and concessions.

Comment: South Africa already has some experiences with private sector involvement in the water sector and can learn from these in order to guide future policies and strategies.

Separation of regulatory and operational responsibilities. Clearer separation of the activities of regulation and operation can help to reduce the potential for conflict of interest inherent in self-regulation and can improve the clarity of objectives and responsibility. The separation of economic regulation from quality and environmental regulation may also undertaken to ensure a proper balance between quality standards and cost to the consumer.

Comment: South Africa has some experience with independent regulators in other sectors (for example, electricity and telecommunications). The water sector can learn from these experiences, as well as experiences elsewhere in Africa and the rest of the world to inform an approach to the regulation of water services in South Africa.

Structured learning aims to design reforms taking into account experiences in other settings, to monitor performance carefully, and to adapt as new information becomes available. Active interest of governments and sector institutions, is an essential prerequisite for the successful implementation of such a process.

Independence from undue political interference. An important requirement identified for effective performance is that both the service provider and the regulatory body (where one exists) be free of undue political interference in day to day operations.

Clearly specifying and separating immediate and longer terms goals. It is important to keep the longer terms objectives in mind and to ensure that the shorter term imperatives serve to build towards the longer term objectives.

Policy issue

To what extent should these international trends and lessons learn be taken on board in the development of the White Paper?

³ Creating operational areas which have a separate cost centres.

5. The key strategic challenges

The key strategic challenges facing the sector are highlighted in this section. Further discussion on some of the challenges raised is provided in Section 6 (Some selected policy issues and choices).

Challenge 1: Promoting effective, sustainable, affordable and efficient service delivery.

This is the key overarching challenge for the sector. Effective, sustainable, affordable and efficient service delivery will be promoted if the following strategic challenges are attended to.

Challenge 2: Improving Water Service Development Planning

Promoting the Water Service Development Planning process (in the framework of the IDP) as the key instrument for planning, managing, monitoring and regulating water services in South Africa and with full community involvement.

An integrated plan. The Water Services Act requires that Water Services Authorities (municipalities) prepare a Water Services Development Plan (WSDP). The plan must cover socio-economic, technical, financial, institutional, and environmental factors and set out how water and sanitation services will be delivered in a sustainable manner over a five year period taking into account both capital and operating costs as well as sources of financing and revenues. In terms of the Integrated Development Planning process set out in the Municipal Systems Act, the water and sanitation service plan should be integrated into the Integrated Development Plan for the municipality. It should be stressed that the WSDP is much more than a technical master plan because it is required to show how services will be provided in a financially sustainable manner, at the same time addressing the social needs of the community.

Integrated water and sanitation planning. The WSDP process facilitates the integrated planning of water and sanitation services. This is important because the choice of the level of service for water predetermines the viable technology choices for sanitation (and grey water disposal) and *vice versa*. Integrated planning also requires that health and hygiene education be integrated and co-ordinated with water and sanitation services provision.

Management arrangements. The WSDP must also show how water and sanitation services are to be managed during the five year period. This means that the choice of Water Services Providers arrangements, and how these will be managed, should be made explicit within the WSDP.

Business plans. The WSDP should be used as the framework for the development of a more detailed water services business plan which a Water Services Provider should develop.

Customer orientated approach. The Water Services Development Plan takes as its starting point an understanding of consumers, their characteristics, what services they

need and what they are willing to pay for. The plan integrates this ‘demand for services’ with the resources which are available, both physically, financially and organisationally. This means that community involvement is a statutory requirement and is therefore consistent with a demand responsive approach to delivering water and sanitation services.

Service goals, service level choices and technology. A key component of the WSDP is a commitment to providing services to the unserved. Thus a WSDP must specify how many new customers will be provided with what level of services by what time. Furthermore, the WSDP must show how the capital programme will be funded and that this capital programme is financially sustainable in the long term in terms of the ongoing operating costs and the repayment of loans, and that the tariffs required to maintain a financially viable service are affordable. Within this framework, Water Services Authorities may choose to opt for a progressive realisation of the minimum standards as set out in the Section 9 regulations of the Water Services Act, going for broader coverage first and increasing levels of service over time. Technology choices should be appropriate to local conditions.

A citizens’ WSDP. It is the intention that each WSDP will also have a citizens’ WSDP which summarises the key outcomes of the WSDP relevant to people living within the municipal (water service authority) area.

Finally, the WSDP provides the framework for information on service provision that is necessary to enable both consumer and regulator to monitor the effectiveness of their water service institutions.

The Water Service Development Planning (WSDP) framework provides a sound basis for planning, managing and regulating the sustainable, affordable and efficient delivery of services in South Africa. Nevertheless, the practice of planning can be improved in important respects.

Improving the effectiveness of Water Services Development Planning

1. Municipalities need to assume greater ownership of the plans and use the plans as the basis for management of the service.
2. Greater integration between the WSDP process and regulation. To facilitate regulation, the WSDP needs to place greater focus and emphasis on key outputs such as service coverage (capital programme, who will be supplied with what by when), tariffs, key service quality indicators (for example, water and effluent quality, service downtime) and water demand management (wise use of water, unaccounted-for water).
3. Improving WSDP planning to better take into account the relationship between water and sanitation services.
4. Improving WSDP planning to guide strategies and choice related to the choice of service levels and technology. (See Section 6.1)

Question: Do the Section 9 regulations need to be revised?

Challenge 3: Developing Water Service Authority capacity

Developing Water Service authority capacity to make wise choices in relation to the selection of water service provider options and the management (and regulation) of water service providers.

Municipalities, as the statutory water service authorities, have a critical role to play in ensuring the proper functioning of water and sanitation services. In terms of the constitution, they are responsible for ensuring that all citizens have access to a basic service and that services are provided in an equitable, efficient and sustainable manner. In terms of the Water Services Act, Water Services Authorities are responsible for selecting Water Service Providers to undertake the provision of water and sanitation services on their behalf. Local government capacity is weak in many areas in South Africa, potentially compromising the effective rendering of water and sanitation services.

The nature of water and sanitation service provision differs markedly between urban and rural areas, between dense and sparsely populated areas, and between cities and small towns. Further, the nature of water and sanitation services provision is dependent on the technology employed. For example, the type and level of skills required to operate and maintain a protected spring or handpump are markedly different from those required for a complex and sophisticated large urban scheme. It is thus appropriate that the nature of the service provider differs depending on the characteristics of service provision. This implies that there should not be a “one size fits all” model for water service providers.

Developing water service authority capacity (See also Section 6.2)

How can water service authority capacity be strengthened?

How can water service authorities be supported in their task?

Should a specialised water service authority support unit be created?

How can the institutional and regulatory environment create a conducive environment for the wise choice of service providers, be they public, private or community-based?

How can the institutional environment encourage greater competition in the function of services delivery (to promote effectiveness and efficiency), yet at the same time ensure that the public interest is safeguarded?

Should a specialised water service provider support unit be created, focussing especially on community-based and SMME-type water service providers?

Challenge 4: Refining the regulatory framework

Developing a regulatory framework which is appropriate for the water services sector and which ensures the effective, efficient, equitable, affordable and sustainable provision of at least a basic water and sanitation service to all people living in South Africa and cost-effective, reliable services to businesses and institutions.

The water services regulatory framework needs to protect and support consumers as well as to create an enabling environment for water service authorities and water service providers and help promote the efficient, equitable and sustainable provisions of services. The regulatory framework should not be complex nor onerous and should be matched to the capabilities of water service authorities and water service providers. A “one size fits all” regulatory approach is not appropriate in the South African context. Clearly the regulation of a large metropolitan water utility poses an entirely different set of challenges compared to the regulation of a community-based Water Services Provider managing local water and sanitation services in a small rural community.

Refining the regulatory framework (See also Section 6.4)

How can a single regulatory framework provide for a plurality of service provider options?

What mechanisms should be followed to support consumers in realising their expectations?

What are the linkages and interfaces between water and sanitation specific regulation and general municipal regulation?

How can the regulatory functions in the water and sanitation sector be separated from operational functions?

How can the regulatory framework work both to support water service authorities as well as to regulate them?

Should the economic, financial, social and environmental regulatory functions be separate from each other?

Should there be an independent regulator? (Where should the regulatory functions reside?)

Should public service providers fall under the same regulatory regime as private service providers?

Should there be a DWAF intervention function and should this be integrated into the regulatory framework? (There is currently an intervention policy in terms of the Water Services Act.)

Challenge 5: Clarifying the institutional framework

The current institutional framework is complex for a number of reasons:

- The new local government boundaries mean that water service authorities must deal with a range of approaches to water and sanitation services in their areas spanning both urban and rural areas.
- There is a lack of clarity related to the allocation of powers and functions with respect to water and sanitation services between category B (local) and C (district) municipalities.
- Water boards act as both bulk and retail service providers, often across multiple water service authority boundaries. At present, the relationships between Water Services Authorities and Water Boards is neither clear nor transparent.
- DWAF own and run schemes within water service authority areas at present and this adds to the current institutional complexity. (In terms of the Division of Revenue Act 5 of 2002, DWAF's direct involvement in schemes will end in the next few years.)

Clarifying the institutional framework

The allocation of powers and functions for water and sanitation services between B and C municipalities needs to be resolved as a matter of urgency. (See Section 6.6.1)

The role of Water Boards needs to be reviewed or clarified in the new policy. (See Section 6.3.2)

Ensuring the financial viability and sustainability of water service providers is critically important. Great care needs to be taken to develop an institutional and financial framework which minimises the risk of setting up water service institutions for failure. (See Section 6.5)

The boundaries between water resource development and water services, and institutional responsibility for water resource development, need to be clarified. (See Section 6.6.4)

There needs to be greater clarity with respect to the respective responsibilities and roles of Water Service Authorities and Water Service Providers when these are in the same organisation (that is, the municipality).

Challenge 6: Rationalising the financial framework

Water and sanitation services are presently funded through a number of different mechanisms including direct DWAF financing of schemes (both operating and capital), a consolidated municipal grant (CMIP which is to be transferred into a Municipal Infrastructure Grant), the equitable share subsidy, RSC levies and user charges. DWAF's support to WSPs has focussed on meeting basic needs and operating existing schemes. It is proposed to rationalise funding streams in terms of the programme outlined in DORA (2002) which will pose some challenges to the water and sanitation sector, especially in the transition.

Rationalising the financial framework (See also Section 6.5)

In the context of the creation of a consolidated municipal infrastructure grant (MIG), how can the appropriate incentives for wise investments in water and sanitation services, which support the overall sector goals and objectives, be created?

How will DWAF monitor and intervene in water and sanitation provision if funds are provided through other government departments?

How will the Constitutional requirement that government take reasonable measures to progressively realise the rights to water and sanitation be put into effect in the new system to avoid challenges such as in the "Grootboom" case?

The responsibility for setting up a sound subsidy framework now rests with local government. It is essential that this is done well if free basic water and sanitation services are to be delivered to the poor. How can they be supported in this endeavour?

How can the financial framework support the implementation of free basic water and sanitation in a manner which targets the most needy consumers and promotes viable water service providers?

How can the financial framework promote the equitable, efficient and sustainable provision of water and sanitation services?

Challenge 7: Creating an enabling policy and legislative environment

The current policy environment needs to be reviewed:

- Government's approach to the role of the private sector in the water and sanitation sector and the way in which choices between public and private providers are made needs to be clarified.
- The Municipal Systems Act discourages the use of alternative water service provider options such as community-based organisations by placing onerous process obligations on municipalities prior to engaging with community-based organisations.
- Certain conflicts in the legislative environment exist which need to be ironed out; in particular between the Municipal Systems Act and the Water Services Act.

Creating an enabling policy environment

Developing clarity with respect to the role of the private sector.

Amending the Municipal Systems Act to promote greater flexibility in the choice of water service provider options, for example, the use of community-based service providers, water boards and other public and private service providers.

Aligning the Water Systems Act with the Municipal Systems Act and resolving other legislative inconsistencies and conflicts.

Challenge 8: Managing the transition

There are many transitional issues related to transforming the sector from the current situation (which is a product of past legacies) into an effective, efficient, equitable and sustainable sector as envisaged in the Sector vision and objectives. The White Paper needs to provide strategic guidance with respect to these. Only the most important are mentioned here.

Managing the transition

The transfer of DWAF owned and run schemes to local government (asset transfer).

The transfer of staff from DWAF to local government.

If the role of Water Boards changes, a transformation process will be required.

Aligning financial flows with function in the transitional period.

The absence of Water Services Authority capacity in many areas.

6. Some selected policy issues and choices

6.1 Achieving sustainability: service levels

Problem statement. In rural areas, despite considerable achievements in providing access to safe water to millions of rural poor people since 1994, there has been growing anxiety about sustainability of completed schemes. The sector has not yet fully addressed the need to ensure that projects delivered are sustainable in the long run.

The introduction of the Free Basic Water Policy poses new sustainability challenges for the sector as a whole. While the policy is a positive move which meets Constitutional obligations to ensure that no one is denied access to safe water because they are too poor to pay, the sector still needs to refine mechanisms for implementing the policy at local level as part of overall financing and service provision. How can the policy be financed in a sustainable way at local government level and also in a way that does not undermine key development principles such as accountability to users, community involvement and ownership?

At the same time there is a demand for higher levels of service than the present basic services. How can higher levels of service such as yard water connections or waterborne sewage be made available?

There is a need to review policies and strategies to ensure that long term sustainability of projects is not compromised.

Policy considerations. The challenge facing the sector is the following: How can South Africa provide sustainable water supply and sanitation services in an environment of enormous need, limited resources and a changing institutional environment? Evidence emerging from the field, locally and internationally demonstrates that people need to be at the centre of management and governance decision making processes concerning water and sanitation services. This means that the design and operation of water and sanitation services should use a *people centred approach* and be based on understanding of people to be served and local conditions. Water and sanitation services are sustainable when social considerations are given priority over technical, where affordability and appropriate technology (based on local conditions) are paramount, decentralised systems for operations and maintenance are considered, and also when health and hygiene becomes an integral part of the intervention.

For reticulated water systems it is important to offer a service level higher than a public standpipe to those who can afford it and hence there should be an emphasis on mixed service level systems. Where higher levels of service are offered, individual metering becomes much more important. The use of pre-payment meters needs considered attention but, in the context of Free Basic Water, it is not clear that the benefits of this technology outweighs the costs at public stand pipes. In some cases, pre-payment meters have been forcefully rejected by communities. The proposed service level philosophy should be based on a consultative approach. The choice of sanitation services should be considered at the same time as water supply since they are, potentially, closely related.

It should be noted that sustainability has a number of dimensions: financial, technical, institutional and environmental. All are important.

Policy choices: achieving sustainability – service levels

Should service levels alternatives and service standards be clarified and/or standardised?

Should there be greater emphasis on local solutions?

Should service levels be linked to settlement types and subsidy caps?

Should there be provision for a progressive realisation of service levels?

Should subsidy caps for new schemes based on per capita operating and capital cost limits be implemented?

How should mixed service levels be financed and funded (need practical solutions)?

6.2 Water Service Authorities

The role and functions of Water Service Authorities. The Water Services Act defines the following primary responsibilities for Water Service Authorities:

- Preparing Water Services Development Plans (integrated financial, institutional, social, technical and environmental planning) to ensure services are provided equitably (universal access to a basic level of service), efficiently (minimum wastage of resources) and in a sustainable manner.
- Ensuring access to basic services (policies and infrastructure development).
- Ensuring the provision of effective and efficient services (performance management).
- Ensuring sustainability (financial planning, tariffs, service level choices, environmental monitoring).
- Selection and regulation of water service providers (by-laws, contract regulation, monitoring, performance management), so as to ensure the effective and efficient use of resources.
- Consumer education and communications (health and hygiene promotion, water conservation and demand management, information sharing, communications, customer charter).

It is noted that WSAs are municipalities and that there are broad programmes for developing capacity and providing support with which water focussed activities must co-ordinate.

Policy choices: water service authorities

How can water service authority capacity best be developed? Should the emphasis primarily be on developing guidelines and tools, or should it also include direct support to individual WSAs? What are the priority areas for support?

To what extent should DWAF be providing support to developing 'generic' service authority capacity, for example, budgeting, tariff setting, policy development, planning capacity, establishing monitoring systems, contractual management capacity?

Who is responsible for establishing WSA capacity in municipalities?

How should water sector for WSA capacity interface with local government capacity support and development? (There could be resource trade-offs here.)

What arrangements should be made where there is no water service authority capacity?

How should WSA capacity be measured? (Should it be benchmarked?)

How should the performance of WSAs be measured and benchmarked?

6.3 Water Service Providers

6.3.1 Choosing Water Services Providers

The status with Water Services Provider (WSP) arrangements can be summed up as follows: In *urban areas* (former TLCs) local and metro municipalities dominate as WSPs and have been relatively successful. There are some new arrangements which have been applied in urban areas: concessions in what is now Mbombela and KwaDukuza; a management contract in Johannesburg; and public-public partnerships in Odi and Maluti a Phafong (former Harrismith).

In largely *rural areas* WSP arrangements include:

- Community-based options, with some successes where the scale of the community and related infrastructure is a relatively small.
- Water boards, with concerns about the emphasis on high cost solutions.
- Municipalities, with successes probably confined to urban fringe settlements.
- DWAF itself, mainly on large schemes which they have inherited from former homelands and with concerns about the sustainability of the operations.

Integrating sanitation. Many water service providers have not taken full responsibility for providing basic sanitation services. The role of Water Service Providers in relation to the provision of sanitation services needs to be discussed.

The role of the private sector. National policy with respect to the role of the private sector in the management and provision of water and sanitation services needs to be put into context. Both the Municipal Systems Act and Water Services Act requires a systematic review of options which are seen by some as a presumption against the

private sector (that is, private sector as a “last resort”). Section 78 of the Municipal Systems Act puts up procedural hurdles for engaging with the private sector to manage municipal services. The Water Services Act states that the private sector can only be engaged after all public management options have been considered. While the position is that a full range of service providers (including private) should be considered, it is desirable for a clear statement to be made on the specific role that the private sector can play in the delivery and management of water and sanitation services.

WSPs in rural areas. In *rural areas* the establishment of effective WSPs is probably the biggest issue facing the water and sanitation sector in South Africa. There is a lack of common vision in this regard, with four primary options considered:

- Municipalities should be the WSP (probably local municipalities, but possibly also district municipalities).
- Community-based organisations such as water committees or NGOs should be the WSP (service contracts).
- Private contractors should be the WSP (management or service contracts).
- Big regional organisations should be the WSP (service contracts). (These organisations could be utilities of some sort, including Water Boards or special purpose agencies such as the uThukela Water Partnership where the intention is to establish a large WSP covering three districts in Northern KwaZulu-Natal).

In any municipal area, a combination of these might be chosen.

For each WSP option there are issues related to the way the WSP will be supported. For example, community-based WSPs require support through what is called a ‘support services agent’ and larger organisations probably need to consider management contracts for the short to medium term.

Another concern regarding rural WSPs is the lack of emphasis placed on the financial viability of the organisations. There is a lack of understanding regarding the costs of operating services and decisions regarding the establishment of new WSPs are often taken without adequate financial analysis.

CBOs as rural service providers. CBOs often have a better understanding of the potential and limitations of their local environment, and as such they are often best suited to manage projects at community level. They know local conditions better and it is in their interest to ensure that projects are sustainable. The involvement of CBOs is particularly relevant when considering the appointment of appropriate Water Services Provider (WSP) at local level. Water Services Authorities are asking whether CBOs have legal status and if they are able to manage risk. Many of the CBOs are not registered in terms of the Nonprofit Organisations Act (Act 71 of 1997) and this fact counts against them. The status and profile of CBOs as potential WSPs in rural and peri-urban areas needs to be enhanced. How can we make the policy environment more conducive for CBOs to participate in water services management?

Policy options. DWAF have developed a draft policy around rural WSPs that is based on considerable research and implementation experience. This policy has the following key elements:

- For smaller rural settlements (less than 5 000 people, say) a preferred approach would be to use community-based WSPs. These are cost-efficient organisations which are close to consumers and understand local issues.
- Community-based WSPs need to be supported by a support services agent. (Who should these support agents be? How should they be developed?)
- For larger settlements, municipal WSPs typically will have a role to play. Alternatively, the WSP function can be contracted to another large-scale organisation, possibly a water board, a public utility or a private company.

There is considerable experience with the latter option in the Limpopo Province as well as lessons from Umgeni Water in KwaZulu-Natal who have had difficulties in running rural schemes cost effectively and in getting WSAs to enter into formal service provision agreements. In order to develop effective WSP capacity, especially in rural areas, not enough attention has been paid to *the process of contracting WSPs by WSAs nor to the financial mechanisms to be used.*

These approaches need to be translated into clear policy options for WSAs to use in their selection of WSPs.

Policy choices: water service providers

To what extent should there be a sector wide approach to the encouragement (or discouragement) of a role for the private sector in WSP arrangements?

To what extent should CBOs be encouraged as WSPs, especially in rural contexts with small schemes?

How can water service providers be given incentives to also assume responsibility for providing basic sanitation services?

How can the effective management of water services infrastructure best be promoted?

How should the process by which WSAs contract WSPs be guided and supported?

How can the consideration of a wide range of WSP options be encouraged?

6.3.2 The role of Water Boards

Current arrangements. The Water Services Act (1997) redefined the role and responsibilities of water boards, ensuring consistency with the Constitutional framework regarding water services (that is, that the primary responsibility to provide water services rests with local government) and to address the need for effective, efficient and cost effective water services provision by water boards. It effectively established the Boards as a national family of public water service providers, operating across municipal boundaries, (similar to provisions for MSSP's – multi-jurisdictional service providers – or the proposed REDs – Regional Electricity Distributors). The Water Services Act recognised the important role that water boards can play in respect of bulk water supply. In addition, it provided for a role for water boards in helping to reduce the backlog in water services delivery.

Policy issues. The finalisation of the local government transformation process and recent legislative and policy developments necessitates clarification of the role of water boards with respect to that of the local government sector. The most important and fundamental issue is the role that water boards will fulfil as part of the future water services institutional framework. Other issues relate to the governance of water boards, their subjection to a fragmented regulatory system (for example, at present they “report to” DWAF but should have contracts with local government), and the need to ensure their financial viability and sustainability.

The Water Services Act requires water boards to enter into contracts with Water Services Authorities in respect of the services they provide to the Water Services Authorities and local government interests are represented on the boards of water boards. Is this adequate to ensure a balanced relationship between water boards and Water Services Authorities?

Policy choices: Water boards

Should water boards continue to be part of the future water services institutional framework? Is there a place for a family of regional public water service providers?

Does the existing role of water boards need to be refocused to align it with water services and local government policy? Can a case be made for wall-to-wall regional integrated (source to tap) water utilities as is proposed for electricity?

Should water boards only exist where water services systems cross water service authority boundaries?

Should water boards be absorbed into the new local government structures or transformed into private entities?

Should water boards continue to provide retail water services or should water boards play only a bulk water services role?

Could water boards play a role in respect of catchment management and development of national water infrastructure?

Is the present legislated approach adequate to ensure that water boards are effectively regulated and accountable to their customers?

6.4 Developing the Regulatory Framework

6.4.1 Progress to date

The right of access to water supply and sanitation is a constitutional right for all South Africans. Whilst the constitution and legislation sets out a framework for progressively realising these rights, the task of monitoring and regulating progress and performance is a major challenge.

A broad-based task team with major sector stakeholders has been set up by DWAF to guide the process of developing a regulatory framework. Phase 1 of the process, which has just been completed, identified a number of principles, problems and issues that would have to be addressed under the next phase of the project.

6.4.2 Why regulate?

Section 62 of the Water Services Act stipulates that “*The Minister and any relevant province must monitor the performance of every water service institution.*” It must also be remembered that water services are delivered to consumers under monopolistic conditions, that is, consumers have no choice as to the institution delivering the service to them. With this in mind, the purpose of regulation, in broad terms, could be described as follows:

- To ensure provision of basic services (especially the extension of services to the poor).
- To ensure effective water services institutions (WSIs).
- To ensure the efficiency and sustainability of water services to underpin economic and social development.
- To protect consumers from excessive charges and poor service.
- To encourage investment in the sector and thereby also to contribute to building the economy and creating jobs.

6.4.3 Key principles for a regulatory framework

Following on from the motivation for regulation, the following principles for a future regulatory framework have been developed:

- It should respect the executive authority of local government (for example, promote principles of good management and protect local government discretion on *how* to manage water services).
- It should take account of the need for everyone to have a reasonable quality of life.
- It should be supportive of water services institutions and should not be punitive.
- A balance between desired standards and what is achievable and affordable should be struck.
- It must treat all water services institutions equally.
- Regulation of water services must fit into the overall framework for the regulation of local government.

The above principles have been incorporated into the water services regulations that have been developed to date.

6.4.4 What needs to be regulated?

Discussion on a regulatory framework often revolves around the format of the regulator, for example, should the regulator be independent or within government. However, the question that needs to be addressed first, is what the regulator is actually going to do. This may determine which type of institution is best placed to do it. Some of the aspects of water services that need to be regulated are:

- **Water quality.** Is the water service provider complying with the compulsory national standards? How well does the water service provider communicate with consumers? (Section 9 regulations.)
- **Level and standard of service.** Do consumers have a choice with respect to the level of service that they receive and can afford? Can consumers upgrade to a higher level of service? How does the standard of service compare to the compulsory national standards (for example, with respect to the reliability of service and the maintenance of assets)?
- **Tariffs.** Is there compliance with the national norms and standards? (Section 10 regulations.) Is there a free basic water strategy? What mechanisms are in place to cater for consumer complaints? How do service providers respond to complaints?
- **Efficiency and effectiveness.** Are services provided efficiently and are institutions effective? What needs to be monitored to ensure this?

6.4.5 Who should be regulated?

The institutional structure of the water services industry is extremely complex. The scale of services and the whole approach to delivery can vary enormously between large urban areas and dispersed rural areas. Ownership of institutions can be public or private. As a result, institutions themselves vary in scale, in terms of the services they have to provide and in terms of how they are governed and/or managed. Given this complexity, the question as to which WSIs should be regulated arises.

One option would be for the national regulator to regulate WSAs on the basis that it is up to WSAs to regulate WSPs. However, it is often the case that WSAs need assistance in dealing with WSPs. Another option is for the national regulator to regulate all WSIs. If the regulator wants to compare the performance of different WSIs, should the regulator divide them into categories or types of WSIs with specific benchmarks for each category?

6.4.6 How should regulation take place?

To a large extent, the answer to the questions “who should be regulated?” and “what should be regulated?” would determine what regulatory mechanisms would be used. There are a large number of possible approaches for regulation. A few of the options and ideas are listed below.

- **Water Services Development Plans and business plans as regulatory tools.** Both WSDPs and business plans provide potentially powerful tools to regulate Water Service Authorities and Water Service Providers respectively. However, the use of these tools for regulatory purposes needs to be developed further, specifically with respect to progress reporting and auditing (as required in terms of legislation) and what DWAF and consumers do with the information.
- **Regulate institutions or contracts?** The approach implied above is that WSIs will be monitored and regulated in terms of their performance. However, another approach may be to regulate contracts between WSAs and WSPs as opposed to the actual institution. A regulator could serve as a national resource centre, which could assist WSAs to develop, monitor and manage contracts. There are also strong merits in water services contractual disputes being resolved by a regulator as opposed to litigation.

- **Regulate performance or compliance?** Regulation for compliance would involve audits of WSIs to ensure that certain absolute standards are satisfied. Regulation by performance on the other hand would be a more complex form of regulation, which requires the regulator to consider how performance can be assessed, that is, develop benchmarks, measurable indicators and assessment methods.
- **Punitive or supportive?** Many sector stakeholders have expressed the opinion that a regulator should be supportive and not punitive. This would also be in the spirit of co-operative governance as laid down in the Constitution. Although incentives for WSIs to comply or improve their performance are necessary, the regulatory institution, with its experience, insights and information into the sector on a national basis, would be ideally placed to support and guide WSIs. The regulator must still maintain an arms-length relationship with the institutions it regulates, and must not get too deeply involved in direct support activities.

6.4.7 The format of the regulator and regulatory models

Currently, the national regulatory function lies with the Minister of Water Affairs and Forestry and is exercised through DWAF. For the short to medium-term, there are no plans to take the regulatory function out of DWAF but even within DWAF this function needs to be fully developed. However, in the longer-term the possibility of an independent regulator outside government may have to be considered. If this is considered the key issues would then be:

- How independent (of government) should the regulator be (there are a number of options with varying degrees of independence)?
- How will the regulator be financed?
- How does an independent regulator fit within the legislative framework?

6.4.8 Legislative and policy constraints: support and regulate

The Constitution clearly states that local government is an independent sphere of government. The Constitution assigns to local government the executive authority for water supply and sanitation (water services). This includes setting tariffs and making bylaws. Provincial and national government do have monitoring, support and regulatory duties as well as setting national standards but are not allowed to take actions that may undermine local government's ability to exercise its executive authority. This decentralised structure relies on co-operation between the different spheres of government and means that a national regulator has to tread very carefully when regulating and intervening in matters which are the competence of local government. A regulatory framework must clearly define the roles and responsibilities of local, provincial and national government and set out any changes that may be required in legislation to make the national regulator effective. The final answer is both regulate and support but practical implications require sensitivity of both.

The water services regulatory framework could be conceptualised as follows:

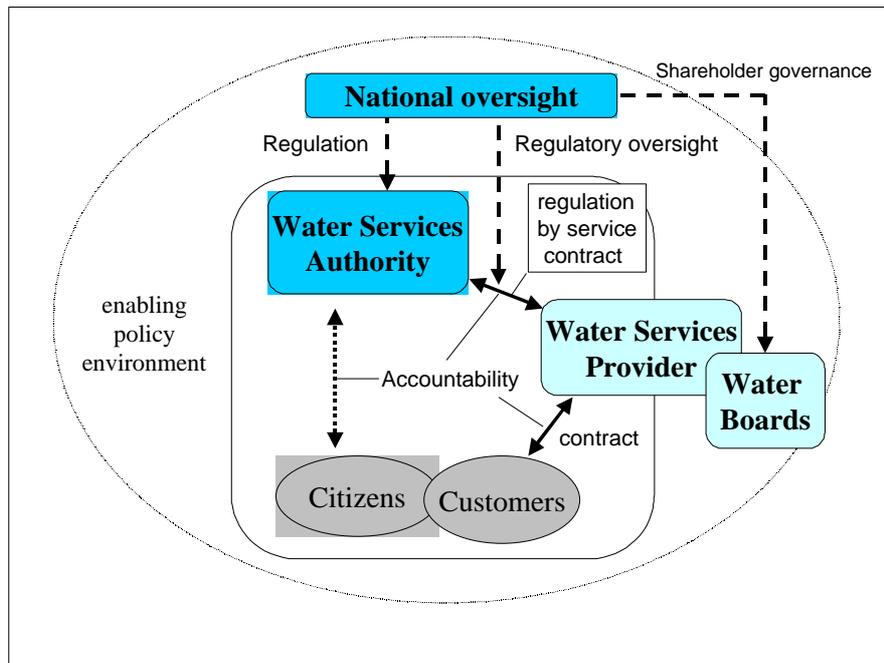


Figure 1: A conceptual framework for water services provision

The allocation of responsibility for water services to local government, as well as the separation of the water service authority role from the function of water service provision, means that a two-part regulatory regime is appropriate. On the one hand, water service providers are regulated by water service authorities (typically through a contractual arrangement, such as a services contract). On the other hand, Water Services Authorities (local government) are regulated by national government to ensure that the objectives of government (in this case the vision and objectives of the water services sector) are realised and there is conformity to the relevant legislation. Note that in this scheme, the national regulatory function should also have oversight of the contracts set up by water service authorities with water service providers and be able to assist in regulating and enforcing these contracts if and when necessary.

6.5 A proposed new financial framework

Current arrangements. Current sources of funding for capital and operating costs of water and sanitation services have been identified in Section 5.

Key challenges. A new financial framework must respond to a number of challenges:

- The channelling of all future infrastructure grants from national government through a consolidated municipal infrastructure grant (MIG).
- The channelling of all future operating subsidies through the unconditional local government equitable share.

- The channelling of all future capacity development grants through a single capacity development grant channel.
- Ensuring the sustainable provision of free basic water and sanitation services by local government.
- Ensuring capital funds are made available to provide basic water and sanitation services to the poor.
- Ensuring WSPs are financially sustainable.
- Ensuring WSPs (including CBO-type WSPs) are allocated subsidies to provide free basic water and sanitation services.
- Creating the right incentives and regulatory framework to ensure good financial management and that available resources are allocated equitably, promote efficiency and ensure sustainability, including the appropriate pricing of services.
- Creating appropriate mechanisms to finance higher levels of service, particularly in rural areas.

A proposed financial framework.

The essential elements of a proposed financial framework are set out below.

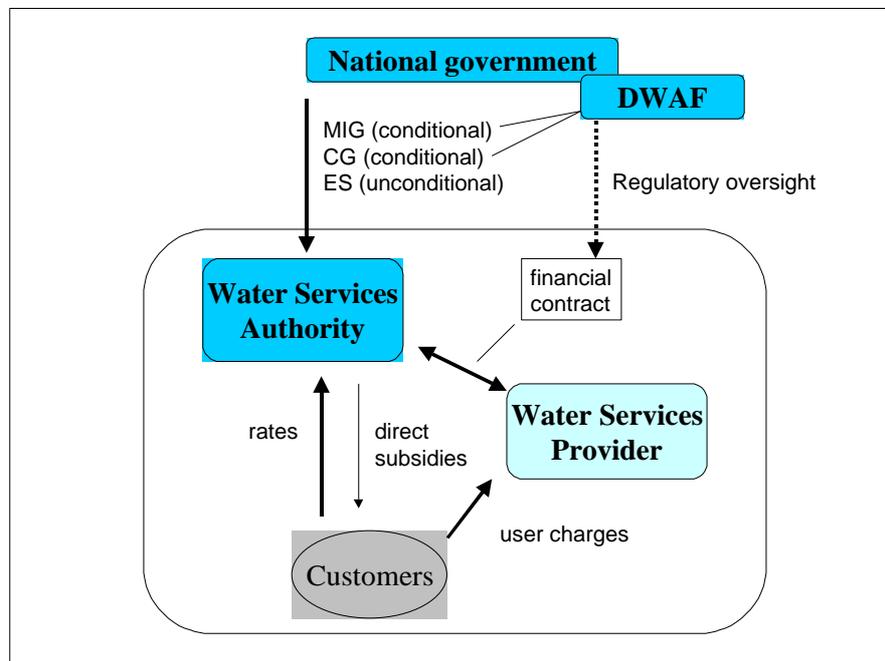


Figure 2: Proposed financial framework

- **Subsidies for capital investment** are provided by national government through the new Municipal Infrastructure Grant (MIG). This is a conditional grant and DWAF should negotiate with National Treasury and DPLG concerning

appropriate conditionalities on this grant to ensure investments support the water and sanitation sector objectives.

- **Subsidies for operating costs** are provided by national government through the local government equitable share (ES). In view of the fact that this is an unconditional grant, it is not possible for DWAF to impose direct conditions on the use of this grant. However, it is possible for DWAF to indirectly influence the use of this grant through the regulation of the financial contract between WSAs and WSPs (see below).
- **Subsidies for capacity development** in local government are provided through a single consolidated capacity grant (CG). This is a conditional grant and DWAF should negotiate with DPLG and National Treasury to ensure that adequate resources are made available for the development of appropriate WSA capacity. Some questions that need answering include the following: What funding mechanisms should be established to support WSA capacity development? Should the funds be conditional grants through DWAF or should the funds be through the Municipal Capacity Building Grant through DPLG? If funding is to continue through DWAF, what should the time frame be before the funding is channelled through the Municipal Capacity Building Grant? To what extent and how will DWAF set conditions for the water and sanitation sector part of the Capacity Building & Restructuring Grant in future DORAs.
- **Tariffs** (user charges) applied by WSAs and/or WSPs are regulated in terms of a national economic regulatory framework which ensures that tariff structures are compliant with the relevant legislation and regulations and that the tariff levels provide a fair return on assets. (The details of tariff regulation are to be set out within the framework for the economic regulation of water and sanitation services. There may be a need to review the Section 10 regulations.)
- A key instrument of regulation is the service contract between the WSA and the WSP. This contract must contain a **financial contract** which specifies the following:
 - The investment programme (together with roles and responsibilities, targets, sources of finance, and cost of finance).
 - The tariff policy, tariff structures and tariff levels to be applied over a five year period, together with mechanisms to deal with contingencies.
 - The financial flows between the WSA and the WSP, particularly with respect to surpluses, dividends and subsidies.
 - The conditions pertaining to the allocation and use of subsidies.
 - Roles and responsibilities for billing and cash collection, including performance targets.

In view of the fact that many different kinds of financial contract are possible depending on the nature of the service contract between WSAs and WSPs, it is not possible to be prescriptive as to the form and content of this financial contract. Nevertheless, the following principles should be observed:

- As far as is practically possible, subsidies should be allocated as close to the user as possible (“end-user subsidies” are generally much more effective than “supply side” subsidies).
- Subsidies should be appropriately targeted.
- If subsidies are not given directly to users (through account credits or service level targeting), then subsidies should be paid to the WSP providing the service.
- The WSDP should be used as the basis for the development of the financial contract.
- The financial contract should form the basis for the regulation of the WSP by the WSA and for the economic and financial regulation of the WSA by national government.

Much more thought still needs to go into the development of this financial policy framework. The framework should distinguish a longer-term framework (once the institutional framework has been clarified and bedded down), and financial arrangements during the transition.

Free basic water and credit control

The Water Services Act states that no person may be disconnected if he / she has proven to the municipality that he / she is unable to pay for water services, that is, that he / she is indigent. However, recent judgements in both the High Courts and the Constitutional Court have supported the right of municipalities to disconnect individual consumers where provision has been made for free basic services and where this right has been abused. If legislation (both national legislation and municipal bylaws) provides for adequate notice of possible disconnection, and if administrative justice is served, then it is possible to argue that no legal impediment to disconnection exists. It is important to note that the financial viability and sustainability of service providers are threatened where the provision of a restricted supply of free basic supply of water is not yet feasible and where disconnection is not possible. Notwithstanding the above, the disconnection of water services to any consumer is a typically a controversial and highly political matter. Health considerations also impact on the disconnection debate.

Policy issues: credit control

Should national policy allow for the disconnection of water services where a person (indigent or otherwise) abuses the right to free basic services?

How can credit control be managed where no Free Basic Water Policy has been implemented by a municipality or where the provision of a restricted free basic supply is not practically feasible?

6.6 Creating an enabling environment

6.6.1 Powers and functions

Current arrangements. In terms of the Municipal Structures Amendment Act (2000), the former TLCs have been given authorisations for the water and sanitation function within their old boundaries and the districts have the authorisation outside the TLCs (primarily in rural areas).

Policy proposals. The Minister of Local Government is investigating the allocation of powers and functions between category B and C municipalities. The results of these investigations are not public and no final decision has been made.

Policy choices: powers and functions

All districts are water service authorities.

All local municipalities are water service authorities.

A mix of districts and local municipalities are water service authorities, but water service authority boundaries do not overlap.

It should be stressed that the resolution of powers and functions is a critical precondition to the development of a Water Services White Paper.

6.6.2 Legislative issues

Contrary to the general perception, little conflict exists in respect of the legislation that impacts on water and sanitation services. The perception of major legislative conflicts seems to be caused by the terminology used in different pieces of legislation and overlaps in respect of matters regulated by different national departments. Nevertheless, some legislative conflicts do exist. The need for the alignment of certain reporting and planning requirements and legislative overlaps in matters regulated by different national departments, interpretation issues, definitions and corrections to the Water Services Act have been identified and will be addressed when the water services legislation is amended to reflect the revised water services policy.

A preliminary list of matters identified to date is attached as Annexure 2. It should however be noted that the list is not complete.

6.6.3 Co-ordination

No formal regular water sector co-ordination initiatives take place between national government, provincial government, municipalities and other role players.

Furthermore, the regulatory mandates of the different national departments are not clear, as reflected in the local government and sector legislation.

A mechanism is needed to ensure:

- Clear mandates in respect of the regulatory scope of national departments, including but not limited to financial regulation and infrastructure development and funding.

- Appropriate interaction, integration and co-ordination in respect of achieving national government's overall objectives.
- Co-ordination and integration of legislation, specifically matters aimed at regulating municipality's performance in respect of water and sanitation services.

Policy option: co-ordination

An Inter-sector Committee similar to that established in terms of the Environmental Management Act be established for the water and sanitation sector to raise and discuss issues relating to water resource management, water services provisioning, local government matters, health matters and environmental issues.

6.6.4 Water resources interface

Current arrangements: The development of water resources is the responsibility of a range of bodies. For large infrastructure (major dams and transfer *schemes*), DWAF has been primarily responsible (including financing). In some cases special purpose companies have been set up (for example, for the Lesotho Highlands Water Project). Water boards, particularly Umgeni, have developed large raw water resource infrastructure. Some municipalities have developed quite large water resource infrastructure, notably Cape Town and Nelson Mandela. In the case of moderately sized infrastructure, there is also considerable variety, with the above arrangement pertaining, except special purpose companies. At this scale the issue of 'shared users' (agriculture and municipal) needs to be addressed: there are places where the water from a resource is shared. If agriculture is involved it is seldom the case that a municipality or water board will be responsible for resource development, with responsibility typically falling to DWAF or more seldom to water user associations. In the case of small scale infrastructure (including groundwater development), resource development for urban areas has typically been the function of municipalities. In rural areas, DWAF has played a greater role with funding, particularly under the community water supply and sanitation programme (CWSSP).

Policy issues. When is a Water Service Authority, and the WSPs appointed by them, responsible for *developing* their own water resources (excluding water resource planning and licensing)?

- A new national utility, taking responsibility for water resource development, has been proposed. Alternatively, between three and five regional utilities could be established. In this case, it may be sensible to integrate some Water Board functions and/or schemes with these regional utilities, that is, the utilities would take responsibility for some bulk services in addition to water resource development.
- If the proposed national / regional utilities are not established, then the development of large scale water resources could continue to be undertaken by DWAF, possible as a "ring-fenced" resource development unit.
- It has been proposed that Catchment Management Agencies (CMAs) could play a role in developing medium scale infrastructure. (The appropriateness of this

proposal has been questioned. The primary function of CMAs is to regulate resource allocation, resource abstraction and return flows. CMA involvement in resource development would seem to be inappropriate in this context as it could lead to a conflict of interests. Furthermore, it is not clear that CMAs would be in a position to finance resource development.

- Are current policies and practices biased towards surface water development?
- It seems that some municipalities may still have to develop their own resources in certain circumstances. This may disadvantage them relative to other municipalities who are not required to raise finance for resource development.
- With the declining contribution made by DWAF to funding rural schemes (which often include resource development), does this mean that this will be funded from a future integrated municipal infrastructure grant (MIG) for capital expenditure?

Policy options. There needs to be a clear policy about the responsibility of water sector institutions with regard to water resource development (including financing). This policy needs to look at surface and ground water resource development in a balanced way. It seems important for a clear line to be drawn between bulk infrastructure and water resource development with development and finance responsibilities clarified. Finally, the definition of water supply services needs to be clarified as the current definition based on ‘potable’ water is not always helpful. Of particular concern is that large industrial water users are often left out of the municipal system and therefore don’t contribute to cross subsidies in the municipalities in which they are located.

6.7 Transitional issues

6.7.1 Transfer of schemes

A process is underway to transfer DWAF owned and run schemes to municipalities. It is DWAF’s preference to transfer schemes to district municipalities. But in the absence of clarity with respect to the powers and functions of local municipalities vis-à-vis districts, it is not clear to which local government tier these schemes should be transferred. It is therefore not surprising that very few schemes have been transferred to date.

From a DWAF perspective, the driver has been a keenness (in some cases) to move temporary water services functions out of the department. However, this has been tempered by doubts around the capacity of WSAs to take up the water services functions to be transferred. Overall, the transfer process has been slow, due substantially to the pace of transformation in the local government environment. This transformation has included the development of policy to guide local government out of its transitional phase, the determination of new local government boundaries, and elections. For DWAF water services staff, the possibility of transfer has been recognised for some time, but it has remained an abstract concern for many.

Transfer is now to be given new emphasis and structural changes will ensue. Among the changes already implemented is the mobilisation of national and regional transfer task teams. For some DWAF water services staff this means more restructuring and

redeployment. It also means that the possibility of transfer to WSAs and WSPs will become more concrete, with the associated hopes and fears.

Policy issues: scheme transfer

It is imperative that the powers and functions of districts and local municipalities vis-à-vis water and sanitation services are clarified as soon as possible.

The White Paper must develop a transfer strategy together with targets and timeframes, and mechanisms for deal with unsustainable schemes.

6.7.2 Implementing agents for water supply projects

Current arrangements. DWAF has a well developed approach to identifying and appointing implementing agents on all the projects which it funds. Most of the implementing agents fall into one of the following four categories: district councils, Water Boards, BOTT contractors and NGOs (for example, Mvula Trust). Currently there is a well developed process through which implementing agents make applications for funds via a ‘business plan’ submission to DWAF regional offices. Such business plans now have to be approved by district municipalities and should be consistent with WSDPs. Although DWAF’s role as financier of water projects will cease in terms of DORA, the issue of implementing agent selection on the part of municipalities is still pertinent.

Policy considerations. The major issues under project implementation can be identified as follows: the capacity of district municipalities to be implementing agents, integrating DWAF finance arrangements with new CMIP finance arrangements (and how to set conditions), project selection criteria, the transfer of funds and agreements related to this, and the role of DWAF in building implementation capacity at the B and C level.

Policy options. It seems important for the focus to be placed on the development of capacity of WSAs to plan and implement projects. Given the likely outcome regarding powers and functions this should cover both local and district municipalities. DWAF still has an important role to play in project finance over the next five or so years as the capital funding arrangements are integrated into combined municipal funding systems (MIG). DWAF also need to investigate ways of strengthening the capacity of private sector bodies to deliver innovative projects.

Policy issues: implementation arrangements in the transition

How to set grant conditions which support sector objectives?

How to develop project implementation capacity at the B and C level?

ANNEXURE 1

Reflection on the 1994 White Paper Guiding Principles

The 1994 White Paper stated eight key policy principles which were used in the development of policy. These are replicated here in full with commentary provided in italics:

- **Development should be demand driven and community-based.** Decision making and control will be devolved as far as possible to accountable local structures. There is a reciprocal obligation on communities to accept responsibility for their own development and governance, with the assistance of the state.

Comment: Since 1994, the Constitution and subsequent financial and local government policy have outlined a system of developmental local government which is currently being developed. Community participation in development planning and implementation is a statutory requirement and the water and sanitation services sector must work within this framework.

- **Basic services are a human right.** This will be interpreted in terms of the Constitution, as a right of a level of services adequate to provide a healthy environment. This does not imply the right of an individual person or community to demand services as the expense of others.

Comment: The Constitution calls for a progressive realisation of this right. This is a fundamental principle, consonant with the Constitution.

- **“Some for all, rather than all for some”.** To give expression to the constitutional requirements, priority planning and allocation of public funds will be given to those who are inadequately served.

- **Equitable regional allocation of resources.** The limited national resources available to support the provision of basic services should be equitably distributed among regions, taking into account population and the level of development.

Comment: Both of the above two principles are now embodied in the constitution and guide the allocation of financial resources.

- **Water has economic value.** The way in which water and sanitation services are provided must reflect the growing scarcity of good quality water in South Africa in a manner which reflects their value and does not undermine long term sustainability and economic growth.

Comment: This principle, as interpreted, is uncontroversial and should be retained, but should also be balance with the concept that water also has social value.

- **The user pays.** This is a central principle to ensure sustainable and equitable development, as well as efficient and effective management.

Comment: This principle needs to be clarified in the light of the Free Basic Water policy which is driven by the constitution to ensure that affordability should not be a barrier to access to basic water services.

- **Integrated development.** Water and sanitation development are not possible in isolation from development in other sectors. Co-ordination is necessary with all tiers of government and other involved parties and maximum direct and indirect benefit must be derived from development in, for instance, education and training, job creation and the promotion of democracy.

Comment: This principle is uncontroversial and the principle of Integrated Development Planning is now established. More attention needs to be given to how water and sanitation services can be supported as a sector in an integrated system of planning and within a financial framework providing consolidated (non-sector-specific) municipal grants.

- **Environmental integrity.** It is necessary to ensure that the environment is considered and protected in all development activities.

Comment. This principle is uncontroversial though more attention should perhaps be given to the practical application of this principle in terms of basic sanitation services.

ANNEXURE 2

Legislative issues: a preliminary and incomplete list

Water Services Act v Public Finance Management Act

Water boards are subject to financial and institutional regulation under both the above-mentioned Acts. The Public Finance Management Act duplicates, contradicts and in certain respects substantially limits the level of autonomy afforded to water boards in terms of the Water Services Act.

Water Services Act v Municipal Systems Act

(a) The Water Services Act requires a Water Services Authority to consider all public sector Water Services Providers prior to entering into a water services agreement with a private sector Water Services Provider.

The Municipal Systems Act does not reflect this requirement, but enables municipalities to enter into service delivery agreements with organs of state without the obligation of a competitive procurement process. It may be argued that organs of state are thus afforded a preference over other service providers. Municipalities are however not required to consider organs of state prior to entering into service delivery agreements with private sector.

(b) The terminology used in the Water Services Act should be aligned to that used in the Municipal Systems Act to provide clarity and avoid misinterpretations. Terminology relevant here are amongst others – service delivery mechanisms, service delivery agreements, Water Services Authority (municipality), model contracts, model bylaws (standard bylaws).

(c) Both pieces of legislation provides for the regulation of service delivery agreements and tariffs as well as the setting of standards.

Water Services Act v Health Act, 1977

Both pieces of legislation provides for the regulation or setting of standards in respect of basic / minimum services, drinking water quality standards and water supply & sanitation in general.

The legislation does not contradict each other but creates confusion in respect of which national department is the lead regulatory Department.

Water Services Act v National Water Act, 1998

Both pieces of legislation provides for the regulation or setting of standards in respect of effluent discharges or water resource quality as well as education / expertise levels of water works operators.

Water Services Act

(a) Definition of “Water Services Authority”

The definition refers to the Local Government Transition Act and not the Municipal Structures Act and to “responsible for” instead of “authorised to”. This seems to create certain interpretation difficulties. It is recommended that the definition be

amended to refer to the Municipal Structures Act and that the wording be aligned with the Municipal Structures Act.

(b) Section 19 – “consider” & “public sector water services providers”

The Water Services Act creates a preference for public sector Water Services Providers. The Act needs clarification as most readers do not understand what is meant by “consider”, that is, that a decision will be subject to the principles of administrative justice.

In addition the interpretation of “public sector water services providers” seem to create confusion. The intention was to create a preference in respect of organisations that have an orientation towards the public interest but because the Act does not define “public sector water services provider” uncertainty as to the application of this preference is created.

(c) Definition of “Water Services”

The interpretation of the term “water services” has been the subject of extensive debate. The definition should be amended to clearly state what it encompasses, that is, does it include all services related to the rendering of water and sanitation services such as meter reading, credit control and the like.

(d) Definition of “Water Services Provider”

Should an institution contracted by a Water Services Provider to provide management services be regulated in terms of the Water Services Act, i.e. should the management contract Johannesburg Water (the Water Services Provider for the City of Johannesburg) be subject to regulations that may be promulgated in terms of the Water Services Act?

(e) Water Services Committees

These institutions contradict the Constitutional institutional framework and should be deleted.

Municipal Systems Act

(a) Definition of Municipal Service

The act does not define what a municipal service is. This is important because decisions relating to the delivery mechanism of municipal services are subject to the Section 78 process.

(b) Status of Community-based Organisations and Non-government Organisations

The Municipal Systems Act clearly recognises CBOs and NGOs as potential services providers. However a problem arises in respect of the implementation of this option. The Act allows local government to enter into agreements for the provision of services with another municipality or organs of state without being obliged to go through a lengthy and costly competitive procurement process. CBOs, however, are not given this privilege.