

Interim Report

Speeding Transformation:

NCOP's Role in the Oversight Process

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This study was conducted by NDI, at the request of the Chairperson of the NCOP, Ms. Grace Naledi Pandor, as well as the Chairperson of the ANC and then Chairperson of the NCOP, Mr. Patrick Lekota. This report is based on a documents review and numerous consultations with individuals from the national, provincial, and local government in South Africa.

The consultations were conducted by Prof. Christina Murray, a professor of Constitutional Law at the University of Cape Town; the Hon. Lisa Ferrell, a lawyer and State Legislator from Little Rock, Arkansas, and Mr. Don Bezruki, the director of the Legislation Auditing and Review Unit of the Wisconsin State Legislature. They were accompanied by NDI Programme Officer Julie Hughes.

The terms of reference for the study, which included oversight of the executive, financial oversight, regulatory oversight, as well as programmatic evaluation, was circulated to the Speakers in the various provinces for approval prior to the start of the consultations. The consultations took place over a three week period and were conducted primarily in the provinces of: Gauteng, Mpumalanga, and the Western Cape.

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Speeding Transformation: The NCOP's Role in the Oversight Process

Introduction

*This House must ask itself and answer the question –
what can the NCOP do to further promote the project of
the provision of a better life for all our people?*

--- The President of the Republic of South Africa Hon. Thabo Mbeki
First address to the National Council of Provinces, 28 October 1999

Political realities in South Africa have shifted the focus of the government from passing transformative legislation to delivering services. Indeed, the old electoral slogan of the majority ANC party, “A better life for all,” has been rephrased by some to “A better life for all...Now!”

A fundamental part of oversight is to assess whether the implementation of laws and the expenditure of funds achieves the goals intended by Parliament. Transformation will occur only to the extent that initial goals are attained. Poor implementation will prevent, or at least, delay transformation. The NCOP's role in oversight is to draw provincial and local experience into the national debate when the effectiveness of policy and its implementation is considered.

Provincial and local government members of the NCOP are the elected politicians closest to the delivery of services. Through oversight, the NCOP brings provincial and local experience of implementing policy to the centre. It thus ensures that the centre remains sensitive to the conditions and needs of everyone. At the same time, in drawing provincial and local government together in a single forum, the NCOP permits sharing of experience and ideas among provinces and local government. Oversight can help identify common problems and best practices, thus strengthening the capacity of every level of government to deliver.

Because of this special role, the NCOP must carry out its constitutional oversight mandate in a way that is distinct from all other legislative bodies. This was again underscored by President Mbeki in his first address to the NCOP in October 1999:

The National Council should devise ways by which it has closer interaction with the provincial legislatures, among other things to ensure that it has access to the reports which the provincial executives present to the legislatures.

This would enable the National Council to get a firm grasp of the progress being made and the problems experienced in the process of governing the Provinces.

Because the Council has the possibility also to interact with the national executive, it is therefore suggested that the Council would thus be in a position to contribute to ensuring better cooperation between these spheres of government.

In his keynote address to the May 1998 National Conference of the NCOP, President Mbeki went further to suggest a criteria for judging the performance of the NCOP beyond the mere amendment and passage of legislation. He posed several questions:

- Are provincial legislatures working to ensure that they engage their communities in evolving the important pieces of transformative legislation that has to be passed?
- To what extent are provinces evaluating legislative proposals emanating from the national executive against the conditions which prevail in their areas?
- Are provincial legislatures alerting the national government to potential problems that may be encountered if particular policy proposals are pursued?

These criteria underscore the importance of establishing effective oversight through the NCOP. No legislature can turn its back on problems once it has legislated. The unique position of the NCOP, as the only constitutional body that can bring together local, provincial and national government in an open discussion, defines its particular oversight role. The NCOP serves as a bridge between provincial, local government and national government. In conducting oversight, it must serve the critical role of ensuring that the policies developed and legislated by the central government are appropriate to needs on the ground.

With this in mind then, the criteria for assessing the performance of the NCOP, as provided by Deputy President Mbeki in May of 1998, might then be interpreted in the following manner:

- Has the NCOP ensured that national policy is designed in a way that enables it to be effectively implemented at a provincial and local level?
- Is the NCOP actively engaged in finding out what difficulties provinces are experiencing in implementing national policy and fulfilling their constitutional obligations?
- Is the NCOP providing provincial legislatures with the opportunity to engage each other and the national government constructively regarding the problems that they have encountered in the implementation of national policy?
- Is the NCOP actively engaged in the search for solutions to problems common to provinces and local government in the delivery of services in South Africa?

This report focuses on the specific mandate of the NCOP and how it can best be applied to the conduct of oversight in a manner that does not conflict with, or duplicate, the efforts of either provincial legislatures or the National Assembly.

The premise of the report is that the oversight role of the NCOP mandated in the constitution is both *broad* and *focused*. *Broad* in that it covers the most areas of government activity, but focused in that it should always primarily be concerned with the relationship between the spheres of government. For instance, while the Public Accounts Committee in the National Assembly investigates the expenditure of funds for a particular government programme, the NCOP's focus should be to inform the national debate by bringing to it the experiences of provincial and local government.

This report attempts to provide both a conceptual framework for the NCOP's institutional oversight role and specific recommendations on how that role might be implemented.

Chapters 1 and 2 deal with the conceptual and constitutional framework for the conduct of oversight in the NCOP and, in Chapter 2, its inherent oversight role is set out. Chapter 3 deals with the specific role that the NCOP has in protecting the integrity of provincial and local government. Chapter 4 deals with oversight conducted in partnership with the National Assembly. Chapter 5 makes recommendations designed to maximise the resources available to the NCOP and strengthens its ability to conduct oversight. Appendix 1 provides the terms of reference for the study as well as an outline of the constitutional provisions that give effect to an oversight role for the NCOP. Appendix 2 provides a biography of the authors of the study. Appendix 3 includes a list of individuals consulted in the preparation of this report. Appendix 4 includes a bibliography of materials used in the drafting of this report, and Appendix 5 provides a glossary of terms.

Executive Summary

CHAPTER 1: AN OVERSIGHT FRAMEWORK FOR THE NCOP

Oversight and democracy: The South African Constitution establishes a Parliament that contributes actively and effectively to building and securing democracy. An important aspect of democracy is that democratically elected representatives of the people should oversee government action and ensure it remains accountable. But oversight is not simply a matter of policing government. If it is properly carried out by members of all parties, it will also contribute to the transformation of South Africa by ensuring that

- i. MPs can legislate in the future in a way that is alert to the successes and failures of past legislation;
- ii. Legislation is implemented as intended and is effective;
- iii. Government policy remains open to the needs and concerns of the people; and
- iv. Problematic laws and policies are identified and changed.

Oversight and the NCOP: The Constitution gives the National Assembly the central role in oversight of the national executive. The NCOP's oversight role complements the role of the National Assembly because it is focused on the relationship between the spheres of government. In this sense the oversight role of the NCOP is *narrow*. Accordingly this report takes as its starting point that the *oversight role of the NCOP should not duplicate that of the National Assembly or the provincial legislatures*. The report is concerned with

- the specific oversight tasks that the Constitution expressly gives the NCOP (e.g. oversight of section 100 and 139 interventions), and
- its inherent role in oversight of the government on matters concerning different spheres of government.

Following the understanding of most consulted for the report, the oversight role of the NCOP to be *broad* in one important sense. That is, *it not only covers oversight of the implementation of legislation, but also the process of passing legislation and, particularly, the budget*.

Finally, the report suggests that the NCOP has a great degree of *flexibility* in the way in which it fulfils its oversight role. Although it is constitutionally obliged to conduct certain oversight functions (for instance, under sections 100 and 139), it is not obliged to oversee all government action all the time. It can be selective. This allows the NCOP to prioritise important issues and review them thoroughly rather than covering a great amount of ground superficially. It is also an approach that acknowledges the NCOP is a small house with limited capacity. In choosing matters to focus on, the NCOP might, for example

- Respond to specific needs or problems that have been brought to its attention; or

- Review areas in which legislation is in place and has been implemented, to assess whether the policy is successful and any glitches need to be sorted out.

Whatever criteria are used for choosing a focus for oversight in a particular session, it is clear that this is an important political decision, needing broad support in the NCOP.

Implementing oversight in the NCOP: The remaining chapters of this report concern the way in which the NCOP might implement its oversight obligations. For this purpose we divide the NCOP’s oversight functions into three:

- The NCOP’s inherent oversight role;
- Oversight to protect the integrity of the three spheres of government and effective government; and
- Oversight in partnership with the National Assembly.

The report proposes that the NCOP rely most heavily on existing institutions, such as the committee system and various agencies such as the office of the Auditor-General. But it is also noted that effective oversight requires trained staff and other resources. Chapter 5 discusses these needs.

Obstacles to oversight: There are a number of obstacles to oversight inherent in every political system. Oversight is seldom a popular job. On the rare occasion when a scandal is uncovered, opposition members may embrace it enthusiastically. Usually, however, oversight involves mundane work that provides very little of the public profile important to politicians concerned with retaining their seats. Moreover, for members of the governing party, it may involve asking their colleagues in government awkward questions.

These and other political disincentives to conducting oversight need to be acknowledged at the outset. In response to them, the main incentive must be emphasised: oversight is a critical part of a democratic society committed to effective government and transformation. It ensures that government remains in touch with the people and that problems in delivery are recognised and addressed.

The size of the NCOP and its lack of resources make effective oversight difficult. Nevertheless, through careful and realistic decisions about oversight priorities, reliance on existing extra-parliamentary institutions (government institutions, NGOs and others), and steady staff development, these problems can be overcome.

CHAPTER TWO: THE NCOP’S INHERENT OVERSIGHT ROLE

The Constitution establishes an inherent oversight responsibility for the NCOP. This flows firstly from its role in the passage of legislation and, secondly, from its role as

representative of the provinces and local government in the national sphere of government.

Chapter 2 deals with this inherent oversight role of the NCOP under four headings:

- Oversight of the budget
- Oversight of legislation during the legislation process
- Oversight of the implementation of legislation - monitoring progress in implementation
- Oversight of the implementation of legislation - oversight of delegated legislation

Oversight of the budget: Because the NCOP's specific constitutional role is to represent provinces and local government in the national sphere of government, its main concern in relation to the budget must be the equitable division of revenue amongst the three spheres of government and the subsequent horizontal division amongst the provinces, as well as any conditional grants to provinces.

The NCOP's role in overseeing the budget is to ensure that provincial and municipal interests are properly accommodated in the budget and that the division is equitable. To do this, the house will have to review past divisions of revenue, consider recommendations of the Financial and Fiscal Commission (FFC), and draw on the experience of provinces in fulfilling their statutory mandates.

This report proposes that the *NCOP Finance Committee* be used for oversight of the budget. Senior politicians should be involved and expert staff should support the committee. Initially staff could be seconded from government departments, the FFC and NGOs. In the medium term, dedicated expert research staff should be in place.

Oversight during the legislative process: The NCOP's major constitutional responsibility is to participate in the passage of section 76 laws. The practical rationale for this constitutional obligation is that, generally speaking, provinces implement section 76 laws. It is essential, then, that provinces use their role in the NCOP to ensure that the laws are appropriate and responsive to the capacity of the province and needs of its constituents.

When the NCOP passes legislation it should also ensure that the legislation facilitates future oversight. For Parliament to oversee the implementation of legislation effectively, the legislation itself must contain clearly stated goals and objectives. In addition, bills should contain reporting requirements that will assist in monitoring. In summary, when passing legislation, the NCOP should ask: "Does this Bill contain adequate provisions to ensure that its implementation can be monitored on an ongoing basis, and its effectiveness properly measured?"

This oversight should take place in the Select Committees.

Overseeing the implementation of legislation - Progress in transformation: A fundamental part of oversight is to assess whether the implementation of laws and the expenditure of funds achieves the goals intended by Parliament when it passed the laws.

The NCOP oversight role is to draw on provincial experience with national policy and inform the national government of issues that affect implementation. The NCOP can provide coordination and a vehicle for provincial participation in several ways, including:

- Providing a provincial perspective on the implementation of national policy and legislation;
- Reporting on cross-cutting issues that affect several or all provinces, including issues of capacity to implement national programs, common provincial institutional needs, such as improved training in financial or computer systems, and common factors which hinder successful implementation of national policies; and
- Coordinating the exchange of information among provinces on issues or practices of common concern to improve the capacity of provinces as a whole to fulfil their responsibilities (i.e. helping to establish best practices).

In accomplishing this, the NCOP will contribute to the overall transformation of society by improving the efficiency of government service delivery efforts.

This report proposes that a specialised committee, tentatively named the *Select Committee on Implementation Review and Best Practices*, should be created to fulfil this task.¹ A specialised committee is necessary because members need to become familiar with the concepts and methods that provide the basis of effective implementation review. The report provides examples of the functions that the committee could carry out, emphasising flexibility and choosing matters according to need. It would work with relevant select committees when appropriate.

Like the Finance Committee, this committee would need to comprise senior politicians. Initially, it could draw on the staff of the Auditor-General's parliamentary office for research back-up. In the medium to long term it would need specialised research staff.

The most effective oversight is likely to be initiated in the committee system. However, committees are not the only useful oversight tools. This report suggests that question time be managed in a way that ensures it is not merely used for party-political purposes but also contributes to serving provincial interests. In addition, debate in the plenary of the NCOP can raise issues in a more public forum.

Overseeing the implementation of legislation – delegated legislation: The NCOP has two distinct roles in the oversight of delegated legislation. First, it must use its inherent oversight power to review delegated legislation for compliance with constitutional standards. Secondly, under section 146 of the Constitution, if provincial or

¹ While this report was under development, the NCOP took steps to establish both an Oversight Committee and a Committee on Delegated Legislation.

national delegated legislation is to prevail against conflicting legislation, it must be approved by the NCOP.

The report proposes that the NCOP define its role in the oversight of delegated legislation narrowly. Its constitutional role, its capacity, and its ability to be effective should guide it. It should not repeat work done by the National Assembly. The report also suggests that the NCOP should not be given the power to declare delegated legislation invalid on its own. Normally, problems with delegated legislation should be dealt with politically, either through general oversight procedures, or through negotiation with the executive.

Existing select committees seem to provide the best forum for the type of oversight of delegated legislation that the NCOP needs to do, whether as part of its inherent oversight role or under section 146. However, some form of coordinating committee is probably necessary to determine what delegated legislation needs consideration by a Select Committee, and to manage the process overall.

CHAPTER THREE: MAINTAINING THE BALANCE - OVERSIGHT TO PROTECT THE INTEGRITY OF THE SPHERES OF GOVERNMENT AND TO ENSURE EFFECTIVE GOVERNMENT

South Africa's system of multi-level government does not set up hard divisions between the spheres. Instead, it gives both provinces and the national government concurrent power in a number of the areas most important to transformation. It also allows one level to intervene in the affairs of another in a number of circumstances. The possibility of such interventions is important to achieving effective government. However, it also makes levels of government vulnerable to actions by other levels.

The NCOP has the job of protecting provincial and local government integrity when such interventions occur.

Interventions under sections 100 and 139: Sections 100 and 139 respectively allow the national executive to intervene in a province and a province to intervene in a municipality when the province or municipality is failing to fulfil statutory obligations. When such an intervention involves a "take over" of a provincial or municipal function, the NCOP must approve the intervention.

Over the past few years, the NCOP has developed procedures to deal with interventions, and the report suggests the NCOP should retain them. Those procedures involve the Select Committee on Provincial Affairs, Local Government, and Administration. When it is appropriate, the committee and even other NCOP Delegates, take an active role in mediating disputes.

Nevertheless, a number of procedural problems have arisen. First, the NCOP needs some warning of likely "take-overs." The Constitution requires that a directive precede all

take-overs. This report suggests the NCOP should require the sphere concerned to inform it when it issues that directive. Secondly, the NCOP is often given poor information about an intervention, and, as a result, expends considerable effort establishing the situation. This problem may be addressed to some extent if the NCOP Rules set out clearly what information should be laid before it. Thirdly, the issues the NCOP needs to consider in approving or disapproving an intervention should be clarified. This report suggests a series of questions the NCOP should answer in reaching its decision. Finally, the Constitution requires the NCOP to review on-going interventions. Unless the goals of an intervention are clearly stated at the outset, with precise, measurable indicators of success, the process is difficult. NCOP resolutions approving interventions should include measurable goals.

Disputes about provincial administrative capacity under section 125(4): The Constitution anticipates that provinces will administer section 76 legislation. However, this is not the case if the province has inadequate administrative capacity. Should a dispute arise about the capacity of a province, the NCOP is to arbitrate.

A process similar to that used for interventions under sections 100 and 139 would be appropriate. The NCOP needs to weigh the evidence concerning the capacity of the province and, in reaching a decision, ensure that the integrity of the province is maintained.

This report proposes that both the Select Committee on Provincial Affairs, Local Government and Administration and the relevant topical select committee become involved. The Select Committee on Provincial Affairs, Local Government, and Administration will be able to draw on its similar experience under sections 100 and 139. In addition, if it is involved in every section 125(4) case, it can help establish uniform procedures and principles. The topical select committee has the necessary expertise of the national legislation and provincial capacity in the field.

Although the Constitution demands NCOP involvement only when a dispute arises under section 125(4), the NCOP should oversee all situations in which responsibility for implementing legislation is removed from a province due to capacity. The Constitution obliges the national government to develop the capacity of provinces; the NCOP must ensure this occurs.

Stopping provincial funds under section 216: The national treasury may stop funds to a province if it fails to maintain adequate accounting standards. The NCOP, together with the National Assembly, must approve the treasury's action. The grounds for stopping funds are narrow and technical. They will typically be matters the Auditor-General would consider in auditing provinces. For this reason, it is suggested that the IRBP Committee deal with this matter, working closely with the Auditor-General. In addition, it would have experience in matters relating to accounting and auditing.

Intergovernmental relations (IGR): A system of multi-level government is dependent on institutions that facilitate cooperation and coordination amongst the levels. The NCOP is such an institution, bringing all three spheres of government together in the national Parliament. While most IGR institutions are found in the executive, the legislature should still oversee them. Because the NCOP straddles all three spheres of government, it is the ideal institution to oversee executive IGR. The goals of oversight of executive IGR would be to ensure that these institutions

- enhance delivery and transformation;
- serve the provinces and local government;
- do not remove decision-making from public debate by striking deals that the executive claims cannot be scrutinised; and
- do not become dominated by inter-governmental squabbles or rivalry.

This report identifies three functions as part of the oversight of IGR:

- Involvement in designing the IGR legislation required by the Constitution
- Scrutiny of IGR institutions once they are in place
- Scrutiny of IGR practices and institutions in each area the NCOP decides to review

The third function is the most important, and does not require a special project. Instead, a consideration of the relevant IGR institution should be part of every review undertaken by the NCOP.

CHAPTER FOUR: OVERSIGHT IN PARTNERSHIP WITH THE NATIONAL ASSEMBLY

The Constitution requires both the NCOP and the National Assembly to conduct oversight of certain executive action:

- Section 199(8) demands oversight of security services by a parliamentary committee
- Section 203 requires Parliament to approve a state of national defence
- Section 231 requires both National Assembly and NCOP approval of international agreements

In addition, statutes require certain state institutions to report to both the National Assembly and the NCOP.

Security matters: Oversight of security services is currently conducted by a joint parliamentary committee. The NCOP's main interest is in policing, in which both provinces and municipalities play a role. The NCOP's involvement in the declaration of national defence ensures that the declaration - which is likely to have profound consequences for the entire nation - is properly discussed at every level.

International agreements: The national executive has the sole authority to enter into international agreements. Nevertheless, such agreements can have direct consequences for provinces. Trade agreements relating to agriculture are an example. The NCOP needs to establish a procedure for overseeing such agreements. The function is made more difficult by the fact that they are frequently very technical. In the long run, Parliament needs staff that can provide research backup. Until then, the NCOP might require the Department of Foreign Affairs to accompany every agreement tabled in the NCOP with a memorandum describing its implications for provinces.

Oversight of state institutions: Generally speaking, the NCOP should not conduct oversight of state institutions. This is normally the role of the National Assembly.

However, institutions might report to the NCOP when pending matters are of concern to the NCOP. For example, provinces and municipalities bear primary responsibility for implementing many social and economic rights. Therefore, if the South African Human Rights Commission conducts a review of the implementation of social and economic rights, it should submit its report to the NCOP.

CHAPTER 5: MAXIMISING RESOURCES AND PLANNING FOR THE FUTURE

The overall goals of oversight by the NCOP are to ensure openness and accountability in government and enhance government's effectiveness. But the NCOP needs certain tools to achieve this. An effective programme for public participation, adequate staffing and enhanced use of information technology are necessary.

Public participation: Public participation programmes can alert the NCOP to problems and achievements, strengthening its ability to oversee the executive. However, many South Africans are unfamiliar with their right to participate in government, legislative processes in general and the role of the NCOP in particular. The NCOP could take a number of steps to achieve better public participation. First, committee processes need to facilitate participation: Firm timetables must be issued well in advance of meetings; rules of procedure must be clear and accessible; and the NCOP might consider holding hearings should be held both in Cape Town and the provinces. Secondly, a public relations department would make communication easier. Thirdly, a public education campaign could explain the NCOP's oversight role to the public. Finally, the NCOP should develop a process for handling petitions received by provincial legislatures and passed on to it.

Staffing: The material committees deal with when they conduct oversight can be voluminous and complex. Trained staff are needed to assist. The report suggests that priority should be given to staffing the Finance Committee and the IRBP Committee. In

the short term, the NCOP could use staff from other institutions (such as the FFC and the Auditor-General's Office). In the medium term, trained and dedicated staff are necessary.

In addition, the NCOP should give consideration to drawing on government institutions, the private sector and NGOs for its short term staffing needs.

Technology: The NCOP is heavily dependent upon communication with provinces, local government, the National Assembly and the national government. New technology can be used to make such communication easier and more efficient. It can also facilitate the distribution of information necessary for oversight. In addition, public hearings may be enriched if TV conference facilities allow the public to make representations from a distance.

Institutional Environment: Proper oversight of the executive demands proper communication among Delegates. To enhance this, delegations should have some facility close to their meeting rooms in Parliament where they can gather, access materials on the Internet and consult with provincial executives and legislatures.

CHAPTER 1

THE NCOP AND OVERSIGHT: A FRAMEWORK

This Chapter proposes a framework within which the oversight role of the NCOP might be understood. Taking into account the NCOP's specific constitutional mandate and its relationships with other institutions (particularly the National Assembly, provincial legislatures and the national executive), the chapter sketches areas in which the NCOP has a duty to exercise oversight.

1. Oversight can aid in the transformation of South Africa by ensuring:
 - MPs legislate in the future with a full awareness of the successes and failures of past legislation;
 - Legislation is implemented as intended and is effective;
 - Government policy remains open to the needs and concerns of the people; and
 - Problematic laws and policies are identified and changed.
2. Oversight by the NCOP should not duplicate that of the National Assembly or the provincial legislatures.
3. The oversight role of the NCOP is a continuous process that begins in the earliest stages of the legislative process:
 - Oversight during the passage of legislation should review proposed policy of the executive and its impact on the provinces;
 - Oversight of the implementation of legislation ensures efficient and accountable government.
4. While there are a number of obstacles to conducting oversight, it is a critical part of a democratic society committed to effective government and transformation. Oversight ensures government remains in touch with the people and problems in delivery are recognised and addressed.

Since the NCOP was established late in 1996, it has faced considerable challenges. As a new institution with a unique mandate, it has had to flesh out the role outlined for it in the Constitution so that it can provide an effective bridge between provinces and the national sphere of government, and contribute to the realisation of the constitutional commitments to cooperative and effective government. The NCOP has understandably concentrated on its role in the passage of legislation, and other roles have remained relatively undeveloped. One of these is its oversight role. Oversight refers to the role of legislatures in monitoring and reviewing the actions of the executive organs of government.

There are, very broadly speaking, two views on the role of legislatures in a parliamentary-style system. The one is that the legislature is simply there to enable the executive to govern effectively. As a rule national bills are prepared by the national executive and approved by the Cabinet before they are introduced in Parliament. On this view, the role of the legislature is to pass legislation introduced by the government and facilitate government. In other words, rubber-stamping legislation is an acceptable function for a legislature.

The other view is that a legislature, even in a parliamentary system, is a deliberative body and, as a crucial element of a representative democracy, bears responsibility for ensuring

that all legislation and all executive action is sensitive to the needs of the people and fulfils national goals. It is this view of legislatures - as an *effective* part of government - that the South African Constitution supports. That is why, for instance, a committee system is entrenched in the Constitution. Discussion in committees makes it more difficult just to go along with government proposals. The commitment to dignified *and* active legislatures is evident in the emphasis placed on public participation: members of every legislature must remain alert to the needs of the electorate. It is also implicit in the electoral system. A system of proportional representation intends to include *and hear* diverse views in the legislature.

Through oversight, legislatures fulfil the constitutional commitment to accountable government. This report focuses on this role, which is one of the primary responsibilities of all modern legislatures. It is especially urgent as South Africa's second democratic Parliament begins its work. Major pieces of legislation are in place, and the emphasis has moved to their implementation or delivery - especially in areas in which provinces play a central role such as health, education, housing and welfare. If legislative oversight of delivery is lacking, both houses of Parliament would be neglecting a critical aspect of their role in ensuring an effective representative democracy.

This report emphasises what might be called "hands on" oversight by the NCOP itself, in other words, oversight the NCOP might conduct through its committees and by considering reports and submissions by departments and others. But it recognises the limits of this form of oversight in modern government. The sheer size and complexity of government in South Africa mean that it is impossible for legislatures alone to fulfil all necessary oversight functions. Recognising this, the Constitution provides for more specialised agencies such as the Auditor-General. Others need to be developed. Like the Auditor-General, such institutions could perform a dual function, acting as additional oversight mechanisms, as well as being tools the NCOP can use in fulfilling its oversight obligations. Chapter 2 suggests certain possibilities the NCOP might consider in this regard.

UNDERSTANDING THE NCOP'S OVERSIGHT ROLE

The Constitution has many expectations of the NCOP in relation to oversight. But oversight is a broad term, used for a wide range of activities in many different contexts. This section sets out an understanding of oversight that seems appropriate for the NCOP.

Oversight is often taken to mean policing. On this approach, the legislature must police the executive to ensure taxes are spent in accordance with policy approved by the legislature, expose corruption, and protect the public from wayward administrators. Following this understanding, opposition parties usually perform oversight and it is sometimes perceived to be opportunistic, or for short-term party political purposes. Because a democracy is committed to ensuring representative government, the policing

element of oversight is important. But to view oversight as a negative activity is mistaken. Oversight reflects - in fact it is essential to - open government because it secures democracy by making government accountable. It is also necessary if legislation is to be passed in a thoughtful and honest way. Moreover, when applied to the NCOP in particular, an understanding of oversight limited to policing the executive seems both too narrow and too broad.

A broad understanding of oversight

Building on the view of oversight held by most people consulted in compiling the report, the understanding of the NCOP's oversight role is not limited to demanding accountability of the executive in its *implementation* of legislation, or to the oversight functions required by the Constitution. Instead the NCOP's oversight role operates at every stage of the legislative process and extends to IGR

- The NCOP should conduct oversight when it passes legislation. It should not merely rubber-stamp bills introduced by the executive but, through careful consideration of the proposed legislation and through other processes such as public participation, should review the executive's proposed policy, particularly in relation to its impact on provinces.
- Once legislation is passed, the NCOP needs to assume a more traditional oversight role and monitor the implementation of the legislative programme. The purpose of such oversight is both to ensure efficient and accountable government and enable the NCOP to feed lessons from the past into new legislation.
- The NCOP should establish a special oversight role in relation to IGR.

Focused oversight in the NCOP – limited to the NCOP's constitutional role

This report outlines an approach in which, the NCOP's oversight role would be limited by its overall constitutional role. First, the Constitution gives the NCOP certain *specific* oversight (or 'checking') functions. For instance, under sections 100 and 139, it is required to review and approve or disapprove certain interventions by one sphere of government into another sphere. The NCOP has also to decide disputes about a province's capacity to administer national legislation (section 125). In each of these and a number of other cases the NCOP oversees the relationships between the spheres of government and operates as a check on executive action that might threaten the integrity of another sphere of government.

The NCOP also has a more "general" oversight role, we refer to this as its *inherent* oversight role. It is constitutionally enjoined to represent provinces in the national sphere, and local government is represented in the national sphere by the NCOP. Oversight is an integral part of this function. But, the NCOP is not to oversee all of national government; it is to exercise oversight only over the national aspects of provincial and local government. Its goal in doing this is to contribute to effective government by ensuring that provincial and local concerns are recognised in national

policy making, and that provincial, local, and national governments work effectively together.

Focusing the NCOP's oversight role in this way is not easy. *In particular, the NCOP needs to respect the oversight roles of both the provincial legislatures and the National Assembly. A provincial legislature must conduct oversight of the provincial executive. This will include oversight of programmes contained in national legislation that the provincial executive must implement and for which the province receives national funding. The National Assembly is primarily responsible for overseeing the national executive. However, neither provincial legislatures nor the National Assembly are in a position easily to identify and act upon problems with those national policies implemented by provincial executives. The NCOP is uniquely situated to fulfil this role.*

Consider, for instance, a hypothetical case: the implementation of the (imaginary) national Preservation of Granite Deposits Act. The Act falls under Schedule 4 because it deals with the environment and soil conservation. It sets out a uniform policy in relation to granite deposits and requires provinces to implement that policy. Three or four provinces have problems in implementing the policy, related to their geography and the distribution of natural resources. Although these problems are raised at the appropriate executive-intergovernmental relations (IGR) forum, the national executive appears not to respond. The problems are raised again when the provincial legislative committees conduct oversight of the relevant provincial departments. Because the matter is one of national policy, incorporated in a national act, the provincial committees acting separately cannot resolve it. Instead they take the matter to the NCOP. As a national body the NCOP is able, first, to consult all its member provinces to assess the problem and gauge how widespread it is, and assess what kind of response might be appropriate and compatible with the needs of all provinces. Continuing its oversight role, it can then provide a forum in which the provinces engage the national executive on the issue. In short, the NCOP provides a channel of communication between provinces and the national government. IGR structures normally provide adequate opportunities for resolving this kind of difficulty, but this will not always be the case. And even if they do, they will not be as transparent as discussion in a legislature. The NCOP provides a public forum for the consideration and discussion of problems. It is the only forum in which all three spheres of government can meet openly and as equals to negotiate solutions to problems.

A flexible approach to oversight by the NCOP

The NCOP is constitutionally obliged to carry out certain of its oversight functions, such as approving or disapproving a section 100 or 139 assumption of responsibility. However, because day-to-day oversight of the national and provincial executives is entrusted to the National Assembly and provincial legislatures respectively, the NCOP can determine whether it wishes to monitor the implementation of a particular act. This gives the NCOP flexibility to respond creatively to matters it views as priorities. It should not allow itself to be burdened by too much routine work. Instead it should use its

inherent oversight role in a strategic way and complement the oversight roles of the National Assembly and provincial legislatures. In so doing, it can contribute markedly to establishing effective and responsive government and ensuring that this multi-sphered system of government works.

NCOP oversight overall

The conception of the NCOP's oversight role is broad insofar as it extends from its consideration of bills through to monitoring the implementation of legislative programmes and IGR, focused in the sense that it is restricted to matters concerning local and provincial government, and flexible enough to allow it to respond to immediate needs. It is also justified by the constitutional role of the NCOP. That role

- Ensures that the NCOP provides a forum in which provinces and local government can scrutinise new legislation and ensure that it is responsive to their needs and compatible with their resources.
- Recognises that giving a voice to provinces and local government in the national sphere is not limited to passing legislation, but extends to monitoring the implementation of that legislation. Politicians concerned with effective government and the transformation of society cannot wash their hands of issues once they have passed legislation.
- Views the oversight functions of the National Assembly, the provincial legislatures and the NCOP as complementary rather than duplicating each other.
- Recognises the practical limitations of the NCOP, a small chamber with a heavy workload.

This understanding of oversight seems compatible with the constitutional role of the NCOP as a provincial voice and as a body that protects the relationships between the spheres of government. It is informed by the view of oversight adopted by the plenary at the National Strategic Planning Workshop of the NCOP held on 13 November 1998, according to which

Oversight in the South African context is the pro-active interaction initiated by a legislature with the executive and administration or other organs of state that encourages compliance with constitutional obligations, such as being accountable to elected representatives, good governance, development, [and] co-operative governance.

It draws on two basic values of the South African system of government: representivity and effectiveness. In other words, oversight in the NCOP must be conducted to

- ensure government remains representative and does not lose its essential link with the people whom it governs, and which is provided by Parliament and the provincial legislatures; and
- contribute to effective government and transformation.

Thus, the ongoing *goal* of oversight by the NCOP is *to contribute to the effectiveness of South Africa's multi-sphered system of government and its representivity* by

- ensuring that laws are implemented as effectively as possible with a minimum of waste and delay
- contributing to new policies and determining changes that may be necessary in existing policies and programmes
- enhancing citizen confidence in government in every sphere
- fostering the principles of cooperative government

IMPLEMENTING OVERSIGHT

In the following chapters this report discusses the NCOP's oversight responsibilities under three headings:

- the NCOP's inherent oversight role; (chapter 2)
- oversight to protect the integrity of the three spheres of government and effective government; (chapter 3) and
- oversight in partnership with the National Assembly. (chapter 4)

These categories are not watertight -- in fact they overlap considerably. But they do facilitate an understanding of the NCOP's oversight functions. In addition, the NCOP, as with all its other functions, is required to fulfil its oversight functions in the spirit of cooperation: oversight must enhance and not undermine co-operative government.

The NCOP can use many tools in conducting oversight. The structure of the institution is critical in this regard, and the recommendations in this report rely heavily on the committee system. In modern government, the committee structure provides the best forum for addressing complex issues. Committees do the detailed work of governing, providing a forum for detailed questioning, analytical discussion, testimony of witnesses and extensive public participation not easily handled in a full plenary session. ~~C~~The committee structures also allows members to develop expertise in their portfolio subjects and thus engage in oversight in a knowledgeable and informed way.

Committees need resources to fulfil their functions. The proposals in this report anticipate the NCOP will have some staff but will also draw on outside agencies. The Constitution itself sets up certain agencies for this purpose. The Auditor-General and the FFC are the two most important to the NCOP, public hearings provide another source of information for legislators, and NGOs yet another.

OBSTACLES TO OVERSIGHT

In any political system, the most serious obstacles to oversight are political. This is because of the close links between the executive and the legislature. Throughout the consultations, concerns were raised about political factors that inhibit rigorous oversight of the executive.

Effective oversight will sometimes involve asking the executive difficult or embarrassing questions. The majority party in a parliamentary system may hesitate before engaging in rigorous oversight of its own leaders. The primary concern of government MPs is often to bolster the government and demonstrate loyalty rather than to act in ways that to both their fellow party members and to the public may seem disloyal or reflect a lack of trust in the government. A related factor that is usually identified as a further obstacle to effective oversight by legislatures is a strong party system. In South Africa this factor may be more important than in other Commonwealth parliaments because, at present, politicians do not depend on voters in geographically defined constituencies for election but on political parties. Politicians may also be concerned about their careers - a history of asking difficult questions of their own Ministers (even when the questions are asked in a constructive spirit) is not usually seen as wise if one wishes to advance in a party. The lack of political confidence in the provincial system brings with it a special obstacle to oversight by the NCOP. Delegates to the NCOP may be reluctant to be perceived to be championing provincial interests against those of the national executive.

It is impossible to eradicate completely these political inhibitions on proper oversight. They are an integral part of any party-based political system. However, their impact will depend substantially on the prevailing political culture. Oversight should not be considered a threatening process, designed to undermine government. Instead, it can keep government open and close to the people it represents. In the context of the NCOP in particular, it offers opportunities to reflect on the effectiveness of government policy in a transparent way and, possibly, with public participation. The approach of the Public Accounts Committee in the National Assembly is often considered a special case, but it provides a model of how oversight might be conducted without undue grandstanding.

This report does not suggest that oversight can be a neutral political activity. It is bound to offer all parties opportunities to advertise or challenge policies, to claim the effectiveness of government or to proclaim its ineffectiveness. Nevertheless, the overall political climate in a country and, on a smaller scale, in a legislature, can either inhibit oversight by all but opposition parties or encourage productive engagement with the executive by all members.

The political ideology and strength of the present governing party puts it in a good position to develop a mature system of oversight in the NCOP. First, as both the repeated promises of accountable and open government in the Constitution and the practice of the past five years show, South African politicians are committed to proper oversight of the

executive. Secondly, encouraging open discussion of the implementation of policy is unlikely to threaten the governing party. Instead, it will demonstrate an honest effort to deliver, eliminate waste and improve the implementation of policy. It will ultimately lead to better service to the public. Thirdly, the unique position of the NCOP allows it to conduct oversight removed from party agendas and focused on provincial needs and services to the people.

In addition to political factors, the resources and infrastructure of a legislature play a role in determining the effectiveness of its oversight of the executive. First, the small size of the NCOP weakens its committee system, which is the engine of the process of oversight. (Here the solution might be to use special delegates in a more consistent and planned way.) Secondly, to conduct proper oversight of the implementation of a policy, of an intervention by one sphere of government in another, or of provincial capacity, the NCOP requires information and staff who have the technical skills to analyse and explain problems and policy. Ideally the legislature should not be entirely dependent on the executive for information and should be able to undertake some form of independent verification of reports that the executive submits. The NCOP, like other South African legislatures, has extremely limited resources. Nevertheless, it can draw on established institutions (like the Auditor-General and the FFC), NGOs and the public for information.

A final obstacle to direct oversight of government by any legislature, including the NCOP, is the complexity of modern government. For this reason, this report suggests that the NCOP should not rely entirely on its own efforts in securing accountable and open government in the area with which it is concerned. Instead, it should also seek to establish other ways of ensuring accountability in government. As already suggested, such mechanisms could be used both as independent means of achieving accountability and as tools for the NCOP in carrying out its oversight responsibilities. This is discussed in Chapter 2 part 1.

CHAPTER 2

THE NCOP'S INHERENT OVERSIGHT ROLE: OVERSIGHT TO ENSURE EFFECTIVE GOVERNMENT

The Budget: The NCOP's role in overseeing the budget is to ensure that provincial and municipality interests are properly accommodated in the budget and that the division is equitable. To do this it would have review past divisions of revenue and their appropriateness, consider FFC recommendations, and draw on the experience of provinces in fulfilling their statutory mandates.

Oversight during the legislative process: The NCOP's major responsibility is to participate in the passage of section 76 laws through Parliament. The practical rationale for this constitutional obligation is that, generally speaking, provinces will be implementing section 76 laws. It is essential, then, that provinces use their role in the NCOP to ensure that these laws are appropriate and responsive to their needs and capacity.

Overseeing the implementation of legislation - Progress in transformation: The NCOP oversight role in implementation is to draw provincial experience into the oversight of national policy and to inform the national government of issues that affect implementation. The NCOP can provide coordination and a vehicle for provincial participation in several ways, including by:

- Providing a provincial perspective on the implementation of national policy and legislation;
- Reporting on cross-cutting issues which affect several or all provinces, including issues of sufficiency of capacity to implement national programs, common provincial institutional needs, such as improved training in financial or computer systems, and common factors which hinder successful implementation of national policies; and
- Co-coordinating the exchange of information among provinces on issues or practices of common concern to improve the capacity of provinces as a whole to fulfil their responsibilities and helping to establish best practices.

This report proposes that a specialised committee, tentatively named the *Select Committee on Implementation Review and Best Practices*, should be created to fulfil this task.

Overseeing the implementation of legislation – delegated legislation: The NCOP has two distinct roles in the oversight of delegated legislation. First, it must use its inherent oversight power to review delegated legislation for compliance with constitutional standards. Secondly, under section 146 of the Constitution, if provincial or national delegated legislation is to prevail against conflicting legislation, it must have been approved by the NCOP. Existing select committees seem to provide the best forum for the oversight of delegated legislation.

Chapter 1 suggests that the NCOP has a inherent oversight obligation in addition to those detailed in the Constitution. This Chapter deals with that obligation.

- 2.1 sets out the constitutional basis for the inherent oversight role of the NCOP.
- 2.2 deals with the NCOP and budget oversight
- 2.3 discusses NCOP oversight during the legislative process
- 2.4 discusses NCOP oversight of the implementation of legislation
- 2.5 covers the oversight of delegated legislation.

2.1 CONSTITUTIONAL FRAMEWORK FOR A INHERENT OVERSIGHT ROLE FOR THE NCOP

The National Assembly bears the primary responsibility for oversight of the national executive: section 42(3) lists scrutiny of the executive as one of the National Assembly's main tasks; section 55(2) requires the National Assembly to hold the national government accountable to it; and section 102 gives the National Assembly the ultimate oversight power over the national executive - the power to dissolve the Cabinet.

Unlike the National Assembly, the NCOP is not expressly required to exercise a general oversight role by the Constitution - and section 42(4) does not mention oversight. But this role is implicit in its constitutional functions, a direct consequence of its role in the passage of legislation. A legislature cannot fulfil its law-making function effectively or responsibly if it washes its hands of legislation once it has passed. Thus, the NCOP must not only oversee the passage of legislation, it must review the regulations that flesh out the detail of legislation. It must also review the implementation of legislation to monitor the success of the programmes put in place. Finally, the understanding acquired in reviewing their implementation feeds back into the legislative process: to consider and pass good legislation in an informed way the NCOP must be alert to the successes and failures of previous laws.

An inherent oversight role is also implied by the requirement that the NCOP "represent provinces to ensure that provincial interests are taken into account by the national sphere of government" and by its general responsibility for "issues affecting provinces". Again, to have real meaning, this must cover the writing of regulations and the implementation of national legislation. The Constitution recognises this in section 66(2), which permits the NCOP to call a national cabinet minister to attend it, and in section 92(2), which holds national ministers accountable to both houses of Parliament.

But the NCOP's inherent oversight role is underpinned by a more basic constitutional principle: the constitutional commitment to effective government and to the transformation of South Africa. Provinces bear the burden of implementing or administering major social programmes. For those programmes to be effective, provincial experiences with them must be seriously considered and must inform the national debate. Oversight by the NCOP has the potential to allow this to happen in a co-operative way, by infusing provincial and local experience into the national debate and permitting public engagement with the national government.

2.2 OVERSIGHT OF THE BUDGET

2.2.1 Introduction: Importance of the Budget and support for an NCOP Role²

“The purpose of the budget is to bring about a better life for all...it is about transforming our country together” President Nelson Mandela.³

In transforming the lives of South Africans, setting public policy priorities and matching those with the expenditure of public funds is the most important step. Budgets are the means of enacting key national goals, such as increased housing, job creation, health care and education. Currently the most important parts of the South African budget are contained in a package of three bills:

- The Division of Revenue Bill, which determines three critical things:
 - i. **W**hat share of revenue raised nationally must go to provinces and local government;
 - ii. **W**hat share of the revenue set aside for provinces goes to each particular province; and
 - iii. **W**hat additional ‘conditional grants’ provinces will receive from the national governments share of the revenue.
- The national Expropriation Bill (the ‘Budget’), which determines the way in which the national government’s share of revenue should be spent.
- The Income Tax Bill.

Because provinces receive 90 to 95 per cent of their funding from the national government, the national Division of Revenue Bill is the most important piece of legislation that goes through the NCOP. It is the Division of Revenue Bill that determines whether provinces can follow through on their transformation mandates.

The Constitution assumes the NCOP will play a substantial role in the passage of the Division of Revenue Bill because, unlike the other two bills that make up the budget, it is a section 76 bill. This gives the NCOP real influence. Thus, in emphasising the need for the NCOP to play a major role in the budget process, Hon. Barbara Hogan, the Chairperson of the National Assembly’s Finance Committee, suggests that the NCOP is the best institution to address the Division of Revenue Bill and the accompanying FFC recommendations.⁴ Also, FFC Chairperson Murphy Morobe in 1998 reiterated Hogan’s point and urged Parliament in general and the NCOP in particular to define its role and

² There has been considerable discussion on the NCOP’s appropriate role in the budget process and how it should be implemented. See, in particular, Tania Ajam ‘NCOP challenged to make bigger impact on budget’ and Warren Krafchik and Joachim Wehner ‘Confusion over NCOP’s role in process’, both in *Budget Watch* (1998) 4:2.

³ Quoted in *Accountability and the Budget Process from a Provincial Perspective* by Joan Fubbs (1999) p 7.

⁴ *The Imperative of Co-operative Governance: Report on the National Council of Provinces Conference (8 - 9 May 1998)* p 29.

procedures under the new budget process to ensure it fulfils its constitutional obligations. The NCOP, he said, should be a key player in the budget process, participating in the determination of the appropriate levels of spending on policy priorities, the distribution of funds among the provinces, and the review of actual expenditures.

The NCOP should analyse the budget with an eye to the effects of the budget on provinces and local government, rather than in a partisan manner, and with the goal of ensuring that the national policy encapsulated in budget proposals and to be implemented by provinces and local government can be effectively fulfilled. Partisan issues are better addressed in the National Assembly, with the budget process in the NCOP focused on provincial viewpoint and impact.

Budgetary Oversight in the Context of Co-operative Governance

Especially in the budget arena, oversight should be conducted with an understanding of the constitutional emphasis on co-operative governance laid out in Chapter 3 of the Constitution. Hon. Hogan stated in regard to the budget process:

On the one hand, the Constitution confers on the legislature the right to amend legislation. On the other hand, it bestows upon the executive the right to govern. A balance has to be struck between these two rights, because a confrontational approach could undermine the integrity of the budget process.⁵

In striking the balance between the executive and legislative roles and between the provincial, local and national spheres, government officials must also recognise that the Constitution reveres transparency and accountability alongside cooperative governance (section 41(c)). Through oversight of the budget process, the NCOP can ensure that all three principles are honoured. The oversight function is not at odds with the spirit of cooperation; it is an extension of it. Oversight can be conducted through cooperative information and idea sharing amongst all participants. Further, public hearings can achieve the related goals of accountability and transparency achieved. This interchange between the executive and the legislative branches and the three spheres results in a stronger, more representative budget and, ultimately, better service to the people.

2.2.2 Implementing NCOP oversight of the Budget Process

Because of its importance in the budget process and particularly in the passage of the Division of Revenue Bill, the NCOP should establish a clear and detailed process for analysing the proposed budget.⁶

⁵ Quoted in *The Imperative of Co-operative Governance* p 28.

⁶ An excellent resource for assisting the NCOP in adopting a budget process, determining the information it needs, and drafting an accompanying manual is *Accountability and the Budget Process From a Provincial Perspective* by Joan Fubbs, Chairperson of the Gauteng Provincial Legislature's Committee on Finance and Economic Affairs.

Using the Select Committee on Finance

The NCOP's Select Committee on Finance should be at the centre. Extending its current engagement with the budget,⁷ the committee would analyse the budget, focusing mainly on national division of revenue and the conditional grants to provinces contained in the Division of Revenue Bill. It should also determine the bill's relation to national policy and provincial needs in the light of its evaluation of past expenditures and performance.

The goal of the committee would be to review the annual Division of Revenue Bill to ensure among other things that

- It is equitable;
- It enables provinces and municipalities to fulfil nationally-determined mandates (for instance in education, health and welfare);
- It permits the fulfilment of national policy goals; and
- Conditional grants are reasonable.

It would also consider issues in the national Appropriation Bill that impact provinces or restrict their flexibility, such as allocations for improvement in conditions of service in the public service.

The committee, and sometimes the NCOP in plenary, should serve as a public forum for explanation and debate on how the division of revenue is determined and the formula used to divide the provincial share into each province's allocation. This public discussion will bring to the fore the national government's expectations for provincial performance while allowing provinces to address the realities posed by financial limitations. A frank discussion of programme goals in the context of the division of revenue will enable local, provincial and national governments to jointly understand what is achievable.

⁷

At present, as far as we are aware, the NCOP Select Committee on Finance does not consider the budget (including the Division of Revenue Bill) in much detail.

The role of the Finance Committee is distinct from that of provincial finance committees, which look at the budget of their individual provinces. Its role should also be distinguished from that of both the National Assembly Public Accounts Committee and provincial public accounts committees. These committees review the legitimacy of expenditures, relying on the Auditor-General to review government action for waste, fraud, abuse etc. The work of the NCOP Finance Committee should focus on policy in the division of revenue amongst the three spheres of government.⁸

How should the Finance Committee work?

Early Involvement in the Budget Process: The key to meaningful involvement in the budget process by the NCOP and the provinces is early involvement, information, and a focus on the provincial and local government impact of the budget.

The earlier NCOP Delegates become involved in the budget process, the more effective they can be in performing budgetary oversight. The FFC provides crucial expert back-up for the NCOP at an early stage of the budget process. The FFC is constitutionally responsible for commenting on legislation that affects the financial relationship between the spheres of government, and it is firmly linked to the provincial and local spheres of government: Of its 22 members, nine are nominated by the provinces and two by organised local government.

The NCOP should take full advantage of the FFC. The FFC's most important task is to make recommendations on the annual division of revenue amongst the three spheres of government. Its report is an invaluable source of information for the NCOP as it provides detailed research and analysis. However, at the outset the NCOP needs to insist that Parliament receive FFC recommendations timeously. The Intergovernmental Fiscal Relations Act requires the FFC to table its budgetary recommendations in Parliament at least 10 months before the start of each financial year. However, the FFC's Recommendations and Comments for 1998-9 were submitted to Parliament only on 9 January 1998 – too late to inform the debate.⁹

⁸ The Finance Committee should not be a joint National Assembly/NCOP committee. The finance committees of each house have distinct roles. The NCOP's necessary – and relatively narrow - focus is on the division of revenue amongst the three spheres of government and its responsibility in representing provinces and local government. The National Assembly committee will be concerned with the division of revenue, but a significant portion of its job is to analyse the national budget. In addition, the NCOP should define and develop its role in budget oversight properly and eventually to contribute to oversight of the budget in a constructive way that complements the National Assembly's role. Combined in a joint committee, NCOP concerns are likely to be overwhelmed by the national and party-political concerns that are appropriately raised in the National Assembly.

⁹ Section 10 of the Intergovernmental Fiscal Relations Act 97 of 1997 permits the FFC to submit recommendations at a later date if the Minister of Finance agrees. It was an oversight on the part of Parliament not to insist that its agreement should also be obtained: the recommendations are as

The 10-months lead time provided by the FFC recommendations and the 3-year time frame of the Medium Term Expenditure Framework (MTEF) present the NCOP with scope for long-term strategic involvement in the determination of the annual division of revenue. In addition, the NCOP's Finance Committee, along with other select committees, should consider the Medium Term Budget Policy Statement, issued in November. The NCOP may also want to hold public hearings on it.

Proposals for the next division of revenue: At present, the Division of Revenue Bill is introduced with the rest of the budget. This means (i) that there is very little time for debate on it; (ii) debate naturally focuses on the national budget; and (iii) it is difficult to propose amendments because of a complex ripple effect on the national Appropriation - Bill and provincial budgets. To address these problems, this report suggests that the Division of Revenue Bill be brought forward by several months at least (and perhaps introduced in November). This suggestion is not impractical – the division of revenue is completed before the other budgets are finalised. Importantly, this would permit a focused debate on the vertical division of revenue among the three spheres of government.

Once the proposed division of revenue for the following year is available, or when the Division of Revenue Bill is introduced in the NCOP, ample time should be given for the Finance Committee to scrutinise the proposed division. Delegates need time to pose questions and evaluate the division of revenue according to public policy goals, fiscal soundness and performance criteria. Any suggested revisions to the proposed division of revenue can be raised at this time or in later amendments. This detailed review will enhance transparency and accountability while providing NCOP Delegates an opportunity to express the needs of the provinces that they represent.

Unfunded mandates:¹⁰ So-called unfunded mandates are one of the most controversial issues in intergovernmental fiscal relations in South Africa. The 1997 *Provincial Review Report*¹¹ commented that

Many national departments create new policies without considering how they are to be implemented. The unwritten expectation is that the provinces will make the necessary financial and organisational arrangements. There appears to be an assumption at national level that policy will automatically become activity.

The national Department of Finance has responded to this problem and sought better control over decisions that involve spending. In addition, the 1999 Public Finance Management Act contains a section dealing with unfunded mandates (section 35).

¹⁰ important to Parliament (and particularly the NCOP) as they are to the executive.
¹⁰ This section is heavily indebted to comments by Joachim Wehner on an earlier draft.
¹¹ Ministry for the Public Service and Administration (1997) p 14.

The Act prescribes that draft national legislation that assigns any obligation to a provincial government must project the financial implications for the province in an accompanying memorandum. In practice much will depend on the detail and accuracy of such costing.¹²

Nevertheless, these estimates will provide the NCOP with a good starting point for considering the administrative and financial impact on provinces of mandates contained in national legislation.

Who should be members of the Committee?

As NCOP Rule 87 requires, the NCOP Finance Committee should reflect provincial interests by including at least one member from each provincial delegation. In addition, SALGA representatives should be permitted to participate in its meetings. Because of the workload, Delegates on the Finance Committee should serve only on that committee, or in positions on other committees that do not require a heavy workload. ~~Because of the workload, Delegates on the Finance Committee should serve on only that Committee, or in positions on other committees that do not require a heavy workload.~~ Concerns were raised about the additional burden this may place on the remaining Delegates who will have to fill these gaps to ensure adequate provincial and proportional representation on each of the remaining committees.

What research information is currently available?

During the process, NCOP Delegates should be able to draw on the expertise and input of representatives of the provincial governments whose budgets are being considered, a representative of the FFC, and any executive branch officials who have an interest in or knowledge of the particular programmes to be carried out by the provinces. The FFC should provide the Delegates with a brief summary of each province's equitable share, noting any significant changes from previous years or irregularities.

How should the Finance Committee be staffed?

The NCOP, like other legislative bodies worldwide, needs budgetary staff that reports only to its Delegates. The staff should include at least one economist capable of evaluating revenue forecasts and several members with accounting experience and financial expertise capable of evaluating detailed budgets, personnel requirements, and capital expenditures.

Until the NCOP is able to hire and train adequate staff, the Ministry of Finance and the FFC could provide support to the Delegates. The FFC has approved plans to establish a parliamentary liaison office in Cape Town, indicating its wish to work more closely with

¹² Joachim Wehner, personal communication August 1999. In requiring that financial estimates should accompany bills, the Public Finance Management Act (Act 29 of 1999) takes up a proposal made in NCOP workshops in 1997 and 1998.

Parliament. The commission is well-resourced and could advise the NCOP and provide research support in budgetary matters. Various NGOs and universities may also be able to provide support (eg Applied Fiscal Research Centre, AFReC). However, ad hoc support from these bodies would not be adequate. An agreement committing the institutions concerned would have to be reached for the Finance Committee to get the level of research support that it needs. These staff would benefit their home agencies by gaining the experience of working closely with a legislative body. They could also assist in the training permanent staff for the NCOP.

In the medium term, the Finance Committee needs its own, dedicated research staff. Staff seconded from other agencies, and particularly the Department of Finance, would not necessarily have the appropriate distance on matters and could not be permanent. In addition, special skills are needed to convey complex financial matters to MPs and the public and to research the question of their impact on provinces and municipalities.

Training for NCOP Delegates and MPLs

To perform effective budgetary oversight, Delegates need training on how to read and analyse budgets. South African elected officials are no different from their counterparts around the globe; most who enter into elected office do not have experience scrutinising large budgets. It is commonplace for legislative bodies world-wide to offer seminars in budgetary oversight for their members. The NCOP should offer a workshop on budget basics with a clear focus on issues relating to the division of revenue amongst spheres of government. Through training, NCOP members should become acquainted with the laws governing the budget, the timetable of the budget process, how to read a budget, the formulas that determine the division of revenue, important questions to ask, and sources of information. Training for the NCOP Finance Committee should be a priority.

MPLs also need this type of training to participate effectively in both the provincial and national budget processes. The NCOP could join with the provincial legislatures in providing workshops to their members to save both time and effort.

2.3 OVERSIGHT DURING THE LEGISLATIVE PROCESS

2.3.1 An effective legislature

In Chapter 1 this report follows the mandate of the Constitution 9in Sec 41(1)c that South African legislatures be “effective”. For the NCOP this means active roles in the passage of legislation and oversight of that legislation once it is implemented.

The most important legislative role of the NCOP is passing section 76 legislation. This is indicated in the Constitution by the fact that section 76 legislation is legislation that concerns matters that fall within the concurrent jurisdiction of provinces and the national sphere of government and by the fact that the NCOP has influence over section 76

legislation - it is difficult for the National Assembly to overrule the NCOP on section 76 matters.

But there is also an important practical reason for the NCOP to take its role in the passage of section 76 legislation very seriously. In section 125, the Constitution anticipates that provinces will administer most section 76 legislation. In practice this means that section 76 bills (such as those relating to health, education and welfare) place demands on provincial executives. A province should not support a section 76 bill in the NCOP unless it is confident that its executive can fulfil the obligations of the bill. Conversely, once a province has supported a section 76 bill, it can hardly complain its burdens are too heavy. Section 76 legislation will typically have already been considered in MinMECs before it is introduced in Parliament and, if the system is working effectively, from the perspective of the executive most problems should have been ironed out. The NCOP process adds essential elements to this executive perspective because:

- it brings provincial legislators into the process and so will introduce new perspectives on the needs of provinces
- it allows a public discussion of the role of provinces in the implementation of policy
- it gives opposition members in provincial delegations an opportunity to raise issues that may not have been considered in executive-run IGR forums

2.3.2 Implementing oversight during the passage of legislation

Oversight of legislation tabled in Parliament by the national executive is a function already carried out to some extent by the NCOP both through its committees and, more indirectly, through provincial committees. For this reason this report will not deal with it in any detail. However, some individuals raised concerns during the preparation of this report regarding the process:

- many provincial legislatures cannot deal adequately with complex national bills
- the NCOP cycles in which bills have to be passed are too short and bills are too often fast tracked
- provincial legislatures and executives seldom communicate effectively about national bills before the NCOP (partly because many MECs appear to believe that their role finishes when a MinMEC agrees to a bill). As a result, NCOP delegations may agree to bills that impose considerable obligations of implementation on provincial executives but that are not sensitive to provincial capacity
- public participation is important but there is confusion about the roles of the National Assembly, the NCOP and provincial legislatures (see Chapter 5)

Each of these issues was raised in the 1997 NCOP needs assessment report, *From Paper to Practice*. Until they are addressed, the NCOP will not function properly.

2.3.3 Preparing the ground for future oversight: measuring legislative effectiveness

In dealing with bills before the NCOP, Delegates should not only consider whether they agree with the policies advanced by the bill, but also whether the bill provides for reasonable methods of accountability. The sheer size and complexity of modern government is a significant obstacle to effective oversight of government. Nevertheless, the process of oversight can be improved considerably if oversight mechanisms are considered during the development of a bill. In its consideration of bill, the NCOP should ensure that legislation contains mechanisms that:

- facilitate oversight by the NCOP; and
- provide other forms of accountability.

For the NCOP to perform its oversight of the implementation of bills properly, it must be possible to assess progress in a non-subjective way. For this, bills themselves must contain clearly stated goals and objectives, and adequate reporting requirements to ensure accurate information is collected.

The goals of a bill should be stated in terms of desired outcomes, not merely outputs. The difference between “outputs” and “outcomes” is crucial to achieving true transformation through legislation. For example, an education bill, which only establishes goals for the number of schools to be built, or teachers to be hired, will measure “outputs” only. Those number are important, but they reflect only how the money was spent. An “outcome” of an education bill, on the other hand, might be stated in terms of larger numbers of children being able to read and write. A measurement might be based on improvements in children’s test scores, or increases in the number of children reading at the level expected for their age. In this example, spending money on schools and teachers is not an end in itself, but rather a *means* toward the end goal of improving the ability of children to read and write. Therefore, while it is useful to measure the number of schools built and teachers hired, it is crucial to measure the progress toward the *end goal* as well.

In addition to ensuring that bills contain mechanisms to facilitate oversight by the NCOP, Delegates should ensure that bills facilitate oversight by others as well. No legislature, however well-resourced and well-intended, can on its own ensure that all government in a country is accountable and responsive. As suggested in the opening to this report, it is essential to have other mechanisms of accountability in place. Chapter 9 of the Constitution establishes “State Institutions supporting Constitutional Democracy” and provides for certain of these. But further steps will be appropriate in some contexts. For instance, legislation dealing with schools might put in place controlling bodies with parent and community representation. Environmental legislation might require special public procedures to be followed before regulations are adopted. In certain instances, it might be appropriate for members of provincial legislative committees to participate in oversight bodies. This type of provision attempts to maintain the responsiveness of government and accountability to the public or interested sectors on an ongoing basis.

This report suggests that, as part of its broader oversight function, the NCOP should pose this question of all section 76 bills that it passes:

Does this Bill contain adequate provisions to ensure that its implementation can be monitored on an on-going basis and its effectiveness measured?

2.4 OVERSEEING THE IMPLEMENTATION OF LEGISLATION – PROGRESS IN TRANSFORMATION

As pointed out in Chapter 1, the NCOP must exercise oversight of the implementation of legislation both because it is a continuation of its law-making role and because section 42 (4) of the Constitution charges the NCOP with the broad responsibility of ensuring that provincial interests are taken into account in the national sphere of government. To be effective in providing a voice for provincial interests, the NCOP must consider the implementation, as well as the passage of legislation, for three reasons:

- It is in the implementation of legislation that transformation occurs and that the full extent of provincial interests can be ascertained.
- The knowledge gained from analysing the success of implementation is essential for Parliament's informed decision-making when considering the feasibility, practicality, and likelihood for success of future proposed legislation. In light of the tremendous amount of legislation that Parliament has passed since 1994, it is especially important that adequate attention be directed to assessing the success of implementation.
- Oversight is integral to achieving the Constitution's democratic commitment to open and accountable government.

The oversight of implementation can be considered in two parts: *progress in transformation*; and representing provincial interests in *delegated legislation*. This section deals with reviewing the effectiveness of the implementation of legislation in achieving its goals. Section 2.5 considers the NCOP's oversight of delegated legislation.

A fundamental part of oversight is to assess whether the implementation of laws and the expenditure of funds achieves the goals intended by Parliament. Transformation will occur only to the extent that initial goals are attained. Poor implementation will prevent, or at least, delay transformation. The NCOP oversight role in implementation is to draw provincial and local experience into the national debate when the effectiveness of policy and its implementation is considered. The NCOP can provide coordination service and a vehicle for provincial and local participation in several ways, including by

- Providing a provincial or local perspective on the implementation of national policy and legislation;
- Reporting on cross-cutting issues that affect several or all provinces (or municipalities), including issues of capacity to implement national programs, common provincial institutional needs, such as improved training in financial or computer systems, and common factors that hinder successful implementation of national policies; and

- Coordinating the exchange of information among provinces on issues or practices of common concern to improve the capacity of provinces as a whole to fulfil their responsibilities.

The NCOP's committee processes provide an already-established and effective way to fulfil the NCOP's responsibility to review the implementation of legislation. The existing committee system is well-understood and allows Delegates to meet, establish oversight and review priorities, develop expertise, review implementation progress, and report to the whole NCOP on their findings. Further, through limited use of the plenary process, including question time, Delegates can obtain testimony from the executive branch as necessary.

In discussing methods that the NCOP might adopt to carry out its oversight responsibility, the following sections support

- a specialised committee;
- the focused use of question time; and
- in some cases, plenary debates.

2.4.1 Select Committee on Implementation Review and Best Practices

A specialised committee is best suited for the tasks of assembling and assessing necessary information and reports concerning implementation results because of the large workload associated with such tasks and the development of expertise that would be needed. Such a select committee could be named something like the *Select Committee on Implementation Review and Best Practices*.

The Select Committee on Implementation Review and Best Practices (IRBP) could integrate and synthesise information contained in pertinent reports by various government bodies. For example, the Auditor-General and the provincial finance MECs are currently required regularly to prepare reports on how funds have been spent, as well as the results and outcomes of those expenditures. Other MECs and departments, such as provincial health departments, may also regularly compile reports on their implementation of legislation. The role of the IRBP Committee would not be to scrutinise individual reports by the Auditor General and others, but rather to extrapolate from those reports information and trends that are relevant to several or most provinces and which require a broader national discussion. Thus, the Committee's work would not overlap with, but complement, that of provincial public accounts and other committees.

Why is a separate committee necessary?

Oversight of the implementation of legislation is a general responsibility of the NCOP and some might argue it should be the role of all select committees rather than of a single committee. However, oversight is a complex and difficult undertaking, and just as select committees develop knowledge of their areas so a single committee is best equipped to

develop the necessary expertise to most effectively conduct and coordinate implementation review.

All select committee members must develop a working knowledge of the concepts the committee will be working with repeatedly. For example, members of a finance committee must understand terms such as debits, credits, assets and liabilities. Members of an education committee may be faced with concepts such as effective teaching methods, child development and standardised testing (ideas which are often hidden in technical language such as cognitive development, norm-referenced testing and pedagogical methodologies). Similarly, members of an implementation review committee must develop understanding of concepts such as criteria, conditions, effects and causes. They must be able to assess whether or not the types of performance measures suggested by a department actually measure the most important factors. For example, an education department may suggest that a performance measure should be the number of students graduating from high school. However, if the graduation requirements are low enough that significant numbers of graduating students do not have adequate mathematical, reading or analytical abilities, a performance measure which tracks the number of graduating students is of little value. Instead, measures that determine academic performance may be more appropriate.

A single committee for implementation review would also make the most effective use of staff resources. To be most effective, implementation review must be based on objective research performed by qualified staff. This report recommends that, at the outset, staff support should be provided by the Parliamentary Unit of the Auditor-General. A critical role staff will play will be to develop summaries of existing performance audit reports and finance department reports and provide briefing papers. Working with a single committee, staff can become familiar with committee procedures and working practices. However, if implementation review responsibilities were divided among all of the select committees of the NCOP, staff support would be spread thinly and so encumbered by differing committee procedures and briefing methods that it would be rendered ineffective.

Of course, the fact that a single committee has primary responsibility for the task of auditing the implementation of legislation does not mean that it would work in isolation. It would obviously draw on the specialised expertise of select committees and, using NCOP's rules that allow joint meetings or an exchange of views between committees (Rules 102 and 103), work together with such committees when necessary.

What about an NCOP public accounts committee?

The NCOP is not primarily responsible for the oversight of any governmental finance procedures. The National Assembly Public Accounts Committee is responsible for this at national level; provincial committees should do it for their provinces; and Municipal Councils are responsible for overseeing municipal finances. Therefore, this report does not recommend the establishment of an NCOP public accounts committee.

However, as we explained below, the proposed IRBP Committee would have the skills necessary to deal with financial matters that may arise. In fact, this report suggests that it might consider monitoring some municipal finances on a temporary basis until local government is better established.

What would the IRBP committee do?

The committee could function in a variety of ways. As an example, three are considered:

Hypothetical Example No.1.

Chapter 4 of the Financial Accounting Act, 1999, requires accounting officers to submit measurable objectives with their budgets. Under this provision, the accounting officer of the Department of Education submitted with the budget an objective that of the 175 school days per year, 60 percent of the days are to be spent in classroom teaching, with the remainder available for related activities, such as test preparation, musical events, athletic events and teacher training. The Implementation Review and Best Practices committee could monitor the following—1) the extent to which the measurable objectives submitted by the provincial accounting officers are similar to the national measurable objectives; and 2) the extent to which provinces are able to meet the objectives.

If the summary report prepared by the parliamentary unit of the Auditor-General indicates that several or most of the provinces were unable to meet the target, the parliamentary unit could further analyse and report to the IRBP committee the reasons why the targets were not reached. For instance, it may be able to identify activities schools were spending their days on other than classroom teaching and whether there are patterns or similarities among the provinces. Informed by such an analysis, the NCOP's IRBP Committee could hold public hearings, with the appropriate ministers and provincial officials in attendance, to engage in a dialogue over the appropriateness of the existing objectives, and whether other priorities need to be considered or de-emphasised. The results of such a dialogue, in which the provincial interests are expressed, would then be available to inform national policy.

Hypothetical Example No. 2

In the process of its strategic planning at the beginning of a legislative session, the NCOP Select Committee on Education concludes that there has been a significant amount of education legislation passed in recent years, but that the committee has little useful information on the actual outcomes resulting from those statutes. Consequently, to make the most efficient use of staff research capacity, the Education Committee and the IRBP Committee cooperatively decide to undertake a comprehensive review of implementation of recent national education legislation at the provincial level before any new education initiatives are considered at the national level.

First, the Auditor-General's Parliamentary Unit could be directed to assemble a summary of available research and brief committee members. Then, the committees could hold one or several public hearings at which provincial officials, representatives of schools and interested members of the public, such as parents, could testify as to the effectiveness of the implementation of the education legislation. These activities could be supplemented by additional specific research conducted within provinces by provincial staff or the Auditor-General's provincial staff.

As provincial officials and representatives of schools report on successful efforts, these could be shared and other provinces and schools could benefit from these best practices. To the extent that provincial officials and representatives of schools identify difficulties in implementing the legislation, or lack of success in improving education even after the legislation was implemented, national ministers could be engaged in a dialogue to better understand provincial concerns and difficulties and cooperatively discuss potential solutions. Subsequently, the lessons learned from the provinces in implementing earlier legislation could be used to better inform the formulation of future legislation.

These two hypothetical examples illustrate the dual roles implied in the name of the IRBP committee. On the one hand, the committee would fulfil the responsibility of the NCOP to give voice to provincial interests in the development and implementation of national policy. By relating provincial interests supported by strong research and actual experience, rather than speculation or anecdotal stories, the NCOP improves the contribution of provincial experience to national policy.

The second of the dual roles is that of providing a forum for the exchange of information amongst provinces. By providing information about provincial best practices, the NCOP can contribute to transformation through effective implementation of national policy at the provincial level, and help improve provincial capacity. For example, in Mpumalanga, the provincial legislature requires government ministries at the beginning of the year to provide the committees with a schedule describing program implementation goals for each quarter. Subsequently, the provincial committees can hold quarterly hearings in which the MECs report on their progress. By requiring quarterly information, the committees are informed promptly of the government's implementation success. Similarly, in the Western Cape, the Finance Department is developing a process of requiring each provincial department to develop short term, medium-term and long term goals for their programmes, and to measure and report on progress in meeting those goals. The Gauteng Legislature's Finance and Economic Affairs Committee has developed a detailed budget manual entitled *Accountability and the Budget Process from a Provincial Perspective*,¹³ which has been shared with neighbouring provinces. The manual contains exceptionally useful and detailed information on the various steps in the budgeting process, including schedules of events. In addition, it provides clear explanations of the need for accurate budgeting and accountability procedures. Fulfilling its co-ordinating role through the IRBP committee, the NCOP can encourage the use of best practices by provinces and be a clearinghouse to disseminate such information to the provinces.

¹³ By Joan Fubbs, May 1999.

Also, as implied in the second of the hypothetical examples above, the IRBP committee could work cooperatively with any of the NCOP's select committees when appropriate. Nevertheless, to be effective the committee should always be able to initiate and undertake implementation review projects on its own motion. Such independence is necessary for committee integrity.

A third function would be to further the NCOP responsibilities for intergovernmental relations with municipal governments. Discussions with officials as part of this study indicated widespread concern over the capacity to implement programmes at the local level in many municipalities. These problems seldom come to public attention at the national or provincial level until a crisis develops.

Hypothetical Example No. 3

The Auditor-General currently conducts audits of all municipalities to ensure fiscal and programmatic accountability. These audits are presented to Municipal Councils that are required to hold a public hearing on the audit's results. While these reports and the required public hearings provide an excellent opportunity for public participation in accountability, as envisioned by the Constitution, numerous officials interviewed during this study expressed concerns about them. A significant number of municipalities do not submit financial statements to the Auditor-General and some municipalities kept the results of audit reports, especially those which identified the need for improvements, secret and failed to hold public meetings on the reports.

Working with the South African Local Government Association, staff for the IRBP Committee could monitor the progress of municipal audit reports and their use. Information from national government projects, such as Project Viability, could feed into the process. The Committee would then be able to determine if the process is followed in a manner that enhances accountability and public participation or whether education and assistance are necessary. For example, staff of the IRBP committee could develop a quarterly report along the following lines:

Name of Municipality	NO	YES	DATE
Financial statement to A-G? Audit completed?			
Contains recommendations?			
Presented to mayor?			
Presented to Council?			
Public hearing advertised?			
Public hearing held?			
Recommendations accepted?			
Plan developed to make changes?			
Changes implemented?			

This basic report would provide information to the NCOP on the status of audits and the implementation of their recommendations. Information gleaned from them could also provide early warning of municipalities struggling to function properly.

Who should be members of the committee?

A variety of considerations could be taken into account in determining membership of the NCOP's Select Committee on IRBP. Because of the importance of the work of the IRBP Committee, its role of providing information to facilitate the consideration of future legislation, and the high visibility of the work, it may be appropriate for its membership to consist of leaders in the NCOP, such as the provincial whips.

Alternatively, because of the close relationships the IRBP Committee will need to develop with other committees, it may be appropriate for the membership to consist of the chairs of NCOP's select committees. This would ensure close cooperation and coordination between the work of the IRBP committee and other select committees. Similarly, the work of the IRBP committee will be useful to the Finance Committee because information on the implementation of legislative programmes will be useful in decisions about future resource levels and allocation methods. Accordingly, consideration could be given to some overlap in membership between the IRBP and Finance Committees.

Regardless of who the NCOP chooses to be members of the IRBP, recognition will need to be made of the relatively heavy workload that will be associated with the Committee. The workload on the Delegates can be offset somewhat by adequate staffing of the committee and prioritisation by the committee on how much oversight can be done in any given session of Parliament.

How would such a committee be staffed?

At the outset, the NCOP could use the resources available in the Parliamentary Unit of the Office of the Auditor-General. The Office of the Auditor-General has established a Parliamentary Unit for the specific purpose of providing research staff support to Parliament. Thus far only the National Assembly Committee on Public Accounts has solicited research support from the Parliamentary Unit, but because the Unit is designed to serve Parliament as a whole, support is also available to the NCOP.

In the long term the committee should acquire its own staff to compliment and augment, but not to fully replace, the Parliamentary Unit of the Auditor-General. Staff of the Auditor-General have the credentials and highly-developed expertise to conduct the analyses with credibility and objectivity. Nevertheless, the IRBP committee will eventually need additional committee staff who can serve as a bridge between the highly-technical Auditor-General's staff and the committee members. Such staff would need to have expertise in government, evaluation research and statistics.

Committee staff could work on a day to day basis with the Auditor-General's staff to ensure that the information gleaned from reports is analysed and presented in a manner most useful to the committee rather than in the technical, complicated manner of most reports.

What research information on implementation is currently available?

Recently, the Auditor-General has undertaken periodic performance audits that are submitted Parliament and provincial legislatures, depending on the level of the government programme evaluated. However, currently these reports are not widely available, and, reviewed individually, they do not provide the information necessary to enable the NCOP or the national government to understand the needs of the provinces as a whole. Consequently, the proposed IRBP Committee could require the Auditor-General's Parliamentary Unit to assemble summary reports, which identify pertinent trends in several provinces. Using the performance audits, and financial audits when appropriate, the summary reports should address cross-cutting issues facing provinces. These issues may include programmatic accountability, which is the determination of the success of programs in meeting their goals, and matters such as financial management, or computer systems capacity.

Information on implementation results will also be available required by the Public Finance Management Act, 1999. The Act requires that when a budget is presented to the National Assembly or a provincial legislature, the accounting officer for each department must also submit measurable objectives for each main division within the department's vote. These measurable objectives, which will represent not *how* the department will spend its budget, but rather what it intends *to accomplish* with those expenditures, such as numbers of housing units provided, will provide the basis against which the department's actual performance can be measured, through, for example, quarterly and annual reports by each main division. As a result, important information will be available to the provincial legislature.

Providing an integrated summary of financial capacity and programmatic accountability is especially important in light of the fact that about 50 percent of the revenue raised nationally is spent by provinces¹⁴ and is not included in the audit reports of national government departments submitted to the National Assembly. Consequently, such information is essential for Parliament's understanding of the pace and success of the transformation process.

What is the IRBP Committee's role in policy development?

A fundamental responsibility of the NCOP is to give voice to provincial interests in national policy debates. However, the primary focus of the IRBP Committee should be a practical one addressing the *mechanics of implementation* of policy, not the *development*

¹⁴ Joachim Wehner *Intergovernmental Fiscal Relations in South Africa* (to be published by AFReC, University of Cape Town, 1999) part 3.3.3.

of policy. By focusing on the technical aspects of program implementation, such as: Were services provided? Was the amount of services actually provided the same as intended in the budget proposal? Did the right people receive the services? The committee can objectively establish a commonly understood set of facts about the status of implementation. Once all parties can understand the common facts of a program, then a policy debate, in which various philosophies and interests are brought forward, can proceed in a more informed fashion.

2.4.2 Question Time

All consulted on this report had concerns about question time in the NCOP. Most thought that it should be used in a way more consistent with the NCOP's constitutional role. A few thought it should be abolished altogether.

The concern with question time as it currently operates is that it is a forum in which opposition party members ask questions of the executive.¹⁵ This is shown clearly in the break down of questions in the NCOP in 1998:

- Of the 170 oral questions posed, all were asked by opposition party members. Similarly, of the 530 written questions, all but 3 were from opposition party members.
- Provincial whips submitted only 5 percent of the oral questions, and only 4.5 percent of the written questions.
- Political party whips, on the other hand, were responsible for 59 (35percent) of the oral questions, and 181 (34 percent) of the written questions put before the executive branch.¹⁶

This is a repetition of processes already taking place in the National Assembly and little evidence of the NCOP acting to: “represent the provinces to ensure that provincial interests are taken into account in the national sphere of government” as section 42(4) of the Constitution requires.

The report does not recommend the abolition of question time. Although the nitty-gritty of oversight of the implementation of policy is likely to take place in committees, some issues will be handled better in the plenary, partly because the requirement of brief answers to succinct questions can focus issues, and partly because members of the executive cannot “hide” as easily in the plenary as they might in committees. On some occasions it will be important to give the national minister concerned an opportunity to answer provincial concerns in the more public forum that the plenary provides. In

¹⁵ Question time is presently dealt with in NCOP Rules 225 to 236. The Rules provide procedures for asking questions and do not permit prioritisation of certain questions above others.

¹⁶ These statistics are taken from an analysis by NDI. In some cases the provincial whips and party whips are the same individuals. In addition, occasionally parties or provinces have had more than one whip during the period like Northern Province or Mpumalanga.

addition, use of the plenary may be important for the NCOP as it develops its public profile.

However, question time cannot be the same in the NCOP -- which meets in plenary every four weeks -- as it does in the National Assembly. Some attempt should be made to use it in a way that ensures that questions reflect provincial concerns.¹⁷

One method of directing the use of question time to matters that are properly within the NCOP's main mandate is to give priority to questions in line with its constitutional mandate. For instance, in a question time of an hour, priority could be given in the first 30 minutes to questions that are provincial in focus. The decision of what is provincial in focus could be made in a number of ways. Priority could be given to questions

- asked by the whip of the provincial delegation or mandated by a provincial legislature or committee or by an NCOP committee; or
- decided by the Chairperson of the NCOP to be on matters affecting the provinces (or local government).

The remainder of the time could be a 'free for all' with questions accepted in the order in which they are raised.¹⁸

Determining what questions are "provincial" is difficult. Very often provinces will want to raise matters in which provincial and national interests overlap. Examples given included the issue of health and education services for illegal aliens and questions concerning the development of the Maputo Corridor. For this reason it may be more practical to give priority to questions from certain sources. Whatever approach is taken two things are clear. First, institutional changes to question time will work only if politicians make them work. As long as questions are left almost entirely to opposition parties, party rather than provincial interests will dominate. Secondly, it is essential to ensure that a revision of the format of question time does not exclude minority parties from asking questions.

2.4.3 "Debate" in the plenary

¹⁷ Under the Constitution the concept of a provincial concern is a narrow one referring to matters over which provinces have jurisdiction (usually under schedule 4 or 5). It does not cover matters which affect people living in provinces. For instance, most matter arising under the Justice portfolio are not 'provincial matters' in this sense although provincial politicians may have strong feelings about them. There are obviously instances in which national and provincial interests overlap. For instance, the national policy on aliens has implications for health and education services in certain provinces.

¹⁸ At present questions to the President and Deputy President receive priority over questions to other cabinet ministers. Questions may only be asked of cabinet members (this excludes deputy ministers).

Currently, NCOP question time provides Delegates the opportunity to put questions to national cabinet members. Should NCOP plenary sessions not also give Delegates an opportunity to discuss matters with MECs from other provinces?

There are a number of reasons for planning regular plenary discussions in the NCOP as part of its oversight function:

- Although the committee system should give provinces an opportunity to talk to each other, this may not always be enough, and provincial MECs appear to be less likely to attend committee meetings than plenary sessions.
- If there is not such an opportunity, MinMECs and other executive IGR forums will become the only places in which such inter-provincial discussions occur.
- Debate in plenary (as opposed to committee) may reach the press, public and members of provincial legislatures. It also gives politicians the opportunity to raise matters in a bigger forum.

In the course of the consultations for this report, many people felt a need for plenary sessions on matters either involving a number of provinces (such as the Maputo corridor development) or on issues in which provincial and national interests overlap (the national dispensation concerning aliens and provincial education responsibilities was one example). These are matters on which the NCOP is uniquely situated to represent the views of provincial and municipal governments in the development of national policy.

2.5 DELEGATED LEGISLATION

In all modern democracies, legislation passed by Parliament normally gives the executive latitude to flesh out details and respond to new circumstances by issuing regulations. However, in a constitutional democracy predicated on the rule of law, openness, and accountability, this power, usually referred to as the power to make delegated legislation, needs to be carefully considered. It should not be used to alter the intent of legislation, or to introduce substantial new policy directions not contemplated in the original statute. These dangers can be countered in two ways – in legislative language that carefully delineates ministerial discretion; and in the powers of parliament to monitor, scrutinise, and if necessary overturn, executive action which oversteps the legislative mandate.

This legislative oversight is the responsibility of Parliament as a whole. The question addressed here is what role the NCOP, as the body designed to represent the provinces in the national legislative process, should play. Is its role to duplicate the National Assembly in overseeing all delegated legislation; or is it to be more focused in the use of its limited resources? The answer is clear: the NCOP's role in oversight is consistent with its role in the overall legislative process. It is to be directed to delegated legislation that affects the provinces and local government.

It is useful to consider separately two distinct aspects of the NCOP's role in overseeing delegated legislation. First, the NCOP must consider all national delegated legislation that affects provinces. This is consistent with the inherent oversight role of the NCOP discussed in previous sections of this report. Section 2.5.1 below suggests how the NCOP can define its inherent role in overseeing delegated legislation so that it best serves its constitutional function and does not duplicate work done in the National Assembly.

But the Constitution also gives the NCOP a very specific function in relation to delegated legislation and concurrent provincial and national powers: the NCOP must approve provincial or national delegated legislation if it is to prevail against conflicting legislation. This oversight role is discussed in section 2.5.2

2.5.1 Inherent oversight of delegated legislation

Making delegated legislation is a necessary part of implementing most legislative policy. Similarly, reviewing delegated legislation will be part of any proper review of the implementation of legislation. This means that if the NCOP establishes a process to oversee the executive (such as an IRBP committee), delegated legislation would be considered in that process. However, the power to make delegated legislation is such a significant executive power that most legislatures are not willing to leave review of that legislation to periodic reviews of executive action. Instead, specialist scrutiny committees systematically review all delegated legislation.

The NCOP needs such a process. In this section the report suggests the matters that should concern the NCOP when it reviews delegated legislation and the powers the NCOP should have over delegated legislation. Later the report proposes a procedure for implementing such review.

The NCOP's role in the oversight of delegated legislation must be based on the same principles that underpin its other oversight roles. It must be:

- Consistent with the NCOP's constitutional role
- Realistic in terms of the NCOP's size and overall workload
- Designed to ensure that it effectively achieves the purposes of the NCOP

Consistency with the NCOP's constitutional role

Because of the NCOP's constitutional role, it will not be primarily concerned with technical issues in scrutinising delegated legislation. Instead, it should focus on the effect that delegated legislation has on the relationship of the three spheres of government, the division of functions amongst them, and the integrity and status of each sphere.

The NCOP will usually be concerned only with delegated legislation issued by the national organs of state under section 76 Acts. In scrutinising such legislation it might apply the following criteria:¹⁹

- Is the delegated legislation consistent with the division of powers amongst the spheres of government intended by the enabling Act and the Constitution?
- Does the delegated legislation demand expenditure by a province or municipality that was not anticipated when the enabling statute was passed or when the most recent budget was adopted?
- Does the delegated legislation impose mandates or obligations on the provinces that they are not equipped to meet?
- Are the responsibilities of the different spheres of government, and particularly local government and provinces, clearly defined in the delegated legislation?
- If provincial or local consultation was required before the delegated legislation was issued, has this consultation taken place?

A realistic scrutiny role

The NCOP's responsibility for examining delegated legislation should not be based on its constitutional role in representing provinces and also on a candid assessment of its resources and capabilities. Far better for it to play a clearly limited role well, than to perform an unlimited role badly. Moreover, it would be an unnecessary and inefficient to have the NCOP duplicate the oversight activities carried out by the National Assembly.

Effective scrutiny

Effective scrutiny begins with a clear definition of responsibilities. But it also depends on other factors.

First, NCOP *procedures and decisions on delegated legislation must carry weight*. In extreme cases, the NCOP should be able to veto delegated legislation. Its powers over delegated legislation should parallel its powers over acts, that is, they should be much greater in relation to delegated legislation made under section 76 acts. If the delegated legislation made under a section 76 act is rejected by NCOP, a procedure similar to that in section 76 should be followed and implementation of the legislation should require support of two-thirds of the National Assembly.

A concern with granting the NCOP a power to veto delegated legislation is that it may delay implementation unduly, possibly allowing the NCOP to raise issues that were fully

¹⁹ In fulfilling this inherent scrutiny role, the NCOP should not be concerned with the question of whether the regulations concerned would prevail under section 146 if they were to come into conflict with a provincial law. The NCOP might find that legislation meets all the criteria for acceptable delegated legislation but, nevertheless, refused to approve it under section 146(6). Such delegated legislation would remain in force until a conflict arises.

canvassed when the enabling statute was passed.²⁰ This danger should not be exaggerated because it would rarely be used. Instead, the NCOP would usually deal with problematic delegated legislation in other ways.

Ordinarily, the NCOP will be able to engage with the executive and resolve difficulties. There are a number of reasons for the national executive to take NCOP concerns seriously. First, as practice in other countries shows, the authority to summon witnesses, hear representations from members of the public and report on executive action, gives scrutiny committees considerable influence.²¹ In the words of Professor Wade, scrutiny committees “*give government departments a lively consciousness that critical eyes are kept on them*”.²² Secondly, the present pattern of government in South Africa has the provinces implementing much important national legislation. This means that the success of national policy is heavily dependent on the capacity and will of provinces to implement it. This in turn gives the national executive a strong incentive to respond to problems at the outset.

Thirdly, review by the NCOP, which draws on provincial experience, will give the national government another chance to consider how its programme works on the ground. Fourthly, the provinces represented in the NCOP will not always be “trapped” by regulations issued by national departments. Instead, by issuing their own regulations or passing appropriate legislation and invoking section 146, provinces might be able to avoid the national law. The knowledge of the ability of provinces to use their legislative power to change the administrative regime should encourage the national executive to take the NCOP’s concerns seriously rather than face a plethora of provincial initiatives. In short, if the NCOP’s oversight process yields serious concerns, the executive should be responsive.

If the NCOP has significant questions about delegated legislation, perhaps relating to the provincial capacity or to compatibility with statutory policy, the best approach is likely to be to request the IRBP Committee to take up the issue. This would ensure that a consideration of the delegated legislation does not occur in isolation of a review of the general policy of the department concerned. Moreover, problematic delegated legislation may signal other problems that the IRBP Committee would be well-positioned to investigate.

For the NCOP’s oversight of delegated legislation to be effective it must carry weight. Its *decisions must also be seen as relatively non-partisan*. For this reason, amongst others, proposals that the NCOP should take care of provincial and local government interests through a parliamentary joint committee will not lead to effective scrutiny. Not only will

²⁰ This problem may be particularly acute if an NCOP veto required the National Assembly to embark on the lengthy process of engaging the mediation committee and using its section 76 override in passing the enabling statute.

²¹ John Mark Keyes *Executive Legislation* (Toronto: Butterworths, 1992) p 127.

²² W Wade *Administrative Law* 6th ed (Oxford: Clarendon Press, 1988) p 891, quoted in John Mark Keyes *Executive Legislation* p 127.

the considerable workload of a joint committee inevitably sideline NCOP-related issues, but experience suggests that NCOP interests tend to be overwhelmed by the National Assembly's interests.

Implementing inherent oversight of delegated legislation in the NCOP

Broadly speaking, the NCOP could follow a process similar to that proposed for the National Assembly.²³ In particular, the nature of the issues likely to be raised by NCOP oversight of delegated legislation suggests that the topical select committee should make substantive decisions. However, a coordinating committee could identify problems and ensure that a consistent approach develops. The following procedure might be considered:

- Table all delegated legislation in the NCOP.²⁴
- Employ a staff member to review delegated legislation laid before Parliament for relevance to the NCOP and draw up a summary of issues. This task would involve sifting out delegated legislation which is not within the NCOP's main constitutional mandate; very little delegated legislation made under section 75 statutes would be of interest to the NCOP.
- Have an NCOP "clearing committee" decide what pieces of delegated legislation need no further consideration; or consideration by the appropriate select committee. A report of these decisions should be available to all Delegates and provinces. No further attention need be paid to legislation classified as (i) unless a province or delegate objects to the classification.
- If delegated legislation is referred to a select committee, the committee should be required to report to the "clearing committee" within a specified time.
- If the "clearing committee" and the select committee report problems with the delegated legislation, the matter should be taken to the plenary.²⁵
- Plenary: Formal approval (or disapproval) must be given by the NCOP as a whole. Approval follows the ordinary decision-making process of the NCOP: delegations each have a vote (which must be cast according to their provincial mandate), support of five delegations decides the question.

2.5.2 Conflicts: Approving delegated legislation under section 146(6) - (8)

The Constitution grants both the national and provincial spheres of government power over certain matters which are listed in schedule 4. These areas of concurrent power are areas in which both the national and provincial governments may legislate. Obviously

²³ See the *Delegated Legislation Report*.

²⁴ As Corder comments in the *Delegated Legislation Report* the meaning of 'delegated legislation' requires clarification (Part E para 7). It would be sensible for the NCOP to use the same meaning as the National Assembly.

²⁵ The reason for involving the 'clearing committee' here is to allow it to impose some consistency in the way in which different Select Committees carry out their scrutiny mandate. Once the NCOP has had some experience with this function, criteria might be drawn up to guide committees.

this system opens up the possibility of conflicting provincial and national legislation. Section 146 provides criteria for resolving such conflicts. When an act of parliament and a provincial act conflict, the provincial act prevails unless the national act meets one of the tests laid out in section 146(2) or (3).

But section 146 treats delegated legislation differently to acts of provincial legislatures and the national Parliament. It states that delegated legislation can prevail in the case of a conflict only if it has been approved by the NCOP. For example, assume there is a national Consumer Protection Act and a Gauteng Consumer Protection Act. The national Act entitles the relevant Minister to issue regulations. The Minister issues regulations that conflict with the Gauteng Act. The Gauteng Act will prevail (and the national regulations will not apply in Gauteng) unless the national regulations (i) have been approved by the NCOP and (ii) comply with the conditions set out in section 146. The position is the same for provincial regulations. If they have not been approved by the NCOP, they cannot prevail in the case of a conflict with national legislation.

In determining whether delegated legislation may prevail, the NCOP does not affect the validity of the legislation. National or provincial regulations will remain valid in the face of NCOP disapproval. The question to which NCOP approval is relevant is what legislation prevails if there is a conflict, in other words, *if* the national and provincial government act in conflicting ways.

Referring delegated legislation to the NCOP

The Constitution requires the NCOP to approve or disapprove delegated legislation under section 146(6) only if the legislation is referred to it for that purpose. The national government or provinces may choose to refer only that delegated legislation which they think may come into conflict with existing or future legislation. They may also delay referral to the NCOP until a dispute has actually arisen.

Criteria for determining whether or not delegated legislation may prevail under section 146(6).

The NCOP needs to establish criteria to guide it in making decisions under section 146(6). To do this, an understanding of the purpose of the provision needs to be established and consideration needs to be given to what factors are relevant in determining what delegated legislation should survive a conflict and how this process differs from the inherent oversight role discussed in section 2.5.1 above.

Acting within the constitutional time limits

When delegated legislation is referred to it under section 146(6), the NCOP must make a decision within 30 days of its first sitting after the legislation was referred to it. In practice the operation of cycles in the NCOP means that if the NCOP wishes to disapprove delegated legislation it must do so either at the first regular plenary after the

delegated legislation is referred to it or at a plenary called specially for this purpose. If the NCOP approves delegated legislation referred to it, it need take no action. After the 30 day period silence on the part of the NCOP is deemed to be approval.

CHAPTER 3

MAINTAINING THE BALANCE: OVERSIGHT TO PROTECT THE INTEGRITY OF THE SPHERES OF GOVERNMENT AND TO ENSURE EFFECTIVE GOVERNMENT

Interventions under sections 100 and 139: Over the past few years, the NCOP has developed procedures to deal with interventions. The NCOP should retain these procedures. Nevertheless, a number of procedural problems have arisen and must be resolved:

1. The NCOP needs some warning of likely “takeovers”. The Constitution requires all takeovers to be preceded by a directive. This report suggests the NCOP should require the government concerned to inform it when it issues that directive.
2. The NCOP is often given extremely poor information about an intervention and needs to go to considerable effort establishing the real situation. This problem may be addressed to some extent if the NCOP Rules set out clearly what information the national government or a province seeking approval should lay before it.
3. The issues the NCOP needs to consider in approving or disapproving an intervention should be clarified. This report suggests a series of questions the NCOP should answer in reaching its decision. Finally, the Constitution requires the NCOP to review on-going interventions. Unless the goals of an intervention are clearly stated at the outset, with precise, measurable indicators of success, the process becomes more difficult.
4. NCOP resolutions approving interventions should include measurable goals so that the NCOP can review interventions properly.

Disputes about provincial administrative capacity under section 125(4): Should a dispute arise about the capacity of a province, the NCOP is to arbitrate. A process similar to that used for interventions under sections 100 and 139 would be appropriate here. The NCOP needs to weigh the evidence concerning the capacity of the province and, in reaching a decision, ensure that the integrity of the province concerned is maintained.

Stopping provincial funds under section 216: The national treasury may stop funds to a province if the province fails to maintain adequate accounting standards. The grounds for stopping funds are fairly narrow and technical. They will typically be matters that the Auditor-General would consider in auditing provinces. For this reason, this report suggests that the IRBP Committee should deal with this matter.

Intergovernmental relations (IGR): A system of multi-level government is dependent on institutions that facilitate co-operation and co-ordination amongst the levels. The NCOP is such an institution, bringing all three spheres of government together in the national Parliament. Most IGR institutions are found in the executive, however. Like other executive institutions, the legislature should oversee them. Because the NCOP straddles all three spheres of government, it is the ideal institution to oversee executive IGR. This report identifies three functions as part of the oversight of IGR:

- Involvement in the process of putting together the IGR legislation required by the Constitution.
- Scrutiny of IGR institutions once they are in place.
- Scrutiny of IGR practices and institutions in every particular area that the NCOP decides to review.

South Africa’s system of multi-sphered government has soft rather than rigid boundaries between the spheres. This is apparent from the number of matters that fall concurrently under provincial and national control. It is also reflected in the degree of intervention possible between spheres in order to ensure effective government. With soft boundaries

comes the possibility of abuse. For practical or political reasons one sphere of government may be tempted to infringe on the integrity of another. The NCOP is given powers that allow it to guard against such abuse: in overseeing the relationships between the spheres, it acts as a check on the power of one sphere over another. This Chapter outlines these special oversight powers of the NCOP and also discusses more generally the NCOP's role in the oversight of intergovernmental relations.

The NCOP is not the only institution entrusted with protecting the balance between the spheres of government. The Constitutional Court may also review action that is alleged to interfere with the integrity of a province or municipality. However, the NCOP's role is very different from that of the Court, because it makes political and practical decisions rather than strictly legal ones. It can also respond in a flexible way to problems, by resolving disputes through negotiation and putting in place solutions that are sensitive to practical and political needs and are thus satisfactory to all parties. This is consistent with the Constitution's preference for cooperative government, and its injunction that governments should, as far as possible, avoid legal proceedings against each other (Section 41).

This Chapter deals with the NCOP's role in maintaining the balance amongst the spheres of government under four headings:

- Interventions: Oversight under sections 100 and 139.
- Administrative capacity: Oversight under section 125(3).
- Financial integrity: Oversight under section 216.
- Intergovernmental relations: Inherent oversight.

A fifth specific legislative task that the Constitution allocates to the NCOP concerns legislative conflicts involving subordinate legislation (section 146(6) - (8)). This is dealt with in Chapter 2 (2.5) together with the NCOP's more inherent oversight of subordinate legislation.

3.1 SECTIONS 100 AND 139: OVERSIGHT OF A TAKEOVER OF PROVINCIAL OR MUNICIPAL FUNCTIONS

Sections 100 and 139 epitomise the soft boundaries of South Africa's multi-sphered system. Section 100 permits the national executive to intervene in provincial government, and section 139 permits a provincial government to intervene in a municipality when the province or municipality is not fulfilling its obligations. An intervention can be fairly drastic and go as far as a takeover of the relevant obligations. In the Constitution this type of intervention is termed "an assumption of responsibilities". To check against abuse of this power NCOP approval is required when an intervention occurs and, if the intervention is approved, the NCOP must continue to monitor it.

Since its inception in February 1997 the NCOP has been called upon to approve a number of interventions under section 139. In each case the NCOP not only acted as a formal check on provincial government but also performed a mediating function, bringing the province and municipality to agreement, and demonstrating the NCOP's potential effectiveness in intergovernmental relations. In dealing with these interventions, and through its involvement in negotiations concerning other struggling municipalities, the NCOP has developed a process that seems clear enough to provide a framework for future action. Perhaps most importantly, the developing process is flexible enough to respond to the myriad problems likely to arise under sections 100 and 139. In setting out a method of dealing with its section 100 and 139 responsibilities, the report simply builds on the NCOP's existing practice.

3.1.1 What committee should deal with an assumption of responsibility?

At present either the Select Committee on Provincial and Local Government (formerly the Select Committee on Constitutional Affairs) or an ad hoc committee deals with section 100 and 139 matters. Although an ad hoc committee might be necessary in special circumstances – such as to deal with an intervention before a new Parliament has set up its committee system properly²⁶-- the Select Committee has worked well. The obvious advantage to having the same committee involved each time is that it can build experience and streamline procedures.

The NCOP Rules also require the Committee to confer with the select committee responsible for financial affairs if the intervention is to maintain economic unity, and with the select committee responsible for security matters if the intervention is to maintain national security. In some cases the Committee may also confer with other committees. For instance, if an intervention involves specific aspects of a municipality's responsibility only, such as health care or the environment, it may consider conferring with or sitting jointly with the relevant NCOP select committee. If a special oversight committee is established in the NCOP (such as the IRBP committee this Report endorses in Chapter 2.4.1), that committee may be consulted to help determine whether the stated goals of an intervention are measurable. This would allow the NCOP to review the progress of the intervention properly.

3.1.2 What research and administrative back up does the NCOP need?

Broadly speaking, there are two sets of support requirements here. First, in assessing any intervention the NCOP needs to be assured that the constitutionally-required procedures have been properly followed, and that deadlines are met.

Second, the NCOP may need to verify facts put before it to assess (i) whether the problem justifies an intervention, and (ii) whether the type and scope of the intervention employed is appropriate. Interventions may be dealt with in a variety of ways. Sometimes

²⁶ This may have been the case in respect of the ad hoc committee set up to deal with the intervention in Tweeling.

documentary evidence may be sufficient for the NCOP to make a decision. In some cases, people may be called to the NCOP to discuss the matter. In others, visits to the relevant province or municipality may be necessary. In all of these situations the NCOP will be called upon to assess the veracity of reports made to it. The committee dealing with interventions should have research staff to assist in this process.

3.1.3 Capacity

Thus far the NCOP's response to interventions has had two distinct though related aspects. It has sought to ensure that the intervention is constitutional both in the sense that necessary procedures have been followed and that it is appropriate. In addition, it has mediated between disputing parties (in the case of Butterworth these included the existing Municipal Council and provincial executive).

Mediating disputes between the spheres of government is entirely consistent with the NCOP's constitutional role. However, it is very demanding. As a result, a number of people consulted were concerned that the NCOP does not have the capacity to deal with a large number of interventions happening at the same time. This concern was premised chiefly on the assumption that the NCOP's mediating role (including visits to municipalities or provinces as the case may be) will be necessary for every intervention. But this is not necessarily correct. In the case of interventions in local government matters, as provinces become familiar with procedures, the kind of technical difficulties experienced up to now should diminish. In addition, most interventions should not be seen as hostile acts but as strategies to assist struggling municipalities. Again, as provinces gain experience they will learn to handle their responsibilities in an increasingly cooperative way and it will only be in the case of interventions involving disputes that the NCOP will be required to fulfil a more substantial role.

3.1.3 Early warning

The Constitution gives the NCOP tight time limits for approving section 100 and 139 interventions. Notice of an assumption of responsibility under section 100 or 139 must be tabled in the NCOP within 14 days of its first sitting after the intervention. The NCOP must approve (or disapprove) an intervention within 30 days of its first sitting after the intervention. These time limits mean that the NCOP may be given only 16 days on which to decide an intervention. The need for provincial delegations to secure provincial mandates and involve special delegates, and the cycles on which the NCOP operates, make this a demanding process. To ensure that the NCOP is able to fulfil its checking function properly, it should be given some warning of a potential intervention.

The constitutional requirement that a government issue a directive to a province or municipality before intervening provides an opportunity to set up such an early warning system. The Constitution requires the national government or a province intending to assume responsibility for a provincial or municipal function to warn the province or municipality of the intended intervention, giving them a chance to rectify the problem.

This process provides an obvious opportunity to give the NCOP early warning of a possible intervention. Although a directive need not be followed by an assumption of responsibility, in practice directives indicate that intervention is likely.

Accordingly, the NCOP should be given notice of any directives issued under either section 100(1)(a) or section 139(1)(a). Notification would serve at least two purposes:

- alert the NCOP to a likely assumption of responsibility, and give it the time necessary to gather some information about the situation and to timetable appropriate committee meetings; and
- allow the NCOP to assess whether or not the directive complies with the Constitution. (In the past this has allowed the NCOP to avert possibly unconstitutional interventions by giving it an opportunity to point out flaws before the assumption of responsibility actually occurs.)

3.1.5 Approval or disapproval

In deciding whether or not to approve an assumption of responsibility the NCOP must:

- Review the finding by the executive that the province or municipality failed to fulfil an obligation imposed upon it by legislation.
- Satisfy itself that a directive was issued and that it complies with the Constitution. Does it:
 - i. identify the statutory obligation that the province or municipality failed to fulfil?
 - ii. describe the ways in which the municipality failed to fulfil the obligation?
 - iii. set out reasonable steps that the municipality or province should take to remedy the situation and give the municipality or province a reasonable time within which to take those steps
- Review the executive's finding that the municipality or province did not comply with the directive.
- Review the executive's assumption of responsibility. Is it, in the opinion of the NCOP:
 - iv. limited to that which is necessary to achieve any of the objectives listed in either section 100(1)(b) or 139(1)(b)?
 - v. limited to that which is necessary to remedy the failure identified in the directive?
- If it decides to approve the intervention, set a time frame within which the intervening executive must report to the NCOP so that the NCOP can review the intervention.

Note: The NCOP's oversight of interventions under sections 100(1)(b) and 139(1)(b) is not a judicial function. It is not the role of the NCOP to determine finally whether or not the intervention is constitutional. This is the role of the courts. The function of the NCOP is to check executive power and ensure that the integrity of provincial and municipal government is maintained. Nevertheless, the NCOP cannot disregard the Constitution. It would be appropriate for a parliamentary legal adviser to advise the

relevant committee on the constitutionality of the procedure. In doing so, a number of the questions listed above would be answered.

Using the NCOP rules to ease the process

The NCOP cannot approve or disapprove an intervention unless it is in possession of certain information. Thus far it has experienced considerable difficulty in securing the information it needs. At present the Rules of the NCOP are very sparse, in effect requiring only that the national minister or province must supply ‘a memorandum explaining the reasons for the intervention’ (Rule 241(2)(b)). It may be appropriate for the Rules to set out more clearly what the national or a provincial executive seeking an approval should submit. The Rules should require that the NCOP be supplied with:

- a copy of the section 100(1)(a) or 139(1)(a) directive
- a description of any progress made to fulfil the obligation after the directive was issued (or a statement to the effect that the directive had no effect)
- in the case of an intervention under section 139(1)(b), written proof that the intervention has been approved by the Cabinet member responsible for local government (see NCOP Rule 241(2)(a))
- the details of the statutory obligation that the province or municipality has failed to fulfil
- a description of the ways in which the obligation has been neglected
- a description of the action that the intervening executive has taken and its results together with a description of the specific goals of the intervention and the time within which specific results are expected
- an estimation of the length of the intervention

3.1.6 Reviewing interventions

The Constitution requires the NCOP regularly to review an intervention that it has approved. In doing so it may make recommendations to the provincial executive.

To facilitate this task, the NCOP should include in its resolution a requirement that the executive concerned report to it at certain, specified intervals. The NCOP should specify the information that it wishes in this report, such as progress in achieving the goals established in the description of the intervention. In addition, the NCOP may request reports from other bodies, such as SALGA.

3.2 SECTION 125: OVERSIGHT OF A DECISION BY THE NATIONAL EXECUTIVE THAT A PROVINCE HAS INADEQUATE ADMINISTRATIVE CAPACITY

It is a basic constitutional assumption that provinces will administer section 76 legislation. Section 125 states that section 76 legislation will be implemented by the provinces *unless* the legislation expressly stipulates otherwise. However, following the Constitution’s underlying commitment to effective government, a province may not

implement national legislation if it does not have the capacity to do so. Accordingly, section 125(3) limits the power of provinces to implement legislation; a province has the power to implement section 76 legislation *only* if it has the administrative capacity to do so. This provision allows the national government to identify those provinces that can and cannot administer section 76 legislation. This is an area in which disputes could arise. Section 125(4) sets up the NCOP as arbiter of such disputes.

3.2.1 Resolving section 125(4) disputes

Underlying principles

The national executive may decide that a province does not have the capacity to administer a particular piece of section 76 legislation or, in an extreme situation, it might claim that the province cannot administer any national legislation.

It is the function of the NCOP in such cases to ensure that the national executive does not infringe provincial integrity or the principle of multi-sphered government more than is necessary for effective government. In both cases, the investigation that the NCOP will undertake will be broadly similar to that under sections 100 and 139. It will need to determine that

- the assessment of the province's capacity is correct and therefore that the removal of provincial authority is necessary; and
- the scope of the action is scaled according to the identified problem, no more and no less.

The burden is on the executive to demonstrate both of these to the NCOP.

What committee should be used?

Two committees need to be considered for this function. First, the Select Committee on Provincial and Local Government will be experienced in IGR and, in particular, will have gained useful experience in its role in section 100 and 139 interventions. The involvement of the same committee in all section 125(4) disputes will also mean that it can build experience and develop standard procedures. The second committee is the select committee under which the relevant national legislation concerned falls, as it will be most familiar with that legislation and its burden on provinces. Accordingly, it might be most appropriate for these two committees to work together, finally presenting a joint report to the NCOP.

Ongoing review

Only when a dispute arises does the Constitution give the NCOP a specific role in section 125 matters. However, the NCOP's constitutional role as representative of provinces in the national sphere and its obligation to oversee executive action that affects provinces

gives it another function under section 125. Whether or not a dispute has been referred to it under section 125(4), the NCOP should monitor any situation in which a province has been relieved of administrative duties. It must ensure that the national executive is fulfilling its obligation in section 125(3) to build provincial capacity and that the action does not extend beyond what is absolutely necessary.

3.3 FINANCIAL INTEGRITY: OVERSIGHT OF A DECISION BY THE TREASURY TO STOP THE FLOW OF FUNDS TO A PROVINCE (SECTION 216)

Under section 216 the national executive may stop the payment of funds to a province if there is “serious or persistent material breach” of treasury regulations. The section requires such a decision to be approved by Parliament in a process that involves both the National Assembly and the NCOP and in which the NCOP exercises the same powers as it does in relation to section 76 legislation. The process is dealt with in Parliament’s Joint Rules (Rules 223 – 230).

In brief, the rules require Parliament to establish an ad hoc joint committee to report on the matter. The National Assembly and NCOP are to have equal representation on the committee. Once the committee has reached a decision, it reports to both the National Assembly and the NCOP. The houses then vote separately on the matter. If the Assembly supports a motion to approve a stoppage of funds but the NCOP opposes it, the matter is referred to the Mediation Committee. If agreement is not reached there, as with regular section 76 matters, the Assembly may override the NCOP with a two-thirds majority.

This report does not recommend that matters such as this, where such important provincial interests are at stake, should be dealt with in a joint committee. However, the Constitution imposes strict time limits on Parliament; it must approve a stoppage of funds within 30 days. Separate Assembly and NCOP committee proceedings may be too cumbersome under these circumstances. Nevertheless, the NCOP should always keep open the possibility of establishing an independent ad hoc committee. If the action of the treasury is going to be controversial, the NCOP might consider establishing an ad hoc committee comprising the same NCOP members as the joint committee. This could facilitate agreement in the NCOP in the long run by allowing some of the early discussions to take place with provincial interests centre-stage. (Of course, such “in-house” discussions could take place in the absence of a specific committee. The danger here is that, unlike formal committee proceedings, they would not be open to the public.)

Section 216 is specific in the type of action by provinces that may legitimately lead the national executive to block a transfer of funds. It must be a breach of technical accounting practices. For this reason, it appears that members of the proposed oversight committee (the IRBP Committee) may be considered appropriate NCOP representatives on the Joint Committee.

3.4 INTERGOVERNMENTAL RELATIONS (IGR)

Intergovernmental relations are a necessary and ubiquitous feature of all countries in which authority and responsibility are dispersed among two or more spheres of government. All such systems are characterised by a high level of interdependence. That is, what one government does has inevitable consequences for the policies and programs of other levels, and frequently activity by the various governments acting together is necessary to address pressing problems effectively. Duplication can lead to waste and inefficiency. Contradictory or conflicting policy can create confusion and deadlock. Hence the necessity for coordination and co-operation in any system of multi-sphered governance.

This is especially true in South Africa, where the constitutional design includes an extensive list of concurrent powers, and where the national government has extensive powers to intervene in areas of provincial competence. Moreover, Chapter 3 of the Constitution calls on all three spheres to “co-operate with one another in mutual trust and good faith” (section 41(1)(h)).

A flexible, adaptable, responsive and effective system of intergovernmental relations is therefore essential to the effective governance of South Africa, and especially important if the goals of transformation are to be met. No single sphere can accomplish these tasks alone; they must do it together.

Intergovernmental relations can take many forms, and take place in many different forums, each bringing different players and perspectives to the table. Three such forums are especially important in South Africa:

Executive intergovernmental relations: In systems where legislative and executive powers are tightly linked, as in South Africa, the vast majority of intergovernmental relationships will take place at the executive level, in the interactions between national ministers and provincial MECs and in the myriad of linkages between officials of all levels. These executive relationships will play out in many ways: from the development of broad policy options, including proposed legislation, to the day to day working out of ways to best coordinate their activities in the delivery of services to citizens.

Legislative intergovernmental relations: Where legislative authority is as widely shared as it is in South Africa, it is critical that national legislation take account of provincial needs and interests; and that provincial legislatures are fully aware of national priorities and standards. The arena the Constitution provides for achieving these goals is the NCOP. In this sense, it is perhaps the most important intergovernmental institution in the country

Intra-party intergovernmental relations: Where a single party has the majority both in the national government and in a majority of the provinces, then the relations between its national and its regional and local organs will have a profound influence on the relationship between governments.

Why oversight of IGR?

It is a central role of legislatures to control and check the exercise of power by executives. IGR are carried out by the executive and therefore should also be monitored.²⁷

Legislative scrutiny and transparency can also be used to ensure that IGR focus on the central issue: How can spheres work together to best serve the people? The danger in closed intergovernmental institutions, whether at ministerial or official level, is that the interests of the legislature, and more broadly of the people, may fade into the background, as the executive participants tend to focus on maintaining a harmonious relationship among themselves. Public discussion, accountability, and scrutiny might all be sacrificed to decision-making behind the closed doors of the intergovernmental institutions.

Why should the NCOP conduct oversight of IGR?

Parliament can respond to the concern with the lack of openness often characteristic of IGR. For instance, IGR legislation may demand that records of certain meetings be made public. Parliament can also insist that policy is spelt out in legislation and that, once legislation is enacted, the role of the executive is restricted to implementing that policy. But the NCOP's special position straddling the three spheres of government puts it in an especially strong position to ensure that IGR are conducted in an accountable, open and effective manner, and that it supports both provincial and local government. Oversight of executive IGR is a natural extension of the NCOP's legislative role, just as oversight of the national executive is a natural extension of the National Assembly's legislative role.

What should oversight of IGR involve?

The precise design of and roles for intergovernmental machinery are still in the process of development. A host of intergovernmental bodies have arisen of necessity, but the constitutional obligation to provide a statutory framework for this machinery remains to be fulfilled. The NCOP's first task, then, is to use its influence in the legislative process to get the statutory base of IGR right from the start.

²⁷ In a system of full separation of powers, in which the executive has legitimacy independent of the legislature (such as in the US where the President is separately chosen by the electorate), it might be possible to argue that legislative oversight of executive IGR is inappropriate because the way that the executive in different levels of government manages its relationships with other executives is a matter with which the legislature should not interfere. However, in a system of fused power, such as the South African one, this argument does not apply. Instead, the ability of the executive to use IGR institutions to by-pass accountable institutions needs to be recognised and addressed and IGR should be the subject of oversight like all other executive activities.

But even when the legislative framework is in place, experience shows that the intergovernmental machinery will not be static. Some mechanisms will work well, others not. Some new mechanisms may be needed to deal with emerging issues; some may outlive their usefulness. Some may facilitate progress, some may frustrate it. Some may fulfil the goals of openness and transparency, others may not. In such an evolving dynamic system, it would be appropriate for an NCOP committee to undertake a periodic review of the state of IGR and its associated mechanisms. It is appropriate that this task be undertaken by the very legislative body designed to integrate national and provincial legislation..

The purpose of IGR is to ensure the effective implementation of policy. At present, the transformation of South Africa and the delivery of services are the overwhelming concerns. Thus, the goals of oversight of IGR will be to ensure that IGR contributes to transformation and effective delivery and that it is conducted in a way that is consistent with the constitutional commitment to transparent and accountable government.

In many substantive areas of policy, including education, health and social services, intergovernmental cooperation is essential to success. So, in monitoring each such policy field, the effectiveness of the IGR mechanisms in that field will necessarily come under NCOP scrutiny. For instance, regular NCOP oversight might reveal that inadequate cooperation is a reason for poor delivery in a particular field. In short, oversight of IGR will be a feature of all NCOP oversight.

If the NCOP continues its work in establishing the Select Committee on Implementation Review and Best Practices, a consideration of the effectiveness of IGR structures in each field that it reviews should form part of the Committee's mandate.

In summary, the NCOP should consider the following specific tasks in its oversight of IGR:

- The NCOP's Select Committee on Provincial and Local-Government should play an active role in the development of the legislation that will govern IGR.
- Once IGR institutions are in place, the IRBP Committee may choose to place an overall review of IGR institutions on its agenda.²⁸ IGR legislation should state certain goals such as openness and co-operation. The IRBP Committee could use these criteria.
- The effectiveness of IGR in a particular field should fall under the mandate of the IRBP Committee and be considered when that field is reviewed.

²⁸ As we note in Chapter 2, we do not think that the NCOP can undertake on-going review of all areas. Indeed, we argue that it is not appropriate for it to attempt this. Instead each year it should prioritise an area or certain areas that it will review thoroughly.

CHAPTER 4

OVERSIGHT IN PARTNERSHIP WITH THE NATIONAL ASSEMBLY, AND OTHER OVERSIGHT RESPONSIBILITIES

Security matters: Oversight of security services is conducted by a joint parliamentary committee, and the NCOP's main interest here is in policing, in which both provinces and municipalities play a role.

International agreements: The national executive has the sole authority to enter into international agreements. Nevertheless, such agreements can have direct consequences for provinces. Trade agreements relating to agriculture are an example. The NCOP needs to establish a procedure for overseeing such agreements.

Oversight of state institutions: Generally speaking, the NCOP should not conduct oversight of state institutions. This is normally the role of the National Assembly.

Three constitutional provisions require both the NCOP and the National Assembly to exercise oversight over the executive: Section 199(8) demands oversight of security services by a parliamentary committee; section 203 requires Parliament to approve a state of national defence; and section 231 requires both National Assembly and NCOP approval of international agreements. Each of these provisions seems to demand from the NCOP a dual character - it is required to act both like a traditional Senate (providing a second view on certain matters) and like a chamber representing distinctly provincial interests.

In addition, some legislation appears to expect the NCOP to oversee certain institutions, usually simply by requiring them to report to Parliament generally rather than the National Assembly in particular as is the case with the Auditor-General Act and the South African Commission on Human Rights.

4.1 SECTION 199(8) (OVERSIGHT OF ALL SECURITY SERVICES) AND SECTION 203 (APPROVAL OF A STATE OF NATIONAL DEFENCE)

The use of the word "parliamentary" in section 199(8) is usually taken to mean that both the NCOP and the National Assembly should be involved in the process of holding the security services to account. It is only in relation to the police that this oversight role fits obviously into the broad constitutional role of the NCOP as a Council of Provinces. The other two branches of the security services, the defence force and the intelligence services, fall squarely within the exclusive competence of the national sphere of government. Nevertheless, it is consistent with the governing principles of national security that head Chapter 11 on Security Services (section 198) that all spheres of government should participate in such matters. At present, there are joint committees on defence and intelligence.

The same can be said of the NCOP's participation in the declaration of a state of national defence. A declaration would be an extreme measure with serious consequences for the

entire country. It is appropriate that all component parts should participate in deliberations concerning its necessity.

4.2 SECTION 231- OVERSIGHT OF INTERNATIONAL AGREEMENTS

Both the National Assembly and the NCOP must approve international agreements. This role for the NCOP is important and, when it considers international agreements, the NCOP will often have different concerns to those of the National Assembly. For example, an international agreement might cover matters that fall within the concurrent powers of provinces and the national sphere. International agreements may also impose burdens on provinces either directly or indirectly.

Consider an agreement between South Africa and Botswana allowing for a border adjustment. While it would by-pass the requirements for constitutional amendment in section 74(3), it would have a strong effect on the North West. Trade agreements will often have a direct affect on provincial affairs, particularly those relating to agriculture. Similarly, changing production standards or varying tariffs should be considered by the NCOP as well as by the National Assembly.

Implementing oversight of international agreements

Large numbers of highly complex international agreements are concluded annually. Ideally, Parliament should have staff that can analyse the agreements and identify those that require discussion. However, until Parliament has a full staff complement, the NCOP could request that Department of Foreign Affairs attach memoranda to agreements tabled in the NCOP, indicating the implications of the agreement for provinces.

4.3 OVERSIGHT OF OTHER BODIES

Chapter 9 of the Constitution establishes a number of ‘state institutions supporting constitutional democracy’. These are:

- (a) The Public Protector.
- (b) The South African Human Rights Commission.
- (c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
- (d) The Commission for Gender Equality.
- (e) The Auditor-General.
- (f) The Independent Electoral Commission.
- (g) The Independent Authority to Regulate Broadcasting

The Constitution makes each of these institutions accountable to the National Assembly.²⁹ However, the statutes that regulate them require them to report to Parliament. The provisions of the statutes lead many people to assume that the NCOP shares responsibility for ensuring the accountability of Chapter 9 institutions. However, this approach confuses two types of reporting –reporting for ensuring accountability and reporting that alerts the legislature to problems with which it should deal. State institutions do need to report to the legislature to remain accountable. The responsible legislature would be concerned with each institution’s financial integrity and would examine its audited financial statements. As part of the same audit it would also be concerned with whether the institution is fulfilling its functions. In relation to institutions established in Chapter 9 of the Constitution, the Constitution establishes the National Assembly as the responsible legislature. To avoid a duplication of tasks, the NCOP should not also be expected to hold these institutions accountable.

Secondly, in the course of carrying out their functions, Chapter 9 and other, similar institutions will encounter matters with which they believe Parliament should deal. They will report these matters to Parliament. Frequently such reports will be of interest to both the National Assembly and the NCOP. For instance, if the South African Human Rights Commission were to report on the implementation of social and economic rights, it should report to both Houses. The NCOP has a special interest in such matters because provinces and municipalities are primarily responsible for the implementation of most social and economic rights. In dealing with such reports, Parliament is not engaged in oversight of the institutions that submit the reports. However, the reports may demand that Parliament review the performance of one or another government department. They will certainly assist the NCOP in carrying out its general oversight responsibility.

Of course, the NCOP has an interest in the Chapter 9 institutions doing a good job because that enhances NCOP’s ability to fulfil its oversight role. The NCOP may conclude, for example, that the Auditor-General’s reports are not as helpful as they should be because they are late. In such a case the NCOP could inform the National Assembly of the problem so that, in fulfilling its oversight responsibility, the National Assembly can take action. However, this would not involve the NCOP assuming direct oversight over the Auditor-General.

There may be situations in which it is appropriate for the NCOP to conduct oversight of Chapter 9 and other, similar, institutions. For instance, although running elections is a national matter, the NCOP has an obvious interest in the performance of the Electoral Commission in the conduct of provincial and municipal elections. It may, for instance, be concerned that the Electoral Commission made an inadequate financial commitment to such elections or that it deployed staff ineffectively. Moreover, the national government and the Electoral Commission may benefit from a provincial assessment of the way in which elections were conducted. Similarly, the functioning of the the FFCis of direct

²⁹ The *Report on Parliamentary Oversight and Accountability* submitted to Parliament in June 1999 by H Corder, S Jagwanth and F Soltau deals with this matter thoroughly.

concern to the NCOP. The FFC's main function is to provide an independent assessment of the adequacy of financial arrangements between the spheres of government. For this reason, the NCOP may wish to review the way it conducts its work. Again, because the independence of the FFC is constitutionally protected, the NCOP would need to conduct such oversight in a circumspect way.

This report does not suggest that the NCOP will wish to conduct oversight of such institutions very often. Also, to avoid conflicts between the National Assembly and the NCOP, the best approach might be to establish ad hoc joint oversight committees in such cases. Although there may be cases in which the National Assembly's concerns and those of the NCOP conflict, the problems would have to be resolved cooperatively.

CHAPTER 5

MAXIMIZING RESOURCES AND PLANNING FOR THE FUTURE

The overall goals of oversight by the NCOP are to ensure openness and accountability in government and to enhance government's effectiveness. But the NCOP needs certain tools to achieve this. An effective programme for public participation, adequate staffing and enhanced use of information technology is necessary.

Public participation: Through public participation programmes, the NCOP can be alerted to problems or achievements in government. This strengthens its ability to oversee the executive. However, many South Africans are unfamiliar with their right to participate in government, thus, the NCOP must actively encourage citizens to participate. The Report outlines a number of steps to achieve better public participation:

Committee processes need to facilitate participation. Firm timetables must be issued well in advance of meetings; rules of procedure must be clear and accessible; and the NCOP might consider holding hearings both in Cape Town and in provinces.

- A public relations department would make communication by the NCOP with the public easier.
- A public education campaign could explain the NCOP's role to the public.
- The NCOP should develop a process for handling petitions that are received by provincial legislatures and passed on to the NCOP.

Staffing: The material that committees are required to deal with when they conduct oversight can be voluminous and complex. Highly skilled and trained staff are necessary to assist in the process. Priority should be given to staffing the Finance Committee and the IRBP Committee. In the short term the NCOP could use staff from other institutions (such as the Fiscal and Federal Commission and the Auditor-General's Office).

Technology: The NCOP is heavily dependent upon communication, both with provinces and local government and with the National Assembly and the national government. New technology can be used to make such communication much more easy. It can also facilitate the distribution of the information necessary for oversight.

Chapter 1 suggests that the overall goal of oversight by the NCOP is to contribute to the effectiveness and responsiveness of government by:

- Ensuring that laws are implemented as effectively as possible with a minimum of waste and delay;
- Contributing to new policies and identifying changes that may be necessary in existing policies and programmes;
- Enhancing citizen confidence in government in every sphere;
- Fostering the principles of co-operative government.

In other words, effective oversight is an integral part of the process of transformation in South Africa and effective service delivery.

The NCOP must be adequately resourced if it is to develop into an active legislature, able to fulfill its constitutional mandate and respond to South African needs. An under-resourced legislature is an expensive decoration - it may add dignity to government but

cannot add value. A properly resourced legislature will not only make representative democracy real but also, through its informed participation in law making and the implementation of legislation, improve transformation.

Legislative oversight is dependent on skilled staffing assistance, modern information technology, and adequate means of communicating with the public. The following sections look at these three critical areas and outline basic needs. They are premised on the fact that some improvement in the NCOP's resources is necessary in the short term and that substantial improvement is a long-term necessity.

5.1 STAFF

5.1.1 Why research staff for the NCOP?

The NCOP needs research staff to gather information from a wide variety of sources so that Delegates can make well-informed decisions on matters of policy and oversight. For instance, Delegates may need information on how a specific piece of legislation or a regulation will effect their provinces so that they can accurately inform the provincial legislature and advocate for appropriate revisions. Delegates do not have the time to determine which Ministry has responsibility for the issue, which person within the Ministry has the specific information, or to make the necessary repeated phone calls, and wait for a response. Similarly, Delegates do not have the time to research the policy successes of other provinces, ministries and countries, but this information could be critical in suggesting legislative amendments or evaluating program implementation.

The types of information that a Delegate needs are as varied and as complex as the issues that come before the NCOP. The NCOP requires a core group of researchers that can serve its vast information needs – needs which sometimes get dwarfed by those of the much larger National Assembly.

5.1.2 Prioritising staffing needs

Based on the information provided in the interviews, it would appear that the current funding levels for Parliament in general and the NCOP in particular are inadequate to provide for the much-needed staff. The budget for staff needs to be increased urgently so that the NCOP can be fully staffed and effective. Drawing on the preceding chapters of this report, the following sections set out what we consider to be the most urgent staffing needs of the NCOP if it is to take up its oversight obligations. It also proposes a number of ways in which these needs may be met at low cost in the short term.

Staff for two key committees: the proposed Select Committee on Implementation Review and Best Practices and the Finance Committee

Chapter 2 of this Report suggests that key inherent oversight functions could be carried out by two committees, a specialised oversight committee suggested in chapter 2 as the Select Committee on Implementation Review and Best Practices (IRBP) and the Finance Committee.

As suggested in 2.4.1, initially the IRBP could draw on the staff of the parliamentary office of the Auditor-General. Similarly, the Finance Committee could draw on the expertise of the Department of Finance, the FFC, universities and NGOs for support.

Staff for the NCOP's constitutionally-required oversight functions

At present, the most demanding of the specific oversight obligations that the Constitution gives the NCOP is its oversight of interventions under section 139. For this the NCOP needs a member of staff who can manage the process (collect material, ensure all legal requirements have been adhered to, set up a draft timetable etc) and can conduct research which facilitates the NCOP's decision concerning the appropriateness and necessity of the intervention. Ideally, this member of staff should be in constant contact with SALGA and provincial governments and keep the NCOP notified of situations in which section 100(1)(b) or section 139(1)(b) may occur. Strong organizational skills are necessary for this job as is the ability to analyse information and to understand the legal issues.

Other of the specific oversight functions will be carried out by existing committees and should not occur frequently enough to add materially to their workload.

Staffing for other Committees

Until the staff budget is increased, the NCOP can seek short-term support from the various ministries. For example, the Department of Education could second people to staff the Select Committee on Education. This exchange of staff benefits both the NCOP and the Departments.³⁰ The NCOP gains the assistance of qualified staff until it can hire and train additional staff. The departments gain personnel with the hands on experience of working through the parliamentary system and establishing relationships with the Delegates, provinces, and NCOP staff. This experience will enable them to work effectively with the legislative branch upon their return to their Departments.

Other sources of short term staffing

³⁰ It should be noted that the regular (or not so regular) 'briefing' of committees by government department officials would not fulfil the NCOP's need for research staff. First, in briefing parliamentary committees, departmental staff represent the department and present ministerial policy. NCOP Committees need the assistance of people who, for a period at least, can act independently of the department. Second, a 'briefing' is a session in which the department concerned presents MPs with information that the department believes the MPs should have. Research produced by a committee researcher will not be constrained in this way.

Other sources of short-term staffing options include: academia, trade unions, NGOs and the private sector. NGOs may be willing to loan staff to the NCOP for a year or two. University programmes are already being drawn up specifically to provide students with hands-on experience through internships in Parliament. Various industries in the private sector, and government parastatals, may be willing to loan staff as well. For example, the banking industry could loan someone to work on the Finance Committee, a health insurance company could loan someone to work on the committee concerned with health. The NCOP could establish a competitive program in which members of the private sector applied for the opportunity to work for one year in the NCOP. The programme could possibly be paid for through the creation of a fellowship fund financed through private sector donations. Through it the private sector gains insight into the workings of government while the government gets the benefit of the talent of some individuals in the private sector.

Another possibility may be to offer attachment programmes where qualified individuals would continue to be paid through their private sector “sponsor,” but their services would be rendered to the NCOP. Of course, in the loaning of staff from the private sector great care would need to be taken to ensure that the private industry did not use it as a means to gain inside access to the legislative process to benefit their industry. Strict guidelines must obviously be developed to prevent undue influence by private sector industries as well as to protect the independence and legitimacy of the committees in the NCOP.

Long-term solutions

Staff loaned to the NCOP from government institutions, NGOs and the private sector for a short period of time, while beneficial, is not the long-term solution for the NCOP. The seconded staff can provide temporary relief and assist in training permanent staff, but for the NCOP to perform its full constitutional duties, it needs more permanent staff and the budget to provide for hiring qualified staff as soon as possible. In the medium term, research staff might be shared with the National Assembly but this must exclude specialised staff for the Select Committee on IRBP and the Finance Committee. Their workload will be great and their specialisation such that sharing would not be a realistic option.

NCOP researchers could be charged with a set portfolio of issues that overlap with committee portfolios so that they develop a level of expertise over their years of service and, in and of themselves, become resources. Each committee should have at least one researcher in addition to a Committee Secretary and Committee Clerk.

Staffing Goals

Short-Term

Expert staff arranged for Finance Committee and IRBP Committee
Develop expertise in one staff member for dealing with section 100 and 139 interventions and other specific oversight responsibilities

Other staff for Finance Committee and IRBP Committee and for other committees detailed from Ministries, NGOs, Private Sector

Medium-Term Goal

Seconded staff assists with training new staff

Long-Term Goal

Full complement of NCOP staff—At least one committee clerk, one committee secretary, and one researcher per committee

5.2 TECHNOLOGY

As mentioned earlier in this report, technological advances available to the NCOP and other government institutions will allow South Africa to rapidly make significant advances in effective government. In particular, electronic media such as e-mail and Internet based communication systems will enable the NCOP to eliminate many of the problems and obstacles that have been plaguing the institution and have been mentioned in earlier studies.³¹ They will enable the NCOP to convey information swiftly and efficiently to all of its stakeholders at relatively low cost.

Quick and easy flow of information between the provinces will allow Delegates both to fulfil their oversight obligations more efficiently and better represent provincial concerns to the national government. But perhaps the greatest benefit of new technology is the increased access, openness and transparency it brings to the public of government activity.

The sections below outline ways in which the Internet and other technologies can be used by the NCOP to facilitate greater communication with the public and better coordination with provincial stakeholders. This communication is a critical part of the process of overseeing and evaluating government programmes both during and after the passage of legislation.

³¹ *NCOP Comparative Study, January 1999; published by the NCOP in association with NDI and under a grant from the United States Agency for International Development, (USAID).*

5.2.1 The Internet

The NCOP should take full advantage of the Internet. Legislative bodies throughout the world have begun similar processes. While some of their legislators have struggled initially with using computers, classes and user-friendly formats can enable even the least computer-savvy legislators to make use of the information this technology provides. Through Internet-based communication systems such as e-mail, Delegates will have access to accurate information from Parliament regardless of where they are in South Africa. The NCOP's recent development of *NCOP Online!* is a significant step in this direction.

The more information from all spheres of government that is placed online, the easier it will be for members and committees to conduct oversight. For example: provincial legislatures can place reports from provincial executives and departments on the Internet to be viewed by legislatures in other provinces and the NCOP.

NCOP Online! Information Management System

As the NCOP has already discovered, the Internet also provides a more efficient and less costly means of communicating with the provinces. The NCOP has developed *NCOP Online!*, an information management system that will keep Delegates and their provinces informed of crucial national developments and publications nearly instantaneously through Internet based communication systems.

The system was designed to replace the current methods of communication, namely fax, courier and postal mail of important government documents such as: legislation, order papers, amendments, committee notices, and schedules. Provinces were experiencing numerous problems with these lines of communication: they were slow, duplicative, and often confusing. The inadequacy of communication between the NCOP and provinces was repeatedly raised with the leadership of the NCOP in various workshops and other fora. As a result, the NCOP developed and deployed a new, web-based information system to address these concerns.

The new NCOP Online! Information Management System provides users with access to copies of bills, green papers, white papers and other important government documents. The system, when fully operational, will also provide Delegates in Cape Town and provinces with a means to communicate with each other, staff, and other government officials quickly, easily and inexpensively.

Prior to its development, a technology assessment was conducted by NDI of the capacity of provincial legislatures and PLGAs to support such a communication system. As a result of that assessment, the system has been designed so that it requires only that users have access to the Internet with web-browser capabilities such as Netscape or Internet Explorer.

At the core of the system is a public web-page that allows users to download: legislation, amendments, committee schedules, minutes, agendas, as well as contact information for Presiding Officers, Delegates, and staff of the NCOP. The site allows individuals to track legislation as it flows through parliament. Bills are entered into the system the moment they are tabled and ordered printed by government.

The site allows users to search by keyword, committee, or phrase in case they do not know the bill number or name. The documents can be printed directly from the site or downloaded to the users computer or to disk. The legislation is downloaded in an Internet-standard format (called PDF), which protects the formatting and pagination of the document so that when printed by a user it will look exactly like the original. This is important when dealing with legislation since the text often requires cross-references with other sections of the legislation.

This system also provides up-to-date and accurate information about committee schedules, agendas and minutes, and will automatically notify individuals of agenda or schedule changes by e-mail, fax, and eventually, cell-phone messaging. It is hoped that this initiative should go a long way toward eliminating complaints registered by provincial participants about wasted travel time, clashing committee schedules, and inefficient administration. It will allow provincial participants to “log on” to the website and confirm committee meetings in Cape Town prior to their departure

Internet –based Audio Visual Archives

The Internet also provides the NCOP with a unique solution to the expense of having provincial stakeholders travel all the way to Cape Town for a Ministerial or Departmental briefing on legislation. Provincial participants frequently expressed their desire to “hear for themselves” the original briefing by the department, but decried the exorbitant cost incurred by the province in doing so.

Investment in technology such as digital audio and visual recorders, dedicated web server, and accompanying software would allow the NCOP to record these briefings and place audio and visual files on the website for individuals across the country to access. This would allow individual committee members to log onto the website and download the images and watch them at their leisure. The initial investment for such a system would be significant, however the long term financial implications should be minimal.

Alternatively, the entire committee could gather at one time to watch the briefing the same way they would if it were broadcast on television. This would require only that the legislature have a computer projector on hand to display an image large enough for the entire committee to watch comfortably. These projectors can be purchased for approximately R20,000.

Training for Members and Staff

This technology will only work, however, if those intended to use it are properly trained. That means that members and staff in both Cape Town and provinces will need training in a variety of skills. They will need to know how to: type, publish and retrieve information on the Internet, send and receive e-mail messages, fax documents via computer, and download files.

This training should be conducted at the earliest possible opportunity and remain part of an ongoing effort for the whole of Parliament as well as the provinces.

5.2.2 Broadcast Television

The NCOP currently has the capacity to broadcast committee meetings on television aired on a pay-for-service network called Multi-Choice to which provincial legislatures subscribe. A number of pilot initiatives were tested in 1997-98 where committee meetings in Cape Town, especially those involving departmental briefings, were televised and provincial committees were advised to tune in and watch the proceedings live. They were then able to fax in questions to the chairperson, who then had discretion as to whether or not they were relevant to the committee. Relevant questions were read by the Chairperson after being attributed to the province and individual from which they were forwarded.

These “live” briefings proved very popular among provincial participants as it allowed them witness the briefings first-hand and interact with the committee without spending hours or even days traveling to and from Cape Town. Some dissatisfaction was raised about the indirect nature of the communication, however, given the massive expense and administrative hassles involved in sending special delegates to Cape Town this seems to be an excellent short term effort that should be used whenever possible.

Due to the quantity legislation processed by the South African Parliament, this report suggests that there needs to be a process of prioritisation. It is not possible to have every committee meeting broadcast on television.

5.2.3 Video-conferencing

Video-conferencing technology would allow committees and individuals in provincial legislatures to interact with NCOP committees without having to travel all the way to Cape Town. Contributions by individuals at these “remote” locations is technically managed by a conference “director” who would conceivably be in contact with the Chairperson of the Committee hosting the conference.

This is a much more interactive experience than simply watching the proceedings on television, however the cost and logistics of such a system would be beyond the ability of the NCOP to finance alone.

5.2.4 Additional Electronic Initiatives

Electronic access to delegated legislation

Earlier sections wrote of the obligations of the NCOP to review delegated legislation and regulations. This is a process that could be greatly facilitated by publishing those regulations on *NCOP Online!* This would allow committees in both Cape Town and the provinces to review and comment on those regulations electronically with a minimum of time and effort.

NCOP Online! can be enhanced by linking those regulations with the legislation that generated them, thus ensuring that the appropriate individuals are reviewing them. This avoids the need for committee members or staff to pour through thousands of pages of the Government Gazette trying to locate them. It would also eliminate the need for a single individual to read and refer the appropriate passages to the committee. This decentralisation of the task is likely to reduce the instances where important regulations escape scrutiny and further improve government transparency.

Technology Goals

Short-Term

Development and deployment of *NCOP Online!*

Installation of computer network for the NCOP

Utilisation of broadcast television for committee meetings

Medium-Term

Training for Delegates and staff on the use and management of *NCOP Online!*

Long-Term

Audio and visual file storage on the NCOP website

Teleconferencing capabilities for committee meetings

National electronic tracking of subordinate legislation

5.3 PUBLIC PARTICIPATION

5.3.1 The NCOP's role in public participation in Parliament

Section 72(1) of the Constitution specifies that:

The National Council of Provinces must -

(i) facilitate public involvement in the legislative and other processes of the Council and its committees

To oversee government, the NCOP needs a proper understanding of the way policies are implemented and the effect of laws. This can be acquired by drawing on the knowledge, skills and experience of the people of South Africa. Citizens will point out unmet needs, inefficient or inadequate service delivery, and sensitise legislators as to their priorities. This will strengthen the NCOP's capacity to perform effective oversight.

The job requirements of an NCOP Delegate are extensive and time consuming. An NCOP Delegate cannot be expected to know the realities of every sector of government and the impact of government action on each individual or constituency. Thus, increased public participation will enhance the ability of Delegates to ensure that government policy reflects the real concerns of the people. After all, legislators cannot be expected to evaluate the effectiveness of a government programme without hearing from its beneficiaries.

5.3.2 Encouraging citizens to participate

While Parliament is already firmly committed to increasing public participation, numerous studies and discussions have previously pointed out the difficulty in gaining adequate public participation in the legislative process in South Africa. This inadequacy increases when attempting to reach rural and disadvantaged communities not represented by a well-funded NGO or civil society organization. Current efforts by Parliament and committees to utilise free media through: newspaper, radio, and television, have proven inadequate. Many of those consulted during the writing of this report also expressed dissatisfaction with the ability of public or committee hearings to reach only a small section of the public. The reasons for this are largely economic. People who spend the majority of their time struggling to survive do not have time to monitor parliamentary committees.

In addition, efforts on the part of parliamentary and provincial committees are time consuming and expensive. They are often the first things to be sacrificed in the rush to pass legislation fast-tracked by the executive. However, to perform effective oversight, the NCOP needs the input of all citizens, not just those who have the means to voice their views and opinions to the government. The success and effectiveness of the governments' housing, health care, job creation, education and many other policies depends on evaluating the implementation of services for the most economically disadvantaged citizens. For that reason, the NCOP must place a special emphasis on reaching out to this group of South Africans. By listening to this group, Delegates can determine if programmes designed to help this most vulnerable segment of society are actually working. Thus, the public participation program outlined below involves special measures for reaching disadvantaged people.³²

³² Public participation is a value in and of itself; however, this report discusses public participation focusing on its contribution to the legislative oversight function. For a more detailed discussion of

5.3.3 Methods of Conducting Outreach

The good news is that involving the public in the evaluation of the impact of legislation and government programs is not subject to the tight time constraints of the legislative process. The issues are of discipline and dedication, rather than time or money.

In determining the effectiveness of a government programme, legislators and committees have a clear and defined objective: that is, to find out who is participating in the scheme and how it has worked. This is a much easier task than communicating with the public at large about legislation that may or may not influence them several years down the line. The legislator in this process has a captive audience.

Information about the individuals or areas effected by the programme should be readily available through national or provincial government departments, NGOs, the Central Statistical Service, and municipal government. Public hearings can then be scheduled, and publicised through radio, television, newsprint and leaflets in a specific geographic area if necessary. Provincial standing committees should be encouraged to communicate the terms of reference for evaluations to the provincial local government association and their member municipalities. Those municipalities in turn can place the programme, its evaluation, and the upcoming public hearing on their council meeting agenda for discussion and thus further broaden the scope of individuals reached. After all, it is logical to assume that if there is a breakdown in a government programme operating within the municipal boundaries, the local council will hear about it from their constituents.

The behaviour patterns of the demographic group the legislators are trying to reach can often provide clues to the most efficient way of getting in touch with them. For example if the committee wanted to explore whether or not a medical scheme was adequately servicing the needs of old age pensioners, then the most efficient way to communicate with those individuals may be to place a general notice at the post office on the day they are likely to pick up their payments.

There may also be a natural marriage between programmatic evaluation and NGOs and civil society organizations. For example, a review of the effectiveness of maintenance grants could perhaps be best facilitated by an NGO such as Black Sash that regularly assists individuals in obtaining these grants and, receives feedback on the programme's adequacy. By contacting Black Sash, the IRBP Committee could determine where the programme is effective and where not. In addition, committees can utilise the vast amounts of public opinion research conducted almost daily in South Africa on a wide range of topics.

how to effectively achieve the goal of public participation as the main goal in and of itself refer to *Strengthening Public Participation Processes in the Provinces* EU Parliamentary Support Program Study produced by PIMS: Idasa's Political Information and Monitoring Service (1999).

5.3.4 Committees should facilitate public participation

Oversight is most effectively carried out in committees, therefore facilitating public participation in NCOP committee hearings is crucial to performing effective oversight.

Clearly established uniform committee rules and procedures will facilitate public participation in the discussion of legislative matters. The public should be given *adequate notice of committee meetings and the agenda items* to be discussed at those committee meetings to allow it sufficient time to arrange to appear and to prepare testimony. During the interview process of this study, a repeated criticism of NCOP proceedings concerned the scheduling and content of committee meetings. Complaints were raised of last minute meetings without advance notice of the items to be discussed at the meeting.

Ultimately the goal should be to reach a level of advance planning and coordination so that these changes are the exception and not the rule. However, until that happens, *NCOP Online!* should be used to provide registered individuals with automatic updates regarding legislation or scheduling changes by e-mail, fax, and even by cell phone. When fully operational, special delegates in provinces will receive a message on their cell phone alerting them to a change in a committee schedule or agenda, mere seconds after that change is made in Cape Town.³³

Committee rules could allow for the presentation of oral testimony from those present at the hearing and written testimony from persons not in attendance. With the constant advance of technology, the rules may also provide means for people to testify from remote locations using electronic mediums, such as teleconferencing. This technology could also be used to allow those without the time or resources to travel to Cape Town to be heard. The effect of the extreme socio-economic inequalities in South Africa can be overcome in part by establishing centres of testimony so that citizens can travel to a local venue and testify via closed circuit TV before an NCOP committee that is sitting in Cape Town. Providing access to committees to more people will allow NCOP members to perform oversight with the views of the disadvantaged in mind.

The financial investment in such a system would be great, and this report does not suggest that such an initiative be born by the NCOP. Rather it is suggested as a possibility for an overall government initiative to reach rural and disadvantaged communities.

The NCOP may also want to encourage chairpersons to hold occasional committee *hearings in the provinces* to bring the process of governing to the people, familiarise the provincial leaders and the citizens with the role of the NCOP and provide a forum for citizens to express their concerns about government issues.

³³ Interview with NDI Senior Programme Officer, Chris Spence, who has been working with NCOP staff for a year in designing the system.

5.3.5 Public Education and Outreach

To achieve increased public participation, this report recommends that Parliament seek funding for a massive nationwide public education campaign. Due to budget constraints this is not something the NCOP can accomplish on its own. Instead, the NCOP should become an active participant in a cooperative campaign to educate the public about Parliament and ensure that the campaign covers its unique role, the Delegates that serve the provinces, and ways that citizens can inform the democratic process through the NCOP. However, some public outreach can be instituted even on a limited budget.

Firstly, the NCOP should ensure that brochures such as *A Visitor's Guide to Parliament*, are updated. These materials are well done, colourful, easy to read and informative. The NCOP should ensure they are distributed at community gathering places, such as schools, health clinics, municipal offices and churches. The materials will increase understanding of Parliament and the NCOP so that people will feel able to approach their elected Delegates when they have a problem or a question.

Those people with limited reading skills will need to be reached in other ways. Here radio and community meetings will be important. The NCOP could join with provincial governments and other government agencies in a radio public education campaign. Public participation is the goal of every branch of government at all levels, and a joint radio campaign would allow the various government branches to reach a wider audience more cheaply with a coordinated and thus more effective message.

5.3.6 Creation of a process for petitions from provinces

Petitions serve two purposes: meeting the needs of individuals who encounter problems and pointing out areas where policy needs review. Many provinces have or will soon establish offices to receive petitions. While most petitions received by the provinces can be handled at the provincial or local level, some will contain issues that need to be addressed at national level. The NCOP should develop a process for dealing with petitions referred to it by the provinces.

Petitions can be a valuable oversight tool. By highlighting a problem, a citizen also points out a potential need for improved government service. The public relations staff charged with reviewing petitions can collect information about the issues raised. The NCOP Delegates can then attempt to address any systemic problems through new legislation, amended subordinate legislation, or a cooperative resolution with the relevant ministries.

Public Participation Goals

Short term

Ensure that committee rules and procedures are sensitive to the need for public participation

Medium terms

Long-Term

Establish NCOP procedure for addressing petitions referred by the provinces
Hold committee oversight mtgs in province
Public education and information campaign on the role of NCOP and its Delegates
Develop program for use of technology to facilitate public participation from sites other than the NCOP

5.4 MORE ON EXISTING RESOURCES: COORDINATION BETWEEN NCOP AND PROVINCIAL LEGISLATURES

The NCOP can be viewed as a very small chamber with 90 delegates, only 54 of whom are on the job full time. Or it can be viewed as a very large chamber, able to draw on politicians in all nine provinces and in municipalities. Neither view is exclusive. Provincial and local politicians should form an integral part of the NCOP but, in practice, they have many other functions. As a result, day-to-day running and responsibilities tend to be left to permanent delegates. For the NCOP to fulfil its substantial oversight task, attention needs to be given to the use of special delegates and local government representatives. Better use of these politicians will strengthen the NCOP.

The need to extend the use of special delegates is particularly acute in relation to oversight. Following the model of other modern legislatures as well as practices already adopted in South Africa, this report assumes that committees will be critical in oversight. The weakness of relying too heavily on the committee system in the NCOP at present is the small number of members that it can draw on consistently. Carefully planned use of special delegates could assist here. A major problem is time-tabling. In particular, the NCOP's committee schedule is still subject to late changes and agendas are often unclear. This makes it difficult for special delegates to participate properly and consistently. More regular processes will help. At the same time, provincial legislatures may allocate NCOP oversight responsibilities to specific members of their legislatures, ensuring some continuity among special delegates in the NCOP. Permanent delegates should not carry this responsibility alone.

5.4.1 A Possible Scenario

As already mentioned in this report, the work of the IRBP Committee will greatly benefit from active public participation in the oversight process. What this report outlines below is a step-by-step process that is only one possible way to achieve the maximum coordination between the NCOP and provincial legislatures as well as the best possible use of Special Delegates to achieve that public input. It is certainly not envisioned as the only way to make optimal use of all stakeholders, nor is it the only manner in which the IRBP Committee would function.

Step 1. Determining the Terms of Reference for Programme Review.

The IRBP Committee, in close collaboration with relevant provincial standing committees agrees upon a broad terms of reference for the programme under review that states its scope, purpose, original intent of the legislation that created the programme, and its anticipated results. This terms of reference should provide those conducting the evaluation with a basic outline of questions the committee is looking at, and a guideline for the evaluation. The IRBP Committee would usually draw upon the resources of the FFC, the Auditor-General, the Public Protector, or other institutions in completing this process.

Step 2. Announcing the Review. (one day)

The staff of the IRBP Committee would then distribute the terms of reference to the relevant provincial standing committees, provincial executive departments, NGOs, civil society organizations, media, and provincial local government associations, (PLGAs). This can largely be done simultaneously through the use of *NCOP Online!* .

Step 3. Provincial Standing Committee Outreach (2-3 days)

The provincial standing committees can then quickly schedule public hearings and further circulate the terms of reference for the hearings among stakeholders. By using phone, fax, e-mail, public notice boards, newspaper announcements, and community radio stations, these committees reach an even deeper level of public awareness. They would be expected to target groups not already reached by *NCOP Online!* as: community based organisations (CBOs), the local programme administrator, political party constituency offices and smaller local media outlets. As mentioned earlier, the date should be far enough in advance (two to three weeks) so that groups and individuals have time to plan and prepare submissions. The date should also be published on *NCOP Online!* , and submissions can be e-mailed directly from the province.

Step 4. The Role for Local Government (2-3 days)

PLGAs can deepen the roots of public participation by notifying their member municipalities of the hearings and providing them with the terms of reference. Municipalities that have direct experience with government programmes or feedback from their constituents are then asked to publicise the dates of the hearing and add the pending evaluation to their local council meetings. In this manner they both contribute to the debate and generate further public awareness.

Step 5. The Provincial Executive

The provincial department should be expected to prepare an internal evaluation of the programme under review, its objectives, obstacles it has encountered and feedback from the terms of reference. This information, along with plans for future implementation should be provided to the provincial standing committee, in advance of the public hearing so that copies may be distributed.

Step 6. The Public Hearing

Ideally the public hearing would be attended by members of the provincial standing committee, the permanent delegates from the province, MECs, relevant provincial department officials, the programme administrators, NGOs, CBOs, representatives from local government, and respondents from the public at large. With a minimum of two to three weeks lead time, the provincial standing committee would have an adequate opportunity to submit a report in writing.

Step 7. The Hearing Report

While an actual transcription is unlikely, the provincial standing committee's report should capture the thrust of public sentiment regarding the programme under review following the outline provided in the terms of reference. However, they may have additional issues to refer based on the results of their review and public hearings. This report should then be conveyed, preferably by e-mail, to the IRBP committee and published on, and distributed through *NCOP Online!*

Step 8. The IRBP Committee Responds

The IRBP Committee, which has used these weeks to conduct additional research and analysis, then has time to review the reports from the nine provinces and compare the findings. They can look for common problems, unique solutions, do further research, and ultimately provide guidance on whether or not the programme is achieving its original objective.

5.5 THE INSTITUTIONAL ENVIRONMENT: OFFICES IN PARLIAMENT

NCOP Delegates need office space in the actual Parliament building that will provide them a place to meet and work with easy access to Committee rooms, the Floor and Staff. The pace of government, particularly when the NCOP is in session, is quick. Delegates do not have the time to walk back and forth to offices located blocks away. The provincial offices at Regis House are not used by the Delegates for this reason. At the very least, each provincial delegation should have an office or a suite of two or three rooms equipped with phones, tables, desks and computers in Parliament.