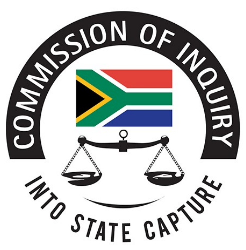


PARLIAMENTARY OVERSIGHT

EXHIBIT ZZ 9

RICHARD CALLAND

JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR INCLUDING ORGANS OF STATE

2nd floor, Hillside House
17 Empire Road,
Parktown
Johannesburg
2193
Tel: (010) 214 to 0651
Email: inquiries@sastatecapture.org.za
Website: www.sastatecapture.org.za

INDEX: EXHIBIT ZZ 9

#	Description	P/O Bundle	Bundle Page	Exhibit Pages
1.	Affidavit of **Richard Calland**	03	003 to 006	001 to 004
2.	Annexure “A”	03	007 to 036	005 to 034
3.	Annexure ”One”	03	037 to 060	035 to 058
4.	Annexure ”Two”	03	061 to 098	059 to 096
5.	Annexure ”Three”	03	099 to 148	097 to 146
6.	Annexure ”Four”	03	149 to 158	147 to 156
7.	Annexure ”Five”	03	159 to 203	157 to 201

IN THE JUDICIAL COMMISSION OF INQUIRY INTO ALLEGATIONS OF STATE CAPTURE, CORRUPTION AND FRAUD IN THE PUBLIC SECTOR, INCLUDING ORGANS OF STATE

CONFIRMATORY AFFIDAVIT BY RICHARD CALLAND

I, the undersigned,

RICHARD CALLAND

do hereby make oath and state as follows:

1. I am an adult male associate professor in public law employed at the University of Cape Town.

2. Save where otherwise stated, or where it may otherwise appear from the content hereof, the facts deposed to in this affidavit are within my personal knowledge and are, to the best of my knowledge and belief, both true and correct.

3. I annex hereto marked **"A"**, a copy of a report that I prepared for submission to the Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State ("the Commission"). My report is entitled "Parliamentary Oversight and Executive Accountability in a time

of 'State Capture': Diagnosis of an Institutional Failure & Ideas for Reform" ("my report) and was lodged, together with its annexures, with the Commission's secretariat on or about 15 July 2020.

4. The annexures to my report comprise the following:

4.1. Annexure 1 - A chapter by Danwood M Chirwa and Phindile Ntliziywana entitled "*Political Parties and Their Capacity to Provide Parliamentary Oversight*" ("chapter by Chirwa and Ntliziywana"), published in a book entitled "*Political Parties in South Africa – Do they Undermine or Underpin Democracy?*" edited by Heather Thuynsma and published by Africa Books Collective, 2017;

4.2. Annexure 2 - "*Report on Parliamentary Oversight and Accountability*", prepared by Hugh Corder, Saras Jagwanth and Fred Soltau ("Corder *et al*"), Faculty of Law, University of Cape Town, July 1999 for submission to Parliament;

4.3. Annexure 3 - Oversight and Accountability Model;

4.4. Annexure 4 - "Credentials - Expertise and Experience – Richard Calland", including my *curriculum vitae*; and

4.5. Annexure 5 - "Report of the Electoral Task Team" (chaired by Dr F van Zyl Slabbert and appointed by the Cabinet on 20 March 2002), published by the Electoral Task Team in 2003.

5. I confirm my credentials and *curriculum vitae* as set out in annexure 4 to my report.

6. Much of my report consists – as its title indicates – of a diagnosis of why, in my opinion, in a time of "state capture" South Africa experienced an institutional

failure as regards parliamentary oversight and executive accountability. I also set out some ideas for reform. I believe that my experience, both in the field of public law and as a seasoned close observer of Parliament over many years, qualifies me to express the views that I have expressed.

7. As my report makes clear, not all of the facts referred to – or assumed – in it lie within my direct personal knowledge, though many of them do.

8. To the extent that the facts referred to lie within my personal knowledge, I confirm that they are true and correct.

9. Where I have referred in my report to facts not within my direct personal knowledge, I have endeavoured to disclose the sources relied upon and I confirm that I believe that all such facts to be true.

RICHARD CALLAND

I HEREBY CERTIFY that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn before me at CAPE TOWN on this 7th day of DECEMBER **2020**, the regulations contained in Government Notice No R1258 of 21 July 1972, as amended, and Government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

Full Names:

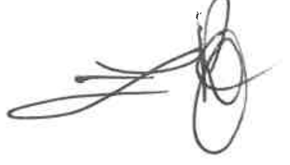
Office:

Business Address:

ZANDRI FOURIE
PRAKTISERENDE PROKUREUR R.S.A.
KOMMISSARIS VAN EDE
4de VLOER, LANGSTRAAT 14, KAAPSTAD

ANNEXURE "A"

ANNEXURE "A"



PO-03-009

ZZ9-RC-007

Parliamentary Oversight and Executive Accountability in a time of 'State Capture': Diagnosis of an Institutional Failure & Ideas for Reform

Richard Calland[1]
Associate Professor: Public Law
University of Cape Town

July 2020

1 Excellent research assistance was provided by Liam Murphy and Rebecca Van Es, and very helpful commentary on each draft was provided by Mike Law, as well as valuable editing and additional research.

CONTENTS

PART ONE: INTRODUCTION: PURPOSE AND INSTITUTIONAL CONTEXT
Purpose and Approach of this Paper
Institutional Context

PART TWO: PARLIAMENTARY OVERSIGHT AND EXECUTIVE ACCOUNTABILITY UNDER THE CONSTITUTION & THE LAW
Parliamentary Oversight Under the Constitution
The Corder Report
The Oversight and Accountability Model (OVAC)
The Report of the Independent Panel Assessment of Parliament
Rules of the National Assembly
The Role of Parliamentary Committees as the 'Engine Room' of Parliament
The position of the MP in holding the Executive to Account

PART THREE: WHAT DOES PARLIAMENTARY OVERSIGHT AND EXECUTIVE ACCOUNTABILITY REALLY MEAN? A BRIEF CONCEPTUAL RUMINATION

PART FOUR: PARLIAMENTARY OVERSIGHT AND EXECUTIVE ACCOUNTABILITY IN PRACTICE: A DIAGNOSIS OF INSTITUTIONAL FAILURE
Individual Cases of Ministerial Accountability
Nkandla - A Case Study
Evidence of what is possible – SCOPA
Conclusion: Political and Institutional Culture collude to undermine constitutional authority

PART FIVE: THE POLITICS OF INSTITUTIONAL EVOLUTION
Oversight and Accountability is Political: the different phases of the post-1994 Democratic Parliament
Case Study: The *A*rms *D*eal 'cover up' in *P*arliament – *A T*urning *P*oint
Parliamentary politics since President Mbeki's time

PART SIX: CONCLUSION AND RECOMMENDATIONS
The Core of the Matter: Institutional 'Insulation' for Individual MPs
A New Opportunity for Reform of the Electoral System
The Rules of Engagement
Procedural Reform: The Defining Features of the Underlying Principle

LIST OF REFERENCES

ANNEXURES
Annexure One: Chirwa, D and Ntliziywana, P. 'Political Parties and Their Capacity to Provide Parliamentary Oversight.' in Heather Thuynsma *Political Parties in South Africa* (2017).
Annexure Two: The Corder Report
Annexure Three: The OVAC Model
Annexure Four: BIO & CV of A/Prof Richard Calland
Annexure Five: The Report of the Electoral Task Team chaired by Van Zyl Slabbert.

I. INTRODUCTION: PURPOSE AND INSTITUTIONAL CONTEXT

1.1 Purpose and Approach of this Paper

What was Parliament doing – or not doing – whilst state capture embedded itself into the body politic? This is an institutional question of fundamental importance and, therefore, one that deserves the attention of the Inquiry into State Capture ('the Inquiry'). The over-arching objective of this report is to contribute to the task of establishing a credible diagnosis of the institutional failures that enabled state capture to gain traction and undermine integrity in public life, and to provide some ideas in relation to possible remedies or reforms that could viably serve to prevent a repeat.

Accordingly, the purpose of this paper is to try and assist the Inquiry by:

- First of all, setting out the constitutional position vis-à-vis the powers and authority of Parliament to exercise oversight over the Executive, including relevant statutes and Parliament's own rules, so as to answer the question: what is the meaning and intention of the concept of parliamentary oversight?
- Secondly, evaluating whether or not the theory of parliamentary oversight has been matched by the practice, by seeking to answer the question: has there been effective oversight of the executive by parliament?
- Thirdly, exploring the reasons for failure – a diagnosis of the problem, by attempting to identify the major factors that impact on the ability of Parliament to serve its constitutional duty to exercise oversight.
- Fourthly, offering some recommendations for reform.

1.2 Institutional Context

The functional organisation of power has long been a conundrum for political and legal theorists. The Separation of Powers Doctrine was derived as a solution to the peril of concentrating power in one person, office or institution.[2] While no express mention of the doctrine is found in the South African Constitution,[3] it is implied by the allocation of distinct powers to the executive, legislative and judicial branches of government,[4] as well as by specific provisions that give one or other branch of government explicit oversight and accountability authority over another. The Executive is endowed with a considerable amount of public power. To safeguard against the abuse of Executive power, the Constitution created a range of oversight and accountability mechanisms. Perhaps the most fundamental of these, aside from judicial review, is Parliamentary oversight of the Executive.[5]

Oversight and accountability are thus two of the key tenets of South Africa's modern, constitutional dispensation, especially when the historical context of apartheid era government is taken into consideration

[2] Chirwa, D and Ntliziywana, P. 'Political Parties and Their Capacity to Provide Parliamentary Oversight.' in Thuynsma, H. *Political Parties in South Africa* (2017) Chapter 7 p135. (Attached at Annexure One).
[3] Constitution of the Republic of South Africa, 1996 (hereinafter "the Constitution").
[4] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa,* 1996 (4) SA 744 (CC) *("First Certification Judgment").*
[5] Section 92(2) and Section 102 of the Constitution.

– a crime against humanity was perpetrated by the executive, with little or no check or balance on power, including by the legislative branch of government. This paper begins by setting out the full constitutional position, as a foundational starting point for the diagnosis of institutional failure of accountability that permitted 'state capture' to take root. It suggests that the legislative branch has all the necessary legal authority to exercise meaningful oversight – and, indeed, has on occasions used that authority in a meaningful fashion – and, moreover, that it is under a duty to exercise this authority in the public interest.

Turning oversight and accountability theory into practice has presented a delicate challenge to most political systems. The first democratic parliament of South Africa (1994-99) recognised this and so it commissioned a report (the "Corder Report") to grapple with the issue and to advise on how to develop the necessary practice and institutional culture. I have attached a the Corder Report at Annexure Two – one of four substantive pieces that are worthy of review alongside and to compliment the analysis and recommendations contained in this paper – each of them contains useful information, analysis or ideas.

In essence, few of the recommendations of the Corder Report were implemented, and certainly Parliament continued to struggle to establish its own distinctive culture of oversight with attendant institutional conventions. Hence, in due course a further piece of work was completed by parliament – known as the OVAC model (which can be found at Annexure Three), which, in turn, led to reform of the rules of Parliament so as to flesh out somewhat the constitutional framework. The first section of this report is structured in line with these various phases and processes.

Despite the advances, an effective way of conducting oversight continues to elude parliament. In this context, hollow rung the alarm bells of Parliament during the Zuma years, enabling the abuse of executive power that became increasingly apparent, to the extent that one answer to the question 'what was Parliament doing or not doing during the time of state capture?' would be to apply the legal doctrine *res ipsa loquitor* ('the thing speaks for itself'), to the extent that the Commission of Inquiry could justifiably choose to in effect 'take judicial notice' of the fact that Parliament failed to intervene to prevent state capture from taking hold and causing such damage.

A more analytical exposition is, however, required, not least so that a diagnosis can be articulated in a sufficiently sturdy form that recommendations for reform can be based upon it. Building on the Constitutional foundations set out in part II, this paper also examines the role that parliamentary committees can play, as the key 'engine room' of the legislative branch, as well the role of the individual MP. The exercise of oversight and accountability is not, however, a technical matter, regardless of the scope of the legal authority. It is inherently *political.* Hence, the paper then proceeds to consider some of the most important institutional design features and political factors that have impacted on the ability of parliament to perform effective oversight over the executive. As such, the paper draws on the writer's long experience as an observer of the South African Parliament since 1995[6] and attempts to infuse the legal and theoretical analysis with a sense of the prevailing *real politique* during the different phases of the evolution of South Africa's post-1994 Parliament. In this regard, therefore, the writer dons two different hats for

[6] From 1995-2011, the writer was employed by IDASA (the Institute for Democracy in South Africa), initially as the founding head of its Parliamentary Information & Monitoring Service (PIMS). He has written extensively on the South African Parliament in a variety of academic and 'grey literature' papers, books, and op-ed/columns in the media. In terms of the author's own credentials – relevant expertise and experience – a full Bio and CV are provided in Annexure Four.

this assignment: that of a constitutional lawyer and academic; and that of a political analysis and commentator.

Enduring one-party dominance coupled with the accountability short-comings inherent in a closed-list system of proportional representation accompanied by strict party discipline, have together served to undermine the potential of Parliament to honour its Constitutional obligations. Accordingly, in the section of the paper that considers possible recommendations for reform or for strengthening the system of executive accountability, both the question of whether the electoral system presents a problem that should be addressed and, by corollary, how the particular dynamics of party discipline play out in South Africa and tend to deflect parliament from performing the constitutional role allocated to it, are addressed. The pivotal focus is this: how can an institutional culture be established that sufficiently insulates individual Members of Parliament from undue partisan political pressure to enable them to fulfil their constitutional duty?

II. PARLIAMENTARY OVERSIGHT AND EXECUTIVE ACCOUNTABILITY UNDER THE CONSTITUTION & THE LAW

2.1 Parliamentary Oversight Under the Constitution

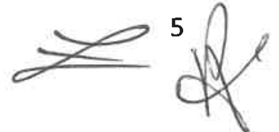
The starting point for any diagnosis of institutional failure on the apparent grand scale of the state capture project must be that the National Legislature has both the constitutional power and authority, and the constitutional duty, to exercise meaningful oversight over the Executive. Chapter 4 of the Constitution sets out parliament's fundamental mandate. Section 42(3) states that:

> The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and **by scrutinizing and overseeing executive action**. (My emphasis).

Section 55(2) obliges Parliament to maintain oversight over and hold the Executive to account – in other words, it is not only a part of Parliament's fundamental mandate but a duty that it must respect:

> The National Assembly must provide for mechanisms— (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and (b) to maintain oversight of (i) the exercise of national executive authority, including the implementation of legislation; and (ii) any organ of state.

Hence, executive oversight is a general duty distinct from its legislative and budgetary functions. In this regard, it is required to adopt oversight mechanisms, the most significant of which relate to the role of parliamentary committees (see below). Aside from the committee system, the Constitution affords the National Assembly two over-arching, more drastic accountability mechanisms: the removal of a President in terms of Section 89 of the Constitution (akin to the "impeachment" process followed in other



jurisdictions); and the vote of no confidence, which may be passed either in the President, forcing the rest of Cabinet to resign,[7] or in the Cabinet excluding the President.

Another apparatus for executive accountability is ministerial responsibility. Section 92 of the Constitution imposes responsibility on Ministers for the executive powers and functions bestowed on them. This responsibility includes the duty to provide parliament with full and regular reports concerning matters under their control.[8] A key, practical dimension of this form of accountability is the authority that Parliament has to put questions to members of the executive and the duty of ministers to answer them.[9] Inherent in the doctrine of ministerial responsibility is the notion that if the minister fails to give a satisfactory account or where there is an impassable ideological disagreement with their colleagues, they have the responsibility to resign.[10] This represents a virtuous attempt at political accountability, but in practice South Africa has a meagre record of resignations as a consequence of ministerial responsibility.[11] Since 92(2) states that ministers are "accountable collectively and individually" to Parliament for the exercise of their powers and performance of their functions, it is worth considering what this means.

My view is that it is open to Parliament to establish mechanisms that will enable it to pose relevant questions to an individual minister in relation to his or her portfolio, and to access information relevant to finding out what the minister has or has not been doing with his or her power and authority. But, it is also open to parliament to pose questions of cabinet as a whole, since the principle of cabinet government is that all key policy and political decisions are taken by the collective. This raises difficult questions about which member of the executive this would, in practice be. And I think the answer must be the President, as the Head of the National Executive. Again, Parliament is free to establish whichever mechanisms and processes it sees fit for it to be able to exercise this form of oversight meaningfully – so, for example, there would be nothing to prevent Parliament establishing a committee whose focus would be the President and the performance of the Cabinet as a collective decision-making body.

2.2 The Corder Report

Commissioned by the first democratic Parliament, the mandate given to Professor Hugh Corder and his two colleagues was to consider how the concept of parliamentary oversight and executive oversight could be instituted within the new dispensation. The Corder Report[12] defines and compares the overlapping concepts of accountability and oversight. Accountability requires decisions and actions to be explained

---

[7] Section 102(2) of the Constitution. See *Mazibuko v Sisulu and Another* [2013] ZACC 28 at para. 44 which speaks to the importance of this motion in a deliberative democracy: *"The right that flows from section 102(2) is central to the deliberative, multiparty democracy envisioned in the Constitution. It implicates the values of democracy, transparency, accountability and openness. A motion of this kind is perhaps the most important mechanism that may be employed by Parliament to hold the executive to account, and to interrogate executive performance."*[7]

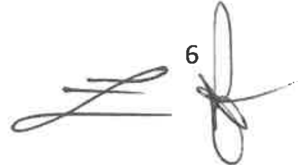
[8] Section 92(3)(b) of the Constitution

[9] This is implied by reading section 92(2) of the Constitution (members of cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions) and section 92(3)(b) (members of the Cabinet must provide Parliament with full and regular reports concerning matters under their control) together with Chapter 10 of the NA Rules which sets out the specific procedure for putting questions to the President, Deputy President and Ministers. However, the constitutional provision means nothing if Parliament cannot access information held by the cabinet, and from the departments of the executive, and this has meant/means, in practice, asking relevant questions.

[10] Chirwa and Ntliziywana *op cit* note 2 at p140

[11] *Ibid.*

[12] Corder, H., Jagwanth, S. and Soltau, F. *Report on Parliamentary Oversight and Accountability Prepared* Faculty of Law, University of Cape Town, July 1999.



and justified according to a set of criteria, and further requires that amends are made for fault or error (the appealing notion of 'amendatory accountability').[13] Oversight, on the other hand, is conceived as a broader concept which refers to an array of activities carried out by the legislature in relation to the executive: monitoring and reviewing its actions.[14] The concept includes accountability, but it is wider than accountability alone.[15]

The recommendations in the Corder Report included a separate legislative framework for Accountability (the Accountability Standards Act)[16], amendments to the Rules of the National Assembly (NA) and National Council of Provinces (NCOP) for regulation of reporting to parliamentary committees,[17] further legislation in the form of an Accountability and Independence of Constitutional Institutions Act[18] and the establishment of a Standing Committee on Constitutional Institutions.[19] The Report also pointed to the weaknesses in the electoral system in fostering accountability[20] and the need for the National Assembly to adopt mechanisms that ensure effective oversight.[21]

2.3 The Oversight and Accountability Model (OVAC)

The background to the OVAC Model seems to be this: research was commissioned by Parliament in 1999 on its oversight function. Following the establishment of an Ad Hoc Joint Subcommittee, the Joint Rules Committee approved a final report in 2003. The Corder Report had essentially gathered dust; none of its main recommendations were taken up. Several years passed before Parliament once again took up the issue, when the Joint Rules Committee established a Task Team on Oversight and Accountability comprising members of both Houses of Parliament, which studied the mandates relating to oversight emanating from the Constitution; its objective was to develop a model for Parliament's oversight function.[22] Its 2009 report proposed a "Oversight and Accountability Model" (OVAC), which was adopted (although not implemented) by the Joint Rules Committee. Amongst other things,[23] the Task Team recommended:

- The establishment of a Joint Parliamentary Oversight and Government Assurance Committee (based on research by the Inter-Parliamentary Union).[24]
- An Oversight and Advisory Section to "provide advice, technical support, co-ordination, and tracking and monitoring mechanisms on issues arising from oversight and accountability activities of Members of Parliament and the committees to which they belong".[25]

---

13 *Ibid* at chapter 2.1
14 *Ibid* at chapter 2.1 and chapter 3.2.
15 *Ibid* at chapter 3.2.
16 *Ibid* at chapter 6.3, including features such as "amendatory accountability" (to correct/rectify wrongs); prescribed standards of administrative accountability and prescribed reporting standards and procedures.
17 *Ibid* at chapter 6.3.
18 *Ibid* at chapter 7.3.
19 *Ibid* at chapter 7.4.
20 *Ibid* at chapter 2.1.
21 *Ibid* at chapter 6.2.
22 Oversight and Accountability Model: Asserting Parliament's Oversight Role in Enhancing Democracy, chapter 1.2. (Hereinafter "OVAC").
23 Additional proposals and recommendations can be found in chapter 4 of the OVAC Model.
24 *Ibid* at chapter 4.1.2.
25 *Ibid* at chapter 4.1.4.

- Development of rules to assist Parliament "further in sanctioning Cabinet members for non-compliance after all established existing avenues and protocols have been exhausted, for example naming the Cabinet member by the Speaker of the National Assembly or the Chairperson of the Council based on a full explanation."[26]
- Improve reporting of committees to the House.[27]
- Ensure sufficient and appropriate resourcing and capacity to develop specialised committees to deal with issues that cut across departments and ministries.[28]
- Split training between legislative and oversight work, and increase training for members in core competencies, including use and application of the OVAC model and budget analysis, amongst several other competencies.[29]
- "... integrate Parliament's public participation function within its overall oversight mechanism..."[30]

The OVAC report contains a good deal of useful thinking, including setting out the constitutional framework for parliamentary oversight and executive accountability. It is a pity that few of its recommendations have been implemented or even properly considered. Within the particular context of a failure of parliamentary oversight that enabled "state capture", it may be opportune, if not essential, to revisit the report and some of its key recommendations, specifically those relating to the monitoring of oversight issues and the sanctioning of non-compliant Ministers.

2.4 The Report of the Independent Panel Assessment of Parliament, 2009[31]

Not long after, in 2006, an Independent Panel was constituted (appointed by the Speaker of the National Assembly – the "Independent Panel") to conduct an independent assessment of parliament. In addition to a strong focus on the reform of the electoral system, it made a number of recommendations related to parliament oversight and executive accountability, including, *inter alia*:[32]

- Parliament should consider the impact of the party list electoral system, the Panel being of the view that the current electoral system should be replaced by a mixed system;
- Putting in place an extensive monitoring schedule to ensure that the recommendations of the Oversight Model find expression in Parliamentary processes;
- Parliament should take steps to improve the quality of reports emanating from parliamentary committees;
- Improving the process through which the National Assembly and National Council of Provinces monitors responses to Parliamentary recommendations;
- The system through which Executive responses to the Committee on Public Accounts (formerly the Standing Committee on Public Accounts [SCOPA]) reports are tracked should be strengthened, both procedurally and administratively.

---

26 *Ibid* at chapter 4.1.9.
27 *Ibid* at chapter 4.2.1.
28 *Ibid* at chapter 4.2.3.
29 *Ibid* at chapter 7.1.
30 *Ibid* at chapter 10.
31 Parliament of the Republic of South Africa *Report of the Independent Panel Assessment of Parliament* (2009)
32 *Ibid* at Chapter 3.

Aptly, the Independent Panel stated that: "There are various mechanisms which Parliament may use to hold the Executive to account, but it is the integrity, independence and authority with which these mechanisms are applied that will ultimately determine the extent to which oversight contributes to improved governance."[33]

2.5 Rules of the National Assembly[34]

The Rules of the National Assembly somewhat flesh out the mechanics of the oversight provisions contained in the Constitution. These include rules to monitor and report on unanswered questions;[35] the power to summon persons to appear before committees;[36] the duty imposed on portfolio committees to oversee executive action under their relevant portfolios and the power to launch investigations and enquiries related to such conduct.[37] But beyond that they do little to give Members of Parliament more teeth in fulfilling the oversight obligations imposed upon them by the Constitution.

2.6 The Role of Parliamentary Committees as the 'Engine Room' of Parliament

According to the British academic and parliamentary historian, Lord Nelson, the creation of committees that shadow the work of particular departments constituted 'the most important reform to Parliament of the latter half of the twentieth century'.[38]

In my view, the most important institutional infrastructure for exercising meaningful executive oversight is the parliamentary committee system. During the first democratic parliament (1994-99) it was the committee system that went through a dramatic and roots-and-branches reform and rebirth, emerging as what I saw to be the 'engine room' of the new democratic parliament[39]. I am not alone in regarding the committees in such terms: Parliament's own website refers to parliamentary committees as "the "engine rooms" of Parliament's oversight and legislative work."[40] An appendix to the National Assembly Rules makes reference to committees "playing a vital role in the parliamentary process".[41] The Inter-Parliamentary Union (IPU) & United Nations Development Programme (UNDP) Global Parliamentary

[33] *Ibid.,* at pg. 40.
[34] Rules of the National Assembly *9ed* (2016) (Hereinafter "the Rules").
[35] Rule 136 – 146 of the Rules.
[36] Rule 167.
[37] Rule 227. See too motions with or without notice (Rule 119), power to institute motions of no confidence (Rule 129), Members' statements (Chapter 9), procedures of SCOPA (Rules 232-245).
[38] Nicol, M. *The Committee System of Parliament: Are the "engine rooms of Parliament" exercising their powers fully and possible areas of reform* (2019) at pg. 4, citing Halligan, J. and Reid, R. (2016) 'Conflict and Consensus in Committees of the Australian Parliament' *Parliamentary Affairs* 69 (2): 230-248.
[39] Calland, R. *All Dressed up with no-where to go? The Rapid Transformation of the South African Parliamentary Committee System* in The Changing role of parliamentary committees. Longley, L. & Agh, A. (eds). Wisconsin: Lawrence University. Research Committee of Legislative Specialists, International Political Science Association, and Governance in Southern Africa, occasional paper No. 5, 1997, School of Government, University of Western Cape.
[40] https://www.parliament.gov.za/what-parliament-does
[41] Section 2(17) of Appendix A to the Rules: Policy for Attendance of Members of Parliament during Plenary and Meetings of Parliamentary Committees and Forums.

Report 2017 argues that "[i]n its modern form, the committee is probably the single most significant and agile instrument of parliamentary oversight."[42]

These characterisations do not overstate the significance of Parliamentary committees and the centrality of their role in the accountability framework. In the modern era, parliamentary committees are responsible for developing legislation, providing focused oversight on government departments, investigating and making recommendations on executive proposals and facilitating public participation.[43] Moreover, unusually, and significantly, Parliament's powers in this regard originate in the Constitution itself.[44]

Has the South African parliament made full and consistent use of these powers? It is clear to me that the answer to this important question hinges to a very large extent on the contextual politics of parliament and, in particular, the political attitude and disposition of the ruling party. Accordingly, I return to this issue below, in my brief historical reprisal of the what I see as the various stage of the political and institutional evolution of Parliament since 1994. In short, these Parliamentary committees are crucial in the oversight and accountability framework, but they are mired by structural limitations and party influence.

For example, it is concerning that many committee chairs get promoted to higher office and that cabinet reshuffles often see the senior MPs, usually chairs, promoted to the executive arm of government.[45] There is a concern that this could foster a culture of executive appeasement, as weak-minded but ambitious MPs position themselves for career advancement by failing to act in an assertive manner when chairing a parliamentary committee. Once again, as will be discussed further below, the prevailing political culture, especially within the ruling party, will likely be a decisive factor in this regard. Instead of encouraging obsequious political fidelity and blind loyalty from MPs deployed to positions of parliamentary responsibility, the political leadership needs to encourage a culture of independent-mindedness not in an 'oppositional paradigm' but in the spirit of ensuring that the executive remains loyal to the mandate given to it by the electorate. This requires real leadership and a profound commitment to the Constitution and its system of accountability, which, in turn, begs the question: do turkeys ever vote for Christmas? My answer is: yes. Why? Because at various times in the past twenty-five years I have heard senior ANC politicians speaking in such terms. Their identity is not material; what is important is that there has been the insight, and sense of sage perspective, within parts of the ruling party that it is in fact in its (the ANC's) political interest for Parliament to do its constitutional job and hold the executive to account.

There are other constraints. Ordinary portfolio members are often shuffled from one committee to another and seldom sit for the duration of the electoral term.[46] This prevents members from settling and disrupts any continuity of work. Furthermore, the lack of adequate mechanisms to monitor the implementation of resolutions by government departments results in the same shortcomings occurring year after year. Thus, diminishing their capacity to hold the executive to account.[47] Moreover, the

---

42 Inter-Parliamentary Union and United Nations Development Programme (2017) *Global Parliamentary Report 2017, Parliamentary oversight: Parliament's power to hold the government to account* at pg. 46.

43 Calland, R. *The first five years: A review of South Africa's democratic Parliament*. Cape Town: IDASA (1999)

44 Section 56 of the Constitution affords Parliament and its committees the power to hear evidence and summon *any person* before it.44

45Calland, R. *The Zuma Years*. (2013) at pg. 141.

46 *Ibid* at pg.142.

47 *Ibid* at pg.143.

committees' potency can be diminished by government departments not handing in reports on time or by providing reports are too lengthy or unwieldy, or too vague and generalised, which can serve to prevent constructive analysis by the relevant committee.[48]

Lastly, too often it is the case that the reports and recommendations of parliamentary committee are not properly taken up by the National Assembly as a whole and given the additional weight and leverage that Parliament as an institution should give them when seeking to hold the executive branch of government to account. There is a danger that Parliament will go through the motions, ostensibly conducting 'oversight' but not a politically or institutionally meaningful way.

2.7 The position of the MP in holding the Executive to Account

MPs swear or affirm their faithfulness to the Republic and obedience to the Constitution and laws. On paper, it is clear that an MP is duty bound to the Constitution and their primary allegiance must lie with the Constitution, not their political party.[49] In the event of a conflict between party loyalties and constitutional principles, an MP's fidelity should be to the people. However, a party, not an MP, gets voted into Parliament – it, not the individual MP, wins the seat(s). The political party determines who is deployed to Parliament and who is no longer permitted to represent the party.[50] This tension between an MP's abstract constitutional duty to the people and the very real political sanction for dissidence – the sword of Damocles which hangs over his or her head, so to speak – has created a vacuum where effective accountability and oversight have floundered.

An MP who questions or challenges members of the executive may face institutional and political backlash that will likely prejudice their career. Moreover, the most high-ranking positions are given to senior leaders and thus an MP would likely be confronting someone who has significant internal institutional, political clout.[51] In addition, MPs are paid a good salary. Thus, the socio-economic realities of South Africa may further disincentivise active and assertive independence and instead encourage blind loyalty.[52] The court in the *UDM* case took note of the risk of defiance, but argued that when assessing the risk it must be counter-balanced with the difficulty of being removed from the National Assembly.[53] While removal is indeed a threat, this dichotomy neglects to consider the more underhand and likely sanction of inhibiting career mobility.

In the *Certification* case, the Constitutional Court addressed the potential conflict of Cabinet Members forming part of the legislature. The argument put forward to the court was that Cabinet Ministers doubling as MPs undercut representative democracy and thus, accountability and responsiveness were eroded. Accordingly, it was reasoned that legislators would obey the party line even in the event that the party had abandoned its political manifesto. As a result, this executive influence would subvert openness, accountability and responsiveness.[54] In response the Constitutional Court stated:

48 Corder *op cit* note 12.

49 *United Democratic Movement v Speaker of the National Assembly and Others* [2017] ZACC 21 at para 79.
50 *Ibid.* para. 75.
51 *Ibid.* para. 76.
52 Calland *op cit* note 45.
53 *Supra* note 4 para.80.
54 *Ibid.* para. 106 & 186.

> *"We do not agree. Under a list system of proportional representation, it is parties that the electorate votes for, and parties which must be accountable to the electorate. A party which abandons its manifesto in a way not accepted by the electorate would probably lose at the next election. In such a system an anti-defection clause is not inappropriate to ensure that the will of the electorate is honoured. An individual member remains free to follow the dictates of personal conscience. This is not inconsistent with democracy."*[55]

The Court in the *UDM* case affirms this notion. The assumption of this argument is the proposition that if institutional failure occurs, such as Parliament failing to hold the party accountable or indeed the Executive for abandoning or failing to deliver on its manifesto, the people will hold them accountable (presumably, at election time). In this framing, the people are the ultimate guardians of good governance. It is the sacrosanct principle of democracy. However, such an approach risks falling into the trap of being a pious theorist. While law has kept in step with our social evolution, democracy and institutions have arguably lagged behind. The will-of-the-people principle of democracy has hardly changed since its original Aristotelian conception and its underlying assumption neglects to consider the nuances of a country's political process, such as the lack of viable political competition, the effect of political rhetoric and misinformation, and the inaccessibility of politics to a large swarth of the electorate. Hence, it is vital that the institutional components and sub-components of the constitutional system function effectively, which is why in my submission the question of institutional strengths and shortcomings should constitute such a vital part of the State Capture Inquiry's work. It goes to the heart of South Africa's post-apartheid democratic dispensation and to the integrity and longer-term sustainability and resilience of its constitutional order.

III. WHAT DOES PARLIAMENTARY OVERSIGHT AND EXECUTIVE ACCOUNTABILITY REALLY MEAN? A BRIEF CONCEPTUAL RUMINATION

From the above discussion on the regulatory framework it is clear that while the fact that Parliament must hold the Executive to account may be constitutionally trite, even for constitutional scholars, the exact nature of that obligation is not so clear – far from it. If one is to conclude that Parliament has failed to hold the Executive to account, we must be clear on how it was expected to do so, which begs, in turn, the fundamental underlying question: what does accountability mean?

To my mind, there are two forms of accountability, which I term "soft" and "hard" accountability. "Soft accountability" (or "explain yourself, Minister!"[56]) is synonymous with the ordinary meaning of the word "oversight". It builds on Professor Etienne Mureinik's famous conceptualisation of a "culture of justification".[57] Parliament fosters this culture by bringing the Executive before it (and by extension, before the public) and calling on it to justify and explain the policies adopted and implemented and the governance decisions taken.[58] Traditionally, it is in the form of oral and written questions, debates and, in some cases, parliamentary inquiries and corresponding reports. The purpose is to uncover poor

---

[55] *Ibid.* para. 186.

[56] The former Speaker of the British House of Commons, John Bercow, who gained global fame during the Brexit debates of 2018-19, used to shout "EXPLAIN YOURSELF, MAN!" from the Chair with frequent recurrence to all sorts of members in his Chamber, even to the Government benches.

[57] E Mureinik, "A Bridge to Where? Introducing the Interim Bill of Rights," *South Afr. J. Hum. Rights* 10 (1994) at pg. 31.

[58] See too I Currie and J de Waal *The New Constitutional and Administrative Law* (2001) at pg. 89.

governance and, if needs be, lay blame and criticism,[59] in the hope that it may prompt Government to reconsider its approach,[60] or the electorate to change its approach at the next ballot. But that does not mean that Parliament is able to control the Executive to such an extent that it is able to overturn its conduct. Elegantly put by Turpin & Tomkins, parliamentary control over the executive "means influence, not direct power; advice, not command; criticism, not obstruction; scrutiny, not initiation; and publicity, not secrecy".[61]

But what is Parliament to do when it is dissatisfied with the answers given to its questions? What recourse is there when its reports on executive conduct and proposed remedial actions seemingly fall on deaf ears? The notion of 'hard accountability' does not fit well with Parliament's institutional design. By 'hard accountability', I mean the ability of Parliament to alter the behaviour of the Executive, either by imposing sanctions and consequences on undesirable government conduct, or overturning such action and placing the Government on a different path. This is obviously a task better suited to another branch of government: the judiciary. It could even be said that other independent constitutional creatures, such as investigating and prosecutorial bodies, and Chapter 9 institutions in some instances, possess more 'teeth' in exercising 'hard accountability' than Parliament. So just because Parliament may not always be able to exercise this type of accountability, does not necessarily lead to a conclusion of a full systematic failure.

But Parliament does possess some means to exercise this more acute form of accountability. As noted earlier, its ability to pass no confidence motions, albeit not in relation to individual Ministers, and to refer apparent unlawful conduct on behalf of the Government and/or administration to prosecutorial and investigatory bodies are some examples. But as alluded to above, the problem with these mechanisms in practice, is that in almost all cases they are dependent on the political will of the ruling party, the centre of power of which resides beyond the formal walls of Parliament. In most cases where such mechanisms have been invoked successfully, the precondition is political appetite and expediency, rather than the extent of misconduct alleged. So, while Parliament possesses the tools to exercise both soft and hard forms of accountability, it appears that it is far more realistic to expect it to be effective at the former than the latter.

IV. PARLIAMENTARY OVERSIGHT AND EXECUTIVE ACCOUNTABILITY IN PRACTICE: A DIAGNOSIS OF INSTITUTIONAL FAILURE

4.1 Individual Cases of Ministerial Accountability

The various parliamentary mechanisms have proved ineffectual, but not because of the absence of transgressions. Throughout Former President Zuma's tenure, he faced a series of no confidence votes and, despite the growing body of evidence of misfeasance and impropriety, he survived all of them. There are numerous additional examples of where a minister has failed to be properly held to account for his or her failures. For example, in 2011 and 2012 the Department of Basic Education failed to deliver textbooks to primary schools in Limpopo amidst allegations of corruption, mismanagement and maladministration in the province. Yet the Minister faced no sanction.

---

[59] M Elliot and R Thomas *Public Law* (2017) *3ed* at pg. 388.
[60] *Ibid* at pg. 402
[61] C Turpin and A Tomkins *British Government and the Constitution: Text and Materials* (2007) at pg. 590.

Another example is the former Minister of Social Development, Bathabile Dlamini, who was embroiled at the centre of the South African Social Security Agency's (SASSA) crisis. In 2014, the Constitutional Court in the *All Pay* cases declared the contract between SASSA and Cash Pay Services (CPS) for the provision of grant payment services invalid. However, it suspended its declaration of invalidity on the basis that either another procurement process would be conducted or SASSA would undertake to distribute the social grants upon the agreement's expiry.[62] The Department opted for the latter, but the Minister failed to take the necessary steps to execute this plan. Due to the Minister's failure to comply with the Constitutional Court's remedial order these already vulnerable people were placed at further risk of not getting their grant.[63] As a result, the court had to intervene and extend its declaration of suspended invalidity for another year.[64]

Subsequently, an Inquiry, presided over by Ngoepe JP, was established to investigate the Minister and SASSA's inaction. The Inquiry concluded that the Minister had failed to disclose certain information to the court in an attempt to conceal her measure of personal accountability.[65] In other instances of unethical governance, Dlamini admitted to SCOPA that Private Security for her children was paid for by SASSA and she was named in the 2010 Travelgate scandal where Members of Parliament were exposed for the misuse of travel funds. In addition, it came to light that the Department of Social Development paid R500 000 to SABC for Minister Dlamini to be interviewed on *Real Talk* with Anele. The show was reportedly rebroadcast during the ANC's elective conference to market herself.[66] Yet the former Minister, who is currently President of the ANC Women's League and a Member of the ANC's National Executive Committee, has recently been appointed as interim chairperson of the Social Housing Regulatory Authority.

Dlamini's case demonstrates both the strengths and weaknesses, the potential and the constraints, of parliamentary oversight. On the one hand, a relatively strong parliamentary committee – SCOPA – held her to account in relation to one instance of executive abuse of power. But, then, when further, even more serious evidence of wrong-doing emerged against her, parliament was apparently powerless to prevent her continued occupation of executive positions. It raises, again, the question of what is the purpose and scope of parliamentary oversight: is it to simply ask questions and expose problems, or does it extend to include a power or responsibility to ensure that appropriate remedial action is taken?

Similarly, numerous allegations of Gupta-links have been levelled against the former Minister of Mineral Resources, Mosebenzi Zwane. In 2016, in response to media reports and suspicious transactions Standard Bank closed accounts belonging to Gupta owned businesses. In retaliation, Minister Zwane at the Gupta's behest, threatened the bank with new legislation to prevent it from closing accounts in an attempt to

62 *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (AllPay 1); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) (AllPay 2).

63 *Black Sash Trust v Minister of Social Development and Others* [2017] ZACC 8 para.43

64 *Ibid.*

65 *Black Sash Trust (Freedom Under Law Intervening) v Minister of Social Development and Others* [2018] ZACC 36 para. 12

66 Unathi Nkanjeni, 'Four of the scandals that tainted former Minister Bathabile Dlamini' available at https://www.timeslive.co.za/politics/2019-06-12-four-of-the-scandals-that-tainted-former-minister-bathabile-dlamini/ Accessed on the 19 March 2020.

persuade the bank to retract their decision.[67] In addition, Minister Zwane exerted pressure on Glencore to sell Optimum coal mine to the Gupta family business Tegeta. This formed part of the Guptas' scheme to capture lucrative Eskom coal supply contracts.[68] The Gupta-links go further back to Zwane's time as the MEC for Agriculture in the Free State. The Estina Diary Project was established to empower and develop poor black farmers in the town of Vrede in the Free State. Instead, aided by Zwane and Ace Magashule (then Premier of the Free State), the R200 million budget was laundered to fund the wedding of Vega Gupta at Sun City.[69] Yet, Zwane is currently a Member of Parliament, and was appointed as Chairperson of the Portfolio Committee on Transport following his return to Parliament after the May 2019 election, inviting the rhetorical question: what kind of accountability can Parliament offer when members of the executive who have been implicated in corruption scandals are removed from the executive but then returned to senior positions in Parliament at the next election? What his appointment suggests is that the system of oversight, and supporting rules, are unlikely to prove to be resilient or useful in establishing a culture of accountability.

In stark contrast is the story of former ANC MP, Zukisa Rantho. In 2017 and 2018, Rantho fearlessly led the Parliamentary Inquiry into corruption and maladministration at Eskom which resulted in a report that was adopted in a rare show of unanimity across party lines and hailed as "brilliant" by Public Enterprises Minister, Pravin Gordhan. It recommended criminal investigations in certain cases and damningly labelled the actions of ministers Lynne Brown and Malusi Gigaba as "grossly negligent". Rantho's reward: removed from the ANC's national list for the 2019 national election and cast into political obscurity.[70]

4.2 Nkandla - A Case Study

The Nkandla case provides a remarkable, on-point case study of partial systemic institutional failure. Both the executive and legislative branches of government failed to respect their constitutional duty. But the reason why I describe it as a 'partial' systemic failure is that two other branches – the judicial branch and what in the South African case one might call a fourth branch – the 'Chapter Nine' State Institutions Supporting Democracy – did fulfil their constitutional role. The case involved the maladministration of department officials, several cabinet members and the then President himself. Moreover, President Zuma was alleged to have personally benefited financially from the maladministration. Relevantly for the present inquiry, it raised the issue of Parliament's duty to hold the Executive accountable and its duty to support the Public Protector when it performs its own constitutional duty.[71] The Public Protector is an independent Chapter 9 institution with the purpose of strengthening our constitutional democracy by providing oversight and accountability. Accordingly, it has the power to investigate and report on improper conduct by the Executive and take remedial action.[72] It aids the legislature in fulfilling its duty of holding the

---

67 Ferial Haffajee, 'The sordid story of Mosebenzi 'Gupta' Zwane – South Africa's most captured Cabinet Minister' available at https://www.dailymaverick.co.za/article/2018-09-18-the-sordid-story-of-mosebenzi-gupta-zwane-south-africas-most-captured-cabinet-minister/ Accessed on the 19 March 2020.

68 *Ibid.*

69 *Ibid.*

70 Law, M and Calland R 'A Constitutional Fiction: Parliamentary Oversight of the Executive in the Fifth Parliament' in *Review of the 5th Parliament.* Cape Town: Parliamentary Monitoring Group (2019). Available online < https://pmg.org.za/parliament-review/article/law_calland> (last accessed: 13 May 2020).

71 Chirwa and Ntliziywana *op cit* note 2 at pg. 148.

72 Section 182 of the Constitution.

executive accountable and accordingly, Parliament is duty bound under s181(3) of the Constitution to support it.

The central issue for interrogation in the Nkandla matter was the security upgrades made to President Zuma's private residence, Nkandla. As early as 2009, media reports emerged detailing excessive expenditure on Nkandla. Two years after the initial reports, it surfaced that R203 million had been spent on 'security upgrades,' prompting the Democratic Alliance (DA) to file an official complaint with the Public Protector's office.[73] The Public Protector's investigation was frustrated by the Executive's reluctance to cooperate.[74] Furthermore, the government directed a parallel investigation by the Department of Public Works into the Nkandla security upgrades – finding that certain state officials and contractors were at fault for the excessive costs and irregular tender processes, but absolving the President of any wrongdoing.[75] In another parallel investigation conducted by the Minister of Police, the Minister found that the President was not liable to pay a reasonable portion of the outlaid costs as it was concluded that the non-security upgrades identified by the Public Protector were in fact security features.[76]

In spite of these hinderances, the Public Protector published her report. She found that in breach of their constitutional duty, the Ministers of Public Works, Police and Defence and various other officials had failed to properly supervise the security upgrade. Most importantly, she concluded that the President had unduly benefitted from non-security features.[77] Having arrived at this conclusion, the Public Protector took remedial action under s182(1)(c) against the President. The remedial action required the President to pay a reasonable portion of the costs of the non-security upgrades, to reprimand the relevant Ministers for their inadequate supervision of the Nkandla project and to report to the National Assembly.[78] Importantly, the judiciary is the only branch of government with the vested authority to set aside findings made by the Public Protector.[79] However, the National Assembly must scrutinise the Public Protector's remedial action.[80] In this regard, the National Assembly set up two *Ad Hoc* committees to examine both the Public Protector's report as well as the report[81] compiled by the Minister of Police. The National Assembly endorsed the Minister of Police's report. Nevertheless, the National Assembly did not challenge the Public Protector's remedial action on the basis of the report completed by the Minister of Police. Instead, it set aside her findings and remedial action, and favoured the Minister of Police's findings. Thus, the National Assembly usurped the authority of the judiciary (as well as undermining the authority of the Public Protector).[82] Dissatisfied, the Economic Freedom Fighters (EFF) and the DA launched applications to the Constitutional Court requesting the court to rule that the Public Protector's remedial action is binding and that the President and the National Assembly acted in breach of their constitutional

[73] Chirwa and Ntliziywana *op cit* note 2 at pg. 148.
[74] *Ibid.*
[75] Department of Public Works, 2013. Prestige A: Security measures president's private residence; Nkandla'. Investigation report at pp.8-10. Available at http://www.gov.za/sites/www.gov.za/files/nkandla.pdf. Accessed 24 March 2020.
[76] *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11 para. 80 (Hereinafter "*Nkandla*").
[77] *Ibid* at para.10.
[78] Office of the Public Protector *Secure in Comfort: Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal province* Report No 25 of 2013/14 at para 11.
[79] *Nkandla supra* note 76 para. 94.
[80] *Ibid.* para. 85.
[81] Report by the Minister of Police to Parliament on Security Upgrades at the Nkandla Private Residence of the President, 25 March 2015.
[82] *Ibid.*

obligations. The Constitutional Court ruled that the remedial action taken by the Public Protector was binding and that the National Assembly's actions were in violation of their constitutional obligations. The Constitutional Court stated:

> *"There was everything wrong with the National Assembly stepping into the shoes of the Public Protector, by passing a resolution that purported effectively to nullify the findings made and remedial action taken by the Public Protector and replacing them with its own findings and "remedial action". This, the rule of law is dead against. It is another way of taking the law into one's hands and thus constitutes self-help. By passing that resolution the National Assembly effectively flouted its obligations. [In terms of sections 42(3), 181(3), 182(1)(c) and 55(2) of the Constitution read with section 3(5) of the Executive Members' Ethics Act and section 182(1)(b) of the Constitution and section (8)(2)(b)(iii) of the Public Protector Act.] Neither the President nor the National Assembly was entitled to respond to the binding remedial action taken by the Public Protector as if it is of no force or effect or has been set aside through a proper judicial process. The ineluctable conclusion is therefore, that the National Assembly's resolution based on the Minister's findings exonerating the President from liability is inconsistent with the Constitution and unlawful."*[83]

This Nkandla case study indicates the systemic problem in the separation between the executive and the legislature (or lack thereof) that can be caused when one party is electorally and politically dominant and enables the collapse of the separation between party and Parliament. And in the course of it's judgment, the Constitutional Court stated clearly what is expected of Parliament, as Nicol points out:

> The Court reflected that, as with 'scrutiny', 'oversight' is not a passive activity of merely looking things over. The ConCourt stated that the National Assembly "*bears the responsibility to play an oversight role over the Executive and State organs* ***and ensure that constitutional and statutory obligations are properly executed***". [84] (my emphasis).

4.3 Evidence of what is possible - SCOPA

However, Parliament did indeed help to uncover some glaring irregularities in Executive behaviour under the Zuma administration, raising criticism and public awareness of these improper ends. One such example was to be found in the annual reports on public expenditure presented by the Auditor-General to Parliament's Standing Committee on Public Accounts (SCOPA). Seemingly, year on year, the Auditor-General would present reports to SCOPA of wasted and irregular expenditure at various levels of Government, coupled with recommendations for remedial action – and Parliament would do little to nothing about it. By the time that the Auditor-General reported wasteful and irregular expenditure exceeding R50bn in the 2016-2017 financial year,[85] it had had enough. The Auditor-General successfully advocated for a revision of the scope of its powers, to essentially sidestep Parliament as a 'middle-man' and give its own office the teeth it needs to implement the remedial action that it proposes.

---

[83] *Nkandla supra* note 76 paras. 98-99.
[84] Nicol, op cit note 38 at page 8.
[85] Auditor-General South Africa Consolidated General Report on National and Provincial Outcomes (2017).

The Public Audit Amendment Act now gives the Office the power to refer serious irregularities to the Hawks, police or prosecutorial bodies directly instead of through the medium of Parliament and the standing to initiative civil claims to recover misspent funds on its own accord.[86] It is an important and admirable piece of legislation that improves South Africa's broader accountability framework, but it is equally an admission of a repeated failure by Parliament to act on damning revelations against the administration.

4.4 Conclusion: Political and Institutional Culture collude to undermine constitutional authority

But notwithstanding the constitutional framework, party discipline structures in a closed-list representative democracy have over time withered Parliament's oversight and accountability mechanisms. Furthermore, in a one party dominant system the boundary between state and party can easily blur, permitting the executive to deploy loyal apparatchiks to key institutions.[87] Complaints made against the SABC, Public Protector and other parastatals adopting pro-ANC partisan positions illustrate this issue in South Africa.[88] Moreover, critics within the ANC have alleged that the party has used its dominance to enforce strict party discipline and to suppress legitimate opposition.[89] Andrew Feinstein in *The Shadow World* perfectly summarises the issues of one-party state dominance coupled with a closed-list proportional representative democracy:

> *"Open accountability gave way to a closing of the ranks in which loyalty to the party and its leader became the crucial political currency."*[90]

Accordingly, if mechanisms are not implemented to heal the atrophy of oversight and accountability instruments and offer protection to independent minded MPs, continued one party dominance may continue to undermine South Africa's democratic system and the Constitution's checks and balances on executive power. The question, then, of course is: what sort of mechanisms? This is not an easy or small question, as I note elsewhere, not least because my view is that political and institutional culture will trump the 'rules of the game' on nearly every occasion. The object, therefore, must be to design a system that will mitigate the risks of this happening by providing practical means to protect MPs in performing their oversight role. This forms the basis for my core recommendation(s), later.

V. THE POLITICS OF INSTITUTIONAL EVOLUTION

5.1 Oversight and Accountability is Political: the different phases of the post-1994 Democratic Parliament

In this sense, accountability is a highly political concept. And, the democratic parliament has struggled to define its oversight role in a political sense as well as in a legal sense. As is clear from what is set out above, parliament undoubtedly has the necessary constitutional and legal authority and ammunition – and has on

---

86 Act 5 of 2018.
87 Anthony Butler. 'Considerations on the erosion of one-party dominance' *Representation* (2009) 45:2, at pg. 165.
88 *Ibid* at pg. 164.
89 *Ibid.*
90 Andrew Feinstein. *The Shadow World: Inside the Global Arms Trade*. (2013) at pg. p175.

occasions used it to exercise meaningful oversight, but has failed to do so in a consistent fashion and, arguably, where the need has been at its greatest.

Over many years of watching parliamentary committees, it is clear to me that a number of political and institutional factors will determine whether or not a committee is willing to intervene and act. First of all, there is the over-arching disposition of the ruling party – does the party leadership create an 'atmosphere' in which oversight is encouraged or at least not actively discouraged or obstructed? Second, the relationship between the main actors, especially the minister and the chairperson of the portfolio committee and/or leading members of the ANC membership of the particular committee (the so-called ANC 'Study Group'). Thirdly, the character, skill, expertise, experience and independence of mind of individual members of parliament, especially those within the ruling party. And fourthly, last, the resources that are available to the committee in terms of research capacity, budget for travel to conduct oversight visits, and so on, are all factors that will impact on the committee's individual and collective ability to exercise meaningful oversight. I develop some of these points and factors below, and then return to them in the Conclusion and Recommendations section at the end.

Although there have been six democratic parliaments since 1994, I would cluster these six parliaments into five distinct groups: the first democratic Parliament (1994-99); the second and most of the third Parliaments (1999-2008); the 'Prague Spring' at the end of the third Parliament and the beginning of the Fourth (September 2008 – 2010); the Zuma years (2010 – 2017); and now, the post Zuma years (2017 – on-going).

The first Parliament was a time of extraordinary change and a 'golden age' in terms of institution-building – most obviously, the finalisation of the Final Constitution – and legislative reform. Very rapidly, Parliament developed a new system of parliamentary committees – almost overnight, around twenty-five 'portfolio' committees were created to shadow the ministerial and departmental portfolios in the executive branch. Many of these committees were chaired by very senior ANC MPs – for example: Pravin Gordhan (local government), Blade Nzimande (education), Gill Marcus (finance) – and this, in turn, served to secure constructive lines of communication between the particular committee and the minister at the head of the portfolio the committee was shadowing. Partly this was because the ANC had chosen to deploy many of its most senior comrades into the legislative branch. Not all of them could be appointed into cabinet, and so they were available to play active roles in the legislature, which many of them then did. Because of their seniority and political gravitas and heft, they were able to cultivate an oversight role for themselves and their committees. But my sense at the time was that this invariably hinged not on formal authority or use of committee powers, but on informal channels – most often via the study group and/or in consultation with the minister. For example, the chair of the justice committee, Johnny De Lange, was able to leverage the fact that he enjoyed a very good, long-standing relationship of trust with justice minister Dullah Omar. His committee was active in legislative terms and, to some extent, oversight.

Something changed in 1999. Partly, it was that the ANC decided to 'redeploy' significant numbers of its most senior members of Parliament either into the executive or into other parts of the state or even private sector. There was an inevitable diminution in the political heft of the ANC caucus – imperceptible on one level, but very profound on another. President Mbeki had a decidedly executive-minded approach to governing. While he played lip-service to executive accountability, this was increasingly observed in the breach. The turning point was the arms deal scandal, which had wide implications for integrity in public

life but also, more specifically, in dampening Parliament's institutional inclination towards meaningful insight on the most important issues of the day.

5.2 Case Study: The Arms Deal 'cover up' in Parliament – A Turning Point

During the first democratic parliament (1994-99), Parliament's Standing Committee on Public Accounts (SCOPA) was much lauded for its rigorous oversight of the executive. But in the early 2000s, SCOPA fell victim of a concerted executive cover up. The Auditor-General had reported to SCOPA irregularities in the Strategic Defence Procurement Package or 'arms deal.' SCOPA responded by recommending a special investigation including a task team of extra-parliamentary bodies. The government completely rejected the idea of an investigation of the arms deal – with the then Deputy President Jacob Zuma playing a significant role in executive meddling.[91] The ANC responded by removing Andrew Feinstein, the chair of the ANC study group in SCOPA; the ANC, thereby, successfully neutralised SCOPA and seized control of the process.[92] This incident provided an early, but revealing, demonstration of the inherent tension between party loyalty and parliamentary oversight – in simple terms, it served to teach a 'lesson' to any MPs who might be minded to step out of line and offer such an independent-minded challenge to the political dominance of their superiors in the leadership of the party and in the executive branch of government.

The arms deal also provides insight into accountability within the party and party leverage. The then Deputy President Jacob Zuma was charged with 783 counts of fraud, racketeering and corruption for receiving payments in relation to the arms deal.[93] The Constitutional Court in the *Shaik* case concluded that Zuma had received bribes to further Mr Shaik's interests in the arms deal.[94] However, ten days before Zuma was elected President, after unseating Thabo Mbeki, the charges were dropped and the prosecutor who controversially did so was appointed as a High Court judge after the election. This lack of accountability for Zuma and others who benefited from the arms deal set the tone for Zuma's tenure.

5.3 Parliamentary politics since President Mbeki's time

When President Mbeki was 'recalled' from the Presidency by the ANC in September 2008 – an event that in itself showed just how powerful the party and its National Executive Committee (NEC) is in determining deployment and the political fidelity of even its most senior leaders – Parliament enjoyed something of a 'Prague Spring' from then until a few months into the Zuma presidency in 2009. During this period, Parliament operated in a sort of political no-man's land, reflecting the relatively loose political dynamics of the day; the balance of power inside the ANC had shifted substantially at its five-yearly national conference in Polokwane in 2007 and the impact of that shift was washing through the political system, institution by institution. Parliament was not regarded as a priority initially at least by the Zuma faction that had taken over power. As a consequence, during the final months of the 3rd democratic parliament (stretching into the first few months of the new 2009 parliament), parliamentary committees were able to stretch their legs a little – the interim president, Kgalema Motlanthe, did not seek to exercise over-bearing control over the ANC's conduct in parliament. The adoption of the OVAC oversight

91 Jacobs, S. Power, G. and Calland, R. *Real Politics*. Cape Town: IDASA (2001) at pg. 58.
92 *Ibid.*
93 Feinstein *op cit* 89 at pg. 186.
94 *S v Shaik and Others* [2008] ZACC para. 5.

'model', cited above, is one example of how increased political space during the period of transition and relative 'flux' between Mbeki and Zuma's administrations was used to advance progress on oversight and accountability. And it should not be forgotten that it was the new, post-2009-election parliament that selected Thuli Madonsela to be the new Public Protector in August 2009.

In the months that followed the 2009 election, the trend continued. For example, while the new ANC caucus focused on matters that they considered a priority – such as the appointment of new board members of the SABC (the early foothills of state capture, one can see now, with the benefit of hindsight), during the same week in August 2009 it paid scant attention to the appointment of a new Public Protector. Thuli Madonsela, who was to become such a defiantly independent holder of such a critical constitutional body, was interviewed by an ad hoc committee with scarcely any public attention – I recall the interviews taking place with just a handful of people in the committee room; perhaps lulled into a false sense of security by the approach taken by her predecessor, the newly dominant Zuma faction in the ANC caucus clearly did not regard this as a significant position and to that extent took their collective eye off of the ball.

Since then, Parliament has more or less followed the trajectory set in the 2000s, but only to a deeper and more damaging extent. As the Zuma presidency gathered root and the need to control or manipulate any challenge to his power or scrutiny of his decision-making, so Parliament became weaker and weaker, a trend that was hastened by the fact that Zuma used the parliamentary caucus as a dumping ground for loyal, but weak party members who remained loyal to him until almost the bitter end. The 2014 intake was even more dominated by Zuma loyalists than the 2009 cohort. It was only when state capture began to be revealed in public and when movements such as Save South Africa emerged that some individuals within the ANC caucus began to speak out.

A final trigger for a modest reinvigoration of parliamentary independence came with the sacking of Pravin Gordhan, Derek Hanekom and others from Cabinet in late March 2017. Then, in the run up to the ANC elective conference at NASREC in December 2017, parliamentary committees began finally to exercise some oversight muscle – most notably the portfolio committee on public enterprises, which commenced a valuable inquiry into state capture at Eskom. When Ramaphosa took power in early 2018 after his victory at NASREC, he was landed with a parliamentary caucus that was largely loyal to Zuma. Yet, interestingly, despite the shift in power away from Zuma on the NEC, deployment by way of the 2019 national election list of the ANC was not significantly shifted; the 'churn' was moderate.

Accordingly, as noted above, the ANC caucus contains remnants of the Zuma years, some of whom hold positions of influence in Parliament – Zuma loyalists such as Faith Muthambi, Bongani Bongo and Mosebenzi Zwane not only appeared on the ANC candidate list for the 2019 national election, but were returned to Parliament and then appointed as parliamentary committee chairs, which suggests that Parliament's attitude to meaningful oversight and accountability, other than in a crude internal factional politics form, is unlikely to shift soon unless there is a serious overhaul of the rules of the game and the institutional arrangements, especially with regards to providing political 'insulation' for those MPs of the ruling party who do wish to honour their constitutional duties.

VI. CONCLUSION AND RECOMMENDATIONS

6.1 The Core of the Matter: Institutional 'Insulation' for Individual MPs

It is clear that parliament has all of the constitutional and legal authority it needs to conduct meaningful oversight over the executive and to hold the executive to account *if it chooses to act*. But, it is equally clear to me that it often chooses not to act, especially when the partisan political stakes are at their highest, because that is when the political and institutional constraints bite and tend to prevent individual MPs from fulfilling their constitutional duty.

The evidence suggests that it is not a weakness in the legal arrangements or in the Rules of Parliament, per se, that is the problem, but rather the institutional and political culture. But this does not mean that the system – including the rules – should not be reformed where reforms would serve to support a shift in culture and, in particular, provide 'insulation' for individual MPs, especially within the ruling party where the stakes are, inevitably, much higher and the potential constraints, far more severe.

To my mind, this is the primary, pivotal challenge to confront and address: how best to insulate a backbench MP of a ruling party from partisan political pressure, applied in general by the leadership of his or her own party (which is where the overlap with the executive branch of government will exist)?

One, short answer is: leadership. Where the leaders of the political party concerned are willing to set the tone and define a set of principles of accountability that parliamentarians, including backbench members of his or her own party, can freely enjoy. Such leadership will provide the political space for individual MPs to ask difficult questions of the executive without prejudice, and in the realistic expectation that they will be taken seriously and answered by the executive branch of government.

But, what if that leadership is absent or if it proves to be temporary (as I noted above, Parliament's evolution since 1994 has coincided with the changes in leadership in the ruling party). What then? And which reforms might help alleviate the predicament or mitigate the risks that parliament will once again fail to act when it should.

The first is the electoral system. It is time to review it and to dust off the report of the Electoral Task Team chaired by Van Zyl Slabbert in 2003[95] (which is attached as Annex Five). The power of the individual Member of Parliament (MP) is essential in assessing Parliament's ability to deliver on its constitutional obligation to provide checks on the exercise of executive power. However, the political space that individual MPs will have to exercise independent political judgment in terms of executive oversight will depend in turn on the political environment that his or her party creates – a point that I made above.[96] After much debate during the CODESA-era negotiations and then again in the run up to the completion of the final Constitution, the closed-list system of pure proportional representation (PR) electoral system was preferred, instead of a constituency-based system (or a mixed system, part-PR/part-constituency, as

---

[95] Report of Electoral Task Team (2003): http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/Van-Zyl-Slabbert-Commission-on-Electoral-Reform-Report-2003.pdf (last accessed 15 July 2020).

[96] Calland, R. *Anatomy of South Africa* (2006) at pg. 109.

was adopted in the case of elections for local government). The choice of electoral system has significant consequences for the system of government and the politics that it generates. Most significantly, in such a system it is the party that holds the seat, rather than the MP – since no MP is directly elected; all are indirectly elected via their party's list.[97]

Arguably, then, the PR system distorts the relationship between the people and their elected representatives. Rather than maintaining a direct link of accountability to voters, there is an ostensible, superficial appearance of representation. In a constituency-based system, an MP has the democratic mandate as a foundation to represent their constituents' concerns and is accountable to them. Whereas in a proportional representation system, the MP does not have that same direct democratic legitimacy and more intimate connection and, thereby, accountability to a set of constituents, but is rather accountable to the party, rather than constituents.

6. 2 A New Opportunity for Reform of the Electoral System

Fortunately, the very recent judgment of the Constitutional Court in the *New Nation Movement* case[98] may provide the hook on which to peg real reform of the electoral system, and the catalyst for a serious-minded review of its place within the overall system of constitutional accountability. The majority decision of the Court held that the failure of the Electoral Act to provide for the right of independent candidates to contest national and provincial elections is inconsistent with Section 19(3)(b) of the Constitution,[99] exercised in accordance with the right to freedom expression[100] and supported by the complimentary political rights framed throughout Section 19 of the Constitution.

The order is, with respect, commendable in that it leaves Parliament a sufficient length of time and due leeway on addressing the inherently political question of the electoral system.[101] Therefore, Parliament has significant discretion and a broad range of options in how it decides to comply with the order, so long as it serves the ultimate purpose of correcting the constitutional defect articulated in the majority judgment of Madlanga J. It may elect to take a narrow view, simply permitting independent candidates to add their names, similar to political parties, to the lengthening national and provincial ballots and, if such candidates meet the representation threshold, limit their 'rewards' to their single seat. Not only may this fall foul of the constitutional provisions providing for a broad system of proportional representation, it would also leave a great sense of opportunity lost.

So the other, more favourable, option is for Parliament to take heed of the string of reports alluded to above, and the core diagnosis and recommendations in this paper, and use the judgment as the necessary means to finally rethink the broader electoral framework that enables so many of the failures personified in the state-capture narrative. The best way to give effect to the judgment is to progress the electoral system in such a way that it retains overall proportional representation as required by the Constitution, but

---

97 Schedule 2, Annexure A of the Constitution

98 *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* (CCT110/19) [2020] ZACC 11 (11 June 2020).

99 *Ibid* at para 120.

100 *Ibid* at para 63.

101 *Ibid* at paras 121-125.

infuses into that formula a constituency element or some other mechanism that moves power over individual MPs away from the party and back to the people.

In the same way that the Constitution Court offered a generous and purposive interpretation of the political rights in coming to its order of invalidity, so too, it is submitted, should it apply the same interpretation to the same rights when assessing whether Parliament has substantively complied with the general purport of the order it seeks to uphold - to promote the fundamental principles of accountability and citizen participation in the political system.

But, despite the real opportunity that the *New Nation Movement* judgment presents, my view is that a change in the electoral system is unlikely to be a panacea. There is no guarantee that direct election via a constituency-based system will result in more accountability or will serve to loosen the shackles of party managers sufficient to enable individual MPs to act more independently in asserting parliamentary oversight over the executive. It will not be the proverbial silver bullet, but it is likely to help.

6.3 The Rules of Engagement

The second area of overdue reform relates to institutional rules and culture. The challenge of turning accountability theory into meaningful practice is not unique to South Africa. All democracies have to wrestle with the question of how best to instil a conducive culture, with amenable conventions. An empirical review of how parliaments operate shows that their ability to review government action is limited in practice.[102] Therefore, Elliot & Thomas argue that "[c]omplaining that Parliament is in decline is to adopt unrealistic expectations of what it is actually supposed to do."[103] Are there any models used in foreign jurisdictions that create useful mechanisms which aid Parliament in effectively holding the Executive to account? All of the most useful ideas have already been considered by South Africa – whether by Corder, by the OVAC model process or by the Rules Committee itself. As I suggested earlier, these reports need to be revisited in the light of the state capture phenomenon and parliament's self-evident failure to exercise sufficient meaningful oversight and in the light of the findings of the State Capture Commission of Inquiry.

Oversight will happen most meaningfully in the committee arena of parliamentary activity. This is the crucible for oversight and accountability – it is the place where, physically as well as constitutionally, the legislative and executive branches cross paths. Hence, in my submission the emphasis should be on ensuring that parliamentary committees are fully equipped to play their role. Strengthening them will require a mixture of 'hard' and 'soft' reforms. Hard reforms include ensuring that they are provided with adequate budgets to appoint skilled researchers, whose employment contracts must be clearly to serve the whole committee and not just the ANC study group of the Chair. Similarly, certain procedural reform should be contemplated whose purpose is to establish a set of conventions and practices that should occur regardless of who is in power, who is in the chair and how good or bad the relationship is with the ministry. A lot of work should be put into thinking about what 'good practice' entails and to enshrining it into working protocols that should then be respected and protected. If they are not, it should be possible for interested parties to litigate and to seek judicial review of failings by parliament to honour its obligations.

102 Elliot and Thomas *op cit* note 59 at pg. 442.
103 *Ibid* at pg. 407.

6.4 Procedural Reform: The Defining Features of the Underlying Principle

There is, of course, a great deal of procedural detail that can be considered or added. I do not think it would be especially helpful for me to try and make proposals here. Rather, I wish to advance the *principle* and then, if the Commission of Inquiry is minded to make recommendations along such lines, parliament will be required to act to take those recommendations seriously and to put in place an urgent reform process designed to strengthen parliament's oversight capacity and culture so that it will not fail again in the future.

The lodestars – the defining features – of the principle involved must be *independence* and *insulation.* Oversight and accountability are inherently, and deeply and unavoidably, *political and not technical.* MPs need a protective institutional and political culture to enable them to fulfil their constitutional duty in relation to oversight. The rules and the conventions must be geared to encourage independence from blind party-political loyalty and to insulate those serious-minded MPs who are determined to serve the constitution and the people from undue influence or pressure from executive-minded party political managers.

One simple, yet potentially far-reaching reform would be to amend section 47 of the Constitution and to remove the provision (s. 47(3)[c]) that gives the political party and its leadership and whips so much power over the individual backbench MP. Accordingly, I recommend that Parliament should give this reform serious consideration. Indeed, it may well be required to do so if it is to produce a coherent and comprehensive response to the *New Nation Movement* judgment, as noted above. Liberating an individual MP from the shackles of their party would be a potential game-changer in terms of enabling parliamentary oversight. But it would need to be considered holistically, in the light of the overall system of government including the electoral system.

Notwithstanding such a significant reform, more than anything, however, enlightened political leadership – in the executive and at the top of the majority party – will be an essential pre-condition for successfully establishing a sustainable oversight and accountability culture and practice.

15 July 2020

LIST OF REFERENCES

Legislation and Regulations

- The Constitution of the Republic of South Africa, 1996.
- Public Audit Amendment Act 5 of 2018.
- Rules of the National Assembly 9ed (2016) https://www.parliament.gov.za/storage/app/media/Rules/NA/2016-09-28_NA_RULES.pdf.

Case Law

- *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (AllPay 1).
- *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) (AllPay 2).
- *Black Sash Trust (Freedom Under Law Intervening) v Minister of Social Development and Others* [2018] ZACC 36.
- *Black Sash Trust v Minister of Social Development and Others* [2017] ZACC 8.
- *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* [2017] ZACC 47.
- *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11.
- *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa,* 1996 (4) SA 744 (CC).
- *Mazibuko v Sisulu and Another* [2013] ZACC 28.
- *New Nation Movement NPC and Others v President of the Republic of South Africa and Others (CCT110/19) [2020] ZACC 11 (11 June 2020).*
- *S v Shaik and Others* [2008] ZACC.
- *United Democratic Movement v Speaker of the National Assembly and Others* [2017] ZACC 21.

Secondary Sources

- Anthony Butler. 'Considerations on the erosion of one-party dominance' *Representation* (2009) 45:2, 159-171.
- Richard Calland. *All Dressed up with no-where to go? The Rapid Transformation of the South African Parliamentary Committee System* in The Changing role of parliamentary committees. Longley, L. & Agh, A. (eds). Wisconsin: Lawrence University. Research Committee of Legislative Specialists, International Political Science Association, and Governance in Southern Africa, occasional paper No. 5, 1997, School of Government, University of Western Cape.
- Richard Calland. *The first five years: A review of South Africa's democratic Parliament.* Cape Town: IDASA (1999).
- Richard Calland. *Anatomy of South Africa.* Cape Town: Zebra Press. (2006)
- Richard Calland. *The Zuma Years.* Cape Town: Zebra Press. (2013)
- Danwood Chirwa and Phindile Ntliziywana, 'Political Parties and Their Capacity to Provide Parliamentary Oversight.' in Heather Thuynsma *Political Parties in South Africa* (2017) Chapter 7.
- Hugh Corder, Saras Jagwanth and Fred Soltau. *Report on Parliamentary Oversight and Accountability.* Cape Town: University of Cape Town Faculty of Law (1999) <http://www.casac.org.za/wp-content/uploads/2015/07/Report-on-Parliamentary-Oversight-and-Accountability.pdf>
- I Currie and J de Waal *The New Constitutional and Administrative Law* (2001) Cape Town: Juta.

- M Elliot and R Thomas *Public Law* (2017) *3ed* Oxford: Oxford University Press.
- Andrew Feinstein. *The Shadow World: Inside the Global Arms Trade.* Cape Town: Jonathan Ball Publishers (2013).
- Halligan, J. and Reid, R. (2016) 'Conflict and Consensus in Committees of the Australian Parliament' *Parliamentary Affairs* 69 (2): 230-248.
- Sean Jacobs, Greg Power and Richard Calland. *Real Politics.* Cape Town: IDASA (2001)
- Etienne Mureinik, "A Bridge to Where? Introducing the Interim Bill of Rights," *South Afr. J. Hum. Rights* 10 (1994).
- Martin Nicol *The Committee System of Parliament: Are the "engine rooms of Parliament" exercising their powers fully and possible areas of reform* (2019) https://pmg.org.za/static/resources/docs/Martin_Nicol-Engine_Rooms_of_Parliament.pdf
- C Turpin and A Tomkins *British Government and the Constitution: Text and Materials* (2007) London: Cambridge University Press.

Reports

- Auditor-General South Africa Consolidated General Report on National and Provincial Outcomes (2017) available online <https://www.agsa.co.za/Portals/0/Reports/PFMA/201617/GR/AG%20PFMA%202017%20Web%20SMALL.pdf> [last accessed: 31 May 2020].
- Department of Public Works, 2013. *Prestige A: Security measures president's private residence; Nkandla'. Investigation report* at pp.8-10. Available at http://www.gov.za/sites/www.gov.za/files/nkandla.pdf. Accessed 24 March 2020.
- Inter-Parliamentary Union and United Nations Development Programme (2017) *Global Parliamentary Report 2017, Parliamentary oversight: Parliament's power to hold the government to account* https://www.undp.org/content/dam/undp/library/Democratic%20Governance/Parliamentary%20Development/global%20parliamentary%20report_EN.pdf
- Office of the Public Protector *Secure in Comfort: Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal province* Report No 25 of 2013/14.
- Oversight and Accountability Model: Asserting Parliament's Oversight Role in Enhancing Democracy, <https://www.parliament.gov.za/storage/app/media/oversight-reports/ovac-model.pdf>.
- Parliament of the Republic of South Africa *Report of the Independent Panel Assessment of Parliament* (2009) http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/090116report.pdf.
- Report by the Minister of Police to Parliament on Security Upgrades at the Nkandla Private Residence of the President, 25 March 2015.

Media Reports

- Ferial Haffajee, 'The sordid story of Mosebenzi 'Gupta' Zwane – South Africa's most captured Cabinet Minister' available at https://www.dailymaverick.co.za/article/2018-09-18-the-sordid-story-of-mosebenzi-gupta-zwane-south-africas-most-captured-cabinet-minister/ Accessed on the 19 March 2020.
- Mike Law and Richard Calland 'A Constitutional Fiction: Parliamentary Oversight of the Executive in the Fifth Parliament' in *Review of the 5th Parliament.* Cape Town: Parliamentary

Monitoring Group (2019) available at https://pmg.org.za/parliament-review/article/law_calland/ Accessed on 13 May 2020

- Unathi Nkanjeni, 'Four of the scandals that tainted former Minister Bathabile Dlamini' available at https://www.timeslive.co.za/politics/2019-06-12-four-of-the-scandals-that-tainted-former-minister-bathabile-dlamini/ Accessed on the 19 March 2020.

ANNEXURE "**ONE**"

ANNEXURE "ONE"

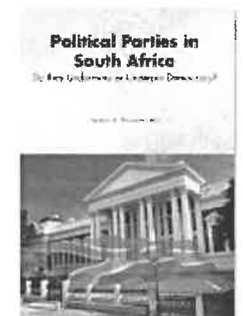
PO-03-039

ZZ9-RC-037

PROJECT MUSE®

Political Parties in South Africa

Heather Thuynsma



Published by African Books Collective

Thuynsma, Heather.
Political Parties in South Africa: Do they Undermine or Underpin Democracy?
African Books Collective, 2017.
Project MUSE.muse.jhu.edu/book/57265.

➪ For additional information about this book
https://muse.jhu.edu/book/57265

Access provided at 18 Feb 2020 16:37 GMT from University of Cape Town

PO-03-040

ZZ9-RC-038

CHAPTER 7

Political Parties and Their Capacity to Provide Parliamentary Oversight

Danwood M Chirwa and Phindile Ntliziywana

INTRODUCTION

Despite ushering in new innovations, such as the principle of constitutional supremacy and Chapter 9 institutions, South Africa's constitutional democracy is still anchored in the traditional Lockean idea of separation of powers.[1] The principle of separation of powers simultaneously allocates distinct powers to each arm of government – the executive, the judiciary, and the legislature – and allows each arm to exercise some form of oversight over the other arms. Of the three arms of government, the executive is potentially the most dangerous to citizens. This branch of government has enormous public power: it is in charge of the coercive resources of the state, such as the police and the military, and has wide powers to devise and implement policies, to enforce the law, to raise government revenue, and to spend public funds.[2] To ensure that these powers are exercised fairly and properly, suitable and effective accountability and oversight mechanisms must be put in place. Parliamentary oversight is one such important mechanism.

In the South African context, the legislature is in a unique position to hold the executive accountable. Firstly, the legislature elects the president, who in turn forms the government. In a way, then, the legislature has more democratic legitimacy than the executive. Secondly, and related to the first point, the legislature passes the laws that the executive is expected to implement. This creates a relationship of accountability. Parliamentary oversight and accountability help to ensure that the executive implements the law according to the legislature's intent and the dictates of the Constitution. Through this oversight and accountability relationship, the legislature is able to keep control of the laws that it passes, to promote the constitutional values of accountability and good governance, and to draw on the

experience of law implementation for future law making. Therefore, oversight and accountability form part of the central tenets of our democracy.[3]

This chapter summarises the formal structure of the parliamentary oversight system and critically reviews how this structure has functioned in the context of a one-party dominated parliament. In particular, we use the Constitutional Court judgment in *Economic Freedom Fighters and Democratic Alliance v Speaker of the National Assembly and Others*[4] (Nkandla case) to tease out some of the challenges that the proportional representation (PR) electoral system presents for effective parliamentary oversight. Although the notion of parliamentary oversight has application at all three levels of government, this chapter focuses largely on the national level.

BRIEF HISTORICAL OVERVIEW

Before 1994, there was neither an inclusive democratic government nor a legitimate parliament in South Africa – both parliament and the executive lacked democratic legitimacy and were largely unaccountable.[5] Under the apartheid government, parliamentary committees[6] held their hearings in secret, had limited power and existed essentially to 'rubber-stamp' legislation put forward by the National Party (NP) government.[7] In the words of Saki Macozoma, former chairperson of the Portfolio Committee on Communications: 'The most shocking thing we found when we got here was [that] Parliament has no computerisation of any kind to talk about, has no secretarial support, no research support …'.[8]

The new democratic parliament, established after the 1994 elections, had to start from scratch, using best international democratic practices as its departure point.[9] One of the first steps taken after 1994 was to open parliamentary committee proceedings to the public and the press. It was only in 1996, when the new Constitution was adopted, that a comprehensive blueprint outlining how parliament could hold the executive to account was approved. With this blueprint in place, parliamentary committees quickly became the 'engine room' of the South African parliament: they are responsible for drafting legislation, examining and revising the proposals submitted to them by the executive, and for holding cabinet ministers and their departmental chiefs responsible for the manner in which they exercise their executive powers.[10]

PO-03-042

ZZ9-RC-040

PARLIAMENTARY OVERSIGHT AND THE SEPARATION OF POWERS

The notion of parliamentary oversight is rooted in the separation of powers – a political and constitutional device long used to tame the menace of public power. The separation of powers evolved as a solution to the danger of concentrating power in one person, office or institution.[11] In its traditional form, the separation of powers doctrine recommended splitting public power into legislative, judicial and executive powers, and vesting them in separate organs of state, which, in turn, were to be run by separate personnel. It was believed that the creation of three separate organs of state would result in power equilibrium and consequently reduce the possibility of one branch of government enjoying total hegemony and becoming a threat to individual liberty.[12] Over the years, states have adopted and implemented a less pure model of the separation of powers, in part following Madison's insight that 'the complete separation between legislature, executive and judiciary was neither possible nor desirable'.[13] According to Madison, the separation of powers was needed to incorporate checks and balances in the three arms of government in order to counter any potential abuse of power.[14]

Like those of the United Kingdom and the United States, the South African Constitution does not recognise a complete separation of powers. Consequently, while it allocates distinct primary powers to the executive, legislature and judiciary,[15] it allows for some measure of overlap in the powers that each branch exercises and makes provision for checks and balances. Like the United Kingdom, South Africa has a parliamentary system of government in which parliament – not the people – elects its president or head of government. South Africa is, however, different from the United Kingdom, in that its Members of Parliament (MPs) are not elected directly in single member districts or constituencies. Instead, the electorate vote for political parties, who compile lists of representatives and determine where each representative will be deployed.[16] Since prospective MPs rely on their parties for their election, they do not use their own independent resources and agenda to increase their chances of election. Where they are involved in electoral campaigns, they do so for their respective parties. Whether or not this unique feature of South Africa's political system has a significant impact on parliament's oversight over the executive is what this chapter will investigate.

PO-03-043

ZZ9-RC-041

PARLIAMENTARY OVERSIGHT UNDER THE CONSTITUTION

Traditionally, the legislature is tasked with enacting laws and making financial appropriations for the government. The South African Constitution recognises these functions in sections 55 (1) and 77. In this chapter, we call these the 'primary functions of the legislature'. In addition, section 55(2) of the Constitution recognises accountability and oversight as distinct functions of the National Assembly (NA). It provides:

> The NA must provide for mechanisms –
> a. to ensure that all executive organs of state in the national sphere of government are accountable to it; and
> b. to maintain oversight of –
>   i. the exercise of national executive authority, including the implementation of legislation; and
>   ii. any organ of state.

Clearly, the duty of the NA to hold all executive organs of state accountable applies only to the national sphere of government.[17] According to Corder et al., this is a minimum responsibility that the NA has to discharge.[18] By contrast, the responsibility to oversee the national exercise of executive authority is a more general and flexible duty of the NA that extends over the whole executive bureaucracy: it is not limited to holding the leadership of the executive to account. It extends to monitoring how national executive authority is implemented.[19] In this chapter, we call the oversight and accountability functions of the NA secondary legislative functions. While their mechanisms are unique, these accountability and oversight functions are shared with other state institutions, such as the judiciary and Chapter 9 institutions. We also treat accountability and oversight as being interchangeable, partly because the mechanisms for these functions have not been distinguished, and partly to avoid repetition.

In practice, there is significant overlap between the primary and secondary functions of the legislature. For example, when the NA is performing its primary functions, it simultaneously carries out its oversight and accountability functions. The power to enact laws and approve the budget is, in essence, also a check on the executive's power to make and implement policies and to spend public funds. In the South African constitutional context, policies do not have any effect until they are approved by an Act of Parliament. Neither can the government spend any money outside the appropriations made by the NA. Through the performance of its primary

legislative functions, the executive is subjected to two levels of accountability: first, parliamentary scrutiny, which allows the public to participate in the process; and second, judicial scrutiny, whereby the Constitutional Court inquires into the constitutionality of the laws enacted by Parliament.

The NA's accountability and oversight functions can also be broken down into primary and secondary functions. Primary oversight functions are those functions that the NA exercises as part of its own constitutional functions. Secondary oversight functions are those functions that the NA exercises to support the oversight functions of other constitutional bodies empowered to hold the executive accountable. One of the unique features of the South African Constitution is the inclusion of a raft of independent institutions (sometimes referred to as state institutions supporting constitutional democracy) that were designed to hold executive power in check – the so-called 'Chapter 9 institutions'.[20] They include the offices of: the Public Protector; the Auditor General; the South African Human Rights Commission; the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; the Commission for Gender Equality; and the Electoral Commission. These independent state institutions, headed by professionals, supplement the separation of powers concept, by adding what may be called a 'fourth arm of the state' to act as an additional accountability mechanism. These institutions perform a wide range of functions, ranging from advisory and promotional to investigative and other protective functions.[21] However, they lack coercive power of the kind associated with the judiciary. Chapter 9 institutions also need to account for the exercise of their duties to the public or other state institutions. As a result, section 181(3) of Constitution imposes an obligation on other organs of state to assist and protect these institutions, in order to ensure their effectiveness. In addition, section 181(5) obliges Chapter 9 institutions to account to the NA and to 'report on their activities and the performance of their functions to the Assembly at least once a year'. These provisions were enacted to add the legislature's much needed political weight to the findings of these institutions and to force the executive to respect any proposed remedial action.

PO-03-045

ZZ9-RC-043

ACCOUNTABILITY AND OVERSIGHT MECHANISMS

Unlike in the past, when parliamentary oversight mechanisms were murky and under-developed, since 1994 South Africa has established a wide range of parliamentary oversight and accountability mechanisms. Some of these are expressly required by the Constitution, while others evolved as part of the NA's constitutional responsibility to create such mechanisms.

The Constitution makes provision for two key accountability mechanisms for the president: impeachment and a motion of no confidence. According to section 89, the NA may impeach or remove the president from office on the grounds of serious misconduct, incapacity, or serious violation of the Constitution or the law.[22] Since 1994, no South African president has been removed by impeachment. Unlike impeachment, the motion of no confidence procedure does not require proof of any specific reason, although it would normally be triggered by serious dissatisfaction with the president's action or inaction. According to section 102 of the Constitution, a successful motion of no confidence in the president would require the president and his or her cabinet to resign. Only one president – Thabo Mbeki – has been recalled since 1994. While the motion of no confidence was not used to procure his resignation, it is widely believed that the ruling African National Congress (ANC) would have initiated such a motion had he refused to resign.[23] In contrast, opposition parties have tabled more than two motions of no confidence in President Zuma since he came to power in 2009, but he has survived each one.

As for members of Cabinet, the Constitution also creates two main accountability mechanisms. The first, recognised in section 92, is the doctrine of ministerial responsibility. Ministerial responsibility requires ministers to account individually or collectively for the manner in which they have performed their powers. This responsibility is discharged through the provision of 'full and regular reports concerning matters under their control' to Parliament.[24] A critical part of ministerial responsibility is the responsibility to resign when an unsatisfactory account has been given or when a minister cannot persuade his or her colleagues to abandon a position that he or she fundamentally disagrees with. South Africa has a poor record of resignations arising from the exercise or enforcement of ministerial responsibility.[25] This could be attributed to many factors, including: that sitting presidents are willing to keep ministers who are under-performing, have been involved in a major scandal or have committed a serious act of maladministration; and the absence of pressure from the NA, civil society and the general public.

PO-03-046

ZZ9-RC-044

The second mechanism is again the motion of no confidence. Such a motion might be presented against a minister individually or against all ministers collectively and either together with the president or not.[26] This procedure has rarely been used against ministers in South Africa. For example, it was open for the NA to use this procedure against the ministers involved in the Nkandla security upgrades, discussed later in this chapter, but this option was not used. Between December 2011 and July 2012, the Department of Basic Education failed to deliver textbooks to primary schools in Limpopo amid allegations of corruption, mismanagement and maladministration in the province. The Minister of Basic Education was not held individually accountable using this procedure. It is difficult to predict whether proceeding against ministers individually could be more effective than targeting them collectively or targeting the president, given that the success of this procedure depends on the ruling party, which dominates the NA. However, the motion of no confidence has the effect of drawing public attention to the minister concerned and, hence, the potential to affect the standing of that minister in his or her party. Over time, this can have a deterrent effect on inappropriate behaviour by ministers.

In *Lindiwe Mazibuko v Max Sisulu and Mathole Motshekga*,[27] the Constitutional Court underlined the significance of the motion of no confidence procedure under section 102 of the Constitution as follows:

> The right that flows from section 102(2) is central to the deliberative, multiparty democracy envisioned in the Constitution. It implicates the values of democracy, transparency, accountability and openness. A motion of this kind is perhaps the most important mechanism that may be employed by Parliament to hold the executive to account, and to interrogate executive performance.

In this case, the DA tried to table a motion of no confidence in the president, pursuant to section 102(2) of the Constitution, accusing him of having politicised the judiciary, weakened the economy, and failed to reduce corruption and unemployment. The Speaker introduced the motion for a prior discussion at the Chief Whips' Forum and then the Programme Committee of the NA. As the Programme Committee did not reach consensus on including the motion in the NA's agenda, the Speaker did not schedule the motion at all. The Constitutional Court held that the responsible committee or the NA has a constitutional duty to ensure that a motion of no confidence 'is tabled and voted on without unreasonable delay'.[28] This duty holds whenever 'a member of or a political party within the Assembly, acting alone or in concert

with other members of the Assembly, tables a motion of no confidence in terms of section 102(2) in accordance with the Rules'.[29]

In addition to these office-specific mechanisms, section 56(a) and (b) of the Constitution empowers the NA and its committees to hold hearings and, for that purpose, to summon any person to give evidence or produce documents, to require any person or institution to report to it, and to receive petitions, representations or submissions from any interested persons or institutions. These powers can be and are exercised in relation to any person in the executive branch of government and statutory corporations.

Section 55(2) of the Constitution requires the NA to provide mechanisms, firstly, to ensure the accountability of all executive organs of state in the national sphere of government, and, secondly, to oversee the national executive's authority along with all organs of state. Prominent among these are parliamentary committees, which presently include the portfolio committees, select committees, ad hoc committees, and standing committees.

Portfolio committees are specialised policy committees tailored to specific government departments; they are responsible for the oversight function on those particular departments and for scrutinising and developing legislation relating to that department.[30] In the NA, these specialised committees are called portfolio committees and are established to shadow government departments. For each of the current 35 ministries or portfolios there is a portfolio committee.

The National Council of Provinces (NCOP) also has specialised committees that are similar to portfolio committees. However, in the NCOP, these committees are known as select committees. Unlike the NA committees, select committees are not established for each department or portfolio. Instead, they are created for two or more departments or portfolios that form part of a given cluster.

Like the NA, provincial legislatures have portfolio committees that shadow the areas of responsibility of Members of the Executive Council (MECs). However, there is not always one committee per MEC or government department.

In addition, both national and provincial legislatures have temporary committees, known as ad hoc committees. These committees are set up to examine specific matters. For example, there is the Ad hoc Committee on the Pan-African Parliament, the Ad hoc Committee on the General Intelligence Laws Amendment Bill, and the Ad hoc Committee on Report No. 13 by the Public Protector.

Standing committees, like portfolio committees and select committees, are permanent features of Parliament. However, standing committees are

PO-03-048

ZZ9-RC-046

not linked to a particular department. Some standing committees have members from both the NA and the NCOP and these are called joint standing committees, such as the Joint Standing Committee on Defence. Most of the joint standing committees of Parliament are established under s 45(1) of the Constitution, which provides for joint activities of the NA and the NCOP.

Legislative committees perform the bulk of the work of the NA and provincial legislatures. They allow for issues to be debated in more detail than is possible in a full sitting of the legislature. They also present an opportunity for the general public to participate in legislative debates and agendas. Members assigned to legislative committees develop expertise and in-depth knowledge of the field covered by their specific committee. Committees: initiate legislation; consider, debate and propose amendments to existing and proposed legislation from the executive; provide focused oversight of each portfolio of the executive, including monitoring the departments and the statutory bodies they oversee; investigate and make recommendations on the budgets of government departments; hold public hearings and consider public submissions on important bills; consider international treaties and agreements; and investigate any function of the executive and its departments.[31] Typically, parliamentary committees do not make binding decisions, but only provide recommendations to the legislature.

The plenary chamber remains the key forum for parliamentary oversight of the executive. Plenary debates in the chamber allow MPs to hear from ministers and government representatives on their proposed policies and the implementation of existing policies. In plenary debates, MPs can ask the president and other members of the executive questions or make statements that criticise or praise the government. The regular and effective use of the classic tools such as parliamentary questions, budget votes, member statements and plenary debates, can bring about a culture of accountable and responsive governance – especially when a motion of no confidence can be passed or the opposition has a good chance of forming the next government.

Table 7.1 Political parties and the practice of parliamentary oversight before Nkandla

		Term 2 (1999 – 2004)		Term 3 (2004 – 2009)		Term 4 (2009 – 2014)		Term 5 (2014 – 2019)	
Party	Seats	Party	Seats	Party	Seats	Party	Seats	Party	Seats
ANC	252 (62.65%)	ANC	266 (66.35%)	ANC	279 (69.69%)	ANC	264 (66%)	ANC	249 (62.15%)
NP	82 (20.39%)	DA	38 (9.56%)	DA	50 (12.37%)	DA	67 (16.66%)	DA	89 (22.23%)
IFP	43 (10.54%)	IFP	34 (8.59%)	IFP	28 (6.97%)	COPE	30 (7.5%)	EFF	25 (6.35%)
FF	9 (2.17%)	NNP	28 (6.87%)	UDM	9 (2.28%)	IFP	18 (4.55%)	IFP	10 (2.40%)
DP	7 (1.73%)	UDM	14 (3.42%)	ID	7 (1.73%)	ID	4 (0.92%)	NFP	6 (1.57%)
PAC	5 (1.25%)	ACDP	6 (1.43%)	NNP	7 (1.65%)	UDM	4 (0.85%)	UDM	4 (1 %)
ACDP	–	FF +	3 (0.80%)	ACDP	7 (1.65%)	FF +	4 (0.83%)	FF +	4 (0.90%)
AMP	–	PAC	3 (0.71%)	FF +	4 (0.89%)	ACDP	3 (0.81%)	COPE	3 (0.67%
UCDP	–	UCDP	3 (0.78%)	UCDP	3 (0.75%)	UCDP	2 (0.37%)	ACDP	3 (0.57%)
FA	–	FA	2 (0.54%)	PAC	3 (0.73%)	PAC	1 (0.27%)	AIC	3 (0.53%)
AEB	–	AEB	1 (0.29%)	MF	2 (0.35%)	MF	1 (0.25%)	AGANG	2 (0.28%)
AZAPO	–	AZAPO	1 (0.17%)	AZAPO	1 (0.25%)	AZAPO	1 (0.22%)	PAC	1 (0.21%)
APC	–	APC	–	APC	–	APC	1 (0.20%)	APC	1 (0.17%)

As Table 7.I shows, since 1994, one political party – the ANC – has dominated South Africa's NA. In 1999, the ANC won 66 per cent of the vote, up 4 per cent from 1994, and just one seat shy of the two-thirds majority needed to amend the Constitution. That seat was eventually secured from the single representative of the Minority Front Party, which effectively increased the ANC's dominance from the first NA.[32] The ANC eventually received an outright two-thirds majority in the 2004 general election, further cementing its hegemony in the third NA.

Between 1994 and 1999, the ANC was the majority party in seven of the nine provincial governments and also enjoyed overwhelming dominance in at least five of them. It also had decisive control in five of the country's six largest city municipalities.[33] In 2004, the ANC increased its dominance in provincial legislatures by regaining control of the Western Cape and KwaZulu-Natal.[34] The 2014 general elections, which ushered in the fifth NA, saw the ANC's dominance decline to 62 per cent of the vote, with many commentators citing President Jacob Zuma's (and, by extension, the party's) waning popularity as reasons. The ANC's poor showing in the 2016 local government elections, in which it obtained about 54 per cent of the vote, adds credence to this claim.[35]

The ANC's dominance in the national and provincial legislatures represents one major impediment to parliament's oversight function. Without any external political threat to speak of, the ANC's ability to dominate the NA and keep the ANC government in check has depended on the calibre of the ANC's leadership of the time.[36] The second major impediment arises from the PR electoral system, voter representation, and legislative-executive relations.[37] As noted earlier, the PR electoral system offers no direct link between legislators and voters. Instead, it has created a strong link between a political party and legislators, because MPs presently retain their seats through their membership of political parties.

Ordinarily, parliamentary political systems have the inherent problem that the party with a majority in parliament forms a government, which blurs the distinction between the legislature and executive – yet it is expected to remain functionally and institutionally independent of the executive and hold its own government to account. In South Africa, this inherent problem is exacerbated by the PR system and the dominance of one political party. The Constitution itself has supported this state of affairs by permitting the removal from Parliament of any member who leaves or is forced out of a political party.[38] Without an independent constituency of support, MPs do not have a strong basis for holding a view that is opposed to the party line. With one party dominating the political system, crossing the floor is not an

PO-03-051

ZZ9-RC-049

and military equipment. Pursuant to this appropriation, the government concluded several arms deals in December 1999. Soon thereafter, allegations of corruption with the deals erupted. The manner in which these allegations were addressed and the investigation that was conducted adversely affected the independence, effectiveness and integrity of the parliament's Standing Committee on Public Accounts (SCOPA), which had – up to that point – been lauded for its oversight work. February, for example, writes:

> Prior to the arms deal, SCOPA enjoyed a reputation as one of the best-run, most efficient committees in parliament ...
>
> The arms deal literally tore SCOPA apart. The minutiae of what happened cannot be detailed here – suffice it to say that a series of heavy-handed interventions from the ANC Whip's office, and (on one occasion) by Deputy President Zuma, gradually snuffed out the flame of non-partisan independence. The first blow was struck in 2001 when the cerebral Andrew Feinstein was removed as the head of the ANC study group within SCOPA and replaced by a hitherto little-noticed fellow ANC MP, Vincent Smith.[44]

Various authors have covered the arms deal case and detailed how both the NA and other oversight mechanisms have failed to bring all those implicated in the arms deal corruption case to account.[45]

A more recent example of strong party discipline over MPs relates to the removal by the ANC in late 2010 of four chairpersons of NA Portfolio Committees – Nyami Booi, Lumka Yengeni, Vytjie Mentor and Hlengiwe Mgabadeli – who were showing signs of independence.[46] For example, Booi was dismissed because the committee he chaired (the Defence Portfolio Committee) refused to process the Defence Amendment Bill, because the Minister of Defence refused to submit the National Defence Force Service Commission's interim reports. Yengeni was allegedly dismissed because of the manner in which she presided over the public hearings on labour brokering, which upset the ANC leadership and Congress of South African Trade Unions (COSATU).[47] With reference to Booi's dismissal, the Deputy Secretary General of the ANC is reported to have said that the Committee's public spats with the Defence Minister could not be tolerated: 'The ANC, at all costs, must be one public representative party that will ensure that, at no time, at no stage, do you place the defence of this country in a situation where the soldiers' attention is deflected from what they are supposed to do.'[48]

PO-03-052

ZZ9-RC-050

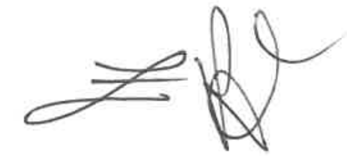
In general, the NA's ability to hold the executive accountable has depended on the quality of leadership in the dominant party. In 2008, Griffiths wrote that parliamentary oversight under President Mbeki had become less rigorous than under President Mandela.[49] One could also say that parliamentary oversight has all but collapsed under President Zuma – a crisis that was precipitated largely by the Nkandla saga.

THE NKANDLA SAGA AND PARLIAMENTARY OVERSIGHT

For purposes of this chapter, the Nkandla saga is peculiar and important in several respects. Firstly, it concerned allegations of maladministration, not just by departmental officials, but also by several cabinet ministers and the president. Secondly, the accusation against the President went beyond mere involvement or acquiescence in maladministration: the President was accused of having benefited personally from maladministration. Thirdly, the Nkandla saga raised the issue of cooperation between and interdependence, or lack thereof, of various oversight mechanisms.

At issue in this saga was the security upgrade work done to President Zuma's private residence (Nkandla) from the time he became President in 2009. As early as 3 December 2009, the *Mail & Guardian* reported that an enormous amount of money (then estimated to be in the region of R65 million) was being spent to improve the President's Nkandla home. Except for a summary refutation of the media report, the government did little to investigate what appeared to be obvious excessive expenditure. Parliament too did not show any serious interest in this report. This changed almost two years later when, on 11 November 2011, the *Mail & Guardian* published another story about the escalating cost of the improvements to the president's private residence. The new report prompted one member of the public to submit a complaint on 13 December 2011 to the Public Protector, asking her to investigate possible abuse of power. It was only after another media report was published on 30 September 2012 by the *City Press*, which alleged that about R203 million had been allocated to the Nkandla upgrade project, that the leading opposition party – the Democratic Alliance (DA) – decided to submit, via its Leader of the Opposition (Lindiwe Mazibuko), its own complaint to the Public Protector. Soon after, four other members of the public filed further complaints with the Public Protector's office.

The fact that the DA chose to petition the Public Protector to address the possible abuse of state resources, rather than invoke the NA's own oversight



PO-03-053

ZZ9-RC-051

powers, such as holding parliamentary hearings, could be interpreted in at least two ways. On the one hand, one could say that the DA did not want to politicise the issue and believed that the Public Protector would be better placed to collect all the relevant information without political interference. On the other hand, one could say that the DA did not believe that the NA would succeed in holding all the actors involved to account. As will be seen later, what happened in the NA after the Public Protector's report was released proved this fear to be reasonable.

The Public Protector's investigation did not proceed smoothly. Once the President and the affected departments were notified of the complaints, the government immediately took rear-guard action to frustrate and derail the investigation.[50] The Ministers in the security cluster raised the security shield to block the investigation or, at least, the release of relevant documents to the Public Protector. They threatened the Public Protector with litigation and challenged her authority. The government also ordered parallel investigations, including a task team to investigate aspects of the Nkandla security upgrade project. Initially classified as top security, the task team's report was later released to the public, but not before a long period of public pressure. It blamed the escalated renovation cost on some state officials and contractors, but cleared the President of any wrongdoing.[51] To prolong parallel investigations, the Minister of Public Works authorised the Special Investigations Unit and the Auditor General to investigate the matter further, which never happened. For his part, the President lent tepid cooperation to the Public Protector, providing evasive answers to her questions.[52]

Notwithstanding all these challenges, the Public Protector completed her investigations and released her final report on 19 March 2014. She made several crucial findings. For instance, she found that the manner in which the decision to do security upgrading work at the President's private home was irregular and amounted to a violation of the existing Cabinet policy.[53] She also found that the Ministers of Public Works, Police and Defence and various officials in these departments failed to supervise and manage the Nkandla security upgrade project.[54] Crucially, the Public Protector found that a significant proportion of the improvements to the Nkandla residence had nothing to do with security and that, as a consequence, the President and his family had benefitted unduly from the maladministration arising from the implementation of this the project.[55]

The Public Protector presented the remedial action she expected the various office bearers to take, including the Ministers involved and the President.[56] Her report ordered the President, with the assistance of the National

Treasury and the South African Police Services, to take steps to determine the reasonable cost of the improvements made to his residence that were not related to security (such as the visitors' centre, the amphitheatre, the cattle kraal, the chicken run, and the swimming pool) and to pay a reasonable cost for these improvements. The President was also asked to reprimand the Ministers involved 'for the appalling manner in which the Nkandla project was handled and state funds were abused'.[57] and to report to the NA on his actions within 14 days. The report also made policy recommendations to the secretary to the Cabinet that included setting clear standards on security measures for current and former presidents and deputy presidents. The Minister of Police was ordered to ensure that no further security upgrading was done at the President's home, except work that was determined to be absolutely necessary. The National Commissioner of Police and the Director General of the Department of Public Works were, among other things, asked to identify all those involved in the Nkandla project and to hold them accountable for various ethical and other infringements.

The Public Protector submitted her report to both the President and to the NA. Contrary to the Public Protector's request, the president did not take remedial action within 14 days. In fact, he did nothing to comply with the Public Protector's request for more than a year. Similarly, the NA did nothing to ensure that the Public Protector's required remedial action was carried out. This non-compliance prompted the EFF, and later the DA, to pursue legal action in 2015, in an effort to enforce the Public Protector's remedial action.

That the opposition parties had to resort to the judiciary underscores their distrust that the NA would be able to hold the executive to account when high-level members of the executive are personally impugned. This lack of trust was based on the NA's record on this issue. The devices of question time, plenary debates, members' statements and a vote of no confidence against the President had all been used. When the EFF joined the NA in 2014, they tried unorthodox tactics, including flouting parliamentary etiquette and rules, derogatory chants against the President and general disruptive behaviour – all to no avail. No doubt, the level of debate and the voice of the opposition increased in the fifth NA, but the ANC's dominance and its members' allegiance to the party caucus proved an insurmountable barrier.

Indeed, instead of ensuring that the Public Protector's remedial action was implemented, the NA set up two ad hoc committees, dominated by the ruling party, to consider the Public Protector's report, the report of the Minister of Police, and other reports related to the Nkandla project. Ultimately,

PO-03-055

ZZ9-RC-053

these committee deliberations resulted in the NA exonerating the President from any responsibility.[58] One should also note, that while the oppositions' focus in the NA was predominantly on the President, the Public Protector's report and remedial action dealt with many other actors, including the Minister of Police, the Minister of Public Works, the Minister of Defence, the SAPS and officials affiliated to these departments. To date, these actors have escaped public attention and any remedial action.

Involving the Constitutional Court in the Nkandla saga resulted in a complete shift in the executive's position. Eight days before the hearing took place, the President conceded wrongdoing and expressed a willingness to comply with the Public Protector's remedial action. This was a result the NA was unable to obtain for more than five years. Even the 2014 national election cycle could not nudge the President and the executive to comply with the Public Protector's findings. This suggests that the ANC's dominance in South Africa's political landscape in general, and in the NA in particular, and the lack of direct accountability of MPs to the electorate, make it difficult for the NA to act as an effective oversight mechanism.

In holding that the Public Protector's remedial action in this case was binding and had to be respected unless challenged and reviewed by a court of law,[59] the Constitutional Court bolstered the powers and the role of Chapter 9 institutions as independent watchdogs of government. In particular, it removed doubt that the remedial action of the Public Protector was non-binding. In doing so, the Constitutional Court vindicated the vision of the framers of the Constitution, who must have foreseen the possibility that political oversight via the NA might not be sufficient to hold the executive accountable.

The Constitutional Court also clarified how the NA should support Chapter 9 institutions in general, and the Public Protector in particular. At a general level, the Court acknowledged that the NA was free to scrutinise executive action as it pleased in performing its oversight function.[60] However, it held that the NA was duty-bound to hold the President accountable, by facilitating and ensuring compliance with the decision of the Public Protector.[61] It said:

> ... there was everything wrong with the NA stepping into the shoes of the Public Protector, by passing a resolution that purported effectively to nullify the findings made and remedial action taken by the Public Protector and replacing them with its own findings and 'remedial action'.[62]

PO-03-056
ZZ9-RC-054

In finding the NA, as a whole, responsible, the Constitutional Court underlined the collective oversight responsibility that the NA has. This is a responsibility that cannot be reduced to a responsibility of the opposition parties.

Overall, the Nkandla saga shows that the task of holding the executive to account is a daunting one, especially when it relates to those with more political power. Political mechanisms are less likely to succeed unless there is a power balance between political parties, the level of integrity in the executive leadership is high, and there is democracy within the ruling party. The Constitutional Court's decision also suggests that non-political mechanisms – such as the courts and Chapter 9 institutions – have an invaluable role to play in complementing the political mechanisms, especially in a context where one party dominates the NA. In order for Chapter 9 institutions to function effectively, they have to be headed by people with proven competence, of high integrity and who are independent, as required by section 181 of the Constitution and their enabling laws. The duty to scrutinise and recommend suitable candidates to the Presidency lies with the NA.

CONCLUSION

The task of holding the executive to account is an enormous one. It requires the deployment of several mechanisms, of which parliamentary oversight is one crucial aspect. Long seen as a panacea to the problem of power, the separation of powers was conceived as a legitimate means by which the legislature could demand accountability from the executive. All other oversight mechanisms lack the political legitimacy that the legislature possesses. It is the very political nature of the legislature that makes it difficult for parliamentary oversight mechanisms to function effectively.

South Africa emerged from a long era of oppression that was characterised by an illegitimate government and parliament, with a new resolve to break decisively from that past by adopting a constitution that proclaimed the values of public accountability, responsiveness and ethical probity. In addition, it placed a huge responsibility on the new parliament to subject the executive to scrutiny and oversight. Over the years, a wide spectrum of accountability and oversight mechanisms has been established. The extent to which these mechanisms have worked in practice has depended on a number of factors, including the quality of the executive leadership and the dominance of the ANC in parliament. More specifically, when specific senior

PO-03-057

ZZ9-RC-055

members of the executive have been accused of wrongdoing, parliament has tended to recoil into their party shells, thereby failing to act collectively to hold the executive to account. What has forged strong party allegiance is largely attributable to the PR electoral system, which offers no incentives for MPs to exercise independent judgment. Even if the ANC were to remain dominant, a constituency-based electoral system would significantly improve the accountability of MPs and, in turn, of the executive. Firstly, since ministers would themselves be MPs, they would be liable to direct electoral accountability in their constituencies every five years. Secondly, they would be subject to competition within their parties in their constituencies, which would improve internal party democracy.

The Nkandla case discussed in this chapter provides more evidence of the problems that parliament faces when trying to hold senior members of the executive to account. Despite all efforts by the opposition, President Zuma would have evaded any form of responsibility for the Nkandla financial abuses had the Public Protector and later the Constitutional Court not intervened. This case underlined the need for non-political forms of oversight to be strengthened and supported, in order for the executive to be held fully accountable. Nevertheless, it is critical that the South African parliament establishes itself as a credible oversight mechanism. Ultimately, accountability has to be institutionalised in the executive itself and in those who hold power. Accountability is critical to establishing a functional democracy that fulfils its promises to its people.

ENDNOTES

1. In Chapter X (1), para. 143 of his Second Treaties of Government, Locke (1690) wrote: 'And because it may be too great a temptation to human frailty, apt to grasp at powers, for the same persons who have power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from the laws they make, and suit the law, both in its making, and execution, to their own private advantage …'
2. Corder, H., Jagwanth, S. and Soltau, F., 1999. Report on parliamentary oversight and accountability. Cape Town: Parliament, p. 2; Schacter, M., 2000. When accountability fails: A framework for diagnosis and action. Institute on Governance, Policy Brief No. 9 (May), p. 1. Available at http://www.iog.ca/view_publication.asp?publicationItemID=44 [Accessed 25 August 2016].
3. Corder, H., Jagwanth, S. and Soltau, F., 1999, p. 5.

4 Cases CCT 143/15 and CCT 171/15; [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC).

5 Mansura, M.K., 2012, Enhancing parliamentary oversight: The South African experience. A paper presented at the 2012 Quebec Session of the Association of Secretaries General of Parliaments, Canada, p. 5.

6 There were 13 of them.

7 Obiyo, R.E., 2006. Legislative committees and deliberative democracy: The committee system of the South African Parliament with specific reference to the Standing Committee on Public Accounts (SCOPA). PhD Thesis, University of the Witwatersrand, p. 55.

8 Ibid., p. 74.

9 Mansura, M.K., 2012, p. 5.

10 Calland, R. (ed.), 1999. The first five years: A review of South Africa's democratic Parliament. Cape Town: Idasa.

11 Montesquieu, 1748. The spirit of laws, pp. 151-2. Available at http://media.bloomsbury.com/rep/files/primary-source-104-montesquieu.pdf [Accessed 26 August 2016].

12 Ibid., p. 152.

13 Bradley, A.W., Ewing, K.D. and Knight, C.J.S., 2015. Constitutional and administrative law. Edinburgh: Pearson Education Ltd., p. 91; Madison, J., 1788. 'The particular structure of the new government and the distribution of power among its different parts', Federalist No. 47.

14 Ibid.

15 The three branches of government have distinct primary powers: legislative authority of the national sphere of government is vested in parliament (section 43(a) of the Constitution), of the provincial in the provincial legislatures (section 43(b) of the Constitution) and local spheres in municipal councils (section 43(c) of the Constitution); executive authority of the Republic is vested in the president, together with members of the cabinet (section 85 of the Constitution), of provinces in the premier and members of the executive council (section 125 of the Constitution), of municipalities in municipal councils (sections 151, 156, 158 of the Constitution); judicial authority is vested in the judiciary (section 165 of the Constitution). See also *In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at paras. 108–9.

16 This is true of members of the NA and provincial legislatures. Local government uses a mixed system, with some councillors elected directly in wards and others being determined by the proportional party electoral system.

17 Section 55(2)(a) Constitution.

18 Corder, H., Jagwanth, S. and Soltau, F., 1999, p. 2.

19 Ibid.

20 Section 181 of the Constitution.
21 See Chapter 9 of the Constitution.
22 Section 89(1) of the Constitution provides further that a resolution for the removal of the president on any of the listed grounds has to be supported by 'at least two-thirds of its members'.
23 De Vos, P., 2012. There was no coup to oust Mbeki. Available at http://constitutionallyspeaking.co.za/ [Accessed 26 August 2016]; Hartley, R., 2014. The sudden dwindling of Thabo Mbeki. *Mail & Guardian*, 19 September 2016.
24 Section 92 (3)(b) of the Constitution.
25 Mfundisi, S., n.d. Individual ministerial responsibility. Available at: www.ucdp.org.za/upload/files/INDIVIDUAL_MINISTERIAL _RESPONSIBILITY.pdf [Accessed 26 August 2001].
26 Section 102(1) and (2) of the Constitution.
27 Case CCT 115/12; [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC)
28 Ibid., para 47.
29 Ibid.
30 Obiyo, R.E., 2006, p. 12.
31 Parliamentary Monitoring, n.d. Group Structure of government. Available at https://pmg.org.za/page/structure-of-government [Accessed 24 August 2016].
32 Hughes, T., 2005. The South African Parliament's failed moment. In Salih, M.A. (ed.) African parliaments: Between governance and government. New York: Palgrave Macmillan, pp. 225, 228.
33 Mattes, R., 2002. South Africa: Democracy without the people? *Journal of Democracy*, 13(1), pp. 22-36.
34 Hughes, T., 2005, p. 228.
35 See Electoral Commission of South Africa. 2016 Municipal Elections. Available at http://www.elections.org.za/content/default.aspx/ [Accessed 24 August 2014].
36 Hughes, T., 2005, p. 229.
37 Mattes, R., 2002, pp. 22, 24.
38 Section 47(3)(c) of the Constitution.
39 Hughes, T., 2005, p. 244.
40 Modise, T., 2004. Parliamentary oversight of the South African Department of Defence: 1994 to 2003. In Le Roux, L., Lupiya, M., and Ngoma, N. (eds.) Guarding the guardians. Pretoria: Institute for Security Studies, pp. 45, 49.
41 See e.g. Modise, ibid.; Czapanskiy, K.S., and Manjoo, R., 2008. The right of public participation in the law-making process and the role of the legislature in the promotion of this right. *Duke Journal of Comparative and International Law*, 19(1), pp. 1, 29.
42 See e.g. *Doctors for Life International v the Speaker of the National Assembly & Others* 2006 (12) BCLR (CC); 2006 SA 416 (CC).1399 (CC); *Teddy Bear Clinic for*

the Abused Children & Rapcan v Minister of Justice and Constitutional Development and National Director of Public Prosecutions, CCT 12/13; [2013] ZACC; 2013 (12) BCLR 1429 (CC); 2014 (2) SA 168 (CC); 2014 (1) SACR 327 (CC).

43 Mattes, R., 2002, p. 25.

44 February, J., 2006. More than a law-making production line: Parliament and its oversight role. In Buhlungu, S. (ed.) State of the nation: South Africa, 2005-2006. Cape Town: HSRC Press, pp. 123, 134.

45 See, e.g., Taljaard, R., 2012. Up in arms: Pursuing accountability for the arms deal in Parliament. Auckland Park: Jacana Media; Griffiths, R.J., 2008. Parliamentary oversight of defence in South Africa. In Stapenhurst, R., Pelizzo, R., Olson, R., and Von Trapp, L. (eds.) Legislative oversight and budgeting: A worldwide perspective. Washington DC: World Bank, p. 230.

46 *The Times*, 18 November 2010. Available at http://www.timeslive.co.za/local/2010/11/18/anc-axes-chairmen-of-parliament-committees [Accessed 25 August 2016].

47 Ibid.

48 Ibid.

49 Griffiths, R.J., 2008, p. 237.

50 Public Protector, 2014. Secure in comfort: Report on an investigation into allegations of impropriety and unethical conduct relating to the installation and implementation of security measures by the Department of Public Works at and in respect of the private residence of President Jacob Zuma at Nkandla in the KwaZulu-Natal Province. Report No. 25 of 2013/2014. Available at http://www.gov.za/sites/www.gov.za/files/Public%20Protector's%20Report%20on%20Nkandla_a.pdf [Accessed 25 August 2016], pp.96-126.

51 Department of Public Works, 2013. Prestige A: Security measures president's private residence; Nkandla'. Investigation Report. Available at http://www.gov.za/sites/www.gov.za/files/nkandla.pdf [Accessed 26 August 2016].

52 Public Protector, op. cit., pp. 269–283.

53 Ibid., p. 427

54 Ibid., p. 428.

55 Ibid., pp. 429–432.

56 Ibid., pp. 442–446.

57 Ibid., p. 442.

58 Nkandla case, para. 12.

59 Ibid., paras. 74–5, 81.

60 Ibid., para. 93.

61 Ibid., para. 97.

62 Ibid., para. 98.

ANNEXURE "**TWO**"

ANNEXURE "TWO"

REPORT ON PARLIAMENTARY OVERSIGHT AND ACCOUNTABILITY

Prepared by Hugh Corder, Saras Jagwanth, Fred Soltau
Faculty of Law, University of Cape Town
July 1999

CONTENTS

EXECUTIVE SUMMARY OF REPORT		**2**
CHAPTER ONE	**INTRODUCTION AND TERMS OF REFERENCE**	**6**
CHAPTER TWO	**A GENERAL FRAMEWORK FOR ACCOUNTABILITY AND OVERSIGHT**	**8**
CHAPTER THREE	**ACCOUNTABILITY, OVERSIGHT AND THE CONSTITUTIONAL IMPERATIVE – THE ROLE OF THE NATIONAL ASSEMBLY**	**10**
CHAPTER FOUR	**THE OVERSIGHT ROLE OF THE NATIONAL COUNCIL OF PROVINCES**	**21**
CHAPTER FIVE	**EXISTING PROCEDURES AND PRACTICES FOR EXERCISING OVERSIGHT**	**26**
CHAPTER SIX	**ESTABLISHING MECHANISMS TO ENSURE ACCOUNTABILITY**	**40**
CHAPTER SEVEN	**ACCOUNTABILITY AND INDEPENDENCE OF CONSTITUITONAL INSTITUTIONS**	**55**
CHAPTER EIGHT	**SUMMARY OF RECOMMENDATIONS**	**64**
APPENDICES	**EXTRACT FROM NEW ZEALAND PUBLIC FINANCE ACT** **LIST OF SUBMISSIONS RECEIVED**	

EXECUTIVE SUMMARY

Introduction

This report addresses the following main points:

a. the constitutional and theoretical values that underpin the concepts of oversight and accountability and the purposes they serve in a democracy;

b. the meaning of 'oversight' and 'accountability' in relation to the constitutional roles of the National Assembly and the National Council of Provinces;

c. an overview of and the problems with the existing procedures for dealing with reports submitted to Parliament;

d. recommendations about mechanisms and procedures that can be put in place to realise the Constitutional obligation of parliamentary oversight of the executive. More specifically we look at the nature of reporting to Parliament and make detailed recommendations on the content of reports and the manner in which reports must be dealt with upon their receipt by Parliament. In this regard we make recommendations dealing with both legislation and structures that need to be put in place to give effect to Parliament's obligations under the Constitution; and

e. an analysis of the ways in which Parliament can ensure accountability of constitutional institutions while at the same time respecting their independence. Here too we recommend both legislation and the establishment of structures.

Accountability and oversight

Basically accountability means 'to give an account' of actions or policies, or 'to account for' spending and so forth. Accountability can be said to require a person to explain and justify - against criteria of some kind - their decisions or actions. It also requires that the person goes on to make amends for any fault or error and takes steps to prevent its recurrence in the future. A condition of the exercise of power in a constitutional democracy is that the administration or executive is checked by being held accountable to an organ of government distinct from it.

Oversight refers to the crucial role of legislatures in monitoring and reviewing the actions of the executive organs of government. The term refers to a large number of activities carried out by legislatures in relation to the executive. In other words oversight traverses a far wider range of activity than does the concept of accountability.

Section 42(3) sums up in a nutshell the essential functions of the National Assembly (NA).
'The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.'

The most important point to note here is that the scrutiny and oversight of executive action are, like the passing of legislation, part of the NA's constitutional obligation.

The oversight obligation created by s 55(2) of the Constitution
Section 55(2) provides as follows:
'The National Assembly must provide for mechanisms -
(a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and

(b) to maintain oversight of-
(i) the exercise of national executive authority, including the implementation of legislation; and
(ii) any organ of state.'

The requires the NA to do two things: hold organs of state in the national sphere accountable, and exercise general oversight over national executive authority and organs of state.

We are of the view that section 55(2)(a) sets obligatory minimum standards of accountability for executive organs of state in the national sphere of government. The NA *must* set up mechanisms to hold them accountable. Within the confines of the Constitution the NA would remain at liberty to set up mechanisms to hold other bodies accountable where this was thought appropriate.

The mention of oversight in section 55(2)(b) describes the broader and more flexible activity of a legislature in relation to the executive. Oversight is a function of a legislature which flows from the separation of powers and the concept of responsible government, like law-making, which entails certain powers. Foremost among these is the power to hold the executive accountable. Monitoring the implementation of legislation goes to the heart of the oversight role. The manner in which the oversight function is carried out will vary according to the circumstances.

The report shows how s 55(2) allows for different levels of reporting in respect of different bodies. The list of bodies that Parliament should oversee covers an extremely wide range and a policy decision needs to be made regarding the feasibility and desirability of Parliament holding all these bodies to account. We have made a preliminary recommendation that the financial accountability of bodies that are presently accountable under the Public Finance Management Act should also be extended to other areas including the implementation of policy. We have recommended that the list of bodies that are accountable could be extended on an incremental basis taking into account Parliament's resource constraints.

The oversight role of the NCOP
While the Constitution does not explicitly require the NCOP to perform an oversight function, leaving this role mainly in the hands of the NA, various provisions leave no doubt that the NCOP must exercise oversight as defined by its constitutional mandate. This is clear from provisions such as ss 66(2) and 92 of the Constitution. The NCOP's oversight role is limited to issues which affect provinces on a national level and inter-governmental relations. In particular the Constitution envisages the

NCOP overseeing any executive interventions in terms of ss 100 and 139. Further relevant constitutional provisions are detailed in the report.

Revising present arrangements
In the light of Parliament's constitutional obligations and present practices the legislation we propose would provide for amendatory accountability (which requires that where deficiencies have been uncovered they be corrected wrongs be redressed) and prescribe standards, content and format for reporting. The procedure on receipt of reports would be that:

- all reports be received by a Central Receiving Office (a joint NA-NCOP office we recommend be established to co-ordinate the receipt, indexing and distributing reports received)
- all reports be acknowledged and indexed;
- there is a duty to review all reports received;
- reports must be responded to in certain circumstances as per our detailed recommendations in this regard;
- Parliament must be informed as outlined further below; and
- there is a procedure for follow-up action by committees.

Accountability and Independence of Constitutional Institutions
We have argued that state institutions supporting constitutional democracy, as well as other similar bodies set up in terms of the Constitution, support and aid Parliament in its oversight function, and *together* with Parliament, they are watchdog bodies over the executive government and organs of state. The constitutional provisions relating to the independence of the Chapter 9 institutions make it imperative that steps be taken to guarantee their institutional independence. These concerns have been underscored in the recent judgment of the Constitutional Court in *New National Party v Government of the RSA and Others* 1999 (5) BCLR 489 (CC). The judgment clearly shows that steps need to be taken so that the Constitutional guarantee of independence for the Chapter 9 institutions is realised in practice. In particular we endorse with respect the observation of the Court that both financial and administrative independence are required for the effective performance of their functions. The way in which these institutions receive their funding needs to be re-examined in light of their constitutional status and special role in relation to the executive. It is our recommendation that they should not receive their funding via the budget vote of departments of State.

We recommend that legislation be considered to guarantee the independence and accountability of constitutional institutions. We also recommend the establishment of a Parliamentary Standing Committee on Constitutional Institutions. Such a body would scrutinise the reports of the constitutional bodies as well as make recommendations on their budgets to Parliament.

Summary of Recommendations
In summary we have made the following recommendations:
a. legislation in the form of an Accountability Standards Act and an Accountability and Independence of Constitutional Institutions Act;

b. amendment to the Rules of the NA and the NCOP for regulation of reporting to parliamentary committees; and

c. the establishment in Parliament of a Standing Committee on Constitutional Institutions.

CHAPTER 1
INTRODUCTION AND TERMS OF REFERENCE
1.1 Introduction
We are pleased to be able to submit our final report which builds on our interim (progress) report submitted to the office of the Speaker in mid-March 1999. As circumstances did not allow us to receive any reaction or comment from the political parties on the contents of our interim report, this report has fleshed out and provided details on the recommendations contained therein. Our work since then has consisted of research, meetings and interviews, as well as the collation and consideration of submissions made to us by various institutions and bodies. We are very grateful to all of them for their input into this project. Empirical research for this project was commissioned from and ably carried out by Matthew Colangelo of IDASA. We wish also to acknowledge the National Democratic Institute, Richard Calland and Cobus Botes for their help and, in particular we wish to

thank Professor Christina Murray for her invaluable insight and assistance.

At the outset we must emphasize the size and complexity of the task entrusted to us. This has proved to be an extremely large project and a thorough, well canvassed set of proposals would have required far more time and human resources than we have had available to us. For this reason we have focussed largely on the constitutional and legal framework within which oversight activity is to take place.

1.2 Our terms of reference
As we understand them our terms of reference required us to do the following:
(a) Outline and explain the nature of the obligation that s 55(2) places on the National Assembly. Incorporated in this task is the list of bodies that should under section 55(2) of the Constitution account to Parliament, including 'organ of state' and 'national executive authority'.

Chapter 3 of this report shows how s 55(2), which deals with the NA's constitutional obligation to conduct oversight, allows for different levels of reporting in respect of different bodies. The list of bodies that Parliament should oversee covers an extremely wide range and a policy decision needs to be made regarding the feasibility and desirability of Parliament holding all these bodies to account. We have made a recommendation that the financial accountability of bodies that are presently accountable under the Public Finance Management Act should also be extended to other areas including the implementation of policy. We have recommended that the list of bodies that are accountable could be extended on an incremental basis taking into account Parliament's resource constraints.

(b) Establish the nature, frequency, contents and purposes of reports currently submitted to Parliament, and provide an overview of existing Parliamentary procedures for dealing with reports that are submitted. In the light of this what processes in addition to reports are necessary to ensure effective oversight.

Chapter 5 of our report covers this aspect.
(c) Should the entities which are accountable report to both Houses of Parliament or only the National Assembly?

In regard to the role of the NCOP, we recommend that its oversight function be in line with its general constitutional function of representing the provinces in the national sphere of government. As a rule therefore entities report only to the National Assembly unless the issue is related to the NCOP's constitutional mandate. In drawing up our recommendations we have worked collaboratively with other institutions engaged in research around the role of the NCOP.

(d) How does Parliament ensure the accountability of State Institutions Supporting Constitutional Democracy without infringing their independence?
In chapter 7 of our report we have pointed out the important role of many constitutional institutions as aiding and supporting Parliament in its oversight function. We have emphasised the need for their independence vis-à-vis the executive branch of the government and urged that Parliament play a direct supervisory role in the work of such constitutional institutions. We recommend both legislative and structural mechanisms which would ensure accountability without infringing the independence of these constitutional institutions.

(e) What mechanisms and procedures could be put in place to achieve the fulfilment of the constitutional obligation of Parliamentary oversight of the executive?
We have made several recommendations about the mechanisms and procedures that could be put in place to fulfill the constitutional requirements of oversight. However we have also emphasised the importance of mainstreaming oversight activity and have noted that all existing structures (and in particular parliamentary committees) should take on oversight functions.

CHAPTER TWO
A GENERAL FRAMEWORK FOR ACCOUNTABILITY AND OVERSIGHT
2.1 The basic concepts
Accountability can be understood in two senses. In a narrow, technical sense it refers to the duty of the head of a department to account as 'accounting officer' to his or her Minister, the Auditor-General,

 ZZ9-RC-065

and finally the Public Accounts Committee. At a basic textual level accountability means 'to give an account' of actions or policies, or 'to account for' spending and so forth. On a wider understanding accountability can be said to require a person to explain and justify - against criteria of some kind - their decisions or actions (D Oliver 'Law, Politics and Accountability' (1994) *Public Law* 238 at 246). It also requires that the person goes on to make amends for any fault or error and takes steps to prevent its recurrence in the future.

Oversight is a commodious concept that refers to the crucial role of legislatures in monitoring and reviewing the actions of the executive organs of government. The term is used to describe a large number of activities carried out by legislatures in relation to the executive. In the chapters below we explore more fully the meaning of oversight and accountability in our constitutional contexts, and the respective oversight roles of the two Houses of Parliament.

2.2 Oversight: the difficult role of Parliament

The executive in carrying out its tasks, whether by implementing legislation or policy, acquires considerable power (the ability to influence or determine a person's conduct). A condition of the exercise of that power in a constitutional democracy is that the administration or executive is checked by being held accountable to an organ of government distinct from it. This notion is inherent in the concept of the separation of powers, which simultaneously provides for checks and balances on the exercise of executive power, making the executive more accountable to an elected legislature.

While our Constitution gives expression to the principle of separation of powers by recognising the functional independence of the three branches of government (see *Re: Certification of the Constitution of South Africa* 1996 (10) BCLR 1253 (CC)), our parliamentary system of government does not give full expression to the notion of separation of powers because of the close links between the legislature and the executive. Our executive is not only chosen from the legislature but also primarily from the leadership of the majority party. In addition like many other parts of the world a strong party-based system exists in South Africa. This can hamper effective oversight as members of the legislature may be reluctant to call to account a government that is made up of leaders of their party. This is further exacerbated by the electoral system of proportional representation because members of parliament presently retain their seats through their membership of political parties. Members of the majority party in particular may be unwilling to subject the government to rigorous scrutiny for fear of being perceived as disloyal or even expulsion from the party and a consequent loss of their parliamentary positions.

Effective and proper oversight of the executive thus requires of members of parliament and members of the executive to fully understand the constitutional justifications and rationale behind accountable government and the purposes it serves. Accountability and oversight can be at their most effective if recognised by those in power as the central organising principle of our Constitution. The oversight role is often seen as that of opposition parties alone, designed to police and expose maladministration and corruption. Such a view is limited and deficient. Oversight and accountability help to ensure that the executive implements laws in a way required by the legislature and the dictates of the Constitution. The legislature is in this way able to keep control over the laws that it passes, and to promote the constitutional values of accountability and good governance. Thus oversight must be seen as one of the central tenets of our democracy because through it the legislature can ensure that the executive is carrying out its mandate, monitor the implementation of its legislative policy and draw on these experiences for future law-making. Through it we can ensure effective government. Seen in this light the oversight function of legislatures complements rather than hampers the effective delivery of services with which the executive is entrusted.

Accountability is also designed to encourage open government. It serves the function of enhancing public confidence in government and ensures that the government is close and responsive to the people it governs. If the values of accountability and oversight and the purposes they serve in a constitutional democracy are realised, members of the executive will more willingly submit to them, thereby fostering and enhancing the principle of co-operative government contained in the Constitution (see Chapter 3).

The requirement that the executive must justify its policies and decisions to Parliament is only one mechanism for ensuring accountability. The requirements that officials provide reasons for their decisions (section 33(2) of the Constitution), that freedom of information legislation be drafted, and

judicial review of administrative action are all other means of making the executive accountable for the exercise of its powers.

CHAPTER THREE
ACCOUNTABILITY, OVERSIGHT AND THE CONSTITUTIONAL IMPERATIVE – THE ROLE OF THE NATIONAL ASSEMBLY

3.1 The constitutional provisions

In the South African context the Constitution itself demands legislative oversight of the executive and all organs of state. While the principles of co-operative government remain paramount, it must also be recognised that under a constitutionally supreme dispensation non-compliance with the oversight requirements may result in legal sanction. It is to these constitutional provisions that we now turn.

Section 1(d) of the Constitution provides that among the values upon which the democratic South African state is founded are '...regular elections and a multi-party system of government, to ensure accountability, responsiveness and openness.'

The notion of responsibility is indispensable to democratic theory, which demands ultimate political accountability of the rulers to the electorate. Popular representation is a mechanism for regulating the government. Through the holding of regular elections and the weight of public opinion, legislators are held responsible for their conduct in office.

Section 42(3) sums up in a nutshell the essential functions of the National Assembly (NA).
'The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and *by scrutinizing and overseeing executive action.*'

The most important point to note here is that the scrutiny and oversight of executive action are, like the passing of legislation, part of the NA's constitutional obligation. At this point it should be noted that section 42(3) speaks specifically of the NA only; the following sub-section which deals with the role of the National Council of Provinces (NCOP) does not expressly accord it a general oversight role. However, in light of the fact that the Cabinet is collectively and individually responsible to *Parliament,* and that the NCOP is granted extensive powers in instances relating to interventions in terms of provisions such as sections 100 and 139, it appears that the NCOP is also mandated with an oversight function. The extent of the oversight role of the NCOP is dealt with in more detail below.

3.2 The constitutional imperative in section 55(2)

Section 55(2) provides as follows:
'The National Assembly must provide for mechanisms -
(a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and

(b) to maintain oversight of-
(i) the exercise of national executive authority, including the implementation of legislation; and
(ii) any organ of state.'

Section 55(2) presents problems of interpretation. It requires the NA to provide mechanisms (most likely in the form of committees and procedures for the passing of legislation), firstly to ensure accountability of all executive organs of state in the national sphere of government, and secondly to maintain oversight of the exercise of national executive authority and all organs of state.

Mechanisms for accountability are required for certain organs of state (those which are executive and additionally operate in the national sphere) while other organs of state and the general exercise of national executive authority must be overseen, or put differently, must be subject to oversight mechanisms.

Before we deal with the bodies that are covered in section 55, we must deal with the question of what is meant by 'accountability' and oversight in the context of the section. Why the distinction?

We have dealt with the basic forms of accountability. Accountability implies a relationship, a hierarchy and a duty by a body to explain and justify its conduct to another body. We are of the view that

section 55(2)(a) sets obligatory minimum standards of accountability for executive organs of state in the national sphere of government. The NA *must* set up mechanisms to hold them accountable. Within the confines of the Constitution the NA would remain at liberty to set up mechanisms to hold other bodies accountable where this was thought appropriate.

While the oversight role of a legislature may entitle it to hold a person accountable, the concept of oversight is a wider one than accountability alone. Oversight describes the broader and more flexible activity of a legislature in relation to the executive. In the process of carrying out its oversight function (as apart from its law-making function) a legislature may need to hold organs of state accountable. While a wide range of activities undertaken by a legislature can fall under the heading of oversight, foremost among these is the power to hold the executive accountable.

An important aspect of the legislative oversight function is the scrutiny of delegated or subordinate legislation. In this connection our report must be read together with the 'Final Report on Methods for Scrutiny of Delegated Legislation by Parliament' submitted by Professor Hugh Corder to Parliament on 2 March 1999. We have accordingly not dealt with this aspect of the oversight role in this report.

3.3 The NA's responsibility in terms of section 55(2)

On such a reading we can make sense of section 55(2). Thus, at a minimum, the NA must take steps to see that executive organs of state in the national sphere, those which are most directly responsible to it, can be held accountable under section 55(2)(a). Section 55(2)(b) on the other hand is an attempt to mark out the basic oversight responsibilities of the NA - and the monitoring of the implementation of legislation goes to the heart of the oversight role. In this way the oversight function of the NA in relation to bodies covered in section 55(2)(b) can be left flexible. The manner in which the oversight function is carried out will vary according to the circumstances. This flexibility is important in ensuring that the NA is not overwhelmed or overburdened by its oversight role. As we point out later in this report, the wording of s 55(2)(b) allows for the NA to take into account the desirability and feasibility of holding all organs of state accountable.

In the Certification Judgment (*In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC) at para 295) the Constitutional Court stated that: '[section] 55(2)(b)(ii) requires the NA to provide "mechanisms" to maintain "oversight" of any organ of state, which will include a department of a provincial government.' The Court went on to state that this will take place within the scheme of co-operative government where the provinces have the responsibility for implementing national legislation unless otherwise provided for by an Act of Parliament.

Section 55(2) covers the following bodies:
- Executive organs of state in the national sphere of government;
- National executive authority; and
- Other organs of state

Each of these will be discussed in turn.

3.3.1 Executive organs of state in the national sphere of government

'Organ of state' is defined in section 239 as any department of state or administration in any sphere of government, or any other functionary or institution exercising a power or performing a function in terms of the Constitution or exercising a public power or performing a public function in terms of any legislation. Thus executive organs of state would include cabinet and any body or institution under its control via the relevant minister (e.g. Telkom or Transnet. See for example *Goodman Bros (Pty) Ltd v Transnet* 1998 (8) BCLR 1024 (W)).

3.3.2 National executive authority

Section 85 provides as follows:

'(1) The executive authority of the Republic is vested in the President.

(2) The President exercises the executive authority, together with the other members of the Cabinet, by -

(a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;

(b) developing and implementing national policy;

(c) co-ordinating the functions of state departments and administrations;

(d) preparing and initiating legislation; and

(e) performing any other executive function provided for in the Constitution or in national legislation.'

From section 85 one can conclude that 'national executive authority' is exercised when the national executive does anything mentioned in subsection 2 (a)-(e). The wide range of activities covered by those provisions reinforces the point that the oversight function required by section 55(2)(b)(i) has a wide ambit.

(i) Individual and collective responsibility
Section 55 (2)(b)(i) must be read together with section 92 which provides as follows:
'(1) The Deputy President and Ministers are responsible for the powers and functions of the executive assigned to them by the President

(2) Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.

(3) Members of the Cabinet must-
(a) act in accordance with the Constitution; and

(b) provide Parliament with full and regular reports concerning matters under their control.'

Section 92(2) entrenches the doctrine of ministerial responsibility. Particular ministers are individually responsible for the conduct of that part of the executive of which they are in charge. The collective responsibility of the Cabinet implies that Ministers are in the end jointly responsible for the conduct of government in the sense that they are obliged to support government policy. In the Commonwealth jurisdictions that share this feature of government, ministerial responsibility takes the form of a constitutional convention which is ultimately only politically and not legally binding. **Under our Constitution it has the force of law.** Effectively this means that the executive cannot respond to Parliament by saying that it does not have the right to demand accountability. However, the right of Parliament, while entrenched in constitutional law, forms part of a political framework and is not normally directly enforceable through the courts without legislative amplification. To illustrate, a court would not ordinarily force a minister to resign for having mismanaged his or her ministry without a legislative framework imposing liability on political office-bearers for such acts or omissions.

(ii) Ministerial responsibility – the Executive's duty to inform Parliament
In a nutshell ministerial responsibility can be said to demand that ministers answer or give an account and submit to scrutiny, and make redress for wrongs and correct errors. In the first place ministers (the executive) must provide Parliament with information about their policies and the activities of their departments. Thus section 92(3) provides that Ministers must 'provide Parliament with full and regular reports concerning matters under their control.' The recent Scott Report in Great Britain, on the failure of the Executive to reveal to Parliament the true nature of British arms exports to Iraq, emphasized the importance of full and meaningful disclosure of information on government policy (Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and related Prosecutions (the Scott Report) H. C. 15 February 1996). The flow of information from the executive to the legislature about its activities goes to the core of oversight and accountability.

The duty to answer or explain is captured by the notion of 'explanatory accountability', which requires the giving of reasons and the explanation for action taken. An element of explanatory accountability is the duty to provide financial accounts demonstrating the regularity of government expenditure. If accountability hinges on the receipt of information then financial information is crucial. Power over expenditure is vital for the system of representative and responsible government. However, financial information - if it is to be used for purposes beyond checking over-spending - must be presented in such a manner or coupled with additional information about the objectives of government spending, so that Parliament can make judgements about whether funds are being spent efficiently and in

accordance with stated objectives. In short, the presentation and 'packaging' of information is crucial for its usefulness.

The obligation to explain and account implies the further duty to submit to scrutiny and to provide an opportunity for Parliament to probe and criticize. Section 56 empowers the NA (these powers are mirrored for the NCOP in section 69) or any of its committees to summon a person to appear before it or report to it.

The obligation to redress grievances by taking steps to remedy defects in policy or legislation can be termed 'amendatory accountability'. It requires an acceptance by Ministers that something has gone wrong, whether or not they are personally culpable.

(iii) Evaluating ministerial accountability

Ministers are traditionally accountable for both the policy and management of their departments (C Turpin 'Ministerial Responsibility: Myth or Reality' in J Jowell & D Oliver (eds) *The Changing Constitution* (1989) 60-3). The growth of the public service has meant that Ministers cannot be expected to have knowledge of all the workings of their departments. However, it is submitted that it is true to say that in terms of the doctrine Ministers can be expected to put in place systems and procedures to ensure proper management and the efficient utilisation of resources allocated to their departments.

In the systems which are based on the Westminster model of responsible government (and this is an element which has been retained by our Constitution), ministerial responsibility is the cornerstone of accountability. Since it is based on departmental hierarchy and lines of responsibility culminating in the Ministers, it proves far less useful when the element of the executive in question (or organs of state) consists of statutory bodies or agencies which are outside the departmental sphere of control. Besides the existing boards and commissions there is a host of recently-created bodies exercising functions previously the province of government departments. The following are some examples: the South African Qualifications Authority (SAQA), the South African Telecommunications Regulatory Authority (SATRA) and the South African Maritime Authority (SAMA). Privatisation of the former parastatals poses a further challenge as regards parliamentary accountability within the existing framework.

Some commentators are highly critical of ministerial responsibility as the chief mechanism for achieving accountability, and describe the concept as possessing only 'fading utility' (N Lewis & D Longley 'Ministerial Responsibility: The Next Steps' 1996 *Public Law* 490 at 493). At this point one can advert to the role of the Public Protector and certain of the other Chapter 9 institutions - they are alternative mechanisms, besides ministerial responsibility, of holding the executive accountable. We return to their special role later in this report. The envisaged Administrative Justice Act and Open Democracy Act present other opportunities for citizens to hold the executive accountable.

We have mentioned as one of the problems with ministerial responsibility as an effective means of realising parliamentary oversight that the growth and development of government has stretched this nineteenth century doctrine to the limits. An aspect of the problem is that while ministers can in the face of developments disclaim responsibility in many instances, the traditional doctrine also excludes public servants from responsibility. A look at the experience in comparable constitutions will assist.

United Kingdom: As part of the responsibility of ministers to Parliament there exists the convention of impartial, non-political civil servants who are not directly accountable to Parliament; accountability takes place through the minister concerned. As a consequence civil servants can refuse to answer questions about advice to ministers on policy or their opinion on policy (C Turpin 'Ministerial Responsibility' 53 at 65 in J Jowell & D Oliver *The Changing Constitution* (1989)). However, the realisation that policy and policy-making is difficult to separate from administration has led to increased efforts to hold civil servants responsible. With regard to executive agencies the Public Service Committee of the House of Commons has stated that a minister's duty to give an account can be delegated to the chief executive of the agency in question, but 'the liability to be held to account...cannot' (quoted by M Radford 'Mitigating the Democratic Deficit? Judicial Review and Ministerial Accountability' 35 at 40 in P Leyland & T Woods *Administrative Law Facing the Future* (1997)). Therefore ministers must take steps to correct the failings of executive agencies revealed by parliamentary scrutiny.

ZZ9-RC-070

Canada: The political neutrality of civil servants and ministerial responsibility means that the British model is followed. By convention civil servants remain anonymous in the sense that they should not be criticized personally or otherwise held accountable in Parliament
(P W Hogg *Constitutional Law of Canada* (3rd ed) 1992 237).

Australia: In general the inheritance of the British model means that civil servants cannot easily be held accountable. In particular civil servants have at times, when questioned or asked to produce documents, successfully invoked the public interest immunity when appearing before committees (*Odgers' Australian Senate Practice* 8th ed (1997) 455ff).

One of the important ways in which ministerial accountability takes place is during Parliament's plenary sessions especially through the institution of question time, draft resolutions, interpolations, special debates and budgetary approval.

3.3.3 Other organs of state

The definition of organ of state in section 239 is outlined above. For the purpose of this report such bodies will be divided into two categories: state institutions supporting constitutional democracy and other bodies set up under the Constitution; and any other functionary or institution exercising a public power or performing a public function in terms of any legislation.

(i) State Institutions Supporting Constitutional Democracy and other bodies set up under the Constitution

In terms of s 181(5) of the Constitution, state institutions supporting constitutional democracy 'are accountable to the National Assembly and must report on their activities and the performance of their functions to the Assembly at least once a year'. This requires reporting to Parliament on the performance of their functions and how their budgets were spent. This is one of the ways in which these bodies are held accountable to Parliament. There is however also another type of reporting to Parliament which serves a very different purpose. This is to inform, assist and complement Parliament's oversight role. For instance, if the Human Rights Commission submits a report on racism in schools this serves to facilitate and assist Parliament's oversight function.

Bearing in mind this distinction between the two types of reporting functions, state institutions supporting constitutional democracy report to Parliament as follows:
(a) The Public Protector must report to Parliament twice a year on the findings of investigations of a serious nature, and may also do so at any other time of his or her own volition or if requested to do so by the Speaker of the National Assembly or the Chairperson of the NCOP (section 8(2) of the Public Protector Act 23 of 1994);

(b) The Human Rights Commission must submit quarterly reports to Parliament on findings in respect of functions and investigations of a serious nature which were performed or conducted by it, and may also do so at any other time it deems it necessary (section 15(2) of the Human Rights Commission Act 54 of 1994);

(c) The Commission on Gender Equality may make recommendations to Parliament concerning gender issues and must prepare and submit any reports to Parliament which relate to international conventions, covenants and charters (s 11 of the Commission on Gender Equality Act 39 of 1996);

(d) The Auditor-General must submit audit reports to any legislature that has a direct interest in the audit (section 186(3) of the Constitution). In addition in terms of the Auditor-General Act 12 of 1995 reports must also be submitted to Parliament and provincial legislatures.

(e) The Electoral Commission Act 51 of 1996 provides that the Electoral Commission must, as soon as possible after the end of each financial year, submit an audited financial report and a report in regard to its functions, activities and affairs to the National Assembly (section 14(1)).

Other institutions set up in terms of the Constitution are accountable as follows:
(a) The Judicial Service Commission Act 9 of 1994 provides that the Judicial Service Commission shall within six months after the end of every year submit a written report to Parliament regarding its activities during that year (section 6);

(b) The Independent Commission for the Remuneration of Office Bearers Act 92 of 1997 provides that the Commission must within 2 months after the end of every year submit a report to the President on its activities who in turn must table the report in Parliament;

(c) The Financial and Fiscal Commission Act 99 of 1997 provides that the Commission must within six months after the end of every financial year report to both houses of Parliament on its activities during that year. The Act regulates the contents of the report, requiring a summary of all recommendations made and an audited financial statement including a balance sheet, income statement, cash flow statements and an auditor's report (section 26);

(d) The South African Reserve Bank Act 90 of 1989 requires the Governor of the Reserve Bank to submit to the Minister of Finance an annual report relating to the implementation of money policy by the bank which must be tabled in Parliament within 14 days of receipt. The Bank is also required to furnish additional information including financial statements and shareholders lists which must also be tabled in Parliament (sections 31 and 32);

(e) The Pan South African Language Board Act 59 of 1995 provides that the Board shall, not later than June 1 of each year, submit a comprehensive report on all its activities during the preceding year (section 12(3)(a)). The Board may also at any time submit a report to Parliament if it deems it necessary (section 12(1)(b)); and

(f) The Public Service Commission is accountable to the NA, and must report annually to it (sections 196(5) and 199(6)(a) of the Constitution).

(ii) Any other functionary or institution exercising a public power or performing a public function in terms of any legislation

The definition of organ of state in section 239 of the Constitution is broadly worded, including not only state departments and the administration, but also bodies which exercise a public power or perform a public function under legislation. This category presents the bulk of the oversight work to be performed by Parliament. Early signs seem to suggest that this broad interpretation will be sanctioned by the courts(see for example *Directory Advertising Cost Cutters v Minister of Posts, Telecommunications and Broadcasting* 1996 (3) SA 800 (T), and *Goodman Bros (Pty) v Transnet Ltd* 1998 (8) BCLR 1024 (W)), which would mean that an organ of state would include within its ambit a vast range of bodies such as various councils, boards and financial, cultural, agricultural, professional, research and educational institutions. Moreover since the term 'organ of state' in section 55(2)(b)(ii) is not qualified by 'national' it must be assumed that the NA is also empowered to carry out some manner of oversight function in relation to provincial organs of state. Section 125 provides that the executive authority of a province is vested in the Premier and that he or she exercises it together with the other members of the Executive Council by, *inter alia*, implementing national legislation. MECs are accountable for the exercise of their powers and performance of their functions to the provincial legislature (section 133). The fact that provincial legislatures will exercise an oversight function over the provincial executive does not preclude the NA from exercising the oversight function, especially in relation to the implementation of national legislation and policy. However in view of the commitment to co-operative government it is likely that such oversight by the NA will only take place in special circumstances.

The Auditor-General has provided a list of over 600 bodies which should potentially report to Parliament (excluding state departments and the administration), and notes that only just over 200 report to Parliament in terms of the Reporting by Public Entities Act 93 of 1992 (which will be repealed when the Public Finance Management Act 1 of 1999 comes into effect) and their founding legislation.

The constitutional obligation for the NA to oversee organs of state gives rise to a number of issues:
(a) There is no clarity on the precise meaning and coverage of the term especially because the requirement of 'exercising a public power or performing a public function' does not lend itself to easy definition. The term 'public body' has been the subject of judicial decisions in the past in the context of the applicability of administrative law principles. Different considerations may well apply in the context of accountability and oversight;

(b) It may be neither desirable nor feasible for the NA to attempt to exercise oversight power over all

the institutions that may fall within the definition, which as suggested earlier is likely to be broadly interpreted. An in-depth examination of each of their functions which must be linked to the NA's resources and goals, including a cost-benefit analysis, is required in order to determine how these bodies are to be accountable. Many of them could be linked to the reports of government departments;

(c) The Public Management Finance Act 1 of 1999, which is due to replace the Reporting on Public Entities Act, subjects certain listed bodies defined as 'national public entities' to strict financial scrutiny. Extending beyond bodies which are substantially funded by the government the definition includes what are known as government business, which are entities under the ownership and control of the government. How does the definition of public entity relate to the definition of organ of state?

CHAPTER FOUR
THE OVERSIGHT ROLE OF THE NCOP

This part of our work has been informed by the work of Professor Christina Murray and the National Democratic Institute who also have been engaged in research on the oversight role of the NCOP.

The constitutional role of the NCOP is to provide an effective bridge between provinces and the national sphere of government, and to contribute to the realisation of the constitutional commitments to co-operative and effective government. In tackling this task as a 'start-up' institution the NCOP has understandably concentrated its energies on its role as legislator, and other roles have remained comparatively undeveloped. One of these is its oversight role. Legislating and conducting oversight can be described as the twin functions of any legislature. Oversight refers to the crucially important role of legislatures in monitoring and reviewing the actions of the executive organs of government. The aim of this part of the report is to briefly sketch the oversight role of the NCOP, mindful of the fact that such a role must be sourced in the Constitution, be suited to the NCOP as an institution and not duplicate the oversight functions of the National Assembly.

4.1 Mapping-out the NCOP's oversight role

When we discussed the oversight role mandated for the NA by section 55(2) we stressed that oversight is a commodious concept. A wide range of activities undertaken by a legislature can fall under the heading of oversight. It is also in accord with the definition of oversight adopted at the NCOP National Strategic Planning Workshop held on 13 November 1998 which states that: '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'.

We see oversight in relation to the NCOP as covering the implementation of legislation and the monitoring of intergovernmental relations. The oversight role of the NCOP is however limited in that it is restricted to matters concerning local and provincial government, as well as national government where this impacts on provincial and local matters. That is what is justified by the constitutional role of the NCOP. Importantly it is an understanding of oversight that does not duplicate the oversight functions of the NA, but instead serves to complement them.

The focus of the NCOP's oversight role is determined (and limited by) its constitutional role. Its role is to represent the provinces and to ensure that provincial interests are taken into account in the national sphere of government (section 42(4) of the Constitution). The Constitution does not specifically mention a general oversight role for the NCOP, unlike the National Assembly which is specifically tasked with a general oversight function in sections 42(3) and 55(2) of the Constitution. Section 102 gives the NA the ultimate oversight power in relation to the national executive – the power to dissolve the Cabinet. The oversight role of the NCOP is implicit in its constitutional function – a concomitant function of any legislature which passes legislation is to monitor the implementation of that legislation and review subordinate legislation made pursuant to it. A reader of the Constitution is left in no doubt that the executive is accountable to the NCOP - section 92(2) provides unequivocally that members of the cabinet are responsible (individually and collectively) to *Parliament* as whole, and not only to the NA. Section 66(2) provides that a member of the national or a provincial executive may be called to attend it.

4.2 General oversight role of the NCOP

The NCOP is constitutionally enjoined to represent provinces in the national sphere, and local government is also represented in the national sphere by the NCOP. Thus, the NCOP is not to oversee all of national government; it is to exercise oversight 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.In this way 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 is expected to 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 that are implemented by provincial executives. The NCOP is uniquely situated to fulfil this role.

In a situation where several provinces experience the same or similar problem with the implementation of national policy it will not be possible for the relevant provincial committees, exercising oversight and acting separately, to resolve the problem. If such a matter is taken to the NCOP all the member provinces can be consulted and a realistic picture of how real and widespread the problem is can be gained. An approach that is appropriate and compatible with the needs of all provinces can then be arrived at. Continuing its oversight role the NCOP can then provide a forum in which the provinces can engage the national executive on the issue. In this way the NCOP serves as a channel of communication between provinces and national government.

4.3 Oversight to protect spheres of government

This category of oversight arises in cases where one sphere intervenes in another in a manner that may affect its integrity. The NCOP is entrusted with the task of guarding against the abuse of the various powers of intervention. The specific instances where the NCOP exercises oversight as set out in the Constitution may be summarised as follows:

(a) Where the national executive intervenes in a province under section 100(1)(b) the NCOP must approve of and regularly review the intervention;

(b) Where a provincial executive intervenes in a municipality under section 139(1)(b), the NCOP must approve of and regularly review the intervention;

(c) Disputes concerning the administrative capacity of provinces must be resolved by the NCOP under section 125(4);

(d) Both houses of Parliament are required to approve of a decision by the treasury to stop the transfer of funds to a province under section 216;

(e) Section 146(6) provides that a piece of delegated legislation cannot prevail over another law, whether statute or delegated legislation, unless it has been approved by the NCOP.

4.4 Intergovernmental relations (IGR)

The NCOP is clearly a crucial part of the framework of intergovernmental institutions designed to ensure the effective functioning of the different spheres of government in South Africa and that the extensive concurrent powers of provinces and national government do not lead to overlap or conflict. The NCOP clearly has a role to play in monitoring the effectiveness of the IGR mechanisms in any field. IGR is an important feature of all NCOP oversight. This is consistent with its constitutional role as representative of provinces and local government in the national legislative arena. It also seems clear that the NCOP should exercise oversight over the general structure and procedures of intergovernmental relations. The logic for this is that intergovernmental executive bodies should be subject to the oversight of the legislative body that reflects the multi-level governance of South Africa. As the 'legislative arm' of IGR, this seems an appropriate role for the NCOP.

4.5 Oversight in partnership with the NA

Joint oversight by the NA and NCOP is required by the following constitutional provisions:

- Section 199(8) demands oversight of security services by a parliamentary committee;
- Section 231 requires both National Assembly and NCOP approval of international agreements;
- Section 203 requires that a declaration of a state of national defence must be approved by both

houses of Parliament.

These provisions appear 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.

4.6 Recommendations
In our interim Report we framed certain questions on issues which we believed required discussion. In the light of the foregoing discussion we now respond to each of them.

a. How desirable is it to set up joint committees to perform oversight functions which are the responsibility of both houses?

We are of the view that joint committees are not ordinarily desirable. The oversight functions of the two Houses differ substantially. A duplication of oversight functions can be avoided by adhering to the general constitutional oversight envisaged for each House by the Constitution, as outlined in this Report. Joint committees may also lead to a dilution of the functions of the NCOP – party or other issues may sideline the provincial issues and interests that the NCOP is meant to articulate. A perceived lack of 'oversight weight' on the part of the NCOP should be cured by a careful and considered employment of resources.

b. What should the role of the NCOP in overseeing the affairs of individual provincial executives and organs of state be?

The provincial legislatures, and not the NCOP, are responsible for overseeing the executive in the provinces. Where a difficulty with implementation or policy is experienced by a number of provinces and cannot be solved at that level, then the oversight remit of the NCOP comes into play.

c. Many pieces of legislation require reporting to 'Parliament' whereas the constitutional obligation is to report to the NA only. Should this be ignored? Is it desirable for the NCOP to oversee organs of state not related or limited to provincial matters?

As a general rule the national executive and organs of state in the national sphere ought to report and account to the NA and its committees only. There are exceptions to this, for example the Financial and Fiscal Commission must report to both Houses of Parliament and is clearly of crucial importance for the work of the NCOP. The NA however remains primarily responsible for oversight of the national executive. For example in most instances financial and related performance of national executive bodies will be the sole remit of the NA and its committees.

However where the body reports as part of its constitutional and legal function and provincial issues are touched on, the body concerned must also report to the NCOP and its committees. The Human Rights Commission serves as an example to illustrate this: while the reports on that body's expenditure are for the NA to peruse, a report on the degree to which socio-economic rights have been implemented must clearly also be presented to the relevant NCOP committee because of its obvious impact on the provinces.

CHAPTER FIVE
EXISTING PROCEDURES AND PRACTICES FOR EXERCISING OVERSIGHT

This part of the report outlines our findings in respect of the reporting system currently in place in Parliament. For the purposes of this report, we have analysed both oral and written reports but it must be noted that we have had several difficulties in analysing the system of written reporting. This is largely because there are very few records or indices of written reports submitted to parliamentary committees. Among the structural constraints that Parliament faces is the lack of resources to implement and execute effective record-keeping practices; in this case, in addition, the absence of official procedures or structures for handling written submissions contributes to the difficulty. There are also other difficulties in using written reports to gain an understanding of the level of parliamentary oversight activity. There is often no way to tell if a given report was ever presented to a committee, or if it was simply distributed for members to read on their own. The level of detail may be excessive, making it hard for committee members to find useful information, or the report may be very general, lacking detail on areas that are important to the committee. In addition it often cannot be determined

ZZ9-RC-075

whether a report was presented to the committee on that committee's request, or if the submission was scheduled or regulated by statute.

In addition, analyses of oral reports serve several important purposes. At the very least some interaction would have taken place between the executive body and the committee. While it cannot be answered for certain whether the oral report had a meaningful amount of detail, the 'live' nature of an oral briefing does give committee members the ability to focus the presentation on issues that are significant to them. It can also be determined whether an oral report was held on the committee's own initiative. Certain types of oversight activity, such as comments on current issues or recent developments, are exercised primarily, and sometimes only, through oral presentations. For example, in 1997 the Portfolio Committee on Justice received three oral presentations on current or topical issues, but only one was accompanied by a written report. Anecdotal evidence bears out the conclusion that current issues are addressed primarily through oral reports in other committees as well.

5.1 Oral reports

Prior to 1997 Parliament operated under the interim Constitution which did not clearly outline parliamentary oversight functions. The final Constitution established clear executive oversight functions for Parliament, and also set up the NCOP. For these reasons, comprehensive data on oral reports given to committees has been compiled from the start of the 1997 parliamentary session.

Several key insights have become apparent through an analysis of this data. First, and not surprisingly, there is a broad range of oversight performance between committees. Some committees are quite active in exercising their oversight functions, while others receive reports from a department or organ of state only in the context of the annual budget vote, or even not at all. Notably active committees include the portfolio committees on Constitutional Development, Defence, Foreign Affairs, Justice, and Mineral & Energy Affairs, and the Select Committee on Land, Agriculture, and Environmental Affairs. Notably inactive committees include the portfolio committees on Education, Health, Home Affairs, and Sport and Recreation. Committees that do not correspond directly to a government department or other organ of state, such as the portfolio and select committees on Private Members' Legislation, obviously have little opportunity or need to exercise an oversight function, and have been excluded from this analysis. We will consider the activity of 25 portfolio committees (excluding the RDP Committee and the Private Members' Legislation Committee) and nine select committees (excluding the Private Members' Legislation Committee). Two standing committees - the Joint Standing Committee on Defence, and the Standing Committee on Public Accounts - will be discussed separately.

When oversight does take place, it is interesting to note that it covers a much broader range of categories than simply financial management. These categories include policy development, structural issues, and current issues or events. Policy reports cover a broad range of activities that involve policy development and implementation, including the presentation of green or white papers, plans for the forthcoming year and statements of objectives or priorities. Reports on structural issues typically deal with matters of internal transformation, including issues such as representivity, human resources, and training and personnel development. Reports on current events deal with recent developments. Examples would include military action in Lesotho and theft of weapons from police storage facilities.

Again, and not unexpectedly, different committees have varying levels of activity. A greater number of committees receive reports on budget or policy issues than on structural or current issues. As Chart 1 indicates, for example, in 1997 there were 20 (of 25) National Assembly portfolio committees that received at least one report from a government department or statutory body on budget issues, and 22 that were briefed at least once on issues of policy; but only 13 that received reports on structural matters, and only 12 that were briefed on current issues. The pattern is the same for NCOP select committees - five (of nine) received budget briefings at least once in 1997, and seven were briefed on issues of policy, while only three had any meetings to discuss executive structural issues, and none was briefed on current events.

Chart 1: Number of Committees Receiving Briefings

	National Assembly			National Council of Provinces		
	1997	**1998**	**1999**	**1997**	**1998**	**1999**
Budget	20	18	17	5	3	3
Policy	22	19	16	7	5	2
Structural	13	9	5	3	1	1
Current	12	15	8	0	3	1

Perhaps more strikingly, Chart 1 also indicates that the level of committee oversight has been declining since 1997, in all areas except current events. While it must be remembered that data for 1999 only covers the first parliamentary term (February and March), and there was thus less time for committee briefings to take place, the pattern from 1997 to 1998 is the same.

The increase in the number of committees that received reports on current issues suggests that parliamentary committees may in fact be growing into their oversight roles, and are increasingly taking more active steps to ensure that executive accountability is pursued. As answerability is one of the key components of effective accountability, the extent to which parliamentary committees actively exercise their oversight role, as opposed to being the passive recipients of reports, is an important factor in determining whether effective oversight exists. Anecdotal evidence suggests that reports on current issues or recent developments are more likely to involve initiative on the part of the committee. As one member of the committee section explained, 'If the briefing is on legislation or policy or the budget, the department will usually arrange to come brief us; but if they come to talk about something current it is because we have asked them to address the issue.' In this context, it is clear that a greater number of parliamentary committees are becoming comfortable exercising the more active aspects of their oversight role.

While Chart 1 provides a general sense of the level of parliamentary oversight, it does not accurately reflect the magnitude of reports received by individual committees, as it only indicates the number of committees that received at least one report on a given subject in a certain year. For example, among the 13 portfolio committees that received executive briefings on structural issues in 1997, the portfolio committees on Foreign Affairs, Housing, and Public Enterprises each were briefed just once, while the Portfolio Committee on Defence held nine separate briefings with either the Department of Defence or the South African National Defence Force.

5.1.1 Ranking committee oversight performance

Here we look at the number and type of briefings that each parliamentary committee received from the executive to develop a conceptual framework for ranking the oversight performance of individual committees. Two specific dimensions of oversight activity - the number of policy reports vs. the number of current issue reports that committees receive - allow classification of their oversight behaviour into different categories. Policy and current issue reports will be used because both involve holding the executive body accountable for how it is handling its category-specific remit; structural briefings deal with how the executive body is handling its internal transformation aims, and are less important to assess from this perspective.

In addition, the degree of committee initiative implied in the number of reports given on current issues provides a useful point of comparison with policy reports. While current issue reports can be said to reflect the level of active, situation-specific oversight taking place, policy reports reflect a more long-term, or developmental, involvement in the executive's policy creation and implementation. Using these categories as the two dimensions for the conceptual framework, therefore, gives a valuable perspective on how parliamentary committees are performing with regard to both active and developmental oversight of the executive body's specific area of remit. This conceptual framework is illustrated in Chart 2 below.

Chart 2: Conceptual Framework for Oversight Performance

Current Issue Briefings	**Current issue briefings, no policy briefings**	**Policy and current issue briefings**
	No policy or current issue briefings	**Policy briefings, no current issue briefings**
	Policy Briefings	

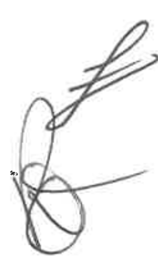
Committees are classified along the x-axis according to whether they have received at least one policy report, and along the y-axis according to whether they have received at least one current issue report. As the illustration above indicates, committees classified in the lower-left quadrant are those who received no policy or current issue reports from a department or statutory body, and can be considered as having weak oversight performance on these dimensions, while committees in the upper-right quadrant have been briefed at least once on both policy and current issues, and can be considered as having relatively strong oversight performance. The matrices below display the committees that fall into each quadrant for 1997 and 1998.

Chart 3: Committee Performance in 1997

Current Issue Briefings	**-** **-** **-** **0 / 0%**	**Portfolio Committees** **Agriculture and Water Affairs** **Correctional Services** **Defence** **Foreign Affairs** **Housing** **Justice**	**Labour** **Mineral & Energy Affairs** **Public Works** **Trade and Industry** **Transport** **Welfare 12 / 35%**
	Portfolio Committees **Finance** **Health** **Land Affairs** **Select Committees** **Constitutional Affairs & Public Administration** **Education** **5 / 15%**	**-** **Portfolio Committees** **Arts, Culture and Language** **Communications** **Constitutional Affairs** **Education** **Environmental Affairs & Tourism** **Home Affairs** **Public Enterprises** **Public Service & Administration** **Safety and Security** **Sport and Recreation**	**Select Committees** **Economic and Foreign Affairs** **Finance** **Labour & Public Enterprises** **Land, Agriculture & Environment** **Public Services** **Security and Justice** **Social Services** **17 / 50%**
	Policy Briefings		

Chart 4: Committee Performance in 1998

Current Issue	**Portfolio Committees** **Agriculture & Water Affairs**	**Portfolio Committees** **Constitutional Affairs**	**Select Committees** **Security and Justice**



PO-03-080

ZZ9-RC-078

Briefings			
	Foreign affairs Land Affairs <u>Select Committees</u> Public Services 4 / 12%	Correctional Services Defence Environmental Affairs & Tourism Housing Justice Mineral & Energy Affairs Public Service & Administration Public Works Safety and Security Transport Welfare	Social Services 14 / 41%
	<u>Portfolio Committees</u> Finance Sport and Recreation Trade and Industry <u>Select Committees</u> Constitutional Affairs and Public Administration Economic and Foreign Affairs Finance 6 / 18%	<u>Portfolio Committees</u> Arts, Culture and Language Communications Education Health Home Affairs Labour Public Enterprises	<u>Select Committees</u> Education Labour and Public Enterprises Land, Agriculture and Environment 10 / 29%
	Policy Briefings		

The figures in the corner of each quadrant are the number of committees listed in each quadrant, and the percent of all portfolio and select committees that they represent. There are several things this framework makes clear about the nature of executive accountability to parliamentary committees. First, in 1998 more committees were exercising active oversight of both policy and current issues than in 1997, as the number of committees in the upper-right quadrant has increased. The two matrices also provide an interesting perspective on the likely process of development of a committee's oversight capability. In 1997 there are no committees that received current issue reports while not receiving policy reports (the upper-left quadrant), while there are 17 committees that received policy reports but not current issue reports (the lower-right quadrant). In fact, the only committees that received current issue reports in 1997 are those that also received policy reports - which indicates that there may be a progression in the development of a committee's oversight capability. If a committee is only active in one area it is likely to be policy first, and from there the committee may develop the confidence, knowledge, or internal capability to pursue executive accountability on recent developments as well. The trend from 1997 to 1998 also bears out this conclusion - of the 17 committees that received only policy reports in 1997, seven remain in the same category in 1998, with seven having moved into the quadrants reflecting greater oversight activity, and only three dropping into lower oversight activity.

Another conclusion to be drawn from Charts 1, 3, and 4 is that the NCOP select committees seem to play much less of an oversight role than the National Assembly portfolio committees. In fact, the data shows that there are very few select committees that could be said to exercise active oversight of either government departments or statutory bodies, with one or two notable exceptions. This may be due to the lack of constitutional clarity regarding the NCOP's oversight responsibilities. The oversight role of the NCOP is discussed elsewhere in this report.

5.1.2 Parliamentary oversight of statutory bodies

An analysis of reports given by statutory bodies, as distinct from government departments, shows that the dynamics of executive reporting are similar. 18 of 25 portfolio committees, and six of nine select committees, have been briefed by statutory bodies since 1997. Again, some committees are more active than others, both in terms of the number of statutory bodies that report to them, as well as in

ZZ9-RC-079

the number and types of briefings held. In general, those committees that have strong oversight performance of government departments tend also to be the ones exercising strong oversight of statutory bodies. Examples include the portfolio committees on Justice, Constitutional Development, and Mineral and Energy Affairs.

A wide range of statutory bodies have reported to parliamentary committees since 1997 - Parliament has received reports from over one hundred executive organs of state in the past three years. Interestingly, the number of statutory bodies that fall within a committee's remit does not seem to be a determining factor in how successfully that committee exercises oversight. For example, the Portfolio Committee on Justice oversees at least twenty statutory bodies, and yet is able to exercise strong oversight. In its abbreviated 1999 session alone, the Justice Committee received briefings from 13 different statutory bodies.

There appears to be a broader accountability expectation for some statutory bodies than exists for government departments. Whereas most government departments only report to the affiliated portfolio or select committee, many statutory bodies or executive organs of state are held accountable by several different committees. Examples include the South African Police Service (SAPS), the South African National Defence Force, the Public Service Commission, and Eskom. The SAPS has reported to no less than six different portfolio and select committees since 1997.

5.2 Written reports

This section analyses examples of written reports submitted to parliamentary committees. As mentioned earlier, structural and resource constraints within the committee section of Parliament preclude a comprehensive analysis, but we have looked at several representative written reports to provide a more detailed perspective on their content and usefulness.

5.2.1 Procedures for recording written submissions

There are currently no formal or official structures through which reports are submitted to parliamentary committees. The process is at the discretion of the individual committee clerks, who may or may not have specific instructions from their committee chair on the handling of reports. In general, reports are submitted by government departments or other organs of state directly to committee clerks, who then distribute copies of the report to committee members. There are no official procedures or policies for recording, indexing, or tracking submissions.

In light of this limited structural system for handling submissions made to parliamentary committees, very poor records exist of written reports received by committees. Of the 25 portfolio committees and nine select committees that were analysed, only one has recorded all submissions made since 1997. For the remainder, records are either poor or do not exist. This obviously makes it very difficult to gain a comprehensive picture of the nature of written reports submitted to parliamentary committees.

Work is underway within the committee section to collate and bind all submissions made to committees since 1995. Originally scheduled to occur at the end of each year, the process was delayed due to lack of resources until the end of Parliament's five-year term. When completed, the collection will unfortunately be far short of comprehensive, as turnover within the committee section and the lack of record-keeping procedures have resulted in the loss of many written submissions.

5.2.2 Review of annual reports

For these reasons, this analysis is primarily based on a representative sample of annual reports submitted by government departments and statutory bodies. Records of the Portfolio Committee on Justice, which has maintained a detailed index of all reports submitted to it since 1997, have also been used to provide some perspective on the volume of written reporting.

The number of written reports received by the Justice Committee since 1997 is shown in Chart 5 below (excluding written submissions on specific legislation). These numbers should not necessarily be taken as representative of all committee activity, since the Justice Committee is among the most active of all committees, and also has oversight responsibility for more statutory bodies than most other committees. Nonetheless, the number of written reports it has received can be helpful in understanding the nature of written reporting to Parliament.

Chart 5: Written Submissions to the Portfolio Committee on Justice

	1997	1998	1999
Departments	22	8	7
Statutory Bodies	8	4	3

These figures show a pattern similar to one discerned in the data on oral reports - the level of reporting has declined from 1997 to 1998. The content of written reports is generally different from the content of oral briefings, however. Written reports received by the Justice Committee primarily address budgetary or policy issues, in the context of annual or bi-annual reporting, with far fewer reports addressing structural or current issues.

In terms of content, most included a description of financial expenditure and performance, a statement of future plans and objectives, and a summary of the previous year's activity. This summary typically covered issues including policy development and implementation, relevant legislation that was passed, progress on achieving representivity, and any significant developments of the previous year. Interim reports usually contain similar information to annual reports, although they typically exclude financial or budget figures.

While it would appear that written reports would seem to be a valuable vehicle to explain executive activity to parliamentary committees, and a useful tool for the committees in the exercise of their oversight function, this has not been the case. While they may provide a comprehensive overview of a department's activity for the past year, there is often too much information to be useful - at the same time being fairly topical and therefore providing too little information in areas that are important for effective oversight to take place. Evidence on committee responses to written reports, as recorded by the Parliamentary Monitoring Group or through committee reports to Parliament as a whole, highlight the problems many of these reports contain.

While many annual reports and budget presentations can be quite lengthy, a common complaint of MPs is that crucial information is either missing or obscured. For example, the Portfolio Committee on Constitutional Development held two full-day briefings in March 1999 for the Department of Constitutional Development to explain its budget for 1999/2000 and its annual report of the previous year. In spite of the significant amount of information included in the written reports submitted for the briefings, MPs found information necessary for their assessment to be missing, including the outcomes of the previous year's expenditure. As one MP complained, it is very difficult to judge a budget without an understanding of the outcomes of the previous budget (PMG, 2/3/99).

Often the financial figures are too general to allow for a clear understanding of what the money is being spent on. During the Department of Justice's budget presentation to the Portfolio Committee of Justice in 1999, an MP interrupted to say that she found the budget figures included in the Department's written report to be of very little value. She said that categories such as Administration of Justice, Administration of Law, and Auxiliary Services were too general to give her any reasonable idea of whether the Department was spending its money responsibly and effectively (PMG, 22/2/99).

These types of problems have led many MPs to virtually ignore most written reports. One MP stated during a committee meeting in 1999 that until government departments refrained from submitting documents of several hundred pages in length, she would continue to ignore the submissions she received from them, preferring instead to wait for a briefing with the department so she could ask about those matters that were of importance to her (PMG, 2/3/99).

Parliamentary committees recognise that the lack of specific requirements regarding the format and content of written reporting contributes to the limited value of most written reports. Due to difficulties encountered in its 1999 budget hearings, the Portfolio Committee on Constitutional Affairs resolved in its 1999 report to the National Assembly that 'the Committee would have further discussions with the Department and the relevant office bearers of Parliament to define more precisely what the Annual Reports to Parliament, particularly those of the statutory bodies, should focus on and what their format should be' (ATC No 25-1999, 10 March 1999, p 171). The development of standards and requirements for written reporting would facilitate Parliament's oversight function by making sure that

 ZZ9-RC-081

information is provided on a useful level. In this regard we make several recommendations later in this report.

5.2.3 Logistical factors

Other factors than the content and format of written reports impact on their usefulness to parliamentary committees. A major problem with written reports is the lack of timely submission. Often, written reports are submitted to committees so late as to be fairly useless in assisting the committee's decision-making or oversight process. In 1999, for example, the Portfolio Committee on Constitutional Development received annual reports from the Department and several statutory bodies only on the day before or the day of meetings held to review the material - even though the same problem had been encountered in 1998, and the Committee had established resolutions regarding the timing of written submissions. As PMG minutes record: 'An MP raised the concern that last year the Committee was given the annual report with very little time in which to consider it. Concern over this issue led to an agreement that reports must be tabled at least ten days before the relevant review meeting, in order to give members time to prepare responses. The annual report being discussed was distributed to members only the previous afternoon - how are they to be expected to have a meaningful discussion on it?' (PMG, 2/3/99).

Another significant problem with written reports stems from the structural limitations mentioned above. In addition to the lack of procedures for documenting written submissions, there is also no procedure for committees to address or respond to written reports. Parliamentary committees are not required to do anything when they receive a submission - there is no obligation for them to hold a briefing or to arrange a response. In fact, most written reports, whether they are annual reports, budget documents, or otherwise, are not accompanied by a meeting through which the executive body can explain the document or field questions from the committee. For example, in 1999 there were ten portfolio committees and six select committees that passed departmental budget votes without ever having had a briefing with the relevant department.

The model of the Standing Committee on Public Accounts, which has specific response requirements vis-a-vis reports from the Auditor-General, might be effectively applied to other committees in this regard. When the Public Accounts Committee receives a report from the Auditor-General on possible fiscal irresponsibility, it must call the implicated parties to give evidence into the matter. Following the conclusion of hearings, the Committee prepares a report of its findings that is then tabled in Parliament. Implicated parties must reply to the Committee's report within sixty days, at which point the Committee reviews the replies and arranges further follow-up if necessary. The entire procedure is highly structured and organised, with a system of status reports used to track developments in the process. Several recommendations are made later in this report to remedy some of the problems described in this section.

5.3 Committee responses to executive reporting

Another constraint to effective enforcement of Parliamentary oversight is that there are no official procedures or requirements for committees to respond to reports that are submitted to them - a constraint that, as mentioned earlier, limits the value of written reporting. Without an established venue for submitting official responses, parliamentary committees cannot effectively transmit decisions they have made either to the executive body in question or to Parliament as a whole.

Members of the committee section of Parliament cited this as one of the difficulties of making sure that reports are addressed by committees in an appropriate manner. As one committee clerk said, 'Decisions are taken to respond to department reports, but they are not followed up. Members never discuss it with their parties, and we never hear about it again'. Another member of the committee section commented, 'When we received the department's policy document, the committee agreed that each party would prepare a response, so they could be combined into a formal response to the department. But that doesn't happen'. The lack of a structure or requirement for responding to reports from executive bodies prevents them from being addressed appropriately.

Even regarding the annual department budget votes there is no requirement that parliamentary committees make a formal response to the department or to Parliament. In 1999, only five portfolio committees, and no select committees, submitted a response on budget presentations to Parliament. This is in spite of the fact that Parliament as a whole must debate and pass the individual department budgets, and that it is in the committees that the most detailed explanation of departmental budgets is

given. While we also make detailed recommendations in this regard, it also appears that parliamentary rules are being changed to address this shortcoming. Section 134 of the Draft New Preliminary Rules of the National Assembly (published in March 1999) states that 'A committee must report to the Assembly on a matter referred to the committee when the Assembly is to decide the matter.... or if the committee has taken a decision on the matter, whether or not the Assembly is to decide the matter. A committee must report to the Assembly on all other decisions taken by it, except those decisions concerning its internal business; and [must report on] its activities at least once per year'.

CHAPTER SIX
ESTABLISHING MECHANISMS TO ENSURE ACCOUNTABILITY

In this part we make recommendations for the establishment of mechanisms to ensure accountability. However it must be pointed out that there are several existing mechanisms already in place to ensure accountability. These include the budget vote, the power to summon members of the executive and the public to appear before parliamentary committees, and parliamentary question-time.

The annual budget vote is potentially one of the most direct tools that Parliament can use to enforce accountability. Each year Parliament must approve the annual budget of the government. Because of this power to approve executive expenditure, the budget vote process is (or can be) among the most direct venues through which parliamentary decisions can be enforced. Committees may be able to use their budget approval power to impose sanctions on or to influence government departments. For example, in 1999 the Portfolio Committee on Constitutional Development used its budget approval power to threaten to punish the Department on Constitutional Development if it fails to submit reports on time in the future. As the Committee wrote in their report on the Department's budget: 'Last year in its report to Parliament the Committee expressed concern that it received the Annual Reports of the department and the statutory bodies too late to do a proper evaluation, and urged that all reports reach the Committee at least ten days before budget review meetings. Unfortunately this call was not heeded... Should the Department and statutory bodies not submit appropriate Annual Reports at least ten days before [next year's] budget review meetings...the Committee will seriously consider not endorsing their budgets in accordance with the rules and conventions of Parliament' (ATC No 25-1999, 10 March 1999, p 171). In this case the Committee has attempted to use its budget approval power to make sure that executive reporting is useful and meaningful in the future.

Another way in which parliamentary committees can enforce executive accountability is through their power to summon members of executive bodies to explain their actions. This power is rooted in s 56 of the Constitution as well as the Powers and Privileges of Parliament Act 91 of 1963. In addition, this power is spelled out in the Rules of the National Assembly. Rule 52(1)(c) states: 'A portfolio committee shall...monitor, investigate, enquire into and make recommendations relating to any aspect of the legislative programme, budget, rationalisation, restructuring, policy formulation or any other matter it may consider relevant, of the government department or departments falling within the category of affairs assigned to the committee...and may for that purpose consult or liaise with such department or departments'.

While summoning members of executive bodies to explain their policies or actions represents a less direct method of enforcing oversight than budget approval, the value of public exposure can be a significant tool to impose sanctions or influence policy. However, in order for this type of enforcement to be applied effectively, committees must be proactive about holding public hearings or requesting presentations from executive bodies.

Based on the requirements of the Constitution, and in the light of the existing parliamentary oversight practices and procedures, we now proceed to make further recommendations regarding measures to ensure effective accountability. The principle on which we base the following recommendations is a recognition that the executive and all organs of state are constitutionally accountable; and a corresponding recognition that the NA has a constitutional obligation to scrutinise and oversee executive action (see especially section 42(3)). Parliament cannot fail to exercise its oversight function any more than it can fail to exercise its legislative function. In particular there is an obligation on the NA not only to put in place mechanisms to exercise this function under s 55(2), but also to respond appropriately. At the very minimum the NA must put in place mechanisms to ensure the accountability of executive organs of state in the national sphere of government (government departments, the administration and entities under the direct control of the cabinet).

The recommendations we make fall broadly under the following three headings: legislation; structures; and amendment to the rules and orders of the NA and NCOP.

6.1 Recommended Legislation: 'Accountability Standards Act'

We recommend that legislation, such as an Accountability Standards Act, be passed to complement the Public Finance Management Act (which will come into force in April 2000) which will serve the following purposes:

(i) partially to fulfill the NA's constitutional obligations for establishing accountability mechanisms;

(ii) to set the broad framework and minimum requirements for accountability; and

(iii) to provide an authoritative and mandatory framework within which committee members can perform their oversight task.

Earlier in our report we pointed out that parliamentary government and the party system can be a powerful obstacle to effective accountability. It is said that committee members who belong to the majority party are uncomfortable with and fear the consequences of calling 'their' minister to account. While effective oversight activity is ultimately dependent on the willingness of members of Parliament to perform it, the proposed legislation will go some way towards providing the legal back-up and justification for the exercise of this function.

The Act should provide for the following:

(i) Amendatory accountability

Amendatory accountability refers to the duty, inherent in the concept of accountability, to rectify or make good any shortcoming or mistake that is uncovered. This Act should give strong effect to the constitutional requirements of accountability. Presently there is no effective machinery by which Parliament can compel the executive or an organ of state to answer to it. But as has been highlighted the South African constitution makes accountability to Parliament mandatory. Accountability is therefore removed from the realm of vague political convention to that of concrete constitutional law. Interaction between branches of government should be governed by the principles of co-operation set out in chapter 3 of the Constitution, but Act should oblige executive and organs of state to answer and submit to scrutiny, as well as imposing on them an obligation to redress grievances. This means that remedial action should be authorised for exposed errors, defects of policy or mal-administration. This form of amendatory accountability is essential to an effective system of reporting.

What mechanisms can be put in place to realise amendatory responsibility in the face of what may be a recalcitrant and unrepentant executive? Firstly, the question of who is accountable needs to be answered. Ministers are collectively and individually accountable to Parliament (see the above discussion of ministerial responsibility in Chapter III). The extent to which they are held accountable for their failings is an intensely political question. However, where those in political office have made themselves guilty of corruption or financial misconduct responsibility should be legislated, just as it is in the case of civil servants. In terms of the Public Finance Management Act offences by accounting officers (Heads od Departments or CEOs of institutions) are punishable either by a fine or imprisonment.

The degree to which civil servants should be held accountable is a vexed question. Clearly junior civil servants cannot be held accountable on issues of policy. However, Parliament has the right to demand at least explanatory accountability (why and how a policy or legislation was implemented) from each and every public servant. Traditionally Ministers have had to account for policy and broad outcomes, and the accountability to Parliament of public servants was limited to the non-political matters such as the detail of implementation and specific outputs. In Commonwealth systems it is still the rule that civil servants cannot be criticised. In an administrative setting where many governmental functions are being privatised or hived off to agencies outside ministerial control the traditional doctrine of ministerial accountability is clearly inadequate. In our political system it is true to say that high-ranking public servants are not merely implementers but also play an important role in advising their Ministers and formulating policy with or for them. It may therefore be that it is appropriate to require more accountability from senior public servants, and not to allow them to shelter behind their Minister as 'faceless' public servants. On the other hand an obvious danger exists that Ministers may

attempt to make scapegoats out of their public servants.

Improving the accountability of senior public servants to Parliament may require first clearing up the lines of accountability between the bureaucracy and the Ministers. The relationship between the Ministers and their D-Gs is the crucial link in the chain of accountability. As is pointed out above the traditional view of ministerial accountability, with all its vaguenesses and uncertainties is not conducive to meaningful parliamentary oversight. The relationship Ministers and D-Gs needs to be formalised and responsibility allocated. Once this is done as between the bureaucracy and the Ministers principles need to be developed which guide accountability to Parliament. For instance Ministers might be responsible for setting the policy agenda, specifying policy outcomes, and the departmental outputs necessary to achieve those outcomes. D-Gs would be responsible to their Ministers for the quantity and quality of outputs delivered. Ministers would in turn be accountable to Parliament for the outputs chosen and for the outcomes of those choices. We recommend that a set of principles covering the accountability of senior civil servants and Ministers be included in the proposed legislation.

With regard to structuring the relationship between Ministers and their public servants it is interesting to note that the Public Finance Management Act requires that the contracts of employment of accounting officers must, where possible, include performance standards. Contracts containing performance standards should be made mandatory for all senior public servants.

As part of public sector reform the Department of Public Service and Administration has drawn up a Code of Conduct for public servants and details their relationship with the legislature. The accountability of regular public servants should take place through the proper application of the Public Service Act and the relevant regulations. In this respect the *White Paper on Transforming Public Service Delivery* (also known as the Batho Pele White Paper) spells out policy framework and practical implementation strategy for transforming public service delivery. The document spells out eight transformation principles, among them the citizens' right of redress and value for money in the public service.

The role of Parliament would be to see that the laws governing the public service are properly enforced and that preventative policies are put in place. In this respect the work of the Public Protector and the Public Service Commission should be of value in guiding Parliament and alerting it to problem areas.

(ii) Prescribed standards of administrative accountability

The Public Finance Management Act demands financial accountability from a range of listed entities in different forms in its schedules. It is due to replace the Reporting by Public Entities Act 93 of 1992. Constitutional institutions, made up predominantly of the Chapter 9 institutions are listed in Schedule 1 and special reporting procedures apply. Nineteen of what are termed 'major public entities', being the large parastatals such as ESKOM and the SABC, are listed in Schedule 2. They possess full managerial autonomy, with the government only being able to intervene through its power as shareholder. Schedule 3 lists 73 public entities that possess varying degrees of autonomy, including the South African Revenue Service, the Financial Services Board, and the South African Rail Commuter Corporation. The existing Schedules must be amended by the Minister of Finance to include public entities presently not included. There is a potentially vast range of bodies that need to be added – a recent search by the Office of the Auditor-General revealed some 648 entities that ought to be accountable to Parliament. The Public Finance Management Act defines 'public entity' as:

'(a) a national government business enterprise

(b) a board, commission, company, corporation, fund or other entity (other than a government business enterprise) which is-

i. established in terms of national legislation;

ii. fully or substantially funded either from the National Revenue Fund, or by way of a tax, levy or other money imposed in terms of national legislation; and

iii. accountable to Parliament.'

It is crucial that the Schedules to the Act are amended rapidly so that they fully reflect the number of public entities that ought to be accountable.

The annual report of a public entity, the audited financial statements for that year and the auditors' report on those statements must be transmitted to the Minister accountable for that entity or within whose portfolio its falls. The Minister must then table the report and financial statements in Parliament. This provision is to be welcomed – in the past the reporting and tabling was governed by the enabling statutes and these often include arbitrary distinctions so that some entities have their reports tabled in Parliament while others report only to the relevant Minister. As the provisions of the Finance Management Act override other legislation dealing with finances, uniformity will be achieved in this respect.

If accountability is to be made effective, it is necessary to set objectives or standards against which performance can be assessed and measured. If this is not done then Parliament's oversight role is unclear because there are no identifiable criteria by which to judge the reporting bodies. Consequently the exercise of oversight becomes difficult and often meaningless.

The Public Finance Management Act focuses on the basics of financial management and limits itself to financial accountability. It is encouraging that the Act broadens existing reporting requirements by prescribing that both the annual report and audited financial statements must include particulars on any material losses; unauthorised, irregular as well as fruitless and wasted expenditure; any criminal or disciplinary steps taken as a result; and any material losses recovered or written off.

However other forms of accountability, such as policy implementation and the achievement of objectives, are equally crucial to the accountability function. In this regard the Act contains some provisions aimed at achieving performance management: when the annual budget is introduced in the NA the accounting officer must also submit 'measurable objectives' for each main division within a vote, the achievement of which must be reflected in the annual report. Thus section 40(3)(a) provides that the annual report of a department, trading entity or constitutional institution must:
'fairly present the state of affairs of the department, trading entity or constitutional institution, its business, its financial results, *its performance against predetermined objectives* and its financial position at the end of the financial year concerned.'(our italics)

Properly utilised section 40(3)(a) is a powerful tool in the hands of parliamentary committees. Since departments and bodies are now obliged by law to set objectives and detail the extent to which they have achieved them the onus is on Parliament to make use of this information. It is important that these set objectives are not 'soft' or too vague. In this regard committees will have to assert themselves to ensure that objectives set are relevant, appropriate and that their achievement is measurable.

A similar system where targets or objectives are set by the body itself is applied in New Zealand. In terms of the Public Finance Act every Crown entity (covering agencies, authorities and roughly the same as the bodies to which our Public Finance Management Act applies) must submit to the responsible minister a statement of intent (see Appendix 1 for an extract from the Act). This statement of intent sets out among other things the following: the objectives of the Crown entity or group, the nature and scope of the activities to be undertaken by the Crown entity or group, and the performance targets and other measures by which the performance of the Crown entity or group may be judged in relation to its objectives. This statement of intent is then tabled in Parliament by the responsible minister. At present the New Zealand State Services Commission is undertaking a project called the Crown Entities Initiative, which is looking amongst other things at the accountability of Crown entities to Parliament.

Three types of financial oversight activity can be isolated:
- Financial and compliance audits determine whether there has been proper financial management, whether financial reports are fairly presented and whether there has been compliance with applicable law and regulations. This aspect is largely regulated by the Public Finance Management Act and encompasses the work undertaken by the Auditor-General.

- Management audits seek to determine whether a department or other organ of state is managing its resources in an economical and efficient way.

- Programme evaluation audits can be used to determine whether a particular programme has

delivered the intended results or services and whether the objectives established for the programme have been met.

Ideally, as in some other legislatures, a non-partisan agency similar to the Auditor-General would carry out such audits, which are then made available to Parliament for use by it in overseeing and holding the executive accountable. At present the As a first step we recommend that the proposed legislation require reporting in terms of a fixed standard of accountability and performance related criteria by certain categories of organs of state. At a minimum this should enable parliamentary committees to assess the extent to which an organ of state has met targets and complied with policy. If at a later stage resources can be diverted for this purpose, one of three options can be considered:

(aa) Beefing up the existing parliamentary research capacity to undertake management and programme audits.

(bb) Establishing a specialised agency for this purpose. For instance in the United Kingdom the Auditor-General scrutinises accounts to see whether moneys have been spent as allocated and that there has been compliance with the relevant legal provisions. The Comptroller and the National Audit Office undertake value for money audits to assess the efficiency and effectiveness of government programmes.

(cc) Increasing the duties of the Auditor-General's Office. In this regard section 188(4) of the Constitution provides that the A-G 'has the additional powers and functions prescribed by national legislation'. A present the role of the A-G extends beyond pure compliance auditing. Section 3(4) of the Auditor-General Act 12 of 1995 states that: 'The Auditor-General shall reasonably satisfy himself or herself that:....satisfactory management measures have been taken to ensure that resources are procured economically and utilised efficiently and effectively.'

The effect of this is to introduce performance and value for money (the three e's) by looking whether steps have been taken to achieve efficiency and whether policy goals have been clearly defined.

Since departments and other bodies covered by the Public Finance Management Act are now obliged to set measurable objectives and to report on their performance against those objectives (section 40(3)(a)) the question arises who will audit or verify statements made in this regard. The Off ice of the Auditor-General is suited for this task : firstly, that office already undertakes performance audits, and secondly the information about the performance against the set objectives must according to the Act be contained in the annual report and financial statements. The existing audit function of the Auditor-General would also be enhanced because without commitments from departments and bodies it is difficult to carry out performance auditing.

(iii) Prescribed reporting standards

Accountability in its simplest form is linked to oral and written (or electronic) reports. This should remain one of the main conduits for feeding information to Parliament. But it is obvious that absence of requirements and guidelines with which written reports must comply results in ineffective accountability. Reports may contain too much information, overwhelming the accounting body with a mass of detail, or may contain too little relevant information to allow assessment of the body's performance. The Browne Commission of Enquiry (Report of the Committee of Enquiry into the Accountability of Public Corporations, Undertakings and Other Institutions) of 1989 pointed out the importance of ensuring that the information in reports is presented in a way that is a manageable, reasonable, objective and accurate reflection of the performance of the task. The need for a common agreement between the reporting and the receiving bodies regarding the standards and conventions in accordance with which reporting takes place was also highlighted. The report recommended that public entities owe accountability to Parliament at least in respect of the following (at 31):

(a) Do the given mandate and objectives continue to be pursued and complied with;

(b) Is the performance of the entity reported on in a meaningful way;

(c) Is the performance of the undertaking as reported accurate and in line with the objectives; and

(d) Are resources applied as economically, efficiently and effectively as circumstances and the

environment allow in respect of the authorised objective?

We endorse these recommendations.

In addition we propose that the Act provide for:

a. the development of standardised formats for reports;

b. a requirement that reports contain information which establishes the quantity and quality of outputs;

c. the development of performance criteria in terms of which the report is submitted;

d. all reporting bodies to submit written reports to Parliament timeously so that there is an opportunity for the reports to be considered (for example, at least 10 days before the relevant committee meeting is to take place);

e. the mandatory submission of an executive summary of the main points contained in the report;

f. a prescribed minimum number of copies of the report and the executive summary to be submitted by the reporting body; and

g. that where findings or recommendations have been made by Parliament with respect to a department or other body's report that the reporting body must respond to the findings and recommendations formally within a specified time.

(iv) Bodies to be covered by the Act

The question of which bodies should be covered by this Act is a complex one. As indicated above, it may be neither feasible nor desirable for Parliament to hold all organs of state as defined in section 239 to account. There is however in terms of section 55(2)(a) a minimum responsibility on the NA to create mechanisms to ensure the accountability of executive organs of state in the national sphere of government. As a preliminary step, we suggest that*at present* the ambit of the proposed legislation should extend to government departments and the administration and those bodies covered in Schedules 2 and 3 of the Public Finance Management Act. These are bodies which must report to Parliament under this Act and it makes sense and will be easy to extend the ambit of the reporting of those bodies which already account to Parliament on financial matters. In terms of section 47(1) of the Public Finance Management Act the Minister must extend the list of public entities included in schedule 3 to include those public entities which are not listed. At the same time it must be borne in mind that a range of bodies not yet added to the Schedules to the Act will continue to report to Parliament in terms of their enabling legislation, where this requires it. A preliminary list of those bodies which should be covered should be set out in the proposed legislation (which will mirror the list in the Public Finance Management Act), and incremental changes and additions will be made to it as other organs of state that should account to Parliament are identified. This approach would be in line with the NA's responsibilities under s 52(2)(b) which provides for a broad and flexible oversight function. The list of public entities which should be accountable to Parliament could gradually be extended, taking into account resource constraints and the need for reporting. The proposed legislation should not cover bodies that for reasons of national security should be excluded, or constitutional entities for reasons outlined below.

(v) Who can be called to account?

Consideration must be given to who should be called to account. This may vary depending on the circumstances. Our Constitution makes provision for both ministerial and administrative responsibility and both the NA (section 56) and the NCOP (section 69) have powers to summon 'any person' to appear before them. In general terms ministers are responsible to account for the development of policy while the officials under them are responsible for its implementation. However it must be noted that with the increase in growth and complexity of government departments this distinction has been blurred and civil servants can and do make important policy decisions. In addition civil servants provide information that is often outside the knowledge of ministers. In this regard the Act should recognise that ministers and officials can be called to account.

(vi) Procedure on receipt of reports

The Act should require the Rules of the NA and the NCOP to set out a prescribed procedure that should be followed on receipt of reports. Our recommendations in this regard are outlined under (3) below.

6.2 Recommended Structures

We are of the view that the present committee system can be very effectively used as a primary mechanism to ensure accountability and our report has been mindful of avoiding the unnecessary proliferation of the present committee structure. We have been at pains to point out that, like its law-making function, the oversight role is one of Parliament's enumerated functions in the Constitution. Ideally this task should not always be entrusted to specific bodies or committees within Parliament but should become an integral part of the work of all parliamentary bodies and structures. This will ensure the effective performance of the oversight task and will contribute greatly towards developing the values of transparency and accountability on which our Constitution is based. Such an approach will also contribute towards the achievement of co-operative government. It is proposed that oversight of these bodies could take place through existing portfolio and select committees, so that each committee is entrusted with one of its primary functions as required by the Constitution. At this point it should be noted that the internal functioning of the committee system is in need of urgent attention: issues of Hansard recording, staffing, expertise and resources need to be addressed if they are to perform their tasks effectively (in this regard we also note the concerns of the Standing Committee on Public Accounts regarding its very heavy workload).

A measure that can be taken to enhance the existing committee system is for the portfolio committees to make increased use of the departmental audit reports submitted by the Auditor-General to the Standing Committee of Public Accounts (PAC). Our information is that these reports have been under-utilised by portfolio committees. The interface between the work of the PAC and portfolio committees needs to be improved so that information unearthed tbrough PAC hearings and reports, which is frequently of direct relevance to the work of the portfolio committees, is picked up and used by these committees. One way of achieving this may be to require portfolio committee members to attend PAC hearings when these deal with departments which fall under their ambit.

In light of the fact that a degree of specialist knowledge has been built up by members of the PAC portfolio committees should consider inviting members of the PAC to their hearings where their knowledge of financial and administrative matters may prove useful. This may be one step in building the kind of expertise amongst committee members that is required to perform meaningful oversight.

6.3 Recommended Amendment to Rules of the National Assembly and the NCOP

As pointed out above, the oversight function of the NA and NCOP differs considerably in that the latter is required only to oversee executive action that impact on provincial concerns or inter-governmental relations. Thus certain reports would have to be submitted to both houses of Parliament while others to one house only, usually the NA.

We propose a number of amendments to the Rules of the NA and NCOP to regulate the receipt, documentation and addressing of reports submitted to parliamentary committees. Here we have partly drawn from the practices of the Standing Committee on Public Accounts. Our recommendations include the following:

(i) *all* written or electronic reports submitted to Parliament must be received by a Central Receiving Office. This function could be appropriately performed by a joint office serving both Houses of Parliament. However consideration should be given to entrusting this responsibility to the Information Officer or his or her deputy who Parliament must appoint under s 4(1) of the Open Democracy Bill, 1998;

(ii) the Central Receiving Office must document and acknowledge the receipt of all written and electronic reports and must notify the Speaker of the NA and the chairperson of the NCOP of their receipt;

(iii) the Central Receiving Office must forward the reports to the chairpersons of the relevant parliamentary committees for review and, if necessary, further action and response, and compile and maintain a list of the parliamentary committees to which each report has been submitted;

(iv) each committee must review all reports received and may, within 60 days of reviewing the report, respond to the reporting body if it falls within an established set of criteria to be determined by the committee. Without derogating from the generality of this section, each National Assembly or joint committee must respond to the reporting body if the report reveals or discloses evidence of:

a. abuse of authority, illegality or neglect in the exercise of a power or performance of a duty;

b. injustice to any person or a danger to the environment or the health or safety of an individual or the public;

c. unauthorised use of funds or assets

d. failure to comply with a constitutional or legal obligation;

e. gross failure to meet performance standards;

f. failure to address an issue required by the committee or a constitutional institution;

g. failure to meet the requirements of the Accountability Standards Act including reporting requirements; or

h. any other factor which the committee may deem to be important.

Each NCOP committee must respond to the reporting body if the report reveals or discloses evidence that falls within the NCOP's constitutional oversight role, including inter-governmental relations and national issues impacting on the provinces.

(v) committees may call any party to give further oral or written evidence which they consider necessary for the further investigation of the matter;

(vi) committees must table for noting a list of all reports reviewed, and a full report of their findings on all reports to which a response or further action has been taken or recommended. A copy of the report tabled must simultaneously be sent to the reporting body;

(vii) implicated parties are obliged to respond to the committee's report within 60 days of it being tabled and the committee must decide on the necessary follow-up action;

(viii) part of Parliament's budget should be allocated to providing reports to requesters of information under the Open Democracy Bill.

The above recommendations make it mandatory for all reports to be acknowledged, indexed and reviewed. Responding to the reporting body will take place under specific circumstances only. All reports received and reviewed must be placed before Parliament for noting, and a report must be tabled in Parliament when a committee has responded to it.

6.4 Obligations under the Open Democracy Bill

The above recommendations will not only serve to fulfil Parliament's oversight responsibilities, but also assist in fulfilling it's obligations under the proposed Open Democracy legislation which requires the proper keeping of records and making these available to the public. The principal objects of the Open Democracy Bill 1998 are generally to 'promote transparency and accountability of all organs of state by providing the public with timely, accessible and accurate information and empowering the public to effectively scrutinise, and participate in, governmental decisions making that affects them' (item 2.1 of the memorandum of the Objects of the Open Democracy Bill). The Bill obliges any department of state or functionary or institution exercising a power or duty in terms of the Constitution (including Parliament) to make information available that will assist the public in understanding the powers, duties and operations of governmental bodies (s 3(1)(b)). In particular there is an obligation under the Bill to make all records open to the public. Despite the exemptions to disclosure contained in the Bill, it provides for mandatory disclosure in the public interest where, inter-alia, disclosure of the record would reveal evidence of substantial abuse of authority, illegality or neglect in the exercise of a power or performance of a duty of an official of a governmental body, or unauthorised use of funds or

other assets of a governmental body and 'giving due weight to the importance of open, accountable and participatory administration, the public interest in the disclosure of the record clearly outweighs the need for non-disclosure contemplated in the provision concerned' (s 44). It is clear that parliamentary records, particularly in the form of reports received by governmental bodies, may be an important source of information under the Bill and Parliament has an obligation to document, preserve and provide access to them.

CHAPTER SEVEN
THE ACCOUNTABILITY AND INDEPENDENCE OF CONSTITUTIONAL INSTITUTIONS

In this chapter we begin by looking at the special role of state institutions supporting constitutional democracy (SISCDs) or Chapter 9 institutions. Their constitutionally guaranteed independence is explored from two perspectives: financial and administrative independence. We also make a number of recommendations on how Parliament can ensure the accountability of institutions listed in chapter 9 'without infringing their independence'. We have operated on the premise that SISCDs have been created for several purposes, among them to assist and facilitate Parliament in exercising its oversight function.

7.1 The Special Role of Constitutional Institutions in Supporting Parliament

7.1.1 Constitutional backdrop

Section 181(2) of the Constitution guarantees the independence and impartiality of SISCDs. The Constitution also creates an obligation on other organs of state to 'ensure the independence, impartiality, dignity and effectiveness of these institutions' in section 181(3). At the same time section 181(4) requires these institutions to be accountable to the National Assembly. Our terms of reference require us to look at the question of how Parliament can ensure the accountability of institutions listed in chapter 9 'without infringing their independence'. We are of the view that other bodies, set up in terms of the Constitution and guaranteed independence by it, should also for oversight and accountability purposes be treated the same as the chapter 9 institutions. Here we have in mind for instance the Public Service Commission (PSC) – section 196(2) provides that the PSC is 'independent and must be impartial' while section 196(3) repeats the formula applied to the chapter 9 institutions requiring other organs of state to 'assist and protect the Commission'. The special status of the Financial and Fiscal Commission appears from section 220(2) which provides that the FFC 'is independent and subject only to the Constitution and the law, and must be impartial'.

7.1.2 The role of the constitutional institutions – an aid and complementary to Parliament

The Constitution describes the institutions set up in terms of chapter 9 as 'strengthening constitutional democracy' (section 181(1)). They are an integral part of the checks and balances of a constitutional democracy and accountable government. An important part of each of their functions is calling government to account and strengthening and promoting respect for the Constitution and the law by society at large. In relation to Parliament they have two roles. Firstly they should be seen as complementary to Parliament's oversight function: *together* with Parliament they act as watch-dog bodies over the government and organs of state. Secondly, they support and aid Parliament in its oversight function by providing it with information that is not derived from the executive.As pointed out above, one of the constitutional functions of Parliament is to be an oversight body to provide a check on the arbitrary use of power by the executive. However, with the complex nature of modern government, members of parliament often do not have the time and resources to investigate in depth, or because of party discipline do not have the political independence that is required to arrive at an impartial decision on the complaint. Hence state institutions supporting constitutional democracy have been created to assist parliament in its traditional functions. This function is most obvious in relation to the office of the Auditor-General which performs the primary part of oversight of financial matters, but this is clear also in relation to the other institutions in chapter 9. The Public Protector for example has as its main function the investigation of improper conduct in state or government affairs and in the public administration which also forms a crucial part of Parliament's oversight role. Similarly, the Human Rights Commission not only ensures the protection and development of human rights but is the also the main vehicle through which the implementation of socio-economic rights in government departments is monitored. Thus Parliament's oversight function can be enhanced by ensuring the effective functioning of state institutions supporting constitutional democracy. Much the same arguments may be advanced in respect of other bodies established in terms of the Constitution, including the Judicial Service Commission, the Financial and Fiscal Commission and the Public Service Commission.

7.2 The importance of independence

The independence of these institutions must be seen in relation to their position vis-à-vis the executive branch of government. It has two facets. In the first place, to make institutions dependent on budget allocations received through the very departments that they are required to monitor is not desirable. Secondly, these institutions must be seen by the public to be independent and free of the possibility of influence or pressure by the executive branch of the government. Approval by the executive of budgets, or other issues such as staffing, is thus inconsistent with independence, as well as the need to be perceived as independent by the public when dealing with their cases. This executive power could render impotent state institutions supporting constitutional democracy through the potential denial of both financial and human resources. Furthermore, the special constitutional features of these institutions are not recognised as executive priorities are set. The effect could be that Parliament itself begins to view the institution in question as another government agency. These factors were unanimously noted by the Constitutional Court in the recent decision of *New National Party of South Africa v Government of the Republic of South Africa* 1999 (5) BCLR 489 (CC), where the court held that both financial and administrative independence were important to ensure the independence of the Independent Electoral Commission. The findings of the court in this regard are equally applicable to other state institutions supporting constitutional democracy. Emphasis on the financial and administrative independence of the institutions, discussed below, does not of course imply that constitutional institutions must not be accountable, but in order to satisfy the provisions of the Constitution, they must be accountable directly to Parliament and not the executive.

7.2.1 Financial Independence

Financial independence implies the ability to have access to funds reasonably required to perform constitutional obligations. While this does not mean that these institutions can set their own budgets, the NA must consider what is reasonably required in the light of other national interests. A common feature of many constitutional institutions is that their budgets are appropriated through other government departments. In the light of the independence guaranteed to constitutional institutions by the Constitution, this arrangement is fundamentally problematic and its constitutionality well open to question. This was also the observation of the Constitutional Court in the *New National Party* case. The court held that Treasury Instruction K5 issued under s 39 of the Exchequer Act 66 of 1975, which requires bodies in receipt of state funding to account to the accounting officer of a government department, was inappropriately applied to constitutional commissions such as the Independent Electoral Commission. According to the court, the essence of the problem was that Instruction K5 is designed 'to cater for a situation in which a department makes funds available from its own budget to a public entity for the performance of certain functions'. The court held this arrangement was fundamentally unsuited to independent institutions such as the Independent Electoral Commission. It noted (at [89]) that under Instruction K5,

'[t]he accounting officer of the department is empowered and required to do two things which are by their nature invasive of the independence of the public entity. Firstly, the accounting officer can stipulate further conditions considered desirable and which must be fulfilled before any further money is paid to the public entity. Secondly he or she is obliged to perform an evaluative role in relation to the public entity. The accounting officer can pay money over to the entity only if satisfied that its objectives have been achieved and that any relevant conditions which have been placed on the financial assistance have been complied with. If Instruction K5 were validly to be applied to the Commission, the accounting officer of the department could refuse to give the Commission money if, in his or her opinion, the work of the Commission did not contribute to a fair and free election or had failed to comply with a condition imposed upon it by the accounting officer. If this were so, the independence of the Commission would clearly be undermined.'

The court held that *[i]t is for Parliament, and not the executive arm of government, to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate.* The Commission must accordingly be afforded an adequate opportunity to defend its budgetary requirements before Parliament or its relevant committees' (at [98], our emphasis). In their submissions to us, many constitutional institutions have also pointed out that the present arrangement may result in a very low priority being given to constitutional institutions as government departments may be slow in recognising the interests of an institution which does not form part of the core business of the department. The very direct control by the executive of constitutional institutions can have a devastating effect on the independence and credibility of these offices.

As much as their special constitutional role demands that care be taken to secure their independence

the constitutional institutions must remain accountable for the manner in which they spend their budgets. The Public Finance Management Act requires that the accounting officer of a constitutional institution must submit to Parliament the institution's annual report and financial statements, and the Auditor-General's report on those statements within one month of the receipt of the Auditor-General's report.

7.2.2 Administrative Independence

Linked to financial independence is the ability of constitutional institutions to perform their functions without administrative control by the executive. Administrative independence implies control over matters directly connected with the functions that such institutions must perform. This meant, according to the court in the *New National Party* case, that 'the executive must provide the assistance that the Commission requires to ensure its independence, impartiality, dignity and effectiveness.' For the same reasons outlined above, this means that the direct supervisory function on the work of constitutional institutions should be performed by Parliament rather than a government department. Presently constitutional institutions report to the NA through associated portfolio committees (for example the Public Protector, Human Rights Commission and Commission on Gender Equality report through the Portfolio Committee on Justice, while the Public Service Commission reports to the NA through the Portfolio Committee on Public Service and Administration). In their submissions to us, many constitutional institutions have pointed out that due to the workloads of these Committees there is no tangible or visible follow up of the matters raised or the recommendations which are made in reports. In addition it has been pointed out that uniform rules and practices need to be set in place for the submission of reports including length, frequency and content.

7.3 Recommended Legislation: Accountability and Independence of Constitutional Institutions Act

In the light of the above discussion we proceed to make recommendations regarding the ways in which the accountability and independence of constitutional institutions may be secured. Our recommendations fall into two categories, viz. legislation, and structures.

It is recommended that the accountability and independence of constitutional institutions be outlined under separate legislation. This legislation should recognise the interrelationship between these institutions and Parliament's oversight function and would ensure their independence. In this way effect will also be given to sections 181(3) and 196(3) of the Constitution which requires legislative and other measures to ensure the independence and impartiality of these institutions. The Act should cover the institutions listed in s 181(1) of the Constitution, viz:

The Public Protector;

The Human Rights Commission;

The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities;

The Commission for Gender Equality;

The Auditor-General; and

The Electoral Commission.

In addition it should also cover those institutions set up in terms of the Constitution which perform similar functions including:

The Independent Broadcasting Authority;

The Public Service Commission;

The Financial and Fiscal Commission; and

The Judicial Service Commission.

The Act should provide for the following:

i. the full financial independence of constitutional institutions. To give effect to this it should be

provided that the budget of these institutions should not be linked to the budget of a government ministry, ensuring that they will not be vulnerable to political pressure by way of financial penalties. The options are a separate vote for each institution, or a separate vote for all institutions as a group. The first option best secures the independence of the institutions. However, it will have to be assessed in terms of the possibly disproportionate accounting and administrative resources that it will require, both on the part of the institutions concerned and the Department of Finance. Providing for a separate vote for the institutions as a group may save scarce accounting and financial resources and also permit easier monitoring of the entire cost of the Commissions by Parliament and civil society. If this option were accepted it would enhance the control that the bodies have over their budgets but also demand greater responsibility. In terms of the current framework as we understand it an accounting officer from one of the institutions would have to account for all the funds in the vote. The option of a separate vote for the institutions as a group would also require that the institutions establish a central administrative structure or secretariat to gather the budget submissions of the various bodies. These would extend to expenditure estimates for the next three years, in order to comply with the medium term expenditure framework (MTEF).

By giving the constitutional institutions a separate budget vote their status as separate constitutional entities is recognised and they would be able to emerge from the shadow of the executive. We regard this as a minimum to achieve fulfil the requirements of the Constitution.

ii. the full administrative independence of constitutional institutions. Provision should be made for parliament, through its relevant committees, to exercise both a supportive and monitoring role for constitutional institutions.

iii. the establishment of a Standing Committee on Constitutional Institutions. The establishment of this Committee appears to be required by s 193(5)(a) of the Constitution, which provides for nominations for membership of constitutional institutions by a Committee of the National Assembly. A more detailed outline of the functions of this Committee follows.

7.4 Recommended Structures: A Standing Committee on Constitutional Institutions (SCOCI)

In general terms this Committee would act both as an accountability and oversight structure. The functions of this Committee (which could operate in a similar fashion to the present Audit Commission) would include:

i. to nominate and make recommendations for appointment of members to constitutional institutions;

ii. to receive from the central receiving office and consider all reports of constitutional institutions;

iii. to hold hearings and call recalcitrant respondents to account before it where such respondents resist the recommendations of the constitutional institution concerned. This practice is followed by similar committees in many countries such as New Zealand and the United Kingdom;

(iv) after having considered the reports to report to Parliament and make appropriate recommendations for changes in legislation or practice;

(v) to support the role of constitutional institutions and to protect and enhance their independence as oversight agencies and in their operations;

(vi) to review results or performance with each constitutional institution and to discuss performance deficiencies or improvements. This is an essential function to ensure accountability as well as resource requirements;

(vii) in consultation with the constitutional institutions to establish uniform rules and practices relating to the submission of reports including length, frequency and content, and to establish procedures for mandatory report-backs to constitutional institutions on the steps which have been taken to implement recommendations made.

In drawing up this report we have been mindful of the financial and human resource constraints under which Parliament is operating, and have as far as possible tailored our recommendations to accommodate existing structures to perform oversight functions. In recommending the establishment of SCOCI we have considered the fact that such a body would serve the dual functions of both an oversight and accountability body. It would in other words provide an important additional

parliamentary mechanism to oversee the executive, and would be a body through which constitutional institutions may be called to account, thus fulfilling two important constitutional obligations set out in s 55(2) of the Constitution.

So that the workload of SCOCI does not affect the carrying out of oversight the bodies it oversees should be 'clustered' where feasible so that those with broadly similar briefs are dealt with together. For instance rather than holding separate hearings for the Human Rights Commission, Public Protector and the Commission on Gender Equality the Committee could deal with them in sequence at certain points during the year.

7.4.1 The Relationship between SCOCI and other Parliamentary Committees

It must be borne in mind that despite the establishment of SCOCI, constitutional institutions would still continue to report to and interact with various other parliamentary committees. For example if the Gender Commission reports on sytemic discrimination against women in the health sector, such information would be of relevance to both the Joint Standing Committee on the Improvement of Quality of Life and Status of Women (JCIQLSW) and the Portfolio Committee on Health.

In addition, presently existing parliamentary committees perform some of the tasks that we propose should be performed by SCOCI. For example the Commission on Gender Equality has a close working relationship with the JCIQLSW, and the Auditor-General accounts to the Audit Commission as well as the Standing Committee on Public Accounts. In addition certain pieces of legislation require the establishment of committees of the National Assembly, for example section 2 of the Public Protector Act 1994 requires the establishment of a committee of the National Assembly to deal with matters referred to it in terms of the Act. The question which arises is whether SCOCI would be best suited to oversee all the work and functions of constitutional institutions or whether existing committees would still have a role to play.

We submit in this regard that existing parliamentary committees, particularly those which perform specific discipline-related functions such as JCIQLSW and/or those that have been set up under governing legislation continue to exist. As pointed out elsewhere in this report, the oversight role is one that should not be limited to a few specialist committees or individuals but should permeate and inform all parliamentary structures. The function of SCOCI as an umbrella oversight and support committee would be tasked with the formulation of general uniform rules and practices governing constitutional institutions, and does not preclude the efficient functioning of other committees designed to achieve more specific objectives.

7.5 Fulfilment of Constitutional Obligations

We propose that these recommendations would considerably enhance the authority of parliament to hold the executive accountable to the people, as well as to give full effect to the independence, impartiality and credibility of constitutional institutions. Both these proposals find support in the practice of many other countries in the world and have proved to be remarkably successful. As the court pointed out in the *New National Party* case (at [78]),

'[t]he Constitution places a constitutional obligation on [other] organs of state to assist and protect the Commission in order to ensure its independence, impartiality, dignity and effectiveness. If this means that old legislative and policy arrangements, public administration practices and budgetary conventions must be adjusted to be brought in line with new constitutional prescripts, so be it'.

CHAPTER EIGHT

SUMMARY OF RECOMMENDATIONS

In summary we have made the following recommendations:

a. legislation in the form of an Accountability Standards Act and an Accountability and Independence of Constitutional Institutions Act;

b. amendment to the Rules of the NA and the NCOP for regulation of reporting to parliamentary committees; and

c. the establishment of a Standing Committee on Constitutional Institutions.

We would be happy to participate in any discussions to further discuss and clarify these recommendations, and report accordingly.

Hugh Corder, Saras Jagwanth and Fred Soltau
Faculty of Law
University of Cape Town
July 1999

APPENDIX I
Public Finance Act (NZ)
V: Reporting by Crown Entities

41C Draft statement of intent
[41C. Draft statement of intent---(1) Every Crown entity named or described in the Sixth Schedule to this Act shall, not later than one month before the commencement of each financial year of the Crown entity, deliver to the Responsible Minister a draft statement of intent relating to that financial year and each of the following 2 financial years.

[[(2) Notwithstanding subsection (1) of this section, one statement of intent may relate to a Crown entity group.]]
Subs. (2) was substituted for the former subs. (2) by s. 35 of the Public Finance Amendment Act 1994.
41D Contents of statement of intent
[41D. Contents of statement of intent---(1) Each statement of intent shall specify for the Crown entity or, where relevant, the [[Crown entity group]], in respect of each of the financial years to which it relates, the following information:

(a) The objectives of the Crown entity or group:

(b) The nature and scope of the activities to be undertaken by the Crown entity or group:

(c) The performance targets and other measures by which the performance of the Crown entity or group may be judged in relation to its objectives:

(d) A statement of accounting policies:

(e) Where required by the Responsible Minister, the ratio of consolidated shareholders' funds (or equivalent) to total assets, and definitions of those terms:
(f) Where required by the Responsible Minister, a statement of the principles adopted in determining the distribution of profits to the Crown, together with an estimate of the amount or proportion of annual tax paid earnings (from both capital and revenue sources) that is intended to be distributed to the Crown:

(g) Where applicable, the procedures to be followed before the Crown entity, or any member of the group, subscribes for, purchases, or otherwise acquires shares in any company or other organisation:

(h) Where the Crown entity is named or described in the Fifth Schedule to this Act, a [[statement of output objectives]] specifying the classes of outputs to be produced by the Crown entity or group:

(i) Any activities (not being activities related to a class of outputs specified pursuant to paragraph (h) of this subsection) in respect of which the Crown entity or group will be seeking compensation from the Crown (whether or not the Crown has agreed to provide such compensation):

(j) Such other matters, including the kind of information to be provided to the Responsible Minister during the course of those financial years, as are agreed by the Responsible Minister and the governing body of the Crown entity.

(2) Where required by the Responsible Minister, each statement of intent shall also include the governing body's estimate of the current commercial value of the Crown's investment in the Crown entity or group and a statement of the manner in which that value was assessed.
In subs. (1) the words in the first set of double square brackets were substituted for the former words by s. 36 (a) of the Public Finance Amendment Act 1994; and in para. (h) the words in square brackets

were substituted for the former words by s. 36 (b) of that Act.
41E Completed statement of intent
[41E. Completed statement of intent---(1) The governing body of the Crown entity---

(a) Shall consider any comments on the draft statement of intent that are made to it by the Responsible Minister, not later than 14 days before the commencement of the first of the financial years to which the draft statement of intent relates; and

(b) Shall deliver the completed statement of intent to the Responsible Minister on or before---

(i) The date of the commencement of the first of the financial years to which the completed statement of intent relates; or

(ii) Such later date as the Responsible Minister determines.

(2) Where the governing body of the Crown entity has a duty to act judicially in relation to any matter, nothing in any comments on the draft statement of intent of the Crown entity that are made to it by the Responsible Minister shall derogate from that duty.

41F Laying of statement of intent before House of Representatives

[41F. Laying of statement of intent before House of Representatives---The Responsible Minister shall, within 12 sitting days after the date on which a statement of intent is delivered to the Responsible Minister in accordance with section 41E (1) (b) of this Act, lay a copy of that statement of intent before the House of Representatives.

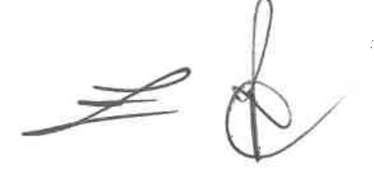
APPENDIX II
PARLIAMENTARY OVERSIGHT OF CHAPTER 9 INSTITUTIONS

List of submissions

26 April 1999	Public Service Commission
29 April 1999	Mr Selby Baqwa, Public Prosecutor
30 April 1999	South African Human Rights Commission
3 May 1999	South African Reserve Bank
4 May 1999	Office of the Auditor-General
6 May 1999	Commission on Gender Equality
14 May 1999	South African Telecommunications Regulatory Authority
14 May 1999	Freedom of Expression Institute
7 June 1999	Independent Broadcasting Authority

ANNEXURE "**THREE**"

ANNEXURE "THREE"



ZZ9-RC-099

OVERSIGHT
AND
ACCOUNTABILITY MODEL

ASSERTING PARLIAMENT'S OVERSIGHT ROLE IN ENHANCING DEMOCRACY

CONTENTS

Chapter 1: Introduction

1.1 Constitutional precepts guiding the vision and mission of Parliament

1.2 Constitutional requirement for mechanisms on oversight

1.3 Composition and mandates of Parliament

1.4 Mandates of focus groups

Chapter 2: The role of Parliament in relation to oversight and accountability as mandated by the Constitution

2.1 Defining oversight

2.2 Defining accountability

2.3 Constitutional provisions expressing powers and functions of Parliament on oversight and accountability

Chapter 3: Institutional characteristics of oversight and accountability and existing mechanisms utilised by Parliament

3.1 Current mechanisms for oversight and accountability

3.2 Tools for oversight and accountability

Chapter 4: New mechanisms for oversight and accountability

4.1 New mechanisms

4.2 Maximising current mechanisms

4.3 General recommendations

Chapter 5: Procedure for amending money bills

5.1 Terms of reference of Budget Focus Group

5.2 Recommendations

Chapter 6: Co-ordination amongst the spheres of government on oversight

6.1 Co-operative government

6.2 Values and principles guiding institutional oversight

6.3 Introducing the parliamentary oversight cycle as a guide for oversight processes

Chapter 7: Increasing the capacity of committees and members

7.1 Training

7.2 Additional support

Chapter 8: Best Practice Guide

8.1 Best Practice Guide (BPG)

Chapter 9: *Projects Focus Group [Constitutional Landscape Governing Oversight]*

9.1 Introduction

9.2 Audit of bodies performing public functions

9.3 Constitutional landscaping

9.4 Review of the rules

Chapter 10: Conclusion

References

Annexures

CHAPTER 1: INTRODUCTION

1.1 Constitutional precepts guiding the vision and mission of Parliament

> Parliament's strategic vision is to build an effective people's Parliament that is responsive to the needs of the people, and that is driven by the ideal of realising a better quality of life for all the people of South Africa and its mission is to represent and act as a voice of the people in fulfilling Parliament's constitutional functions of passing laws and overseeing executive action.

Based on the vision and mission of Parliament and the constitutional requirements Parliament hereby develops mechanisms to guide its work on oversight in the form of an oversight model.

Historically, the 1994 elections ushered in a new democratic order in South Africa. The extraordinary participation by South Africans showed that we desired an end to the divisions of the past and a move towards establishing a society based on democratic values, social justice and fundamental human rights. The process of negotiations, which preceded the 1994 elections, resulted in the drafting of a new Constitution, as adopted on 8 May 1996 by the Constitutional Assembly.

The mandate of Parliament is achieved through passing legislation, overseeing government action, and facilitating public participation and international participation. The role of Parliament includes the promotion of the values of human dignity, equality, non-racialism, non-sexism, the supremacy of the Constitution, universal adult suffrage and a multi-party system of democratic government. It upholds our citizens' political rights, the basic values and principles governing public administration, and oversees the implementation of constitutional imperatives.

Much of Parliament's focus in the first decade of democracy was on ensuring the transformation of South Africa's legislative landscape, in line with the country's first democratic Constitution, Act 108 of 1996. In this process, Parliament's oversight function received less attention, and was compounded further by the reality that the Constitution deals with Parliament's legislative authority in more detail compared to its oversight role.

In giving credence to its increasingly important oversight role, Parliament's new strategic vision, namely to build an effective people's Parliament "... that is driven by the ideal of realising a better quality of life for all the people of South Africa", underpinned the manner in which the organisation began engaging on the need to institutionalise public participation as an integral part of its oversight function. The motivation for political delegations to undertake the management of the legislative and oversight programme of Parliament demands capacity, competence and collective action.

1.2 Constitutional requirement for mechanisms on oversight

Against this backdrop, and in the context of sections 42(3) and 55(2)(b) of the Constitution, as well as

various provisions that imply oversight functions of the National Council of Provinces, Parliament through the Joint Rules Committee established a Task Team on Oversight and Accountability comprising members of both Houses of Parliament, which studied the mandates relating to oversight emanating from the Constitution. The task team established three focus groups, that of, the Projects Focus Group, the Budget and the Committees. The objective was to develop an oversight model for Parliament in line with the Constitution and Parliament's new strategic vision, together with the realignment of resources to fulfil its mandate with greater efficiency.

The model's primary objective is to provide the framework that describes how Parliament conducts oversight. It seeks to improve existing tools of parliamentary oversight, streamline components of the new oversight model with existing components, and enhance Parliament's capacity to fulfil its oversight function in line with Parliament's new strategic direction.

Furthermore, the rationale for the Oversight and Accountability Model was to scrutinise existing practices and/or mechanisms used as a prototype, something to be measured or standardised, and thereafter interrogate and offer alternatives that could be utilised in the future. An oversight and accountability model must therefore comprise the most important, features, which include -

- the values and principles by which Parliament conducts oversight;
- the mechanism or framework to conduct oversight; and
- the processes and resources required for conducting oversight.

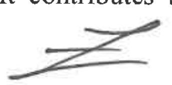
The model is not dogmatic and will adapt from time to time depending on the context and circumstances.

1.3 Composition and mandates of Parliament

Parliament consists of two Houses, namely the National Assembly (NA) and the National Council of Provinces (NCOP).

Section 42(3) of the Constitution provides that the National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the president, by providing a national forum for public consideration of issues, by passing legislation and by scrutinising and overseeing executive action. The Assembly is further required in terms of section 55(2) to provide mechanisms to ensure that all executive organs of state in the national sphere of government are accountable to it; and to maintain oversight of the exercise of national executive authority, including the implementation of legislation, and any organ of state.

The National Council of Provinces represents the provinces to ensure that the provincial interests are taken into account in the national sphere of government as stated in section 42(4) of the Constitution. The Council does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting the provinces. The Council's role is to exercise oversight over the national aspects of provincial and local government. It contributes to



effective government by ensuring that provincial and local concerns are recognised in national policy making and that provincial, local and national governments work together effectively.

In addition, Parliament -

- facilitates public participation, involvement and transparency;
- facilitates co-operative government;
- facilitates international participation; and
- represents the interests of the people.

Based on these mandates, the Constitution further requires Parliament to develop mechanisms for oversight.

1.4 Mandates of focus groups

1.4.1 Projects Focus Group [Constitutional Landscape Governing Oversight]

The terms of reference of this group were to -

- conduct constitutional landscaping;
- conduct an audit of bodies performing public functions;
- analyse the oversight role of institutions supporting democracy; and
- review rules on oversight.

1.4.2 Committees Focus Group

The terms of reference of this group were to -

- draft the best practice guide in respect of oversight practices of committees;
- draft guidelines for portfolio and select committees to allow for joint planning and oversight work;
- draft guidelines on joint planning on protocols for structured communication between the two Houses of Parliament;
- draft recommendations for capacity development of committees; and
- draft recommendations on appropriate record-keeping systems and monitoring mechanisms in the Committee Section.

1.4.3 Budget Focus Group

The terms of reference of this group were to -

- develop procedure for the amendment of money bills; and
- draft legislation on the amendment of money bills.

CHAPTER 2: THE ROLE OF PARLIAMENT IN RELATION TO OVERSIGHT AND ACCOUNTABILITY AS MANDATED BY THE CONSTITUTION

2.1 Defining oversight

The conventional Westminster view on oversight, as inherited by many former British colonies, is often rather adversarial and in some instances oversight is professed to be the purview of opposition politicians and not the legislature as an institution. The emphasis is placed on the oversight role of legislatures, especially as it relates to ensuring government compliance with approved public spending. The task team adopted the following definition of oversight:

> In the South African context, oversight is a constitutionally mandated function of legislative organs of state to scrutinise and oversee executive action and any organ of state.

It follows that oversight entails the informal and formal, watchful, strategic and structured scrutiny exercised by legislatures in respect of the implementation of laws, the application of the budget, and the strict observance of statutes and the Constitution. In addition, and most importantly, it entails overseeing the effective management of government departments by individual members of Cabinet in pursuit of improved service delivery for the achievement of a better quality of life for all citizens.

In terms of the provisions of the Constitution and the Joint Rules, Parliament has power to conduct oversight of all organs of state, including those at provincial and local government level.

The appropriate mechanism for Parliament to conduct oversight of these organs of state would be through parliamentary committees. In conducting oversight, the committee would either request a briefing from the organ of state or visit the organ of state for fact-finding, depending on the purpose of the oversight. The committees would have to consider the appropriate means for conducting oversight to cover all organs of state.

One of the most important aspects of the oversight function is the consideration by committees of annual reports of organs of state and the Auditor-General's reports.

2.1.1 Functions of oversight

The concept of oversight contains many aspects which include political, administrative, financial, ethical, legal and strategic elements. The functions of oversight are:

- To detect and prevent abuse, arbitrary behaviour or illegal and unconstitutional conduct on the part of the government and public agencies. At the core of this function is the protection of the rights and liberties of citizens.

- To hold the government to account in respect of how the taxpayers' money is used. It detects waste within the machinery of government and public agencies. Thus it can

improve the efficiency, economy and effectiveness of government operations.

- To ensure that policies announced by government and authorised by Parliament are actually delivered. This function includes monitoring the achievement of goals set by legislation and the government's own programmes.

- To improve the transparency of government operations and enhance public trust in the government, which is itself a condition of effective policy delivery.

2.2 Defining accountability

Accountability can be broadly defined as -

> a social relationship where an actor (an individual or an agency) feels an obligation to explain and justify his or her conduct to some significant other (the accountability forum, accountee, specific person or agency).
>
> *Ghutto. S*

Accountability is the hallmark of modern democratic governance. Democracy remains clichéd if those in power cannot be held accountable in public for their acts or omissions, for their decisions, their expenditure or policies. Historically, the concept of accountability was closely linked to accounting in the financial sense. It has however moved far beyond its origins and has become a symbol of good governance both in the public and private sectors. Accountability refers to institutionalised practices of giving account of how assigned responsibilities are carried out.

2.2.1 Functions of accountability

The functions of accountability include the following:

- To enhance the integrity of public governance in order to safeguard government against corruption, nepotism, abuse of power and other forms of inappropriate behaviour.

- As an institutional arrangement, to effect democratic control.

- To improve performance, which will foster institutional learning and service delivery.

- In regard to transparency, responsiveness and answerability, to assure public confidence in government and bridge the gap between the governed and the government and ensure public confidence in government.

- To enable the public to judge the performance of the government by the government giving account in public.

Notwithstanding the fact that section 55 of the Constitution enables the National Assembly to maintain oversight over all organs of state and section 92 which enables Parliament to hold the Cabinet

accountable operationally, organs of state at national level and Ministers and their departments are generally held to account by Parliament. At national level, there is direct accountability to Parliament by national departments, national public entities and national bodies such as commissions.

The National Assembly does however have the right to call organs of state at provincial and local level to account, but does not do so operationally unless there are issues of public importance, national interest and shared competencies. Accountability to Parliament by organs of state at provincial and local level must be conducted through observance of the Intergovernmental Framework Relations Act and the principles of co-operative government.

When national departments account to Parliament by means which include the submission of reports, for example annual reports etc, Parliament needs to be informed of the complete picture of the performance of the functions reported on. The consideration of the annual report of the department alone may not give the complete picture of the performance of the functions. This is so because national departments have public entities that are agencies of implementation of their functions, and their activities may not be reported in the annual report of the national department.

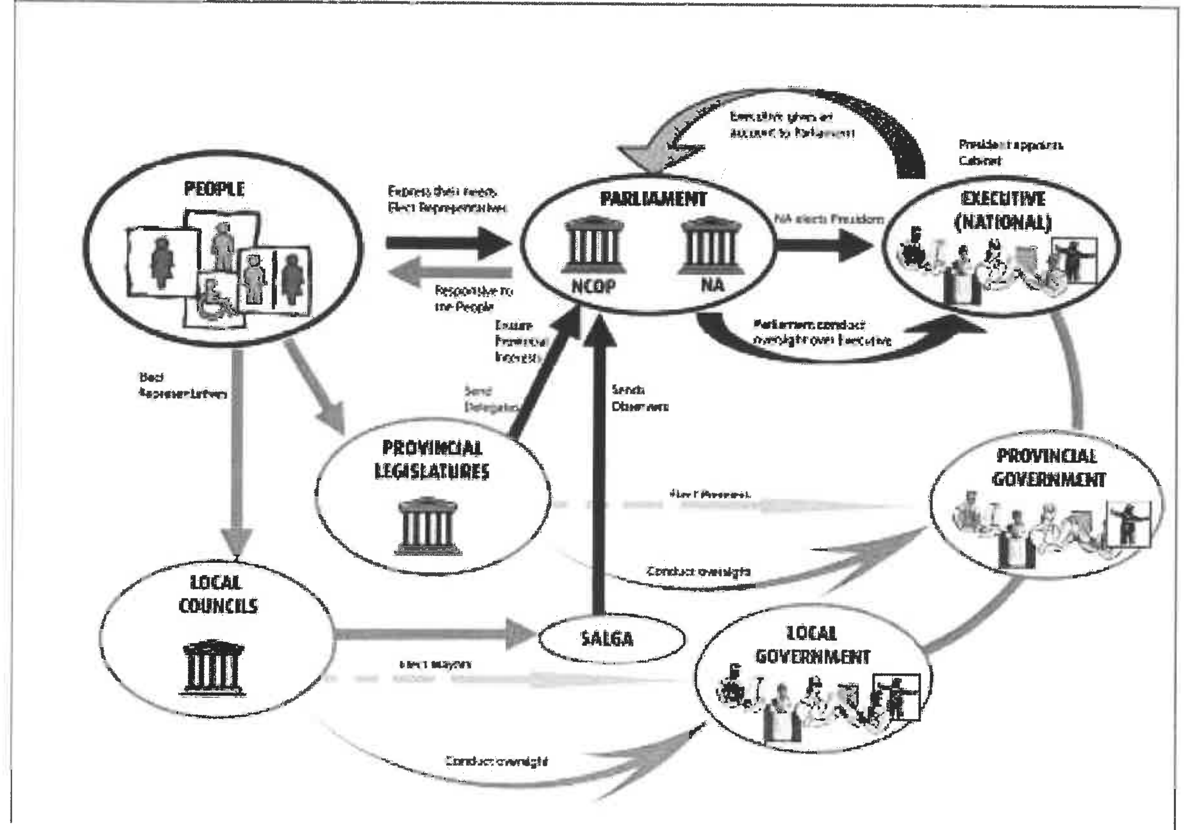
The annual reports of organs of state that report to national departments must be considered when evaluating the annual report of the national department for Parliament to have a complete picture of the performance of the functions reported on.

If further accountability is required, committees could use the power provided in the Constitution to access information even from public bodies that are at provincial or local government level in order that the committee has complete information and details on the public function reported on. Where a parliamentary committee is reviewing the performance of a national organ of state, the committee must ensure that the performance of its other entities, ie subsidiaries of the main organ of state, is included in the report to Parliament. If this is not included in the report, Parliament should in terms of sections 56(b) and 69(b) of the Constitution require of the entity to report to it so that Parliament has the complete picture.

In conducting oversight and accountability, the principles of co-operative government and intergovernmental relations must be taken into consideration, including the separation of powers and the need for all spheres of government and all organs of state to exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.

The illustration (Figure 1) below depicts the linkages in creating efficiency and ensuring co-ordination on co-operative government which ultimately lead to oversight and accountability at national, provincial and local levels of government.

Figure 1



2.3 Constitutional provisions expressing powers and functions of Parliament on oversight and accountability

The relevant constitutional provisions that refer directly and indirectly to oversight and accountability are the following:

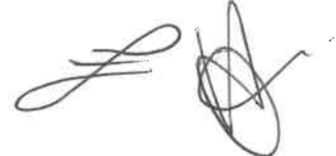
Section	Provision
Section 41(2)	An Act of Parliament must establish or provide for structures and institutions to promote and facilitate intergovernmental relations and must provide for appropriate mechanisms and procedures to facilitate settlement of inter-governmental disputes.
Section 42(3) & (4)	(3) The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinising and overseeing executive action. (4) The National Council of Provinces represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. It does this mainly by participating in the national legislative process and by providing a national forum for public consideration of issues affecting provinces.
Section 55(2)	The National Assembly must provide for mechanisms – (a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and (b) to maintain oversight of - (i) the exercise of national executive authority, including the implementation of legislation; and (ii) any organ of state.
Section 56	The National Assembly or any of its committees may - (a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents; (b) require any person or institution to report to it; (c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and (d) receive petitions, representations or submissions from any interested persons or institutions.

Section 66(2)	The National Council of Provinces may require a Cabinet member, a Deputy Minister or an official in the national executive or a provincial executive to attend a meeting of the Council or a committee of the Council.
Section 67	Not more than 10 part-time representatives designated by organised local government representing the different categories of municipalities may participate in the proceedings of the National Council of Provinces when necessary, but may not vote.
Section 69	The National Council of Provinces or any of its committees may – (a) summon any person to appear before it to give evidence on oath or affirmation, or to produce documents; (b) require any person or institution to report to it; (c) compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and (d) receive petitions, representations or submissions from any interested persons or institutions.
Section 70(1)	The National Council of Provinces may – (a) determine and control its internal arrangements, proceedings and procedures; and (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.
Section 89	(1) The National Assembly, by a resolution adopted with a supporting vote of at least two thirds of its members, may remove the President from office only on the grounds of – (a) a serious violation of the Constitution or the law; (b) serious misconduct; or (c) inability to perform the functions of office. (2) Anyone who has been removed from the office of President in terms of subsection (1)(a) or (b) may not receive any benefits of that office, and may not serve in any public office.

Section 92	(2) Members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions. (3) Members of the Cabinet must … provide Parliament with full and regular reports concerning matters under their control.
Section 93(2)	Deputy Ministers … are accountable to Parliament for the exercise of their powers and the performance of their functions.
Section 100(2)	If the national executive intervenes in a province by assuming responsibility for the relevant obligation which that province cannot or does not fulfil, the national executive must submit a written notice of the intervention to the National Council of Provinces within 14 days after the intervention began. The intervention must end if the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention. The Council must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the national executive.
Section 102	(1) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the Cabinet excluding the President, the President must reconstitute the Cabinet. (2) If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the President, the President and the other members of the Cabinet and any Deputy Ministers must resign.
Section 114(2)	A provincial legislature must provide for mechanisms – (a) to ensure that all provincial executive organs of state in the province are accountable to it; and (b) to maintain oversight of - (i) the exercise of provincial executive authority in the province, including the implementation of legislation; and (ii) any provincial organ of state.

Section 125(4)	Any dispute concerning the administrative capacity of a province in regard to any function must be referred to the National Council of Provinces for resolution within 30 days of the date of the referral to the Council.
Section 133 (2) & (3)	(2) Members of the Executive Council of a province are accountable collectively and individually to the provincial legislature for the exercise of their powers and the performance of their functions. (3) Members of the Executive Council of a province must provide the provincial legislature with full and regular reports concerning matters under their control.
Section 139(2)	If a provincial executive intervenes in a municipality which cannot or does not fulfil an executive obligation by assuming responsibility for the relevant obligation in that municipality, the provincial executive must submit a written notice of the intervention to the Cabinet member responsible for local government affairs and the relevant provincial legislature and the National Council of Provinces within 14 days after the intervention began. The intervention must end if the Cabinet member responsible for local government affairs disapproves the intervention within 28 days after the intervention began or by the end of that period has not approved the intervention, or if the Council disapproves the intervention within 180 days after the intervention began or by the end of that period has not approved the intervention. The Council must, while the intervention continues, review the intervention regularly and may make any appropriate recommendations to the provincial executive.
Section 139(3)	When the relevant provincial executive intervenes in a municipality which cannot or does not fulfil an executive obligation by dissolving the Municipal Council, the provincial executive must immediately submit a written notice of the dissolution to the Cabinet member responsible for local government affairs and the relevant provincial legislature and the National Council of Provinces. The dissolution takes effect 14 days from the date of receipt of the notice by the Council unless set aside by that Cabinet member or the Council before the expiry of those 14 days.

Section 139(6)	If a provincial executive intervenes in a municipality in terms of subsection (4) or (5), it must submit a written notice of the intervention to – (a) the Cabinet member responsible for local government affairs; and (b) the relevant provincial legislature and the National Council of Provinces within seven days after the intervention began.
Section 146(6)	A law made in terms of an Act of Parliament or a provincial Act can prevail only if that law has been approved by the National Council of Provinces.
Section 154(1)	The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.
Section 155(6)	Each provincial government must establish municipalities in its province in a manner consistent with the applicable national legislation and, by legislative or other measures, must - (a) provide for the monitoring and support of local government in the province; and (b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.
Section 155(7)	The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority.
Section 194(1)	The Public Protector, the Auditor-General or a member of a Commission established by this Chapter may be removed from office only on – (a) the ground of misconduct, incapacity or incompetence; (b) a finding to that effect by a committee of the National Assembly; and (c) the adoption by the Assembly of a resolution calling for that person's removal from office.



Section 199(8)	To give effect to the principles of transparency and accountability, multi-party parliamentary committees must have oversight of all security services in a manner determined by national legislation or the rules and orders of Parliament.
Section 201(3) & (4)	(3) When the defence force is employed in co-operation with the police service; in defence of the Republic or in fulfilment of an international obligation, the President must inform Parliament promptly and in appropriate detail. (4) If Parliament does not sit during the first seven days after the defence force is employed as envisaged in subsection (2), the President must provide the required information to the appropriate oversight committee.
Section 203	(1) The President as head of the national executive may declare a state of national defence, and must inform Parliament promptly and in appropriate detail of - (a) the reasons for the declaration; (b) any place where the defence force is being employed; and (c) the number of people involved. (2) If Parliament is not sitting when a state of national defence is declared, the President must summon Parliament to an extraordinary sitting within seven days of the declaration. (3) A declaration of a state of national defence lapses unless it is approved by Parliament within seven days of the declaration.
Section 206(9)	A provincial legislature may require the provincial commissioner of the province to appear before it or any of its committees to answer questions.
Section 210	National legislation must regulate the objects, powers and functions of the intelligence services, including any intelligence division of the defence force or police service, and must provide for - (a) the co-ordination of all intelligence services; and (b) civilian monitoring of the activities of those services by an inspector appointed by the President, as head of the national executive, and approved by a resolution adopted by the National Assembly with a supporting vote of at least two thirds of its members.

Section 216(3) & (4)	(3) A decision to stop the transfer of funds due to a province .... may be enforced immediately, but will lapse retrospectively unless Parliament approves it. (4) Parliament may renew a decision to stop the transfer of funds for no more than 120 days at a time.
Section 231(2), (3) & (4)	(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3). (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time. (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

In the context of the constitutionally mandated provisions of accountability and oversight as listed above, the chapters below detail the existing processes undertaken by the South African Parliament to fulfil its constitutional oversight and accountability obligations. The focus is also placed on the gaps in current rules pertaining to oversight, and some mechanisms are recommended to address these challenges.

CHAPTER 3: INSTITUTIONAL CHARACTERISTICS OF OVERSIGHT AND ACCOUNTABILITY AND EXISTING MECHANISMS UTILISED BY PARLIAMENT

3.1 Current mechanisms for oversight and accountability

Parliament has established mechanisms to fulfil its oversight and accountability mandates in terms of the Constitution and under the rules established by the two Houses, individually and jointly. Committees can interact with civil society organisations, organised business, experts and professional bodies as a way of enhancing accountability and can call Ministers and departmental heads to account on any issue relating to any matter over which they are effecting accountability within the ambit of the provisions of sections 56 and 69 of the Constitution and legislation. Current practices and oversight mechanisms include the committees of Parliament (with their associated practices) and plenary processes as listed below.

3.1.1 Practices of committees to effect oversight and accountability

The mandates of the committees are provided for in the rules of each House and the Joint Rules. Committees offer a setting which facilitates detailed scrutiny of legislation, oversight of government activities and interaction with the public and external factors. Consideration of committee reports is necessary because committees work as intermediary bodies between interest groups and government and are an entry point for citizens to the work of Parliament. In addition, the work of committees include study visits that entail physical inspections, conversing with people, assessing the impact of delivery and developing reports for adoption by committees which contain recommendations for the Houses to consider. In exercising oversight, committees often obtain first-hand knowledge from people engaged in the direct implementation of specific programmes and/or who are directly responsible for service delivery. In order to evaluate the work of government from a broader perspective, committees may invite experts from outside government to provide background knowledge and analysis on relevant issues.

Reports and mandates of committees

Parliamentary committees are established as instruments of the Houses in terms of the Constitution, legislation, the Joint Rules, Rules of the NCOP, Rules of the NA, and resolutions of the Houses to facilitate oversight and the monitoring of the Executive, and for this purpose they are provided with procedural, administrative and logistical support - they are regarded as the engine rooms of Parliament.

Parliamentary committees have various tools of oversight as listed above, including departmental briefing sessions, annual and departmental budget analyses, calls for submissions and petitions from the public, the consideration of strategic plans and annual reports, and public hearings.

Whilst committees have established ways of conducting their oversight functions, their business generally runs parallel to government's political cycle, unless there are specific "ad hoc" oversight functions that are required. In programming their oversight activities, they would thus act in a responsive/reactive manner.

A committee conducts its business on behalf of the House and must therefore report back to the House on matters referred to it for consideration and report. A committee may also report on any other matter within the scope of its mandate that it considers necessary in terms of NA Rule 137(2) and NCOP Rule 102(2).

When a committee reports its recommendations to the House for formal consideration and the House adopts the Committee report, it gives the recommendations the force of a formal House resolution pursuant to its constitutional function of conducting oversight. The House then also monitors executive compliance with these recommendations.

The following types of committee reports are presented to the House:

1. Legislation (in terms of sections 74, 75, 76 or 77 of the Constitution);
2. Study tours;
3. Oversight activities of committees, including responses to annual reports and financial

statements of departments;

4. International agreements;
5. Private members' legislative proposals;
6. Budget votes;
7. Petitions;
8. Statutory provisions (for example the filling of vacancies in a statutory body);
9. Annual reports of committee activities and performance against their strategic plans;
10. Any matter referred to committees for consideration and report in terms of NA Rule 137 and NCOP Rule 102.

Once a report has been adopted by the House, the Speaker communicates the recommendations of the House to the relevant Minister and copies the relevant House Chairperson, portfolio committee Chairperson and Director-General. The Speaker also requests the Minister to direct his or her responses to the Speaker for formal tabling.

The Secretary to Parliament communicates with the Director-General in the Presidency on all resolutions.

Portfolio committees of the NA and select committees of the NCOP

The mandate of oversight resides with the NA and the NCOP and through their respective rules, the NA establishes portfolio committees and the NCOP establishes select committees. Portfolio committees mirror portfolios in government whilst select committees mirror the clusters in government. Due to the fact that committees conduct their business on behalf of their respective Houses, they report to the relevant House individually and separately on matters referred to them to ensure that each House may make any decisions it deems necessary.

Joint committees

Joint committees are committees that are established in terms of the Joint Rules and have similar powers to portfolio committees and select committees, except that they have specific mandates relating to transversal issues, such as women, children, youth and disability.

Ad hoc committees

When necessary, Parliament establishes ad hoc committees to assist in its investigation of transversal issues.

Joint standing committees

Parliament, in accordance with the Constitution, legislation and the rules, can establish standing committees. Two joint standing committees currently exist in Parliament through legislation, namely the Joint Standing Committee on Intelligence and the Joint Standing Committee on Defence.

Specialised committees

The NA Rules and the Public Audit Act (No 25 of 2004) establish the Committee on the Auditor-General with a mandate to maintain oversight over the Auditor-General and perform functions in terms of the Public Audit Act. The Joint Committee on Ethics and Members' Interests is established by the Joint Rules (Rule 121) to implement the Code of Conduct for Assembly and permanent Council members and develop standards of ethical conduct for Assembly and Council members. The Committee on Public Accounts is established by the NA Rules (Rule 204) and is tasked with considering financial statements of all executive organs of state and constitutional institutions, any audit reports issued on those statements as well as any reports issued by the Auditor-General on the affairs of any executive organ of state or other public bodies or any other financial statements or reports referred to the committee in terms of the rules.

3.1.2 Plenary processes for effecting oversight and accountability

Budget Votes

Budget votes occur when the Minister of Finance announces the budget projections for the next financial year, as well as the budget votes of each Minister (department). In the Budget the Minister of Finance sets out how much money the government will spend in the following year. Parliament must approve the Budget. Subsequent to the presentation of the Budget by the Minister of Finance, each parliamentary committee has hearings with the government department over which that committee exercises oversight and can also check whether the department kept the promises of the previous year and spent taxpayers' money properly. The budget votes are debated in the National Assembly and the National Council of Provinces once committees have finished discussing the different budget votes.

Questions

Section 92 of the Constitution stipulates that members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions. The procedure of putting questions to the Executive is one of the ways in which Parliament holds the Executive to account. Questions can be put for oral or written reply to the President, the Deputy President and the Cabinet Ministers on matters for which they are responsible. Question time affords members of Parliament the opportunity to question members of the Executive on service delivery, policy and other executive action on behalf of both their political parties and the electorate.

Members' statements

This is the process whereby members of Parliament are afforded the opportunity to make statements on any matter in the House.

Statements by Cabinet members

Ministers may make factual or policy statements in relation to government policy, executive action and other similar matters of which the Assembly should be informed. The Minister asks the Speaker for the opportunity to make such a statement, which should not be longer than 20 minutes.

Notices of motion

Motions are one of the mechanisms available to members of all political parties which can be used to help fulfil their oversight responsibilities in Parliament by bringing issues to Parliament for debate. Notice must be given of a motion unless it is by way of an amendment to a draft resolution, raising a point of order or a question of privilege, the postponement or discharge of or giving precedence to an order for the day, referring a bill to a committee, the proposal of a draft resolution on the report of a committee immediately after a debate on the report has been concluded, or in regard to which notice is dispensed with by the unanimous concurrence of all the members present. Notice must be given of every motion since in principle the House must be informed in advance of any substantive motion so that members and parties have time to prepare to debate it. Notices of motion are therefore a vital tool which can be used by members to bring matters of political importance before Parliament for debate or a decision.

Motions without notice

Motions which require notice may be moved without notice provided no single member present objects. It is therefore common practice for parties to be consulted before the House meets when seeking to move a motion without notice, and to inform the presiding officer of the intention to do so. Motions without notice are moved when the presiding officer calls for any formal motions, usually near the beginning of the day's sitting. This medium allows for consultation between parties to obtain consensus on issues that must be brought to the attention of the House.

Plenary debates

Plenary debates are a further means to bring important information to the attention of the Executive regarding specific government programmes and legislation required to improve service delivery. In plenary debates, certain mechanisms for conducting oversight are used. These include question time, the consideration of committee reports, showcasing, scrutinising and debating the implementation of policy and budget votes, members' statements and questions by members of Parliament, which draw the attention of the Executive to the concerns of members' constituents.

3.1.3 Use of activities and reports from state institutions supporting constitutional democracy to enhance Parliament's oversight functions

These institutions have particular mandates as provided for in the Constitution and by way of additional Acts of Parliament that prescribe their functions and powers. The institutions are independent and subject

only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice. In terms of section 181(3) of the Constitution other organs of state, through legislative measures, have to assist and protect the aforementioned institutions to ensure their independence, impartiality, dignity and effectiveness.

In terms of section 181(5) these institutions are accountable to the National Assembly and must report on their activities and the performance of their functions to the Assembly at least once a year.

The institutions are:

- The Auditor-General (AG);
- The Commission for Gender Equality (CGE);
- The Public Protector (PP);
- The Electoral Commission (EC);
- The South African Human Rights Commission (SAHRC); and
- The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Rights Commission).

The task team considered the views and concerns raised by state institutions supporting constitutional democracy during the interviews and in their submissions. Weaknesses were identified in the current parliamentary mechanisms. However, concomitant to the work conducted by the task team, Parliament established the Ad Hoc Committee on the Review of Chapter 9 and Associated Institutions. The committee's mandate was broader than that of the task team and as a result it was agreed that direction would be obtained from the outcomes of that process.

It is recommended that Parliament develop clear mechanisms to enable the reporting by state institutions supporting constitutional democracy on their activities and the performance of their functions as prescribed in the Constitution and related Acts of Parliament.

The second recommendation is for Parliament to put in place processes in order to allow the reports to be referred to committees for consideration, oversight, and reporting back on issues to plenary sessions.

3.1.4 Other statutory institutions supporting democracy

Financial and Fiscal Commission (FFC)

The FFC is an advisory body and has a mandate to make recommendations on financial and fiscal matters to Parliament, the provincial legislatures, and any other institutions of government when necessary. The FFC is separate from government and is therefore able to perform impartial checks and balances between the three levels of government. It facilitates co-operative government on intergovernmental fiscal matters. At least 10 months before the start of each financial year, the Commission must submit recommendations for that financial year to both Houses of Parliament and the provincial legislatures, with particular regard to:

- An equitable division of revenue raised nationally, amongst the national, provincial and local spheres of government;
- The determination of the equitable share of each province when revenue is divided between the nine provinces; and
- Any other allocations to provinces, local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations should be made.

National Youth Commission (NYC)

The National Youth Commission is a statutory body of government established through the National Youth Commission Act, No 19 of 1996. The Commission consists of five full-time members, five part-time members and nine commissioners, nominated by Premiers of each province and appointed at national level. The National Youth Policy has been designed to address the major needs, challenges and opportunities of young men and women.

Pan South African Language Board (Pansalb)

The purpose of the Pan South African Language Board is to promote multilingualism in South Africa by:

- creating the conditions for the development and equal use of all official languages;
- fostering respect for and encouraging the use of other languages in the country; and
- encouraging the best use of the country's linguistic resources to enable South Africans to free themselves from all forms of linguistic discrimination, domination and division, and to enable them to exercise appropriate linguistic choices for their own well–being, as well as for national development.

Public Service Commission (PSC)

The PSC derives its mandate from sections 195 and 196 of the Constitution. The PSC is tasked and empowered, amongst others, to investigate, monitor and evaluate the organisation and administration of the public service. This mandate also entails the evaluation of achievements, or lack thereof, of government programmes. The PSC also has an obligation to promote measures that will ensure effective and efficient performance within the public service and to promote basic values and principles of public administration, as set out in the Constitution, throughout the public service.

Independent Communications Authority of South Africa (Icasa)

The Independent Communications Authority of South Africa derives its mandate from several statutes: The Independent Communications Authority of South Africa Act of 2005, the Independent Broadcasting Authority Act, the Broadcasting Act and the South African Telecommunications

Regulatory Authority Act and the Icasa Amendment Act. The Electronic Communications Act substantially amended the IBA Act of 1993 and the Broadcasting Act of 1999. The Authority regulates the telecommunications and broadcasting industries in the public interest. Its key functions are to:

- make regulations and policies that govern broadcasting and telecommunications;
- issue licences to providers of telecommunications services and broadcasters;
- monitor the environment and enforce compliance with rules, regulations and policies;
- hear and decide on disputes and complaints brought by industry or members of the public against licensees
- plan, control and manage the frequency spectrum; and
- protect consumers from unfair business practices, poor quality services and harmful or inferior products.

Organs of state

An "organ of state" is defined in section 239 of the Constitution as –

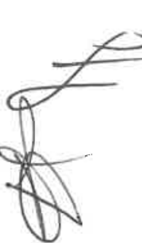
(a) any department of state or administration in the national, provincial or local sphere of government; or

(b) any other functionary or institution –

(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer ....

Section 239 divides organs of state essentially into two categories. The first category is descriptive in terms of which organs of state are defined as any department of state or administration in the national, provincial or local sphere of government. This category is, we believe, self defining. For example, in its interpretation of this first category, the Corder Report (1999: 13) included bodies represented in Cabinet as comprising "national executive authority", where accountability is vested at the political level via the doctrine of ministerial responsibility (section 92(2)). The terms “any department of state or administration" can further be traced to the Public Service Act (No 103 of 1994), which refers specifically to national and provincial "departments", and other departments. Finally, the inclusion of the term "local" in this category in section 239 must also logically include municipalities, as these constitute administrative bodies operating in the local sphere of government.



The second category in section 239 is subdivided, and focuses on the conduct or activity of the organ of state and on the empowering provisions. These two subcategories are:

- section 239(b)(i): any other functionary or institution exercising a power or performing a function in terms of the Constitution or any provincial constitution; and
- section 239(b)(ii): any other functionary or institution exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.

If the institution or functionary is exercising a power or performing a function in terms of the Constitution or a provincial constitution, then it is an organ of state. The nature of the power exercised or the function performed is irrelevant. In this category, the source of the power is the determining criterion.

All organs of state in the national sphere of government must account to the National Assembly and they do this mainly by way of the submission of annual reports. As per section 55(2)(b)(ii), the Assembly has power to conduct oversight over all organs of state.

There is an increasing number of listed organs of state, of which only national organs of state are required to submit their annual reports to Parliament as part of their accountability to Parliament, based on sections 55(2)(a) and 69(b) of the Constitution in that the executive organs of state in the national sphere of government account to Parliament.

Other public bodies and institutions listed as national organs of state include institutions such as universities and business units or subsidiaries of other national organs of state. These institutions do not have to table their annual reports in Parliament because their activities are reported on in the annual reports of the main public entities they belong to. For example, Intersite Property Management Services (Pty) Ltd is a subsidiary of the SA Rail Commuter Corporation Ltd and should be reported on in the annual report of the SA Rail Commuter Corporation Ltd.

Information in relation to public bodies as commissioned from the Human Sciences Research Council (HSRC) Report will be used as the main source to establish which institutions are required to report to Parliament. In this regard, Parliament will know which institutions are supposed to table annual reports as required by the Public Finance Management Act and related legislation.

It is important when departments or public entities at national level account to Parliament through the National Assembly and when provinces report to the National Council of Provinces that both Houses are informed of the complete scope of the function that the department or public entity is reporting on.

It is therefore recommended that the performance of these other public bodies and institutions be included in the reports to Parliament. If not, Parliament can, in terms of sections 56(b) and 69(b) of the Constitution, require of the entity to report to it in order that Parliament has the complete picture of the function reported on. In this regard, the mandate of the National Assembly by virtue of section 55(2)(b)(ii) entitles it to exercise oversight over all organs of state. A list of all organs of state, public bodies and institutions are

attached hereto for reference purposes to assist portfolio and select committees to identify which institutions are required to report and be accountable to them.

3.2 Tools for oversight and accountability

Currently South Africa has designed the following tools in relation to oversight and accountability. For ease of reference, these tools have been split into four categories: Category 1 lists tools of established legislation and long-term plans; Category 2 contains tools relating to annual, monthly and weekly activities; Category 3 lists financial instruments; and Category 4 relates to issues arising from institutions supporting constitutional democracy.

Category 1:

- Constitution of the Republic
- Legislation
- Government Programme of Action [5-year plan].

Category 2:

- State-of-the-Nation Address
- Questions (written and oral)
    - President
    - Deputy President
    - Ministers
- Members' statements
- Ministerial statements
- Debates in the House
- Matters from constituency work
- Private member's bills
- Individual member's oversight
- Committee reports on legislation and oversight activities
- Committee reports on international agreements
- Departmental strategic plans
- Departmental current and past annual performance plans
- Annual reports (including annual financial statements, statements on programme performance and human resource information)
- Performance contracts
- Departmental compliance with parliamentary committee recommendations.

Category 3:

- Budget Speech
    - Estimates of National Expenditure (ENE)

- Division of Revenue Bill
- Estimates of National Revenue
- Budget Review

- Ministers' budget vote speeches
- Departmental budget votes
- Treasury Regulations relating to strategic planning
- Reports of the Auditor-General (including performance reports)
- Treasury reports (monthly and quarterly reports)
- Audit Reports (Scopa)
- Medium-Term Budget Policy Statement (MTBPS)
- Adjusted Estimates of National Expenditure
- Intergovernmental Fiscal Relations report
- Public Finance Management Act (PFMA)
  - Financial statements (monthly financial reports and quarterly performance reports)
  - Statistics South Africa reports.

Category 4:

- Reports on investigated matters of relevance by institutions supporting constitutional democracy (ISDs) and other statutory institutions supporting democracy for consideration by Parliament.

CHAPTER 4: NEW MECHANISMS FOR OVERSIGHT AND ACCOUNTABILITY

4.1 New mechanisms

The previous sections outlined the current parliamentary oversight and accountability mechanisms and practices. The sections below highlight potential mechanisms to further strengthen oversight and accountability:

4.1.1 Institutional mechanisms

Notwithstanding the existing rules on conferral, it is proposed that where committees are clustered for oversight and other legislative work, they should be able to report jointly on matters that are transversal and for the House to adopt such a cluster report.

Reports and matters arising from the same delegations representing Parliament at organisations, such as the Commonwealth Parliamentary Association, Inter-Parliamentary Union, Pan African Parliament, SADC Parliamentary Forum, Africa Caribbean and Pacific-European Union Joint Parliamentary Assembly and others, should also be tabled and be programmed for consideration by the relevant committees and, where necessary, should be debated in the relevant Houses.

It is recommended that the rules be amended to facilitate the referral of matters arising from reports of international bodies to which Parliament is affiliated to committees for consideration, where necessary, and for debate in the relevant Houses.

It is recommended that sectoral parliaments such as the Women's Parliament, Youth Parliament, People's Assembly and other such assemblies should be formally recognised in the rules and that provision be made for their procedures, powers and functions and for the formalisation of recommendations to be submitted to the relevant committees, where necessary, and to the relevant Houses for consideration.

Parliament currently attends to special petitions through the Committee on Private Members' Legislataive Proposals and Special Petitions. However general petitions, representations and submissions as specified in sections 56 and 69 of the Constitution are not adequately addressed through institutionalised mechanisms.

Sections 56 and 69 require Parliament or its committees to accept petitions, representations or submissions from any interested persons or institutions.

It is therefore recommended that mechanisms be put in place to facilitate the processing, referral and guidance on attending to petitions, representations and submissions. Best practices have already been established in various provinces, including the establishment of petitions offices and in some instances budget committees to assist those offices. The effectiveness of these offices can be investigated by Parliament in the process of developing mechanisms.

It is proposed that rules be amended and developed to accommodate Sub-Plenary Sessions of the National Assembly which will purport to provide an extended avenue for the debate and consideration of issues referred to it by the House which are of national concern. It is further proposed that resolutions reached and issues arising from these sessions be tabled in the House for final consideration. It is recommended that consideration be afforded to the development of mediums for deliberation, engagement and debates on broader and complex issues in traditional South African channels which include Lekgotleng, Inkundleni and Bosberaad. This will lead to a move away from the Westminster system and place greater impetus on the transformation of Parliament in the South African context.

4.1.2 Joint Parliamentary Oversight and Government Assurance Committee

In identifying mechanisms for Parliament to effect its oversight role, a gap was identified which necessitated that consideration be given to the establishment of a Joint Parliamentary Oversight and Government Assurance Committee. The committee should have some powers governing the work and function of committees of Parliament.

Its main purpose and mandate will be to consider and deal with broader, transversal and cross-cutting issues. It will furthermore pursue all assurances, undertakings and commitments given by Ministers on the

floor of the House(s) and the extent to which these assurances etc have been fulfilled.

The Inter-Parliamentary Union presented a study which was a compendium of parliamentary practice as it applies to oversight. It elaborated on a broad range of tools that parliaments have at their disposal or may want to develop. It acknowledged that parliaments can establish a general oversight committee which co-ordinates the oversight work of other permanent committees. An oversight committee can recommend that other permanent committees investigate specific problems that it has identified. Other permanent committees can also bring matters before the general oversight committee.

It is recommended that the rules be developed to accommodate and furthermore express the functions, powers and objectives of the proposed committee. The recommended committee will be one of the subcommittees of the Joint Rules Committee chaired jointly by designated House Chairpersons and its membership will be based on the issues before it within the cluster or multi-cluster group of portfolio and select committees, and therefore it will have a rotational membership. Secretarial support will be provided by the Oversight Advisory Section and the Table staff of both Houses.

4.1.3 Treaties, Conventions and Protocols - Compliance including oversight on development aid

An international agreement binds the Republic only after it has been approved by resolution in both Houses, unless it is an agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, in which case the agreement must be tabled in the Houses within a reasonable time.

The recommendation is that Parliament ought to be robust and proactive in the negotiations that are conducted relating to international agreements prior to the signing of these agreements, as well as in relation to oversight on allocations per programme and expenditure from overseas development aid (ODA) extended to the Republic. A mechanism needs to be established to ensure that Parliament engages with the stakeholders involved in the negotiation teams.

It is further recommended that there ought to be a mechanism to oversee compliance with international agreements and that this matter should form part of the programme of Parliament for effecting oversight and accountability. Rule 306 of the NA Rules stipulates when the Assembly's approval is sought for an international agreement in terms of section 231(2) of the Constitution, the agreement must be submitted to the Speaker with an explanatory memorandum. The NCOP rules do not stipulate that the agreement should be submitted to the NCOP with an explanatory memorandum in the instance where matters of provincial interests are addressed in the agreement.

It is recommended that when a matter of provincial interest is addressed in the agreement, the NCOP should be provided with the agreement and an explanatory memorandum and further that the rules of the NA and the NCOP be developed to enable the presentation of reports to Parliament by the Executive prior to their presentation to international bodies to enable Parliament to assess the compliance aspects in

the reports.

4.1.4 Oversight Advisory Section

In developing the oversight model, the need was identified for support services relating to the monitoring and tracking of issues between Parliament and the Executive, and on all other related matters within Parliament's broader mandate. An Oversight and Advisory Section ought to be created in response to the need identified. Its main functions will be to provide advice, technical support, co-ordination, and tracking and monitoring mechanisms on issues arising from oversight and accountability activities of members of Parliament and the committees to which they belong. The work of this section should also include the archiving of relevant information to facilitate the retention of institutional memory.

The foreseen objectives of the Oversight Advisory Section encompass the following:

- Providing information and advisory support to parliamentary oversight activities as an information management section;
- Tracking and monitoring Executive compliance in respect of issues, that individual MPs raised flowing from constituency work;
- Assisting with tracking, monitoring and following up issues raised through the Parliamentary Democracy Offices;
- Ensuring a more co-ordinated, integrated and holistic approach to parliamentary oversight;
- Assisting with co-ordinating all oversight-related information gathered through Parliament's public participation activities;
- Analysing substantive reports by institutions supporting constitutional democracy to advise the Houses on issues for referral to committees for consideration and report;
- Assisting with monitoring and tracking Executive compliance with House resolutions;
- Assisting with monitoring and tracking of government assurances and commitments that emanate from the floor of the Houses; and
- Monitoring and analysing debates, discussions and comments made by the public and participants in the sectoral parliaments with a view to advising the Houses on issues for consideration.

In the establishment of the Oversight and Advisory Section, the following subdivisions can be created:

- Financial Scrutiny Unit, which will develop systems for the scrutiny of finances, for instance:
  - the planning cycle which will include aspects on performance and expenditure targets for departments and spending reviews;
  - the budget cycle which will include aspects of how government makes its assessment on the state of the economy and how it plans to raise revenue the following year;
  - the estimates cycle which is the process by which departments' resources and cash for the year is approved; and
  - the reporting cycle which involves the reporting by departments through reports.

This will assist the committees responsible for Finance and the portfolio committees to enhance their oversight activities and tracking of issues that are addressed in monthly reports to Parliament and those that would have been raised by the Committee on Public Accounts.

- Tracking and Monitoring Unit, which will address decisions in the House(s) and at committee level, as well as issues from emanating from the floor of the House(s) and from committee reports that get tabled in the House(s).

- Advisory Unit, which will identify issues from sectoral parliaments, other assemblies, international bodies and compliance with international protocols, treaties and conventions as well as petitions.

It is therefore recommended that Parliament must speedily establish this section with full resources, capacity and personnel for the efficient fulfilment of the objectives of oversight and accountability.

4.1.5 Reserve Bank

The South African Reserve Bank Act (No 90 of 1989) regulates the South African Reserve Bank. Section 37 of the Act requires the Minister of Finance in the case of non-compliance by the Bank with the Act or any regulation under the Act to give notice to the board of directors of the Bank of non-compliance and the requirement of compliance within a specified time. In the event that the non-compliance is sustained, the Minister can apply to a division of the High Court to compel compliance. Whilst section 224 (2) of the Constitution stipulates that the Reserve Bank is independent, as an organ of state, it is accountable to Parliament in terms of sections 55 and 69. The exercise of its powers and functions and conditions attached to it must be determined by an Act of Parliament in accordance with section 225. In this regard, it is recommended that the Reserve Bank Act of 1989 should be reviewed and revised for purposes of aligning the act with the Constitution in order that Parliament may exercise oversight over it

4.1.6 Issues from constituency work

In the course of their constituency debates, issues of concern to the public are brought to the attention of members of Parliament. These issues, once introduced in Parliament, can be formally channelled through the parliamentary processes for executive responses.

4.1.7 Appointments to institutions supporting constitutional democracy and other specialised institutions which fall under the mandate of Parliament

The procedural aspects of appointments to Chapter 9 institutions and specialised institutions are assigned to committees. After considering the matter, the committees report their recommendations to Parliament for a decision. The weakness is the lack of co-ordination in handling these very important appointments, and therefore mechanisms in the rules are needed to assist Parliament to give effect to this important mandate.

It is recommended that an ad hoc committee be set up to receive and hear the presentation on the Audit

of Statutes and make recommendations that it deems necessary to the presiding officers for consideration.

4.1.8 Public participation

The need to have public participation is required in section 42 of the Constitution. The task team considered the matter of how the public can engage through involvement and participation in parliamentary processes. Amidst the research conducted by the task team and the recent Constitutional Court cases on public participation, the task team identified that the need for public participation and involvement cannot merely be addressed in a chapter of the model but ought to be included in a separate model on public participation, which will be interlinked with the Oversight and Accountability Model. Research, ideas and best practice will be provided to the necessary process that will be established for the development of the model.

4.1.9 Sanctioning non-compliance by the Executive

It is recommended that Parliament develop rules to assist it further in sanctioning Cabinet members for non-compliance after all established existing avenues and protocols have been exhausted, for example naming the Cabinet member by the Speaker of the National Assembly or the Chairperson of the Council based on a full explanation.

4.2 Maximising current mechanisms

4.2.1 Reporting by committees to the Houses

A mechanism for evaluating annual reports from government departments does exist. This is one of the procedures through which Ministers are held to account. Ministers, as the executive authority in terms of section 65 of the Public Finance Management Act (PFMA) have to table annual reports of departments and public entities for which they are responsible within six months after the end of the financial year (30 September). The Speaker' immediately refers all annual reports to the relevant portfolio committee and the Committee on Public Accounts for consideration and report. Late submission requires a written explanation by the Minister providing reasons for the delay. The Committee on Public Accounts reviews the audited financial statements and the audit reports of the Auditor-General and indicates to the relevant portfolio committee which specific issues they should be aware of with regard to oversight. The committee has to evaluate thoroughly the technical quality and the performance information presented in the annual report.

Members should have a clear understanding of the portfolio over which they are conducting oversight and what it is they want to achieve (improve service delivery). There are different phases which lead up to the final reporting, namely:

- *Oversight preparation phase:*

  This starts six to eight weeks prior to 30 September each year. Members need to have access to and interrogate documents which include current and previous annual reports for comparison purposes,

ZZ9-RC-131

strategic plans and Estimates of National Expenditure of related years, State-of-the-Nation Address, Budget Speech, budget vote speeches, division of revenue information and related policy documents, quarterly performance reports, previous oversight reports and House resolutions.

- Oversight hearing phase:
  Ideally during the last two weeks of October each year, public hearings are conducted to gain clarity/input into the areas that should be addressed in the annual report.

- *Oversight report-writing phase:*
  A report for each of the entities reviewed must be tabled in the House (by the second week in November). The report should contain comments with regard to compliance, spending patterns, a general information section in the annual report, reported performance, key issues of the previous year and recommendations.

It is recommended that a system for tracking resolutions until the matter has been dealt with or an adequate response has been received must be instituted.

A need to strengthen Parliament's mechanisms for evaluating annual reports was identified as it is a critical mechanism through which Ministers are held to account and is dealt with in 3.1.1 above. However there is a need to improve on mechanisms that would ensure that there is reporting on responses by the Executive on resolutions adopted by Parliament.

It is recommended that the current system be improved in the following manner:

- Where a response is required, the House resolution with its date of adoption must be appended to the Order Paper until such response has been received. The Minister's formal response must be addressed to the Speaker or Chairperson of the Council.
- If no response is received within a reasonable time or within the period specified by the House resolution, the House Chairperson should notifiy the Speaker or Chairperson, who should then write to the Minister requesting compliance within 14 days or a written explanation of the delay.
- In the event of sustained non-compliance by the Minister, a written complaint by the Speaker or Chairperson may be sent to the Leader of Government Business, and in exceptional circumstances the Minister may be called to account in the House (e.g. during question time).
- Quarterly reports and an annual report on resolutions (by category) and compliance with outcomes should be made available to the Houses. These reports could be used to feed information into the tracking and monitoring mechanism.

This process does not preclude the committee from monitoring executive compliance as part of its continuous oversight function.

4.2.2 Debates initiated by Presiding Officers

NCOP Rule 84 and NA Rule 103 respectively enable members to request the Chairperson of the

Council and the Speaker in writing to allow a matter of public importance to be discussed in the individual Houses. It is recommended that the rules must be expanded to enable the Speaker and the Chairperson of the NCOP to initiate debates in the Houses.

4.2.3 Developing specialisation for certain parliamentary committees

The committee system in South Africa has drawn much guidance from the Westminster system, as has other jurisdictions. However, many jurisdictions have tapered the Westminster approach to accommodate variations in the structure of committees based on their specific needs and the need for specialisation. The need for fundamental change in the current manner in which committees exercise oversight is necessitated by the fact that South Africa has pioneered mandatory oversight by Parliament through the Constitution.

The Inter-Parliamentary Union is of the view that the existence of specialised committees adds value to parliamentary work because these committees can work simultaneously to address problems from different angles.

Parliament should consider strongly resourcing, capacitating and developing the specialisation of committees that are dealing with broad issues that cut across departments and ministries in all spheres as this has an impact on society and the nurturing of our democratic objectives. This consideration is motivated by the type, quantity and duration of work, complexity of issues and the need for the development of specialisation as is the case in other parliaments in the world.

The programming of Parliament should prioritise reports for tabling which arise from the work done and conducted by these committees on all areas of their focus for consideration and decision-making within the ambit of enhancing oversight. These committees ought to be given the right to consider and initiate debate on some of the issues they find to be of national consideration, as identified in the process of their oversight work. Furthermore, these committees must provide annual reports which must be published in the Announcements, Tablings and Committee Reports document as well as tabled in Parliament to allow other committees to identify issues that will help them in enhancing oversight and effecting accountability.

It is highly recommended that Parliament prioritise the development of criteria to identify on an ongoing basis which committees qualify for strengthened resourcing, capacity and development based on the broadness of their mandates.

4.2.4 Appointment of ad hoc committees

The current system in Parliament of appointing ad hoc committees to investigate a matter of public interest is effective. However, we need to ensure that issues of public interest, as they arise and are made known to Parliament, are investigated through the appointment of ad hoc committees. This will enhance Parliament's role on oversight and ensure compliance with the Constitution where we are becoming responsive to the needs of the people as outlined in the vision and mission statement of Parliament. In addition, Parliament

ought, when it deems it necessary, to be proactive in appointing ad hoc committees to address issues of public interest.

4.2.5 Accountability and oversight in relation to the Executive

NA Rule 117 and NCOP Rule 249 provide for the Executive to reply to a question for written reply within 10 working days of the day for which the question was set down for written reply. Should the Executive fail to do so, the question may, upon request of the member of Parliament in whose name the question stands, be put to the Cabinet member in the House for oral reply on the relevant question day. NA Rule 115(3) provides that a question for oral reply may not stand over more than once. This is generally assumed to be a period of 14 days. It is still a moot point as to what happens to a question standing over more than once as there are such instances, and no sanctions in this regard exist.

There is a constitutional obligation on the Executive to account to Parliament (section 92(2) and (3) of the Constitution). In March 2003, the NA Rules Committee decided that the Speaker should write to Cabinet members and the Leader of Government Business with regard to members of the Cabinet not complying with their constitutional obligations as there is no compulsion on a member of the Cabinet to respond to a question other than the option of members' statements, motions or a request for a debate on errant members of the Cabinet.

It is recommended that NA Rule 117 and NCOP Rule 249, which provide a timeframe for the Executive to respond to a question for oral reply, be amended to extend the timeframe for a response to 21 days.

Notwithstanding the right of Parliament to pass a motion of no confidence in the President or in the Cabinet excluding the President (Section 102 of Constitution) and the existing mechanisms for holding the Executive to account, it is recommended that Parliament utilise the Joint Parliamentary Oversight and Government Assurance Committee to implement effective measures to ensure compliance by the Executive in the event that all existing avenues of eliciting a response from the Executive have been exhausted.

4.2.6 Individual member oversight

Amidst the multifaceted and multidimensional work of members of Parliament lies the role of members to effect individual oversight. This role is currently performed through questions, members' statements, motions without notice, notices of motion, motions on the Order Paper, debates in the Houses, member-initiated debates, constituency work, interventions made by members, private members' legislative proposals and the processing of bills.

Political parties have constituency offices from which the public can obtain information on new Bills or discuss issues of concern with members of Parliament. Each party represented in Parliament is allocated funds to develop its own method of constituent outreach. Each member of Parliament is assigned by their political party to perform constituency work. Notwithstanding this, members are not precluded from performing work in other constituencies. Constituency work affords members the greatest opportunity to conduct individual oversight. It constitutes the closest level of interaction between members

and the public, and provides the best platform from which members can familiarise themselves with the issues confronting their constituents. Through this interaction, a member may address matters of local, provincial and national concern. However, it is important that, in exercising their oversight role, members take care not to encroach on the jurisdiction of provincial and local political representatives but rather adhere to the principles of co-operative government.

Interventions made by individual members is one of the more effective forms of individual oversight as it empowers members to interact directly with departments and other organs of state at national, provincial and local government level. Members have a duty to alert Parliament to any issue of concern identified during such oversight interventions.

In practice, departments establish structures to process concerns raised by members of Parliament, such as departmental parliamentary liaison officers. These liaison officers are accountable to the Director: Ministerial Services within each department. Their key function is to facilitate communication between the ministry, the department and members of Parliament. Concerns raised by members are referred to senior officials within departments, with the veiled threat that should the department not respond in a satisfactory manner, the matter will be brought to the House formally at the risk of great embarrassment to the department, and ultimately the Minister. If the member's informal communication with a department does not yield satisfactory results, he or she has discretion to communicate formally with the relevant Minister to provide him or her with the opportunity to rectify the matter before placing it formally before the House. The observance of this protocol allows for the services not to be disrupted. It is recommended that in the interests of ensuring greater communication on issues arising from members' individual oversight work ministries develop guidelines for members' interaction and engagement with Ministers on issues of public concern.

4.3 General recommendations

- Parliament should strengthen and develop its current rules to accommodate new and old mechanisms as proposed in this model in order to enhance its oversight role.
- In the event that the new mechanisms above are agreed to, the rules need to be realigned to accommodate the new mechanisms.
- It is recommended that the Joint Rules be amended to refer to "Persons with Disabilities" instead of "Disabled Persons".

CHAPTER 5: PROCEDURE FOR AMENDING MONEY BILLS

5.1 Terms of reference of Budget Focus Group

The Budget Focus Group was mandated to develop procedure for amending money bills and to draft legislation to amend money bills. These mandates have been completed.

ZZ9-RC-135

The classification criteria guiding the above terms focused on the following:

- The role of Parliament in amending money bills. This is against the backdrop in which the introduction of money bills is the sole responsibility of the Minister of Finance. The Executive plays a major role in the budgetary process, but the point of concern is that in terms of section 77(3) of the Constitution, an Act of Parliament must provide for a procedure to amend money bills before Parliament. The mandate from the Joint Rules Committee to the Budget Processes Focus Group was to develop a draft bill providing for a procedure to amend money bills.

The findings of the focus group took cognisance of -

- presentations by National Treasury;
- reports of Ms A Folscher; and
- an analysis of the budget cycle.

5.2 Recommendations

The bill in draft format, as submitted, must be tabled in Parliament and referred to the appropriate committee and must follow the normal parliamentary process.

CHAPTER 6: CO-ORDINATION AMONGST THE SPHERES OF GOVERNMENT ON OVERSIGHT

6.1 Co-operative government

The three spheres of government must conduct their oversight and legislative work with due regard to Chapter 3 of the Constitution, the Intergovernmental Relations Framework (IGRF) and other relevant legislation to achieve the objectives of co-operative government and the separation of powers.

The NA, NCOP, provincial legislatures and municipal councils each conduct their functions with reference to co-operative government as required in the Constitution and the Intergovernmental Relations Framework Act (No 13 of 2005). There are however frequent misunderstandings in relation to the parameters of oversight conducted by the NA, NCOP, provincial legislatures and municipal councils due to the unco-ordinated way in which all these bodies carry out their functions. This chapter provides clarity on the role of each of these functional bodies found in the Constitution and legislation. Much debate is still required on mechanisms/protocols to facilitate greater co-operation and co-ordination between the three spheres of government.

The Constitution requires co-operative government between the three spheres of government. In this regard, the parliamentary oversight process, as it relates to interactions with the people and the government, must seek to adhere to the values of co-operative government.

National, provincial and local spheres of government must seek to promote the objectives of the Intergovernmental Relations Framework Act, which include coherent government, the effective provision of services, monitoring the implementation of policy and legislation and the realisation of national priorities. They must therefore take into account the circumstances, material interests and budgets of other governments and organs of state in other governments when exercising their statutory powers or performing their statutory functions. In addition, there must be consultations with other organs of state in accordance with formal procedures emanating from applicable legislation and accepted conventions as agreed with organs of state or alternatively consulting in the most suitable manner. Actions must also be co-ordinated when implementing policy or legislation affecting the material interests of other spheres of government.

6.2 Values and principles guiding institutional oversight

This model's primary objective is to provide a framework that describes how Parliament conducts oversight. It seeks to improve existing tools of parliamentary oversight, streamline components of the new oversight model with existing components and enhance Parliament's capacity to fulfil its oversight function in line with Parliament's new strategic direction.

An oversight model must therefore consist of three elements as indicated in Figure 3 below:

- The values and principles by which Parliament conducts oversight;
- The mechanism or framework to conduct oversight; and
- The processes and resources required for conducting oversight.

Constitutionally, the NA and the NCOP have the prerogative to design their own internal arrangements, proceedings and procedures in terms of sections 57 and 70 of the Constitution. To this end, the Constitution explicitly states that in making rules and orders concerning its business both Houses are compelled to take into account representative and participatory democracy, accountability, transparency and public involvement. In addition to these values, section 195(1) also stipulates basic values and principles governing public administration in every sphere of government. Added to the abovementioned values are a high standard of professional ethics, the efficient, economic and effective use of resources, development-orientatedness, impartiality, fairness, equity, and responsiveness. These values are captured and summarised in Parliament's strategy that was adopted by both Houses in March 2005, as follows:

- Constitutionality: Democratic values (of human dignity, equality & freedom), social justice and fundamental human rights;
- People-centredness: Respect, integrity and service delivery;
- Co-operative government: Co-operating with other spheres of government; and
- Good governance: Accountability and transparency, value for money, customer focus and service quality.

6.3 Introducing the parliamentary oversight cycle as a guide for oversight processes

Parliamentary processes to ensure that institutional mechanisms are effectively undertaken are prescribed within the parliamentary oversight cycle. The parliamentary oversight cycle takes into cognisance the Medium-Term Expenditure Framework cycle of the Executive, the Medium-Term Budget Policy Statement, the Division of Revenue Act, the annual Appropriation Bill and legislation raising revenue.

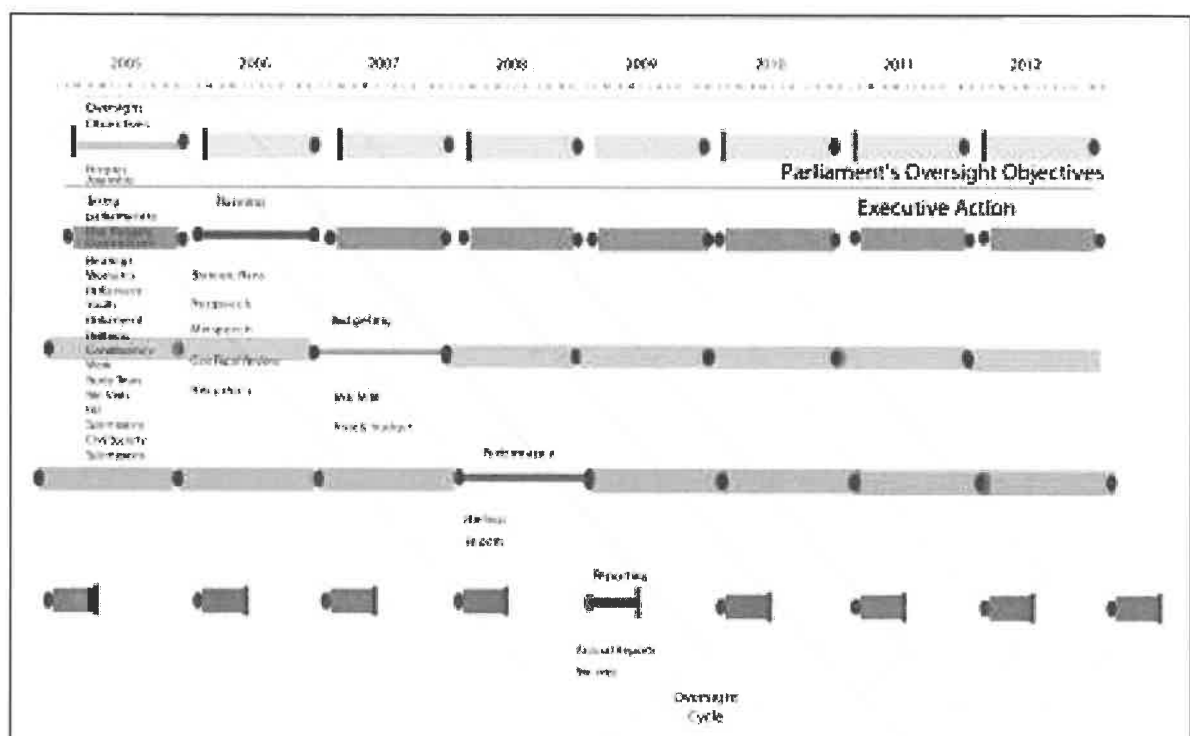
Annual reports, reports from the Auditor-General, resolutions of the Committee on Public Accounts, committee reports, quarterly and monthly reports of National Treasury are considered amidst the cycle and performance by the Executive is measured by a comparison between these and the Medium -erm Budget Policy Statement, the Division of Revenue Act, the Appropriation Bill, and legislation raising revenue. Ministers are accountable for the policy that underlies their budgets whereas accounting officers account for expending the budget.

Figure 2 below illustrates the oversight cycle on an annual basis:

Month	Jan	Feb	March	April	May	June	July	Aug	Sept	Oct	Nov	Dec
Petitions												
Constituency Work												
Study Tours & Site Visits												
ISD Submissions												
Civil Society submissions												
Strat Plans												
Departmental Briefings												
Pres Speech												
Ministerial speeches												
• media briefing												
• budget speeches												
Ministerial statements												
MTBPS												
Legislation /Policy Assessment of Impact of Legislation												
Youth Parliament												
Women's Parliament												
People's Assembly												
Annual Reports												

The oversight cycle requires Parliament to take a long-term view of oversight in order to ensure effective oversight of sustainable delivery. The parliamentary oversight cycle provides a means through which Parliament can monitor government delivery in terms of long-term commitments, rather than focusing exclusively on annual commitments, annual planning and performance assessments. The cycle thus provides for continuity in Parliament's oversight activities from year to year.

Figure 3



CHAPTER 7: INCREASING THE CAPACITY OF COMMITTEES AND MEMBERS

The best practices in the world are such that members of parliament are adequately supported by institutions to enable them to perform their mandates. In some instances, it includes a dedicated secretary and researcher in addition to that which is offered to the committees to which they belong. Committees in some parliaments also have dedicated rooms and they can meet as often and as long as possible, which translates into better performance in the execution of their mandates. Therefore it is being proposed that Parliament should in its lifetime progressively consider strongly achieving on this world standard depending on the availability of space and the expansion programme of Parliament's infrastructure.

7.1 Training

Training should take place based on the Constitution, rules and relevant practices in Parliament as well as the public representative role of members to conduct oversight and pass legislation.

Training should be split in terms of the oversight mandates and making laws. The personal development of members should be dealt with internally in accordance with the individual member's interests.

Other areas of training include formal academic programmes, as well as informal training programmes such as seminars and conferences. Members' training should incorporate the following core competencies: Affirming the understanding of the Constitution

- Affirming the understanding of all statutes and laws
- Procedural training
- Speed reading
- Computer literacy
- Use and application of the Best Practice Guide
- Use and application of the Oversight and Accountability Model
- Budget analysis
- Speech writing
- Public speaking and debating skills

ZZ9-RC-140

- Policy analysis and engagement
- General knowledge of current news and historical issues (domestic and global)
- Methods of work
- Standard operating procedures
- The separation of powers doctrine
- Legislative processes
- Rules of Parliament
- Protocol skills and ethics
- Commitment to work ethic and obligations
- Skills on developing petitions to assist the public
- Conforming to ethical standards expected from citizens.

7.2. Additional support

Members ought to have additional support that they can access or utilise in the course of their work in the form of:

- Content/subject advisers for each committee;
- Dedicated researchers for each committee;
- A panel of experts;
- Tertiary institutions;
- Research institutions;
- Civil society;
- Increased capacity for public hearings;
- Increased utilisation of facilities and resources, for instance, libraries, the internet and referencing facilities.

Support staff to committees should be trained and capacitated on the following:

- The Constitution and the law making process;
- Areas of specialisation;
- Reporting and minute-taking skills;
- General proficiency of language use;
- Communication skills;
- Good behavioural skills;
- General discipline;

- Parliamentary protocol, skills and basic ethical standards.

CHAPTER 8: BEST PRACTICE GUIDE

8.1 Best Practice Guide (BPG)

The purpose of the BPG is to capture in a single document the best practices that have emanated from the work conducted by committees since the advent of democracy to allow for user-friendly access to and guidelines for committees.

The BPG will include aspects on scrutinising government's financial management and parliamentary scrutiny of the same in the planning cycle, budget cycle, estimates cycle, reporting cycle, efficiency programme, the private finance initiative and initiatives with an impact on financial management and financial scrutiny, including capability reviews, financial management reviews, regulatory impact assessments and all government's accounts.

CHAPTER 9: *PROJECTS FOCUS GROUP [CONSTITUTIONAL LANDSCAPE GOVERNING OVERSIGHT]*

9.1 Introduction

The Projects Focus Group had several mandates elaborated on in Chapter 1 above. The mandates and outcomes of the specific projects are discussed below.

The group, without explicitly stating its classification criteria, placed its primary focus, as noted aptly by Tiscornia, on:

- The object and aims of the system: In law, models are built around complex activities (precedents searching, contraposition of arguments, decision-making, legislative planning, etc), or models are built around the products of these activities, such as legal documents (statutes, judicial decisions, administrative, etc); and
- The method, that is textual modes based on linguistic aspects, the deductive models of legal knowledge and reasoning.

The source documents supporting an understanding of accountability and oversight utilised by this group comprised the following:

- Constitution of the Republic of South Africa;
- Primary and secondary documentation to define oversight and accountability; and
- Rules of (the South African) Parliament.

9.2 Audit of bodies performing public functions

The objectives of this audit were to -

- determine the "scope" of the oversight and accountability role of the National Assembly *(in particular),* and to present Parliament with an electronic database that captures relevant information; and
- capture information on relevant fields including full identification (i.e. contact details of bodies), bodies exercising powers and performing functions in terms of section 239 of the Constitution, bodies receiving state funding, the legal relationship of bodies to Parliament and the government, as well as line function departments responsible for bodies.

This project has been completed and the final report is attached hereto.

9.3 Constitutional landscaping

Parliament, through the Joint Rules Committee, was required to compile a document landscaping the constitutional provisions dealing with the interrelated themes of oversight, accountability, transparency and responsiveness, and outline international trends.

The Corder Report and the ad hoc Joint Subcommittee on Oversight and Accountability's final report map out and landscape, to a great extent, some of the constitutional provisions relating to the interrelated themes of oversight, accountability, transparency and responsiveness. The NA Table published an Audit of Statutes, 2004: Guide to Parliament's obligations under the Constitution and legislation, which maps out statutes mandating oversight. The landscaping document therefore provides a perspective on these provisions, without repeating the mapping exercise. This perspective can be discussed and refined for use pursuant to Parliament's constitutional functions relating to the interrelated themes of oversight, accountability, transparency and responsiveness.
This project has been completed and the final report is attached hereto.

9.4 Review of the rules

The model is proposing definite proposals on the rules that need to be established and amended to effect change in order for the model to find its expression within the rules of the NA, the NCOP and the Joint Rules.

It is recommended that a review of rules be conducted subsequent to the adoption of the model. It is proposed that the Joint Subcommittee on Review of the Joint Rules must attend to the review of the rules once the model is adopted.

CHAPTER 10: CONCLUSION

The true test of democracy is considered the extent to which Parliament can ensure that government remains accountable to the people by maintaining oversight of government's actions. Whether Parliament is indeed

successful in effectively holding the Executive accountable will ultimately depend on the extent to which committees and individual members of Parliament actively exercise their oversight role.

Whilst an appropriate legal framework and adequate resources constitute critical elements for effective parliamentary oversight and accountability, it is equally important that individual members, as well as members of the Executive, understand the rationale for accountable government and the purpose it serves. Effective oversight requires the political will on the part of the individual members of Parliament to utilise the oversight mechanisms and the array of tools at their disposal optimally.

Conceptual models are by definition simplified, ideal-type frameworks. This document and the accompanying proposed model strive to present a framework within which Parliament's oversight role can be structured, so as to enhance Parliament's oversight capacity, as well as bring current practices in line with Parliament's strategic path. This model will be a process that can enrich itself by adapting to a situation that permeates from one parliament to another.

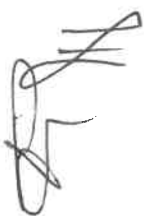
Two critical factors for ensuring the success of this model is, firstly, the need to integrate Parliament's public participation function within its overall oversight mechanism and, secondly, to provide the appropriate capacity, especially human resources, to committees and members for its execution. It is vital that all public participation processes become inputs to the work of appropriate committees.

Detailed oversight practices aligned with this framework are captured in the Best Practice Guide on oversight currently being finalised. However, given the complex nature of Parliament's activities and the dynamic environment in which it operates, we wish to echo the sentiments of the ad hoc Joint Subcommittee on Oversight and Accountability that Parliament should adopt a policy requiring each new parliament to assess and review its oversight capabilities, including its oversight model, at least once during its five-year lifespan.

In order to implement the proposed model decisions are required on the following aspects:

- The immediate need to increase the research (and content specialist) capacity of committees, which is currently underway.
- The implementation of systems to capture and manage information within committees.
- The development of a public participation model to ensure that inputs received through public participation activities are channelled to appropriate committees.
- Changes in parliamentary policy/rules to accommodate the creation of an Oversight Advisory Section with recommended terms of reference.
- Continuous capacity development of members of Parliament and support staff to committees in terms of information and communications technology, budgeting practices and other skills required to enhance their oversight capacity.
- Offices of members of Parliament should also be afforded additional human resources and upgraded in terms of technology capacity.
- Training of staff in line with the Best Practice Guide.

- The adoption of a procedure for executive compliance.
- Dedicated committee rooms need to be considered when Parliament expands its infrastructure.
- Parliament can at a later stage consider the development of further legislation relating to oversight, which will include other committees that are currently regulated by the rules in relation to oversight as is the case with the Joint Standing Committee on Intelligence and the Joint Standing Committee on Defence.



References

List of sources consulted

- National Assembly Table. (2004) *Audit of Statutes.*
- National Council of Provinces. (2005) *NCOP Members' Handbook.*
- *ISD interviews report.*
- Jenkins, F S. (2005) *Constitutional landscape of the constitutional provisions dealing with the interrelated themes of oversight, accountability, transparency and responsiveness in respect of Parliament's functions (Draft 1).*
- *Nhleko, N. (2005) Oversight and Accountability: Statement of Definition.*
- Committee work structure proposal.
- HSRC. (2005) *Audit of public funded bodies (Draft 2).*
- Constitutional Experts Interview Report.
- National Treasury. (2005) *Guidelines for Legislative Oversight through Annual Reports.*
- Development Bank of Southern Africa, www.dbsa.org
- Gauteng Provincial Legislature (GPL). (2002) *Programme Evaluation and Budget Analysis: An Oversight Paradigm for the Gauteng Legislature p 77.*
- Tools for Parliamentary Oversight. (2007) *A comparative study of 88 national parliaments.*
- Information Services Section, Research Unit, Parliament of South Africa (2006). *The Strategic Imperatives for South Africa as set out in the 2006 State of the Nation Address: An Oversight Tool for Members and Committees of Parliament, Cape Town, Parliament of South Africa.*
- Duitlwileng B. (2005) Trends and tendencies in the South African public management and administration in the post 1994 period, unpublished paper, University of the Western Cape.
- Gutto S *et al.* (2007) Study commissioned by Parliament, *A study on enhancing the status, role, image and positioning of the Parliament of the Republic of South Africa.*
- Constitution of the Republic of South Africa, Act 108 of 1996.
- Joint Rules of Parliament.
- Rules of the National Assembly.
- Rules of the National Council of Provinces.
- http://www.parliament.gov.za
- Parliament's submission to the Independent Commission for the Remuneration of Public Office-Bearers. (2006), Proposals on a Comprehensive Structure for the Remuneration of Parliamentary Public Office-Bearers.
- Tiscornia D. (2000) The Meaning of Model in Handling Legal Information.

Assistance in the drafting and input was obtained from the Hon Mr K O Bapela, MP; the Hon Mr G Q M Doidge, MP; the Hon Mr N M Nene (MP), the Hon Mr T S Setona, MP; Mr M B Coetzee (Deputy Secretary to Parliament); Mr M K Mansura (Secretary to the National Assembly); Mr P Lebeko (Clerk of

the Papers); task team members and Managing for Excellence (Pty) Ltd.

ANNEXURES

1. Audit of bodies performing public functions (see www.parliament.gov.za)

2. Constitutional landscaping (see www.parliament.gov.za)

ANNEXURE "**FOUR**"

ANNEXURE “FOUR”

ANNEX FOUR: CREDENTIALS – EXPERTISE AND EXPERIENCE – RICHARD CALLAND

RICHARD CALLAND – BIO

Now based at the University of Cape Town (UCT), where he is Associate Professor in Public Law, Richard Calland has for more than twenty-five years been working in the fields of democratic governance and sustainable development in South Africa and beyond. He teaches constitutional law and has a developed a new LLM programme in his core area of expertise – transparency law and governance. In the early 2000s he was an advisor to the Carter Centre as it established access to information programmes in Jamaica, Bolivia, Nicaragua and Mali, and has served as a member of the World Bank's Independent Access to Information Appeals Board since 2012. A programme director at democracy think-tank Idasa from 1995-2011, Prof Calland has founded and/or led a number of organisations including the Council for the Advancement of the South African Constitution (CASAC), the Open Democracy Advice Centre and the Democratic Governance & Rights Unit. He is also a Fellow of the University of Cambridge Institute for Sustainability Leadership (CISL) and since 2005 has been a member of faculty on numerous customized sustainability leadership programmes for partners such as Anglo American PLC, the World Bank, the Asian Development Bank, Tata, PWC, Network Rail, Namdeb and Nedbank. In 2012, Prof Calland created the African Climate Finance Hub, an advisory and research organisation that works principally in Sub Saharan Africa for a range of local and international development organisations, focusing both on the supply and demand side of climate finance in order to identify the key transformational levers, combining expertise in finance, law, and governance. One of his passions is the intersection of education and sustainability, to which end he is the co-founder of the Sustainability Education (sused.org) initiative, which is working with schools and other partners around the world to create opportunities for critical reflection by school leaders on questions of what, where and how they teach. He was the co-lead, with Amar Bhattacharya of the Brookings Institute, of a technical task team of experts appointed by the UN Secretary-General to prepare a report on the state of climate finance ahead of his climate summit in September 2019. In February 2019, Prof Calland was appointed by the South African Minister for International Relations to chair an eight-person Ministerial Task Team to make recommendations on the design and establishment of a new diplomatic academy, a process that was completed on schedule in August 2019. A long-time advisor to Massmart, in 2015 he established a new political risk advisory consultancy, *The Paternoster Group: African Political Insight*, whose past and present clients include: RCL Foods, Citadel Wealth Management, Anglo American PLC, Nandos, Distell, Discovery, VWSA, the Agence Française de Développement in South Africa, the Australian High Commission to South Africa and the Norwegian Embassy. He is the author of several books on South African politics – including *Anatomy of South Africa*, *The Zuma Years* and *Make or Break?* – and has been a political columnist for the Mail & Guardian newspaper since 2001.

CURRICULUM VITAE - RICHARD CALLAND

RELEVANT CAREER HISTORY

THE PATERNOSTER GROUP: AFRICAN POLITICAL INSIGHT
Founding Partner
2015 -
Niche political economy advisory consultancy. Past and present clients include: Bank of America Merrill Lynch, UBS, Citibank, Citadel, RCL Foods, Anglo American Platinum, Norwegian Embassy in South Africa, Australian High Commission to South Africa and the Agence Française de Développement in South Africa - http://thepaternostergroup.com/

THE AFRICAN CLIMATE FINANCE HUB
Founding Co-Director
2012 –
Formed in mid-2013 in response to the fast-growing world of international climate finance such as the new Green Climate Fund, the African Climate Finance Hub works on both the supply and demand side of climate finance to identify the key issues and transformational levers, to assist governments in Africa to develop the necessary governance and policy arrangements to access new sources of climate finance, and collaborates with development partners to convene conversations between key role-players so as to forge consensus about how best to use climate finance to transform African societies and their economies.

UNIVERSITY OF CAPE TOWN
Associate Professor: Public Law
August 2007 -
- Teach undergraduate Constitutional Law; and postgraduate LLM programmes in Litigating the South African Bill of Rights and Administrative Law & Open Government.

August 2007 – February 2017
- **Director: Democratic Governance & Rights Unit**, Faculty of Law – leading a niche research unit that specialises in 'judicial governance' - monitoring the judicial appointments process and issues of judicial ethics - the independence of the rule of law, and free access to the law in Africa.

IDASA – Africa's Leading Democracy Institute
1995-2003
Programme Manager: Political Information & Monitoring Service (PIMS)
- South Africa's leading - and first - parliamentary monitoring project; Specialist resource for civil society; advocating strong anti-corruption framework and promoting transparency in party political funding and regulation of private donations

2003-2011
Programme Director: Economic Governance
- Leading & developing brand new continental programme on political economy: bringing Idasa's right to know and public finance/participatory budget work competences together to support the intersection between democratic politics and economic policy-making

- Flagship projects included: the 'Right to Know, Right to Education' project in six African countries (Tanzania, Malawi, Ghana, Swaziland, Uganda, Zambia) and its Sustainable Agriculture project in eight African countries
- The lead partner in the Electricity Governance Initiative-South Africa, part of a global programme led by the World Resources Institute to promote transparency and accountability in electricity governance. In South Africa, the initiative monitored the policy-making process for the country's new Integrated Resource Plan in 2010-11, and organised civil society submissions within a multi-stakeholder engagement with policy-makers, leading to significant shifts towards renewable energy.

OPEN DEMOCRACY ADVICE CENTRE, CAPE TOWN
Executive Director
January 2001 – January 2010

- Founding member and director of specialist "right to know" law centre, focusing on Freedom of Information & Whistle-blowing: offering free legal advice to potential whistle-blowers; pursuing test case litigation; conducting policy advocacy & training, setting new regional standards.

CHAMBERS OF JOHN SAMUELS QC, LINCOLN'S INN, LONDON
Barrister
October 1987 - March 1994

- Specialist advocate, practising in public & administrative law and labour law (including race & sex discrimination).

OTHER RELEVANT PROFESSIONAL EXPERIENCE, POSITIONS & ACCOMPLISHMENTS

Chair, Ministerial Task Team on the establishment of a new Diplomatic Academy in South Africa – appointed by Minister for International Relation, Lindiwe Sisulu, in February 2019 (delivered report on 31 August 2019).

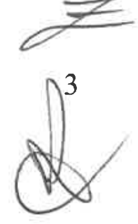
Co-Lead, Expert Technical Task Team appointed by United Nations Secretary-General to advise on Delivering on the $100 Billion Climate Finance Commitment and Transforming Climate Finance, ahead of SG's September 2019 Climate Summit - July 2019 (delivered report in September 2019).

Fellow, University of Cambridge Institute for Sustainability Leadership (CISL)
Since 2006
Core Faculty member for a range of programmes including:
Sustainable Development Leadership Programme for senior leadership of the World Bank, Asian Development Bank & African Development Bank, Tata Brothers, Namdeb, PWC, Anglo American & Nedbank. The programme provides a strategic forum for senior decision makers and key executives to explore innovative and pragmatic approaches to reconciling profitability and sustainability. It has established a reputation as the leading international, cross-industry and cross-sector forum for sustainable business.

Member of World Bank Access to Information Appeals' Board *2012 -*

Expert Witness, US Securities Exchange Commission - prosecution of Hitachi, 2015

Political Columnist, Mail & Guardian Newspaper *since 2001 -*



Regular contributor of op-eds to numerous publications in South Africa and, occasionally, the UK, and frequent commentator in the electronic media.

Retained Advisor on matters of Politics & Governance to Massmart South Africa/Walmart, *2009 -*
Advise Massmart on South African politics and issues of potential governance risk, as well as related issues of sustainability and brand reputation.

Expert Witness, MTN Board level inquiry chaired by Lord Hoffmann – re impact of MTN's bid for Iranian cellphone operator licence on South African Foreign policy, 2013.

Founder Member of the Council for the Advancement of the South African Constitution (CASAC); member of the Advisory Council, 2010 –
Incubated at UCT by Richard Calland and launched in September 2010 under the leadership of Dr. Sipho Pityana, CASAC is a Council of 45 eminent South Africans who believe that the South African Constitution is a platform for democratic politics and the transformation of society based on the core principles of the Constitution – the promotion of socio-economic rights, judicial independence & the rule of law, public accountability and open governance. CASAC makes high-level interventions on issues that impact on the Constitution and which threaten the rule of law and undermine public accountability.

Ad Hoc Governance Advisor to DFID Construction Industry Sector Transparency Initiative (CoST), 2009 –
CoST is a new multi-stakeholder initiative modelled in part on the EITI which seeks to help participating countries improve the value for money spent on the construction of public infrastructure. This goal is to achieve the delivery of good quality infrastructure projects at lower cost, with increased predictability of outcomes. I advised the international secretariat during the pilot phase on issues of governance and multi-stakeholder process and facilitated workshops and advised Multi-stakeholder groups and governments in Tanzania, Ethiopia, Zambia and Vietnam.

Secretary-General: African Network of Constitutional Lawyers, 2008-2012;
Convenor of its Access to Information Working Group, 2008 – 2013
Brings together academics and activists from 15 countries in Africa to collaborate on evidence-gathering and other research to advance the case for open government on the continent.

Member of International Advisory Group: Medicines Transparency Alliance (MeTA)
May 2008 – July 2010.
MeTA brings together all stakeholders in the medicines market to improve access, availability and affordability of medicines for the one-third of the world's population to whom access is currently denied. As a member of the IAG during MeTA's pilot phase, I helped establish the governance and other related protocols to guide the information disclosure process and the 'rules of the game' for the multi-stakeholder groups in the pilot countries. The review of MeTA's pilot found that: 'Each of the pilot countries has new, good quality data that has been validated by each of the three stakeholder groups. This means that future decisions and policy recommendations are based on sound data and that, crucially, the debate has moved from a discussion about "which facts and figures are 'true'?" to "what are we going to do about it?"'

Expert Consultant on Access to Information & Transparency Law & Policy to the Carter Center:
2002-2005

- Advisor to governments of Bolivia, Mali, Nicaragua, Peru and Jamaica.

Co-Founder, The Parliamentary Monitoring Group, 1996
PMG was set up to fill a hole in the transparency and accountability of South Africa's new parliament – its new system of portfolio committees were not being recorded and no public minutes were compiled or published. Over twenty years later, PMG remains the only source of such records and a highly respected organisation.
https://pmg.org.za/

Other Consultancy:

- Lead Consultant heading team of consultants preparing detailed report entitled "Research on Citizen's Access to Information and it's use for Greater Government Accountability and Responsiveness in Tanzania": July-November 2004
- Anti-corruption consultant to British Council: Southern Africa – assessment visits to Mauritius & Mozambique, March/April 2003; designer of first Mozambican Open Democracy Week, September 2003.
- Public Service Commission, South Africa: Desktop study on International Best Practice: Implementation of Financial Disclosure Regulations for Senior Public Servants, February – May 2002.
- Member of Independent Review Body on Political Appointments in the Cape Town City Council, April - June 2001
- Writer, SA Human Rights Commission Resource Manual on the Promotion of Access to Information Act, February 2001
- Project Manager: EU Parliamentary Support Programme commissioned study on Public Participation in the Provinces, 1999-2000
- Member of DFID Panel of Governance Experts, Southern Africa (trained in Logframes and Project Management)
- International Consultant: Malawi Institute for Democratic & Economic Affairs' Parliamentary Information & Monitoring Service, *1997-2000.*

EDUCATION

Visiting Scholar: Lauterpacht Research Centre for International Law, University of Cambridge, UK
Visiting Fellow, Robinson College *Michaelmas and Lent Terms, October 2005-March 2006*
Research Topic: Entrenching the Right to Know at the International Financial Institutions (IFIs): Limits & Possibilities of International Law & Audited various International Law LLM classes.

UNIVERSITY OF CAPE TOWN
LLM: Joint Masters in Law & Politics
1994

- Coursework: Equality & Freedom of Expression in a Comparative Constitutional Context; Comparative Labour Law; South Africa's Foreign Policy in Transition; Contemporary South African Politics
- Law dissertation: *A Step in the Right Direction: A critique of the Selection Procedure for South Africa's first Constitutional Court*
- Politics dissertation: *The Winds of Change: The ANC's campaign in the Western Cape - an assessment of the principal strategic issues & some projections for the future.*

LONDON SCHOOL OF ECONOMICS
Diploma in World Politics
1991 - 1993 (part-time)

- Courses included: The Politics of International Economic Relations; Revolutions & International Relations; and, Foreign Policy Analysis.

INNS OF COURT SCHOOL OF LAW, LONDON
Degree of Barrister-at-Law
1986 - 1987

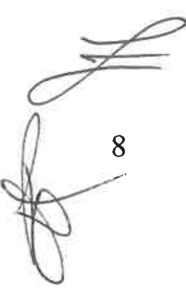
UNIVERSITY OF DURHAM, UK
BA (Hons) Law
1983 – 1986

SELECT RELEVANT PUBLICATIONS

- Presidential Leadership and Accountability from Mandela to Ramaphosa, with Mabel Sithole – chapter for HSRC 2020 State of the Nation book (forthcoming).
- Populism versus Grassroots Movements – chapter on the politics of climate action for *Future Earth* annual report 2019: https://futureearth.org/publications/our-future-on-earth/
- Delivering on the $100 Billion Climate Finance Commitment and Transforming Climate Finance – joint author of expert technical team paper commissioned by UN Secretary-General, September 2019
- The Future Trajectory of South Africa's Foreign policy: Is there a real opportunity for a fresh voice on Global Human Rights – A Political Economy Assessment – paper commissioned by Freedom House, June 2018 (an edited version, co-written with Jon Temin, can be found at: https://www.csis.org/analysis/can-south-africa-return-global-stage)
- *Access to Information and Constitutional Accountability: Ruffling Feathers in South Africa* in: Special Edition: The Right to Information in VRÜ Verfassung und Recht in Übersee (Law and Politics in Africa, Asia and Latin America) *2017.* Seite 367 – 389.
- Sandile Ngcobo: A Short Study in Judicial Leadership. Southern African Public Law. Volume 32, Issues 1 & 2, 2017. *Make or Break: How the next three years will shape South Africa's next three decades.* PenguinRandomHouse. September 2016.
- *The South African Case*, in Norris, P. & Abel, A. (eds), Checkbook Elections? Political Finance in Comparative Perspective, Forthcoming, 2016.
- *Guarding the Guardians: South Africa's Chapter Nine Institutions*, with Plenaar, G. in State of the Nation 2016: Who is in Charge? HSRC. 2016.
- *Institutional Renaissance or Populist Fandango? The Impact of the Economic Freedom Fighters on South Africa's Parliament*, with Seedat, S. in VRUe/Law and Politics in Africa, Asia, Latin America. Humboldt University, Berlin: January 2016.
- *Mitigating climate change: State of the carbon nation,* in Meyiwa T., Nkondo M., Chitiga-Mabugu M., Sithole M., Nyamnjoh T. (eds), State of the Nation 2014. HSRC. 2014.
- *Exploring the Liberal Genealogy and the Changing Praxis of the Right of Access to Information: Towards an Egalitarian Realisation* in Theoria, Volume 61, Number 140, September 2014.
- *Access to Information: A Theory of Change in Practice,* with Bentley K. in Langford, M, Cousins, B, Dugard, J and Madlingozi, T (eds) Strategies for Socio-Economic Rights in South Africa: Symbols or Substances. Cambridge University Press. 2014.
- The Zuma Years: South Africa's Changing Face of Power. Zebra Press. August 2013.
- Global Climate Finance, Accountable Public Policy: Addressing The Multi-Dimensional Transparency Challenge. With Jonason P. Georgetown Public Policy Review. May 2013.

- The Right Of Access To Information: The State Of The Art And The Emerging Theory Of Change in Calland R. & Diallo F. (eds). *Access to Information in Africa: Law, Culture and Practice*. Brill Publishing. 2013.
- Things Fall Apart; The Centre Cannot Hold, in Bentley K. Calland R. & Nathan L, (eds). *Falls the Shadow: The Gap between the Promise of the South African Constitution & the Reality.* UCT Press, 2013.
- Private Sector Participation in Low Carbon Infrastructure: A Case Study of South Africa. OECD, 2013.
- Country Readiness for Climate Finance in Southern Africa: Insights and Framework. GIZ. 2013.
- Financing low-carbon energy for low-income housing. OECD Study Paper. 2012.
- *The Impact and Effectiveness of Accountability and Transparency Initiatives,* with Bentley K. Development Policy Review, Special issue on Freedom of Information. ODI. 2013.
- Calland R. and Hawkins, J. 2012. The Construction Sector Transparency Initiative (CoST): promoting public accountability through multi-stakeholder Collective Action, in Pieth M. (ed). Collective Action: Innovative Strategies to Prevent Corruption. Basel Institute for Governance: Basle.
- Towards a Framework for National Climate Finance Governance in Africa. With Reddy, K. HBF, 2012.
- Calland R. & Nakhooda S. Participatory democracy meets the hard rock of energy policy: South Africa's National Integrated Resource Plan, in Burnell P. & Mittag J. Volume 19, No. 5 (October 2012) of *Democratisation*. Academic Journal published by Heinrich Boll Foundation. 2012.
- Dubosse N. & Calland R. Beyond the Jargon: The Governance of Climate Finance. Idasa: November 2011. http://www.idasa.org/media/uploads/outputs/files/cop17forweb.pdf
- "The Construction Sector Transparency Initiative Global Program: Institutional Options for the Future International Governance of the Initiative". Working Paper - World Bank, July 2011.
- *Machiavelli meets the Constitution: Mbeki and the Law*, with Oxtoby, C. in Glaser D. (ed). Mbeki and After: Reflections on the legacy of Thabo Mbeki. Wits University Press. 2011.
- Calland R. & Jonason P. New horizons, urgent imperatives: transparency & climate finance. Rutgers University 1st global conference on transparency research, 2011
- *Standard Setting at the Cutting Edge: An evidence-based Typology for multi-stakeholder initiatives,* in Non-State Actors as Standard Setters, Cambridge University Press: 2009, with Koechlin, L.
- *Illuminating the Politics and Practice of Access to Information in South Africa*, in *Paper Wars*, Wits University Press: 2009.
- Making the Law Work: The Challenges of Implementation. With Laura Neuman, in *The Right to Know: Transparency for an Open World.* Institute of Public Dialogue at the University of Columbia; Columbia University Press. May 2007.
- *Democracy in the Time of Mbeki: Idasa's Democracy Index*. Co-editor (with Paul Graham). IDASA. Forthcoming April 2005.
- *Whistleblowing Around the World: Law, Culture & Practice.* Co-editor (with Guy Dehn). Open Democracy Advice Centre & Public Concern at Work. April 2004.
- *Thabo Mbeki's World: The Politics & Ideology of the South African President*. Joint Co-editor (with Sean Jacobs). University of Natal Press/Zed Books. September 2002.
- *The Right to Know, The Right to Live: Access to Information & Socio-economic Justice*. Co-editor (with Alison Tilley). Open Democracy Advice Centre. October 2002.
- *Real Politics: The Wicked Issues* with Sean Jacobs and Greg Power. British Council: December 2001.
- *The First Five Years: A Review of South Africa's First Democratic Parliament*. Editor. IDASA: September 1999.
- *All Dressed up with no-where to go? The Rapid Transformation of the South African Parliamentary Committee System* in The Changing role of parliamentary committees. Longley, L. & Agh, A. (eds). Wisconsin: Lawrence University. Research Committee of Legislative Specialists, International Political Science Association, and Governance in Southern Africa, occasional paper No. 5, 1997, School of Government, University of Western Cape.

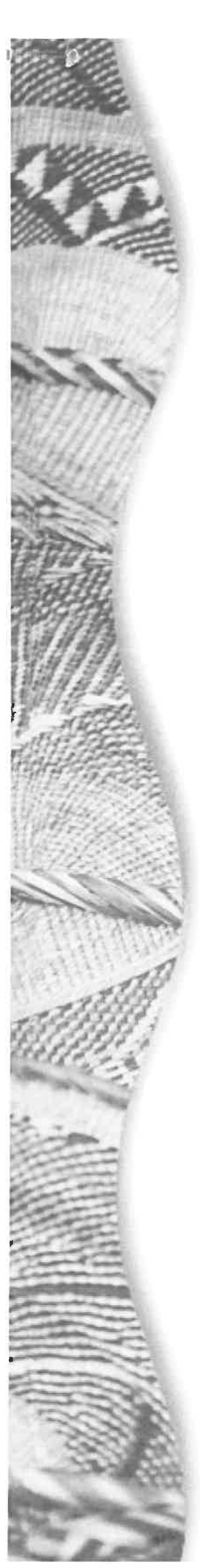
MAY 2020



ANNEXURE "**FIVE**"

ANNEXURE "FIVE"

ZZ9-RC-159

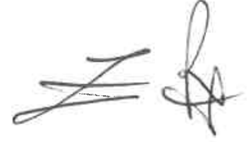


Report of the Electoral Task Team

January 2003

REPORT OF THE ELECTORAL TASK TEAM

JANUARY 2003



Published by the Electoral Task Team, Cape Town, 2003

Printed by the Government Printer, Pretoria

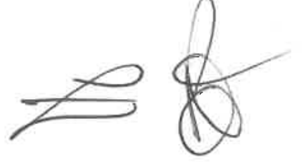
ISBN 0-621-33571-1

For further information contact

The Director-General
Department of Home Affairs
Private Bag X114
Pretoria
0001 South Africa
Telephone +27 (0) 12 314 8911

CONTENTS

		page
Chapter 1	Appointment, terms of reference, composition and programme of action of the Electoral Task Team	1
Chapter 2	The round-table conference	7
Chapter 3	Electoral Task Team interaction with stakeholders	9
Chapter 4	Majority recommendations for a preferred electoral system for South Africa	12
	Annexure A: Graphic illustration of the present and proposed electoral systems: National Elections	between 31 & 32
	Annexure B: Graphic illustration of the present and proposed electoral systems: Provincial Elections	between 31 & 32
	Annexure C: Legal framework as proposed by the majority	32
	Annexure D: Draft Electoral Systems Bill (as proposed by the majority)	34
Chapter 5	Minority recommendations for a preferred electoral system for South Africa	62
	Annexure: Draft Bill (as proposed by the minority)	74
Chapter 6	Concluding comments and acknowledgements	88



CHAPTER ONE

Appointment, terms of reference, composition and programme of action of the Electoral Task Team

1.1 INTRODUCTION

1.1.1 South Africa has been undergoing constitutional transformation since 1993, a process ushered in by the interim Constitution of the Republic of South Africa (Act 200 of 1993). This Constitution provided for the members of the National Assembly and the legislatures of the nine new provinces to be elected in 1994 by universal adult franchise in accordance with a system of proportional representation. With minor modifications (detailed in Annexure A to Schedule 6 of the Constitution), the 1994 electoral system was carried over to the 1999 national and provincial elections by means of items 6(3)(a) and 11(1)(a) of Schedule 6 of the Constitution.

1.1.2 The provisions of the final Constitution relating to an electoral system do not, however, extend beyond the 1999 elections. The Constitution requires that an electoral system be introduced through the enactment of national legislation. Thus there is at present no electoral system prescribed for the conduct of the national and provincial elections scheduled for the second or third quarter of 2004. This situation led Cabinet to establish an Electoral Task Team to draft legislation for an electoral system for the next national and provincial elections. In executing its mandate the Task Team would be guided *inter alia* by the relevant provisions of the Constitution.

1.2 APPOINTMENT AND TERMS OF REFERENCE

1.2.1 Cabinet resolved on 20 March 2002 that an Electoral Task Team (ETT) should be established to "draft the new electoral legislation required by the Constitution". It should "formulate the parameters of new electoral legislation and draft it in order to prepare for the scheduled National and Provincial elections of 2004 or any earlier election, should the need arise" and include political parties in its consultations with stakeholders. Further, this Task Team was to be chaired by Dr F van Zyl Slabbert.

1.2.2 A letter from the Minister of Home Affairs dated 26 March 2002 informed Dr Slabbert of his appointment and expanded on the Task Team's terms of reference. The ETT would be required to:

- identify the controlling constitutional parameters
- identify the salient and relevant aspects of the South African context
- identify the list of options available within our context
- canvass the preferences and views of relevant role-players and stakeholders, with special regard to political parties, in respect of the list of identified options
- develop specific proposals identifying the preferable electoral system to be canvassed with the aforesaid role-players and stakeholders
- formulate a draft Bill for submission to the Minister of Home Affairs

1.3 COMPOSITION

1.3.1 Initial Cabinet approval was given to a Task Team consisting, in addition to the Chairperson, of a representative appointed by the Minister of Constitutional Development, a representative appointed by the Minister of Provincial Government, a representative appointed by the Chairperson of the Electoral Commission, two representatives appointed by the Minister of Home Affairs, and the Chief Director: Legal Services of the Department of Home Affairs. However, the Minister made it clear that the Chairperson was free to propose additional members to provide expertise and technical assistance and in the event six more appointments were made.

1.3.2 The members appointed to the ETT were:

- **Dr F van Zyl Slabbert** (Chairperson)
- **Raesibe Tladi**[1] (Director: Legal Services, Department of Justice and Constitutional Development: appointed by the Minister of Justice and Constitutional Development)
- **Zamindlela Titus** (Special Ministerial Adviser, Department of Provincial and Local Government: appointed by the Minister of Provincial and Local Government)
- **Adv Pansy Tlakula** (Chief Electoral Officer, Electoral Commission: appointed by the Chairperson of the Electoral Commission)

[1] Ms Tladi resigned on 13 August 2002 and was not replaced.

- **S S van der Merwe** (Commissioner, Electoral Commission: appointed by the Minister of Home Affairs)
- **Norman du Plessis** (Deputy Chief Electoral Officer, Electoral Commission: appointed by the Minister of Home Affairs)
- **Adv Rufus Malatji** (Chief Director: Legal Services[2], Department of Home Affairs)
- **Professor Jørgen Elklit** (Department of Political Science, University of Aarhus, Denmark: recommended by the Chairperson)
- **Professor Glenda Fick** (School of Law, University of the Witwatersrand: recommended by the Chairperson)
- **Nicholas Haysom** (Attorney in private practice: recommended by the Chairperson)
- **Dr Wilmot James** (Executive Director, Social Cohesion and Integration Research Programme, Human Sciences Research Council: recommended by the Chairperson)
- **Dren Nupen** (Director, Electoral Institute of Southern Africa: recommended by the Chairperson)
- **Tefo Raditapole** (Attorney in private practice: recommended by the Chairperson)

Jenny Nothard was appointed Secretary and Administrative Manager of the ETT.

1.4 LAUNCH

The ETT was formally launched by the Minister of Home Affairs in the auditorium of 120 Plein Street, Cape Town on 9 May 2002. On this occasion the Minister made it known that he hoped to receive the completed draft legislation by 11 November 2002.

1.5 MEETINGS

Broadly speaking, the ETT meetings were of three types: planning, engaging stakeholders and internal deliberations.

1.5.1 Planning

These meetings had to do with drawing up the ETT budget, planning fundraising, commissioning research and finalising a questionnaire, and making arrangements for

[2] This was Adv Malatji's designation at the time of his appointment to the ETT; he is now Acting Deputy Director-General of the Department of Home Affairs.

a round-table conference. The ETT also decided that Professor Roger Southall (Executive Director, Democracy and Governance, Human Sciences Research Council) would convene and report on the research to be commissioned, a comprehensive survey of voters' involvement in, and understanding of, current politics and the electoral system. The survey was to be undertaken by four South African research survey companies (ACNielsen MRA, MarkData, Markinor and Research Surveys) and coordinated and analysed by the Human Sciences Research Council. It was agreed that their work would be completed by 23 August 2002, so that Professor Southall and Dr Robert Mattes (Associate Professor, Department of Political Studies and Director, Democracy in Africa Research Unit, University of Cape Town) could interpret the results and prepare them for presentation.

1.5.2 Engaging stakeholders

The ETT decided that it should be as open, accessible and transparent as possible. Meetings were scheduled to engage interested bodies from civil society and media representatives (see paragraphs 1.5.2.4, 3.1, 3.2 and 3.4) and it was made clear that the ETT would welcome comment and analysis.

1.5.2.1 The most important injunction laid on the ETT, stressed repeatedly by the Minister of Home Affairs in the Chairperson's letter of appointment, was to engage political parties throughout its deliberations. They after all represent the voters. To this end, the ETT asked each party in Parliament to appoint a liaison person to facilitate communication with the ETT.

1.5.2.2 Introductory meetings were held with the political parties on 11, 12 and 25 June 2002. It was made clear that at that stage the ETT was not interested in a "final" position on an electoral system but simply wished to canvass views and familiarise parties with its approach and work process. The ETT also met with the Home Affairs Portfolio Committee at Parliament on 25 June 2002.

1.5.2.3 Furthermore, the ETT asked each party to send not more than three delegates (in addition to party representatives who would be participating in panel discussions) to a round-table conference to be held on 9-10 September 2002. At the end of the conference each party would receive the proceedings of the conference, the research

report and details of the options to which the ETT was giving serious attention. Finally, the ETT set aside the month of October to engage all parliamentary parties, once they had been given as much information by the ETT as possible, in discussions on their preferred electoral systems for South Africa.

1.5.2.4 On 25 June, 11 July and 22 July 2002, the ETT met with representatives of the media and relevant NGOs which had expressed an interest in engaging the ETT in discussions. These were the Centre for Policy Studies, the Helen Suzman Foundation, the Institute for Democracy in South Africa (Idasa) and the Steve Biko Foundation. Other NGOs, such as the Gender Advocacy Programme (Gap), made written submissions. The ETT also received a number of papers from academics and had the benefit of reports on conferences where electoral systems had been discussed.

The round-table conference held on 9-10 September 2002 is discussed in Chapter 2.

1.5.3 Internal deliberations

As the work of the ETT progressed, time was set aside for internal deliberations. For example, Professor Glenda Fick of the School of Law at the University of the Witwatersrand presented a paper on the constitutional position and the terms of reference of the ETT, Dr Wilmot James of the Human Sciences Research Council presented a paper on core values that should guide deliberations on alternative electoral systems, Norman du Plessis of the Electoral Commission gave an overview of different electoral models and their practical applications and consequences in the South African context and the Chairperson put forward a proposal in the form of a discussion document on which each member was invited to comment. This formed the basis for discussion at a weekend retreat held in October 2002, when the ETT was to come up with its final recommendations for a preferred electoral system.

1.6 CONCLUSION

From the outset the ETT operated under a severe time constraint. When it was appointed only two to two-and-a-half years remained before the 2004 national and provincial elections. Any electoral system that would require extensive redemarcation and voter education would simply be too impractical for consideration, no matter how suitable it might otherwise be in the South African situation. The ETT was aware of

the resulting tension. It had to do the best it could within the time available. In the event, it is satisfied with the results of its efforts.

ZZ9-RC-170

CHAPTER TWO

The round-table conference

2.1 INTRODUCTION

A round-table conference took place at the Vineyard Hotel in Cape Town on 9-10 September 2002 and was formally opened with a keynote address by the Minister of Home Affairs. A central theme of the Minister's address was the issue of how an electoral system can contribute to political accountability in the sense of closer interaction between public representatives and voters. This was one of the issues that dominated debate throughout the conference.

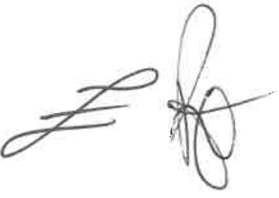
2.2 TOPICS OF DISCUSSION

During the formal presentations and discussants' responses a number of key points emerged: first of all, the advantages of the current electoral system – fairness, inclusiveness and simplicity – that should not lightly be interfered with. Secondly, the need to introduce greater accountability into democratic politics and the role which electoral systems can play in this regard. Views on this ranged from there being no role for electoral systems in accountability, through electoral systems having some contribution to make, to electoral systems having an absolutely essential role. Proponents of the latter two views felt that some form of constituency system (over and above the current nine provinces each being a constituency) needed to be combined with a proportional representation system. Opponents, on the other hand, emphasised the danger of becoming so obsessed with electoral accountability as to undermine the obvious advantages of the current system.

A range of issues that could logically be linked to the problem of accountability, but bore no obvious relationship to electoral systems, was also raised. These included internal party discipline, the role of Parliament, party funding, rural/urban differences, the separation of powers and the relationship between party and support base. This highlighted the fact that an electoral system is only one component of the process of democratic consolidation, albeit an important one.

2.3 RESEARCH REPORT

The agenda of the conference included the results of the research that had been commissioned, which were presented by Professor Roger Southall and Dr Robert Mattes. The intention of the research was to establish to what extent voters identified



with and understood the current electoral system and to identify indicators of the need for adjustments or amendments.

Delegates were left in no doubt that there was a very high level of satisfaction with the current system. For example, 74% of voters were "satisfied with the way we elect our government", 72% felt that the current system was "fair to all parties", 81% that it ensured "we include many voices in Parliament", 78% that it gave voters "a way to change the party in power" and 68% that it helped voters "hold the parties accountable for their actions".

Not only was there a great extent of satisfaction with the inclusiveness and fairness of the current system, but results showed a high degree of political literacy and over 80% of the respondents declared a clear intention to vote in 2004. Whatever reservations voters may have had regarding parties, leaders and/or politicians, they displayed a marked commitment to the act of voting and its importance in the democratic process.

What is also clear is that a significant majority of voters wanted closer interaction with the politicians who represent them. Thus 71% said they wanted to vote for a candidate from the area where they lived, 64% that MPs should "live close to the people they represent" and 53% that party candidates should be chosen by party members rather than party leaders.

2.4 CONCLUSION

The feedback the ETT received on the round-table conference indicated that it was successful and that participants found it worthwhile. A number of participants expressed the view that more such public debates were needed in South Africa.

CHAPTER THREE

Electoral Task Team interaction with stakeholders

3.1 INTRODUCTION

On 11, 12, 25 and 26 June and 11 and 22 July 2002 the ETT held meetings with political parties, NGOs and academics.

3.2 OVERVIEW OF INTERACTION WITH STAKEHOLDERS

3.2.1 A theme that was to repeat itself constantly throughout the ETT's activities was satisfaction with and the acceptability of the current system as far as fairness and inclusiveness are concerned. This was particularly so in the case of most of the political parties and slightly less so as far as representatives of the media and NGOs were concerned.

3.2.2 The same emphasis, however, was placed on the importance of accountability. What was apparent was that, whereas there was a high degree of consensus as to what principles such as fairness, legitimacy, inclusiveness, simplicity and representativeness meant, this did not apply to the principle of accountability. (An attempt is made to clarify this confusion in Chapter 4.) For many participants the principle of accountability related to the internal organisation of political parties, their relationships with their respective support bases, party funding, parliamentary discipline and so on. No doubt these and other issues play an important role in making a political system more democratically accountable, but none is directly related to the working of an electoral system. Many, if not all, of these factors relate to accountability between elections: what is known as "interim accountability". The ETT had repeatedly to stress the distinction between an electoral system that *produces* representatives, on the one hand, and the *subsequent behaviour* of such representatives as far as accountability is concerned, on the other. The point was emphasised that no electoral system can compel an elected representative to behave democratically, take care of a constituency or party responsibilities, or be a disciplined, dedicated member of Parliament. In so far as these issues may relate to accountability, additional measures, policies, rules or regulations are needed to operate alongside or parallel with an electoral system.

3.2.3 Nonetheless, some of the stakeholders involved refused to accept that an electoral system bears little relationship to the principle of accountability. For them it was inconceivable that an electoral system could make so slight a contribution to accountability.

3.2.4 The continual emphasis on interaction between representative and voter was taken very seriously by the ETT and Chapter 4 demonstrates how it grappled with this problem. The fact remains that many of the matters raised with the ETT did not fall within its terms of reference. Issues such as party funding, the internal democratic organisation of parties, a stronger monitoring role for Parliament and the possibility of a directly elected President were mentioned. They reflect a wider concern with problems related to accountability but fall outside the ETT's purview.

3.3 FINAL MEETINGS WITH POLITICAL PARTIES

3.3.1 A final meeting with each political party took place on 11, 15, 16, 17 and 25 October 2002. The purpose of these meetings was to establish each party's preference for the most appropriate electoral system for South Africa. It is worth noting that the interaction between the ETT and all parties without exception was cordial and constructive.

3.3.2 Most parties made written representations which they elaborated on in discussions. All parties were in favour of some system of proportional representation. The governing party, the African National Congress, favoured the retention of the current system, as did the African Christian Democratic Party, the Afrikaner Eenheidsbeweging, the Freedom Front, the New National Party and the United Christian Democratic Party. On the other hand, the Democratic Party, the Federal Alliance, the Inkatha Freedom Party, the Pan Africanist Congress and the United Democratic Movement favoured a move towards a multi-member constituency system, while the Azanian People's Organisation favoured a "first-past-the-post" constituency system for 50% of National Assembly seats and proportional representation for the remaining 50%.

3.4 CONCLUSION

In the short time available the ETT canvassed opinion as widely as possible, through commissioned research, conferencing and interaction with stakeholders and other interested parties. This was important in order for it to understand "the salient and

relevant aspects of the South African context" mentioned in its terms of reference. All these activities helped shape the ETT's own final deliberations, the conclusions of which are presented in the following chapters.

CHAPTER FOUR

Majority recommendations for a preferred electoral system for South Africa

4.1 INTRODUCTION

4.1.1 When the time came to formulate its own recommendations, the ETT was confronted by the fact that two schools of thought had crystallised out of its own deliberations: one that the current system should be retained unchanged and the other that a larger measure of constituency representation should be built into the system. No unanimity or consensus could be reached on these two points of view.

4.1.2 It was consequently agreed that those to whom the ETT report is addressed should not be denied the benefits of either of these views and that each group should draft and sign its own set of recommendations. The majority recommendations are submitted in this chapter and the minority recommendations in Chapter 5.

4.1.3 The fact that there are majority and minority views should not create the impression that the ETT is deeply divided on every issue. There is considerable consensus and unity of purpose on these points:

4.1.3.1 The core values/principles should be reflected in the electoral system.

4.1.3.2 A preoccupation with accountability should not jeopardise the values of fairness, inclusiveness and simplicity.

4.1.3.3 The current electoral system should not be replaced or radically altered.

4.1.3.4 The current electoral system enjoys considerable support, has served South Africa well through two sets of national and provincial elections and has contributed greatly towards transitional stability.

4.1.4 The key question on which the ETT divided had more to do with the problem of risk than with matters of deep principle and substance. The question can be put in this way: Do the advantages of adjusting the current system outweigh the concomitant disadvantages? (Or do the advantages of not

changing the current system outweigh the concomitant disadvantages?) The majority thought it worthwhile to adjust the current system; the minority thought not.

4.2 THE CONTROLLING CONSTITUTIONAL PARAMETERS

4.2.1 The ETT accepted at the outset that its brief was not to suggest amendments to the Constitution, but to propose an electoral system in terms of the relevant constitutional guidelines. Furthermore, this electoral system was to apply only to national and provincial elections and not to those for local government.

4.2.2 Several constitutional provisions are relevant:

4.2.2.1 Subsection 1(d) (in the Founding Provisions) states that South Africa as a "sovereign, democratic state" is founded *inter alia* on the values of "[u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness".

4.2.2.2 Section 19 (in the Bill of Rights) states that every citizen is "free to make political choices" and that this includes the rights "to form a political party; to participate in the activities of, or recruit members for, a political party; and to campaign for a political party or cause"; furthermore, that "[e]very citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution" and "has the right to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret; and to stand for public office and, if elected, to hold office".

4.2.2.3 Under the heading "National Assembly" (in Chapter 4: Parliament), subsection 46(1) stipulates that the National Assembly "consists of no fewer than 350 and no more than 400 women and men elected as members in terms of an electoral system that is prescribed by national legislation; based on a national common voters roll; provides for a minimum voting age of 18 years; and results, in general, in proportional representation".

4.2.2.4 In addition, under the heading "National Council of Provinces" in the same chapter, sections 60, 61 and 62 provide for such a council and spell out its composition, allocation of delegates and membership.

4.2.2.5 As in the case of the National Assembly, subsection 105(1) (in Chapter 6: Provinces) specifies that a provincial legislature "consists of women and men elected as members in terms of an electoral system that is prescribed by national legislation; is based on the province's segment of the national common voters roll; provides for a minimum voting age of 18 years; and [also] results, in general, in proportional representation". Furthermore, subsection 105(2) states that a provincial legislature "consists of between 30 and 80 members" and that "[t]he number of members, which may differ among the provinces, must be determined in terms of a formula prescribed by national legislation". Item 25 of Schedule 2 of the interim Constitution as amended and kept in force by items 6(3) and 11(1) of Schedule 6 of the Constitution defines a "region" as "the territorial area of a province" and defines a "regional list" as a party's list of candidates (in preferential order) for an election of the National Assembly.

4.2.2.6 Another provision which has implications for an electoral system is contained in Annexure A to Schedule 6 (Transitional Arrangements) of the Constitution. This annexure contains amendments to Schedule 2 of the interim Constitution and inserts item 23A, which relates to what are known as "floor-crossing" or "anti-defection" provisions, under the heading "Additional grounds for loss of membership of legislatures". Item 23A(1) states, "A person loses membership of a legislature to which this Schedule applies if that person ceases to be a member of the party which nominated that person as a member of the legislature." However, item 23A(3) qualifies this: "An Act of Parliament may, within a reasonable period after the new Constitution took effect, be passed to amend this item" so as to permit floor crossing without loss of membership of a legislature.

Legislation was adopted during 2002 to do precisely that. Urgent proceedings in the Cape High Court by the United Democratic Movement to block the legislation ended in the Constitutional Court some months later. That Court found that a prohibition on floor crossing "is not an essential component of multi-party democracy, and cannot be implied as a necessary adjunct to a proportional representation system" and that legislation to permit floor crossing was not as such unconstitutional. The judgment expressed no view on

floor crossing vis-à-vis closed- and open-list proportional representation systems. The Court made plain that it could not rule on the appropriateness of the provisions but only on their constitutionality. The ETT has a different mandate, to propose the most desirable electoral system for South Africa, and has therefore itself investigated the question of floor crossing.

4.2.3 These constitutional parameters provide the broad framework in terms of which a future electoral system for South Africa will have to be considered and proposed. They also provided the framework in terms of which an electoral system was decided on for the 1999 national and provincial elections (the 1994 system with minor modifications). For convenience' sake, this electoral system will be referred to as "the current electoral system", although, technically speaking, it was decided in 1996 it would apply only until the 1999 elections, after which an electoral system would be decided on by Parliament. There is thus a legislative vacuum as far as a system for the election of national and provincial legislatures is concerned and it is the brief of the ETT to present a proposal to fill this vacuum, which will be handed to the Minister of Home Affairs to put before Cabinet.

4.2.4 It needs to be repeated that the ETT's terms of reference do not imply that the current electoral system has to be abandoned or replaced. In a speech launching the ETT on 9 May 2002, the Minister made it clear that the advantages or disadvantages of the current system had to be thoroughly investigated before – and if – it was to be amended or abandoned.

4.2.5 The obvious and immediate problem confronting the ETT was how to compare the relative merits of alternative electoral systems, which had to be done in terms of its letter of appointment. The second point of several in this letter expanding on the terms of reference states specifically that the ETT had to consider the most appropriate electoral system against the background of "the salient and relevant aspects of the South African context". It would serve little purpose to propose an elegant electoral model that was not appropriate to such "salient and relevant aspects". However, even if the ETT had reached consensus on these aspects (and consensus is unlikely where enquiry and debate are ongoing), it still would not have resolved the dilemma of what criteria to apply in deciding on the most appropriate electoral system. After sustained and vigorous debate, the ETT reached a high degree of agreement

as to what the core values/principles should be for judging the adequacy of alternative electoral systems. Once decided on, these were then elaborated at the round-table conference and were generally accepted by those present. They need to be briefly stated now before recommendations can be made on an electoral system.

4.3 CORE VALUES/PRINCIPLES FOR JUDGING AN ELECTORAL SYSTEM

4.3.1 The ETT accepted *fairness, inclusiveness, simplicity* and *accountability* as core values. The majority view on these values can be stated briefly:

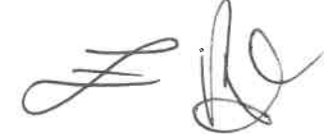
4.3.2 Fairness

4.3.2.1 Taking its cue from the Constitution, the majority felt not only that every eligible voter should have the opportunity to vote but that, as far as possible, all votes should be of equal value. This was the understanding of proportionality "in general", where every vote has some relevance in the composition and membership of the national and provincial legislatures. Fairness also lies in the closeness of the relationship between votes cast and the composition of the body elected.

4.3.2.2 A common misconception which was cleared up in the process of interaction with interested parties was that proportionality cannot be associated with a constituency system. For many, a constituency system meant a "first-past-the-post" system and this was seen as undermining proportionality and fairness. When it became clear that a multi-member constituency system was in fact proportional and generally fair, there was a distinct shift in some parties' attitudes towards the various electoral systems.

4.3.3 Inclusiveness

4.3.3.1 By this is meant that, given the demographic, ethnic, racial and religious diversity of the South African voting population, every attempt should be made to allow the widest possible degree of participation by various political preferences in the representative legislatures. An electoral system that inhibited inclusiveness could be a source of instability and conflict.



4.3.3.2 Almost without exception, political parties and other commentators commended the inclusiveness of the current system. The ETT agreed that no proposed electoral system should undermine inclusiveness. The ETT also argued that, with a view to the system's remaining as inclusive as possible, *no legal threshold for representation should be applied.*

4.3.4 Simplicity

4.3.4.1 Given the South African situation, a complex electoral system presupposing a high degree of literacy would violate the principles of fairness and inclusiveness. The system has to be accessible to practically every voter, easy to understand and easy to participate in. It is not simply the act of voting that is important; voters must also understand the results.

4.3.4.2 At the same time, the degree of political sophistication of the average South African voter should not be underestimated. Voters have become used to multi-balloting and to distinguishing between voting for individual candidates and for parties in municipal elections. The rate of spoilt ballots in modern South African elections is remarkably low in comparison with many other countries and has been below 2% in all elections from 1994 onwards. This applies not only to the national average; close analysis of the situation in all 15 000 voting districts shows no great variance. Whether a constituency ballot paper is used in addition to a national/provincial ballot paper is inconsequential in terms of simple voting procedures.

4.3.5 Accountability

4.3.5.1 No principle gave rise to more discussion and debate than this. Although it is common cause within the ETT that an electoral system may encourage, but cannot ensure, accountability, with very few exceptions a lack or perceived lack of accountability was identified as a problem in the current system. This factor was also emphasised by most media representatives whom the ETT subsequently met and also surfaced in many of the submissions by NGOs and other interested parties.

4.3.5.2 The results of the public opinion survey largely confirm the impressions gained from the initial discussions with political parties. In terms of percentages of respondents, 74% were satisfied with the fairness and equality of the present electoral system and 81% with its inclusiveness. In the matter of accountability, however, while 68% felt that the electoral system helped voters hold political parties accountable, only 60% felt that the system helped voters hold individual representatives accountable. This resulted in 71% feeling that candidates should come from the area they represent, which was seen as a means of improving their individual accountability. Lack of accountability and availability/responsiveness was thus also seen as the weak point of a system with which respondents were otherwise generally satisfied.

4.3.5.3 Throughout the many discussions the ETT had with stakeholders as well as debates at the round-table conference, it became clear that there was a host of aspects of democratic political life that revolved around the issue of accountability but were not related to, or consequent upon, a specific electoral system. Very often people associate issues of accountability with an electoral system, whereas no system can simply deliver accountability. Electoral systems of whatever variety can be abused by leaders, cliques, representatives and parties in an unimaginable number of ways. Redress for such behaviour cannot be sought in an electoral system. Certainly, collective accountability allows a party to be rewarded or punished by voters at election time, but this usually comes around only every four or five years. Some would argue that nothing more can be said about accountability in relation to an electoral system.

4.3.5.4 The question remains: Is there nothing else an electoral system can do to make a contribution to political accountability? In the interaction of the ETT with parliamentary parties, interested NGOs and media representatives, a recurring theme was that an electoral system could at least put a face to a party, somebody who has representative responsibility for a designated area, somebody who is identifiable and accessible in the period between elections. Collective accountability at periodic intervals was seen as insufficient. Some form of individual

accountability had to be provided by an electoral system. The majority saw this as a real challenge in proposing an electoral system.

4.3.6 A final word on core values: It should be obvious that each principle/value – fairness, inclusiveness, simplicity and accountability – could be presented separately with compelling intellectual and moral force. In this sense, each principle is a "good" value. What happens, however, when they are pursued concurrently in the development of an electoral system? They possess no inevitable fixed hierarchy of importance. We are not forced to choose between good and evil. We have to weigh up the relative importance of each in relation to the others in proposing an electoral system. The ETT has done this by taking into account "the salient and relevant aspects of the South African context" and thus gives primacy to fairness, inclusiveness and simplicity. It would be hard put to it to propose an electoral system that demonstrably gives primacy to accountability at the expense of these three factors. This is an extremely difficult choice to make and in no way shows contempt for the problem of accountability. It is, however, a choice the ETT has made.

4.4 THE MAJORITY VIEW ON SINGLE-MEMBER CONSTITUENCIES WITH A COMPENSATORY CLOSED NATIONAL LIST

4.4.1 The ETT considered some eleven different electoral systems. One enjoyed more attention than others before it too was found unacceptable: single-member constituencies with a compensatory closed national list. This calls for comment. Under such a system, the country would be divided into single-member constituencies which would each elect an MP on a "first-past-the-post" basis. This would lead to considerable disproportionality with the larger parties dominating the scene and the biggest of all probably winning more than 80% of constituency seats. In order to restore proportionality, a second ballot would determine overall party support and its result would determine the final composition of the National Assembly, with proportionality being restored by allocations from closed national lists.

4.4.2 Such a system would, generally speaking, align the electoral systems for all three spheres of government and could allow for independent candidates to participate in elections. It would also provide a sound basis for floor-crossing arrangements in the case of directly elected representatives and deal with the inadequacies of the present provincial electoral system as far as localised

representation is concerned. Regular, if costly, by-elections could also serve as a political barometer providing continuous evaluation of government.

4.4.3 For provincial elections there would, however, be 215 constituencies and not the 200 used for the national election. This would flow from the constitutional prescript on the minimum (30 seats) and maximum (80 seats) sizes of provincial legislatures. In four provinces, this would result in the constituency boundaries for national and provincial elections not corresponding with each other – in addition to not corresponding with municipal boundaries in any event, since single-member constituencies would all have to have about the same number of voters. The Constitution would consequently have to be amended to avoid the situation of many voters having to vote in two different constituencies (and thus at two different voting stations) on the same day, or else national and provincial elections would have to be conducted on separate days, which would greatly increase costs. This apart, the demarcation of constituencies will always be complex, time-consuming and costly and its results unavoidably controversial.

4.4.4 This system enjoyed considerable media and some party-political support at the outset. When parties stated their formal preferences at the end of the process, however, only one small party continued to regard this as an option. Proponents of this system principally support it because direct election has traditionally been regarded as providing the greatest degree of accountability. The distinction between collective and individual accountability is, however, blurred. The case of collective accountability is clear: the political party must account to the electorate for its performance as a party. The electoral fortunes of a party are thus mostly determined collectively.

4.4.5 When it comes to individual accountability, the matter is less clear. Candidates are elected in their own right, but that is mainly as a result of their association with a political party. It should be remembered that one can reject an individual candidate only by voting for a candidate from another political party, and that may just be asking too much of many voters, regardless of where they find themselves on the political spectrum. In reality, the opportunity to reject an individual candidate in an election seldom materialises.

4.4.6 The problems or disadvantages presented by a mixed proportional system with single-member constituencies are such that there would be more to lose

than to gain by it at the present time. The ETT thus did not see it as a viable option.

4.5 THE MAJORITY RECOMMENDATION

4.5.1 Discussion

4.5.1.1 A critical point of departure for the majority view is that the current electoral system is already a mixed proportional system where at least half the representatives are elected from nine regions (provinces) or constituencies, which are clearly defined geographic areas (see item 25 of Schedule 2 of the interim Constitution). The provinces are to all intents and purposes multi-member constituencies with representatives elected from separate regional lists and with a separate quota applying in each case. The remaining 200 representatives are allocated from compensatory national lists (with a quota which is different from any of those used to determine regional/ constituency representation) with a view to restoring overall proportionality. (A less favoured alternative would be to submit only regional or constituency lists [400 names] which would then also be used for top-up purposes in order to restore overall proportionality. This would not change the method of calculation for the allocation of seats.) The minority view is that provinces should not be treated as multi-member constituencies. This is a fundamental difference of opinion between the majority and the minority.

4.5.1.2 This point of departure is critical for the majority view because the principle of multi-member constituencies, which is already embedded in the current electoral system, can be used to expand the number of such constituencies in an evolving electoral system for the country. The majority proposes multi-member constituencies together electing 300 members of the National Assembly and a compensatory closed national list providing 100 members (giving a total of 400 members).

4.5.1.3 This proposal corresponds generically with the current system except in that the present nine multi-member constituencies (regions/ provinces) would be expanded to some 69. *(In accordance with the relevant formula, there would be approximately 69 multi-member constituencies if the present distribution of population in municipalities*

were taken into account. The final demarcation might result in one or two constituencies more or fewer. For the sake of simplicity, we shall simply refer to "the 69-constituency option".) The boundaries of constituencies would be those of district councils (with perhaps combinations or sub-divisions of district councils along local municipal boundaries) and metro councils (or subdivisions thereof) and the same outer boundaries would apply for national, provincial and obviously also municipal elections. No constituency boundary would transcend a provincial boundary and an electoral demarcation would thus not be required. There would merely have to be an adjustment to the number of representatives (according to the number of registered voters) to be elected in those cases where, owing to the constitutional prescript on the sizes of provincial legislatures, the number is not the same for the provincial election as for the national election.

4.5.1.4 The number of representatives to be elected in such a constituency would vary, depending on the number of voters, from three to seven for a national election, and 300 of the 400 members of the National Assembly would be elected from closed constituency lists in this way. It might be preferable to operate with both a constituency and a national ballot paper but, since lists would be closed, it would be possible to combine them and use one ballot paper only, as is the case under the current system. For the voter, regardless of the number of ballot papers, there would be no confusion concerning voting procedures or ballot papers. Voters have become familiar with multiple ballot papers in municipal elections and ballot papers would still bear the names of political parties, their emblems and their leaders' photographs.

4.5.1.5 Apart from the 300 constituency representatives, a further 100 representatives would be allocated from closed national lists in order to restore overall proportionality. The results in the constituency elections would already be largely proportional and, with current voting patterns as a guide, it is not expected that any deviation from overall proportionality would exceed the 4%-6% range. It would therefore be easy to restore overall proportionality.

4.5.1.6 What has been given here constitutes the technical outline for the suggested electoral system for South Africa. The question obviously has to be asked: In what significant way is it an improvement on the current system? To answer this question, we must return to the core values which should be used to judge the adequacy of an electoral system. It is common cause that fairness, inclusiveness and simplicity should not be jeopardised. The majority is of the opinion that its proposal complies with this injunction. It is also common cause that an electoral system cannot resolve the problem of political accountability. But can one electoral system make a greater contribution than another? The majority is persuaded that it can, and that its proposal makes significant progress towards this end.

4.5.1.7 A distinction can be, and often is, drawn between individual and collective accountability. It has already been pointed out that individual accountability in a "first-past-the-post" constituency system is more apparent than real. Collective accountability occurs at each general election when a party is subjected to the opinion of the electorate. Is it, however, in any way possible to complement collective accountability with some form of individual accountability? The only way to increase individual accountability significantly would be to create the possibility for a candidate to be rejected *without concomitant rejection of a party*. This could best be achieved by using open rather than closed party lists, with voters influencing the order of candidates. They would do this either by ranking candidates or by selecting a number of preferred candidates listed next to the emblems of their respective parties. Should the order of candidates, as decided by a party, be acceptable to a voter, however, then a mark need merely be made against the name of the party. Open lists would not only improve the accountability of individual candidates dramatically but would also substantially increase voter participation in the democratic process.

4.5.1.8 It should be obvious that the candidate lists of the present nine multi-member constituencies (provinces/regions) do not lend themselves to becoming open lists. Two hundred names appear on the nine different constituency (regional) lists and these are simply too many to be ranked by any electorate. The three to seven candidates in the

69 multi-member constituency option would offer a much better prospect of success.

4.5.1.9 In the short to medium term it will not be possible to have open lists in the proposed multi-member constituencies. Present literacy rates simply make this impractical. It is, however, particularly important to keep the possibility in mind with a view to later evolution. Even if closed candidate lists are used for the foreseeable future, the 69 multi-member constituency option is a much better prospect. Given that the lists will be short (three to seven names) and that candidates will have to campaign in their constituencies and represent them afterwards, there will clearly be a face to representation and a much closer link with the electorate than is presently the case. Putting a face to politicians seems to be the only way to increase accountability significantly at the present time. The current system makes no contribution to this.

4.5.1.10 Although it is common cause that the current system has considerable merit and the research and round-table discussions revealed a large measure of satisfaction with it, it is not flawless or incapable of improvement. If, for example, one looks at the present electoral systems in the three spheres of government, it is clear that a common approach was not followed in their institution. At the national and municipal levels, we have two-tier systems with both centralised and decentralised components. For the election of the National Assembly there are regional lists (decentralised/localised) as well as national lists (centralised for the country as a whole). For the election of municipal councils there are ward representatives (decentralised/localised) as well as proportional list representatives (centralised for the municipality as a whole).

4.5.1.11 The electoral system for provincial legislatures is, however, out of step. Here each province is regarded as a single entity and, contrary to the expectation of greater decentralisation in the second sphere of government, there is no decentralisation, with a single provincial list being used to elect representatives. It thus falls to political parties to ensure that all regions or sectors of society in a particular province – such as urban/rural communities with their

concomitant socio-economic disparities – are fairly represented in a provincial legislature. If inclusiveness is important in terms of accommodating most political groupings, then it is hard to understand why the division which exemplifies one of the country's fundamental problems, that between the economically advantaged and disadvantaged, is not dealt with at a fundamental level but is left to political parties to resolve internally. It is quite possible to deal with this matter in an electoral system which provides for localised representation. The majority proposal makes provision for this.

4.5.1.12 The majority view on floor crossing is uncomplicated. Floor crossing in itself is not necessarily undemocratic. The majority is, however, of the view that the basic principle should be that floor crossing, while it can be entirely appropriate in open list systems, is incompatible with closed list proportional representation. To the extent that a multi-member constituency system makes provision for a relatively small number of representatives of a constituency (as in the majority proposal where three to seven representatives would be elected) and they are known beforehand to voters, either through their names on a ballot paper or their photographs displayed during an election campaign, floor crossing could be considered, even in a closed list system. The guiding principle should be the degree of accessibility and responsiveness between voter and representative. There is a very real likelihood that floor crossing under the current system will distort proportionality as reflected in the previous election; it will also deprive parties of their right to replace defectors on their own party lists. In fact, it increases the distance between voter and representative. If the argument is that floor crossing is actually an interim manifestation of a shift in public opinion, then the best way to test this is by holding elections.

4.5.2 Timeframe and manner of implementation of the majority proposal

4.5.2.1 It is proposed that legislation be passed to establish multi-member constituencies which will elect 300 members of the National Assembly from closed constituency lists while 100 members will be designated from compensatory closed national lists to achieve overall proportionality. The legislation should provide criteria for

the demarcation of constituencies by the Municipal Demarcation Board (which is already performing functions other than those relating to municipal demarcation and which may require a name change) which will result in approximately 69 multi-member constituencies. The legislation will also provide for the submission of candidate lists and the introduction of constituency ballot papers in addition to a national ballot paper for the National Assembly and a provincial ballot paper for each provincial legislature. All other provisions in the legislation will, apart from some technical adjustments, correspond with the relevant provisions presently contained in Schedule 2 of the interim Constitution as amended by Annexure A to Schedule 6 of the Constitution.

4.5.2.2 Parliament cannot be expected to pass a new Electoral Systems Act much earlier than a year before the next national and provincial elections, which would leave very little time for political parties to adjust their processes for compiling candidate lists. While balloting and voter education should not present problems to the electorate, there will be little time to fully acquaint voters with the intentions and principles of the new system as part of a democracy education programme. *For the 2004 national and provincial elections, it is therefore proposed to retain the current situation of nine multi-member constituencies responsible for the election of 200 members of the National Assembly supplemented by an additional 200 members drawn from a national list.* It is, however, best to deal now with the question of an electoral system which will serve us beyond the next 18 months and to handle the immediate practical realities of the 2004 elections by means of transitional arrangements. To do otherwise would be to nullify the present effort and to start the debate afresh after the 2004 elections.

4.5.2.3 This timeframe and manner of implementation in no way represent a sudden break with the current electoral system. On the contrary, they encapsulate its central features in legislation and use them as the basis for a gradual and considered evolution towards a multi-

member constituency system. To the extent that an electoral system can make some contribution towards political accountability, this evolutionary process will assist in pursuing that objective. To insist that the current system not be explored for whatever contribution it can make toward accountability would be to abandon any possible relationship between accountability and an electoral system for the foreseeable future. The majority finds this unacceptable. This is particularly so since accountability and responsiveness feature in the founding provisions of the Constitution and can thus not be ignored.

4.5.3 Possible reservations/concerns about the majority view

4.5.3.1 The issue of treating provinces as multi-member constituencies

The argument has been advanced that a province is an entity in the form of a state and was never intended to be seen as a constituency. Whatever the intention may have been is irrelevant in the light of the definition of a region in the Constitution and the number of representatives that each region may provide for the National Assembly. Logically there is no reason why a "form of state" cannot be seen as a constituency for electoral purposes. Defining a region as the "territorial area of a province" from which candidates are elected on a list for the National Assembly is about as close to a universal definition of an electoral constituency as one can imagine.

4.5.3.2 The issue of simplicity

4.5.3.2.1 Concern has been raised that the majority proposal is too complex and would prove too costly. The response is that voters have become used to multi-balloting and to distinguishing between voting for individual candidates and for parties in municipal elections. Given that candidate lists would continue to be closed lists, the ballot papers for the 69-constituency option would remain exactly as they were in 1994 and 1999 and would include party names, emblems and leaders' photographs. The majority does not accept that costs would increase to any significant degree under the suggested new system.

4.5.3.2.2 The next point that has been raised concerns the compilation of candidate lists by political parties. Under the current system each has to compile nine constituency/regional lists which together contain no more than 200 names as well as a national list containing no more than 200 names. This approach does permit a global perspective for parties in respect of the allocation of positions to women, for instance. While the same total number of candidates would have to be nominated under the 69-constituency option, this would obviously have to be done on 69 separate constituency lists (300 names) and a national list containing no more than 100 names. To achieve the same results as with the current system would require careful planning on the part of political parties but there is no inherent reason why the result could not be as successful.

4.5.3.2.3 As to electoral administration, more ballot papers would have to be printed if constituency ballot papers were to be introduced. This would not necessarily increase costs if the ballot papers were to be similar in quality to those used in municipal elections rather than the full-colour sort used up to now in national and provincial elections. The electronic systems used for candidate nominations, ballot paper generation and result calculations would obviously also have to be adapted. Only adjustments, and not complete redesigns, would be required and these should present no major problems and not be overly expensive.

4.5.3.2.4 An important element of candidate lists is gender representation. The introduction of a prescribed gender quota was considered but there was not unity on its practicality. There was also a strong view that 50% of candidates should be women. This is a view which Parliament will have to consider. The recommendation at this stage is that each party must seek to ensure that at least 33% of the candidates on both the party national list and the combined constituency lists are women and that male and female candidates be as evenly distributed as possible throughout the party national list. This should apply regardless of which electoral system may be decided upon. (This recommendation is an advance on the legislative recommendation for municipal

elections, whereby 50% of list candidates [=25% of all candidates] should be women.)

4.5.3.3 The issue of stability

The point has been made that the 69-constituency option will create instability. It is not at all clear why this should necessarily be the case, particularly as it is proposed that this option should be phased in over a period of five years.

4.5.3.4 The issue of timing

This is a variation on the "if it ain't broke – don't fix it" position. The majority felt, however, that the time is indeed right for considered and carefully planned change in order to improve an already very good system. There is at present a constitutional, legislative and political opportunity to introduce an evolutionary path of transformation in the electoral system, with great potential benefits in allowing South Africans in both urban and rural areas to feel much more closely involved in the democratic process. That opportunity will not easily come again. This is the considered assessment of the majority, taking into account the political readiness of the population as demonstrated in surveys and interaction with stakeholders. There is never a perfect time to do everything necessary, but certainly it is preferable to do the best one can without being forced by circumstances of crisis and pressure.

4.5.4 Other factors to be considered apart from the core values

4.5.4.1 Participatory democracy

The current system does not lend itself to participation by the electorate in the selection of candidates. That is an inherent weakness in all systems using closed candidate lists, which include both the current system and (for the time being) the 69-constituency option. The difference is, however, that the current system does not lend itself to ever evolving into having open lists where the electorate may rank candidates according to preference, since the lists simply contain too many names for that to be practical. The 69-constituency option is, however, eminently suited to its candidate lists (three to seven names) becoming open lists when the time is ripe. In the meantime, the lists would be short enough, even though closed, for voters to get to know or identify the

candidates on the list for a particular constituency. This would contribute substantially towards participatory and representative democracy.

4.5.4.2 Systemic synergy

In view of the consequences at provincial level, it is significant that there are presently three different electoral systems for the three spheres of government. Each province is a single entity and that is problematic for local representation. The only way this can be addressed is to move to the 69-constituency option since that would introduce regional representation in provincial legislatures. It is important to note that constituency boundaries would not transcend provincial boundaries and that all constituencies would thus be contained within provinces. This would allow the same constituencies to be used for provincial elections as for national elections with only the number of representatives elected differing.

4.5.4.3 The size of the National Assembly

The Constitution provides for between 350 and 400 members of the National Assembly. In deciding on the number of seats, it should be borne in mind that the higher the number of representatives, the more likely it is that smaller parties will be represented. Given the emphasis on inclusiveness, a reduction in the number of seats is not proposed.

4.5.4.4 Residential qualifications

Imposing a residential qualification would be impractical and inhibit freedom to accommodate diversity (e.g. gender). The closer link between representatives and voters in the 69-constituency option, both before and after an election, should go some way towards resolving the issue.

4.5.5 Summary and conclusion

4.5.5.1 The nub of the majority view is that it is worthwhile to make legislative provision for an electoral system that can evolve towards a larger multi-membership constituency system with a compensatory national list. In order to facilitate accessibility and responsiveness between voter and representative, multi-member constituencies with between three and seven representatives in the National Assembly are envisaged. This would require approximately 69 multi-member constituencies to provide 300 representatives for the National

Assembly with 100 representatives allocated from national lists to restore overall proportionality. Both the constituency and national lists will be closed.

4.5.5.2 It is further proposed that as a transitional arrangement the current nine multi-member constituency system, with provinces as constituencies, be retained for the 2004 elections to provide 200 representatives, and that these be supplemented with 200 representatives elected by proportional representation from a closed national list. This in effect corresponds with the current electoral system. After the 2004 elections the Municipal Demarcation Board would demarcate constituencies to increase the current nine to approximately 69 multi-member constituencies.

4.5.5.3 The majority on the ETT is confident that this proposal does not offend against the core values of fairness, inclusiveness and simplicity characteristic of the current system, but uses the electoral principles already contained in the current system to strike a balance between accountability and the other core values. To the extent that an electoral system can make some contribution towards political accountability, the majority is satisfied that the proposed electoral system will do so demonstrably and effectively.

4.5.5.4 If nothing else, this proposal, if accepted, will keep an essential debate alive on the ways and means by which political accountability can be strengthened in the South African democracy. That this is necessary and important was seen as common cause by all the parties, NGOs and media representatives with whom the ETT interacted.

Members subscribing to the above views:

Dr F van Zyl Slabbert (Chairperson)	**Nicholas Haysom**
Norman du Plessis	**Dr Wilmot James**
Professor Jørgen Elklit	**Adv Rufus Malatji**
Professor Glenda Fick	**Dren Nupen**

ZZ9-RC-195

ANNEXURE A TO CHAPTER 4

Graphic illustration of the present and proposed electoral systems:

National Elections

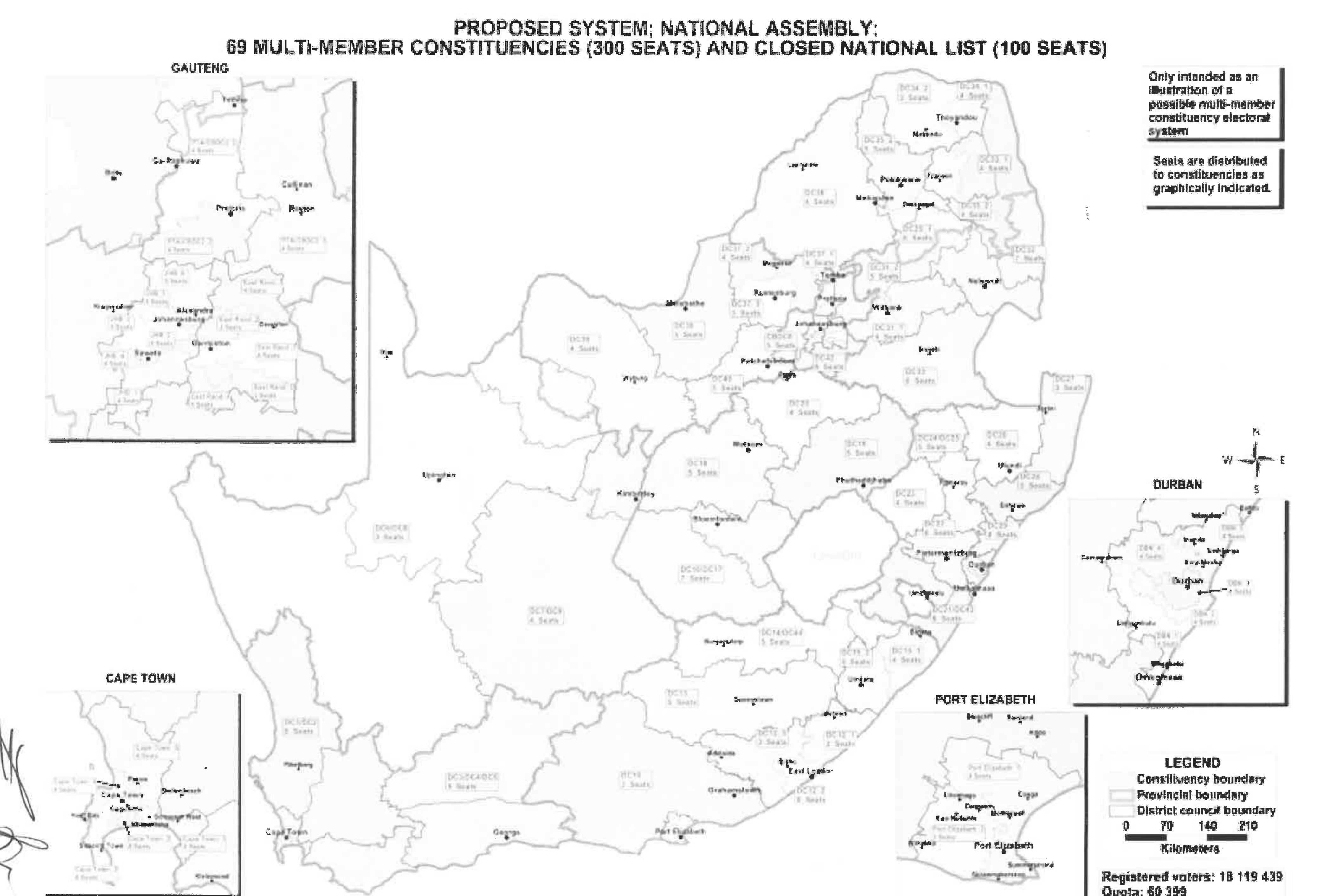
PRESENT SYSTEM; NATIONAL ASSEMBLY: 9 MULTI-MEMBER CONSTITUENCIES (200 SEATS) AND CLOSED NATIONAL LIST (200 SEATS)

Seats are distributed to constituencies (provinces) as graphically indicated.

PRESENT SYSTEM; NATIONAL ASSEMBLY: (1999 ACTUAL RESULT)

9 MULTI-MEMBER CONSTITUENCIES (200 SEATS) AND CLOSED NATIONAL LIST (200 SEATS)

Party	Valid votes	% Valid votes	Regional seats (200)	National list seats (200)	Total seats (400)	% Overall seats	Variance
ACDP	228975	1.43%	3	3	6	1.50%	0.07%
ANC	10601330	66.35%	139	127	266	66.50%	0.15%
AEB	46292	0.29%	0	1	1	0.25%	-0.04%
AZAPO	27257	0.17%	0	1	1	0.25%	0.08%
DP	1527337	9.56%	20	18	38	9.50%	-0.06%
FA	86704	0.54%	0	2	2	0.50%	-0.04%
IFP	1371477	8.58%	18	16	34	8.50%	-0.08%
MF	48277	0.30%	1	0	1	0.25%	-0.05%
NNP	1098215	6.87%	13	15	28	7.00%	0.13%
PAC	113125	0.71%	0	3	3	0.75%	0.04%
GPGP	9193	0.06%	0	0	0	0.00%	-0.06%
SOPA	9062	0.06%	0	0	0	0.00%	-0.06%
UCDP	125280	0.78%	1	2	3	0.75%	-0.03%
UDM	546790	3.42%	5	9	14	3.50%	0.08%
VF/FF	127217	0.80%	0	3	3	0.75%	-0.05%
AITUP	10611	0.07%	0	0	0	0.00%	-0.07%
TOTAL	**15977142**	**100%**	**200**	**200**	**400**	**100%**	


PROPOSED SYSTEM; NATIONAL ASSEMBLY:
69 MULTI-MEMBER CONSTITUENCIES (300 SEATS) AND CLOSED NATIONAL LIST (100 SEATS)
GAUTENG
Only intended as an illustration of a possible multi-member constituency electoral system
Seats are distributed to constituencies as graphically indicated.
N
W
E
S
DURBAN
Durban
CAPE TOWN
PORT ELIZABETH
Port Elizabeth
LEGEND
Constituency boundary
Provincial boundary
District council boundary
0
70
140
210
Kilometers
Registered voters: 18 119 439
Quota: 60 399

RESULTS OF THE 1999 NATIONAL ELECTION AS APPLIED TO THE PROPOSED NATIONAL ELECTORAL SYSTEM

CONSTITUENCY	Total Votes	Total Seats	Quota	ACDP	ACDP Seats	ANC	ANC Seats	AEB	AEB Seats	AZAPO	AZAPO Seats	DP	DP Seats	FA	FA Seats	IFP	IFP Seats	MF	MF Seats
Johannesburg 1	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Johannesburg 2	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Johannesburg 3	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Johannesburg 4	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Johannesburg 5	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Johannesburg 6	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
East Rand 1	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
East Rand 2	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
East Rand 3	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
East Rand 4	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
East Rand 5	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Durban 1	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Durban 2	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Durban 3	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Durban 4	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Durban 5	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Cape Town 1	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Cape Town 2	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Cape Town 3	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Cape Town 4	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Cape Town 5	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Port Elizabeth 1	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Port Elizabeth 2	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
PTA/DRDC2 1	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
PTA/DRDC2 2	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
PTA/DRDC2 3	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
TOTAL	15977142	300		228975	6	10601330	214	46292	0	27257	0	1527337	34	86704	0	1371477	26	48277	0

SEAT ALLOCATION	Total	Total Seats	Quota	ACDP	ACDP Seats	ANC	ANC Seats	AEB	AEB Seats	AZAPO	AZAPO Seats	DP	DP Seats	FA	FA Seats	IFP	IFP Seats	MF	MF Seats
Constituency Seats	15977142	300		228975	0	10601330	214	46292	0	27257	0	1527337	34	86704	0	1371477	26	48277	0
Proportional Seats		100			6		52		1		1		4		2		8		1
Total Seats		400			6		266		1		1		38		2		34		1

RESULTS OF THE 1999 NATIONAL ELECTION AS APPLIED TO THE PROPOSED NATIONAL ELECTORAL SYSTEM

CONSTITUENCY	Total Votes	Total Seats	Quota	NNP	NNP Seats	PAC	PAC Seats	GPGP	GPGP Seats	SOPA	SOPA Seats	UCDP	UCDP Seats	UDM	UDM Seats	VF/FF	VF/FF Seats	AITUP	AITUP Seats
Johannesburg 1	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Johannesburg 2	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Johannesburg 3	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Johannesburg 4	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Johannesburg 5	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Johannesburg 6	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
East Rand 1	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
East Rand 2	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
East Rand 3	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
East Rand 4	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
East Rand 5	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Durban 1	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Durban 2	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Durban 3	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Durban 4	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Durban 5	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Cape Town 1	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Cape Town 2	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Cape Town 3	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Cape Town 4	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Cape Town 5	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
TOTAL	15877142	300		1098215	17	113125	0	9925	0	3062	0	125280	2	548790	7	127217	0	10811	0

SEAT ALLOCATION	Total	Total Seats	Quota	NNP	NNP Seats	PAC	PAC Seats	GPGP	GPGP Seats	SOPA	SOPA Seats	UCDP	UCDP Seats	UDM	UDM Seats	VF/FF	VF/FF Seats	AITUP	AITUP Seats
Constituency Seats	15877142	300		1098215	17	113125	0	9925	0	3062	0	125280	2	548790	7	127217	0	10811	0
Proportional Seats		100			11		3		0		0		1		7		3		0
Total Seats		400			28		3		0		0		3		14		3		0

ANNEXURE B TO CHAPTER 4

Graphic illustration of the present and proposed electoral systems:

Provincial Elections