

PUBLIC PARTICIPATION TOOLKIT

BUILDING EFFECTIVE CIVIL SOCIETY ENGAGEMENT WITH PUBLIC OFFICIALS



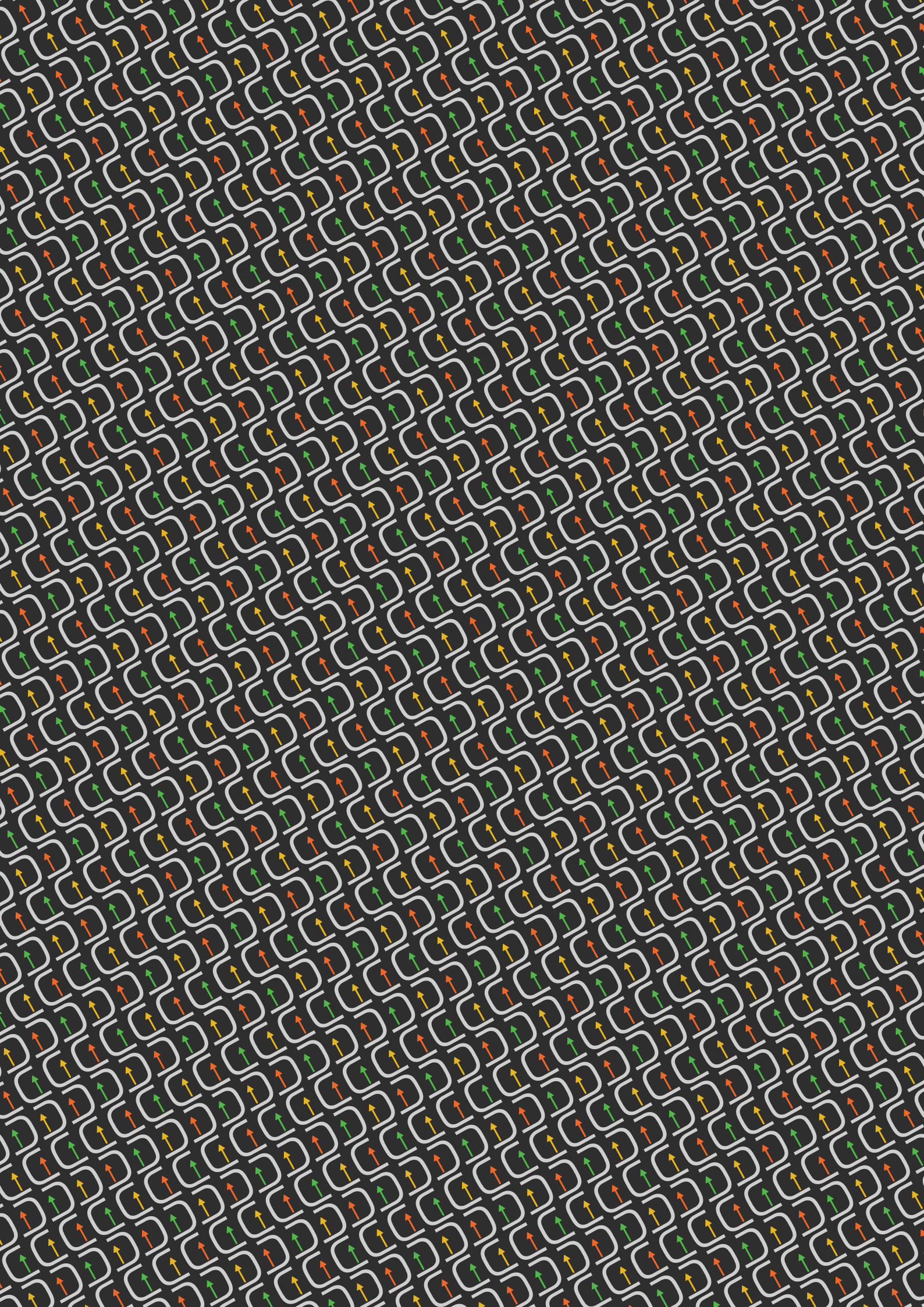


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Introduction

Democracy Works Foundation (DWF) has learned and equally shared much knowledge through the project to bridge the gap between civil society organisations (CSOs) and public officials, in partnership with the **Westminster Foundation for Democracy** (WFD), co-funded by the **European Union** (EU).

The project, seeking to promote democracy and good governance by strengthening CSOs and political representatives' ability to hold ongoing and sustainable public participation in democratic institutions, is called **Civil Society Organisations' Participation in Provincial Legislatures** (CSPPL). has generated learnings and resources that may benefit CSSPL Partner, those working in similar institutions or others operating in the sector, generally.

For that reason, the CSPPL project has collected this material and collated it into this Toolkit. It is our hope that it may be of value to community organisations pursuing public engagement and community driven oversight and accountability to fulfil needs of societies within which they work. Should this resource provide value, we have achieved our goal.

What is the Civil Society Participation in Provincial Legislatures Programme?

Democracy Works Foundation (DWF) aims to promote democracy and good governance by strengthening CSOs and political representatives' ability to address service delivery challenges through ongoing and sustainable public participation in democratic institutions.

The Civil Society Organisations' Participation in Provincial Legislatures (CSPPL) project seeks to increase levels of Civil Society Organisations (CSO) activity in public participation and oversight at the provincial legislatures in Limpopo, Northern Cape, and North West. The project is implemented by DWF in partnership with WFD, with the financial support from the EU and WFD for the period from March 2018 to January 2021.

The project facilitated events with CSOs and Members of Provincial Legislatures (MPLs) and key legislature staff. These events and ongoing support aim to increase state responsiveness and accountability in the broad thematic areas of public health and public safety in three provinces.

Specifically, the CSPPL project works with,

- CSOs to enhance their participation in relevant provincial legislative oversight and public participation processes that increase community voice in provincial government;
- MPLs and Portfolio Committee Staff to increase their awareness of the value of public participation and oversight in good governance and strong democracies;
- Both CSOs and MPLs collaboratively to nurture relationships between the legislatures, civil society, and communities to increased engagement and responsiveness on pressing issues.

What are South Africa's Provincial Legislatures

Constitutional Powers and Mandate¹

The constitution empowers provincial legislatures to pass legislation with respect to sectors including health, housing, development and town planning, environmental protection and basic education. Details of these are found in Schedule 4 and 5 of the Constitution.

In sectors where the provincial legislature does not have the authority to pass legislation, they may make recommendations to the national legislature through representation at the National Council of Provinces. These constitutional powers of provincial legislatures are stipulated in chapter 6 of the Constitution.

SOUTH AFRICA'S CONSTITUTION ON PUBLIC PARTICIPATION²



Chapter 6: Constitution of South Africa, Sections 114 - 118

Powers of provincial legislatures

SECTION 114

(1) In exercising its legislative power, a provincial legislature may—

- (a) consider, pass, amend or reject any Bill before the legislature; and
- (b) initiate or prepare legislation, except money Bills.

(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

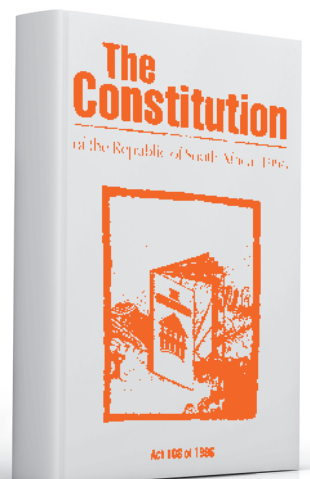
(b) to maintain oversight of—

(i) the exercise of provincial executive authority in the province, including the implementation of legislation; and

(ii) any provincial organ of state.

¹ <https://www.justice.gov.za/legislation/constitution/chp06.html>

² <https://www.justice.gov.za/legislation/constitution/chp06.html>



SECTION 115

A provincial legislature 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 provincial institution to report to it;
- (c) compel, in terms of provincial 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.

Internal arrangements, proceedings, and procedures of provincial legislatures

SECTION 116

(1) A provincial legislature may—

- (b) make rules and orders concerning its business, with due regard to representative and participatory democracy, accountability, transparency and public involvement.

Public access to and involvement in provincial legislatures

SECTION 118

(1) A provincial legislature must—

- (a) facilitate public involvement in the legislative and other processes of the legislature and its committees; and
- (b) conduct its business in an open manner, and hold its sittings, and those of its committees, in public, but reasonable measures may be taken—
 - (i) to regulate public access, including access of the media, to the legislature and its committees; and
 - (ii) to provide for the searching of any person and, where appropriate, the refusal of entry to, or the removal of, any person.

(2) A provincial legislature may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society.

In democratic societies legislatures also known as parliaments are regarded to be institutions of representation. Legislatures must ensure that people are represented in decision making processes by considering the views of the population. Legislatures are thus regarded by many as the backbone of representative democracy.



Provincial legislatures have the following constitutional mandate³:

- Conduct efficient and effective oversight over the Provincial Executives, to ensure they are accountable and answerable to the public. Provincial legislatures have a duty to oversee that provincial governments discharge their powers in a responsible manner and that they act in the best interest of the people. In conducting this function, the provincial legislature can summon members of the provincial executives to legislature sittings and question them on any issues that might be related to the services they are mandated to provide (as per Section 115).
- Write provincial laws and enhance existing provincial legislation. They have a responsibility to ensure that whatever laws are proposed before the legislature is responsive to social needs, can transform communities and improve the quality of life of communities.
- Make communities aware of the work and business of provincial legislatures. Provincial legislatures also have a responsibility to actively mobilise and promote the effective participation of communities and the public in their business and decision-making processes.
- Give the necessary support to committees and promote cooperative governance between the various arms of the state. They have a duty to scrutinise reports on budgets and approve budget proposals from provincial administrations.
- Be a platform for engagement and deliberation on issues relating to governance in provinces, through providing the space for important issues including provincial budgets to be debated.

Provincial legislatures also act as a watchdog over public funds and budgets received by provincial governments. They have the power to approve or reject budget proposals for provincial government departments. In 2009 the National Assembly passed an amendment to the Money Bills Amendment Procedure and related Matters Act. While the traditional role of legislatures has always been to approve or reject budgets, this amendment gave legislatures the power to make amendments on proposed provincial government budgets. In empowering parliament with the “power of the purse” the Act allows for the input and participation of civil society in the budget process.⁴



Who is “the public”? To understand what constitutes public participation, it is useful to get clarity on the definition of the term “public”. ‘Public’ refers to the general population or the people living of the country. The public encompasses individual persons in their own capacity, as well as entities that represent various sections of the population – for example political parties, CSO’s or any interest groups.



³ <https://pmg.org.za/blog/Why%20Parliaments%20Matters>

⁴ Analysis based on discussions and presentations in a roundtable of civil society organisations working with parliament, 8 February 2012, Cape Town.

Facilitating public participation in Provincial Legislatures



Public participation in the decision-making processes of the legislature is democracy in action⁵. This is informed by the understanding that a strong representative democratic state, cannot only act on behalf of the people but also with the people. Members of provincial legislatures are given a general mandate by the public once every five years through provincial elections. The mandate given to MPLs also empowers them with decision making authority on behalf of the people. Modern day standards of democracy require people to not only participate in free and fair elections but also to be enabled to influence the day to day decisions of government. This is achievable through on-going processes of participation which are facilitated by the legislative organs.⁶ This is to ensure that government remains responsive to the peoples' wishes and affords citizens a platform to legitimise the decisions and actions of provincial government⁷. Public participation and active citizenship promotes collective problem solving and a sharing of knowledge and ideas.

Civil Society Organisations in many instances have limited knowledge about public participation processes in the provincial legislatures⁸. Information about the participation of civil societies in provincial legislature is also scratchy to find and in some instances non-existent. There is however notable participation of CSOs in the National Assembly. Civil society participation in the National Assembly has over the years been invaluable to protecting the country's democracy and promoting a better quality of life for people. The participation of civil society has proven to have the potential of strengthening the oversight capacity of parliamentary committees. CSOs, which participate in legislative processes offer an alternative source of information to parliament, which can either verify or challenge the authenticity of information put before the legislature and its committees. This is crucial for oversight, as many CSOs are based and organised in communities and are therefore strategically positioned to offer MPLs insight into issues that affect communities. CSOs also have skills and connections that can support legislatures for example technical capabilities supporting the overstretched research capabilities of provincial legislature's research units⁹; spreading relevant public participation opportunities throughout relevant networks to assist the public participation units in fulfilling their mandates; and collecting and sharing data about service delivery and policy implementation challenges to name a few examples¹⁰.

⁵ Have we been underemphasising public participation?

⁶ Creating political legitimacy: Electoral democracy versus quality of government.

⁷ Public participation: its more than just elections (Part 1) <https://www.dailymaverick.co.za/article/2018-07-24-public-participation-its-more-than-just-elections-part-1/>

⁸ Civil Society Participation in Provincial Legislatures Project

⁹ Analysis based on discussions and presentations in a roundtable of civil society organisations working with parliament, 8 February 2012, Cape Town.

¹⁰ See podcasts series for reflections on engagement between CSOs and Members of Provincial Legislatures here

Committee system and how they promote public participation and oversight¹¹

Much of the oversight functions of Legislature happens through its Committees. Committees exist around different thematic areas and are tasked with investigating and making recommendations to the provincial legislatures. The provincial legislature will then table matters for Members of Provincial Legislatures or MPLs to debate and deliberate on and then take a decision, according to its internal rules. The provincial legislature has powers to establish these committees, which in turn have a responsibility to report regularly to the legislature about their activities. There are various types of committees in the provincial legislature with each carrying out a different function. To learn more about the various Committees at National and Provincial Parliaments, see the [report](#) of the Parliamentary Monitoring Group workshop hosted with DWF for CSO partners in three provinces.



¹¹ <https://www.parliament.gov.za/how-parliament-is-structured>



Committees found in Provincial Legislatures

Portfolio Committees

Portfolio Committees are established for each department of the provincial government. The responsibility of portfolio committees is to exercise oversight over the work of the respective provincial departments. This includes scrutinising annual budgets, reviewing government spending and service delivery. They also review whether departments' strategic plans are in-line with what government has promised the people. Portfolio committees are also responsible for deliberating on proposed bills and amendments to legislation that covers the departments' area of work. It is common for portfolio committees to conduct site visits when exercising their oversight mandate. During these visits they go to communities to verify information directly.

Standing Committees on Petitions¹⁰

Provincial legislatures standing committees on petitions have the power to hold public hearings, which can be used to grant people the opportunity to directly speak to officials from the provincial administrations about service delivery problems in communities they live in. These hearings offer members of communities and civil society groups an opportunity to make submissions, present petitions and make requests to the committees or officials who are invited from the provincial administration.¹²

Sectoral parliaments

Sectoral parliaments are also important avenues when wanting to deal with issues affecting certain sectors. For example, youth sectoral parliaments would be effective avenues available for communities to bring matters affecting young people to the provincial legislatures' attention¹³. For a report on the Women's Parliament and CSPPL and other CSO partners participation in these events please review [here](#).

Role players in Provincial Legislatures^{10, 14}

Office of the Speaker

The primary objective of this office is to promote a culture of participatory democracy and inclusive representation. The office of the speaker ensures the effective, efficient and economic running of both political and administrative functions of the legislature and ensures that the protocols of the house are observed by members. The office of the speaker might also host special programs in response to social challenges such as World Aids Day celebrations and Mandela Day events. On a more day to day basis the Speaker oversees the training of Committees, conducts public hearings, facilitates oversight work and organises study tours for members of the provincial legislature.

¹² Each Committee elects its own chairperson. Each Committee is supported administratively by a Committee secretary/clerk.

¹³

¹⁴ The Provincial Legislature and its committees form the political or legislative authority. To implement the decisions of the political or legislative authority, an administrative authority is required. The administrative authority is comprised of departmental heads and staff members. For more information see [here](#).

Office of the deputy speaker

The Deputy Speaker assists the speaker to run the provincial legislature with duties the Speaker sees necessary.

Office of the secretary

The office of the secretary is responsible for planning, performance monitoring, evaluation, reporting and ensuring effectiveness of the legislature. The Secretary provides leadership to all employees of the legislature and offers strategic advice to the Speaker.

The Leader of the House

The Leader of the House is a Member of the Executive Council (MEC) appointed by fellow MECs to represent the Executive Council in the Legislature. The Leader of the House is thus empowered to speak on behalf of MECs who are unable to participate in legislative activities. He/she also assists in coordinating in the business of the House.

What are your rights to public participation?¹⁵

As a civil society organisation, you have the right to public participation. To participate effectively, it is important to understand your rights.

You are entitled to

1. **Attend a public hearing:** Parliamentary committees host these events when they seek to engage with the public or with a specific segment of society which might be affected by proposed legislation. A schedule of these hearings should be found on the provincial Legislatures' websites and should be available to the public.
2. **Make a submission:** Submissions allow members of the public to present their views or opinions on a matter or a new proposed law which the legislature is considering. This is an important way to make direct input into the work of the committees – and ultimately, influence the decisions a legislature makes. Anybody may present a submission in writing and request the opportunity to present verbally to a Committee. For instance, as part of the consultation on Section 25 of the Constitution, the parliamentary Constitutional Review Committee invited members of the public to make written submissions on “the necessity of, and mechanisms for expropriating land without compensation”. The process also foresees the possibility for the public to make oral submissions in Parliament at a certain date.
3. **Lodge a petition:** Petitions are formal, written requests whereby members of the public ask a Legislature to intervene in a matter. They can be a complaint or a request for assistance with a specific issue, which lies within mandate of the provincial executive. Parliament or a provincial legislatures will only consider petitions on matters which is included within the competence of provincial legislatures and government departments. Schedules 4 and 5 of the Constitution dictate the distribution of “functional areas” between national, provincial and local levels of government. The legislator has the task to review and respond to petitions, provided that they meet the minimum requirements in terms of form and content. Each Legislature normally provides information to the public on the procedure to lodge petitions.

¹⁵ <https://www.sals.gov.za/docs/pubs/ppf.pdf>



- 4. Attend sittings of the House or meetings of parliamentary committees:** This is a way to hear first-hand what is being said and by whom during these sessions. Attending these meetings is mostly informative, as the public cannot voice their opinion. It can also be time and money-consuming in terms of transport, which creates a challenge for people living far away from the legislatures buildings, or for those juggling many competing priorities (like many of us). Nonetheless, attending parliamentary sessions is really important. It's a way for the public to observe the work of their elected representatives, and to assess the extent to which they are representing the public's interests. Attending these meetings is therefore an essential part for citizens to be able to hold their representatives to account. All meetings of the Parliament, Provincial Legislatures and their committees are open to the public, unless there are reasonable and justifiable grounds for denying the public access (issues of national security, for instance). You should not hesitate to contact the Legislatures directly to request information about the legislatures' schedules, if there are challenges in finding out about them online.
- 5. Attend sector parliaments or programmes like Taking Parliament to the People (TPTP) and Taking the Legislature to the People (TLTP):** The legislative sector has several programmes aimed at increasing participation of groups with specific interests (Workers, Youth, Women, Senior Citizens, Persons with Disabilities, to name only a few) and making the Legislatures more accessible to the communities. Sector Parliaments are organised once a year, at the discretion of Parliament and each Provincial Legislature. The Women Sector Parliaments, for instance, traditionally take place during August¹⁶. TPTP and TLTP are other programmes run by the National Council of the Provinces and some Provincial Legislatures, whereby committee or plenary sessions are held in various locations outside the legislatures' premises. These programmes intend to help bridge the gap between the people and these institutions, and usually target communities outside of main urban centres. They are supposed to take place at least once a year. However, communication about the sittings on the legislatures' websites or on media channels is usually not efficient enough to allow for open, inclusive public participation.
- 6. Get involved in oversight activities:** Throughout the yearly parliamentary cycle, the legislatures review various documents as part of their oversight of the executive power: Strategic Plans, Annual Performance Plans, Annual Budgets, Quarterly and Annual Reports, etc. Public input is essential to guarantee that the Legislature objectively monitors and assesses the information provided by government, and follows up on recommendations made. The public may also request and seek involvement in oversight visits and targeted studies. This can be done through submissions.
- 7. Another key avenue for citizens' engagement is through our elected representatives!** While this may seem obvious, we have found that these interactions are much less frequent than they should be, particularly in the provincial legislatures. Members of Parliament and of the provincial legislatures carry out a significant part of their work at the legislatures, through the work of committees and plenary sessions. But they have an equally important responsibility to engage directly with people and communities. The parliamentary programme must reserve specific time for these engagements: every Monday when Parliament is in session, and during constituency periods – several weeks during the year reserved for elected representatives to concentrate on

¹⁶ <https://democracyworks.org.za/press-release-civil-society-organisations-participate-in-the-womens-sector-parliament-in-the-northern-cape-provincial-legislature/>



constituency work. During these periods the representatives avail themselves to the public, help solve problems, and report back to the people who elected them on what is happening in the legislature. The parties represented in the legislatures receive an allowance to run Parliamentary Constituency Offices to facilitate interaction between elected representatives and their constituencies. It is estimated that there are about 350 of these throughout the country. Despite this, very few of us know these structures even exist, and the information about their location and the members assigned to each of them is scarce, although these offices are funded by the public purse¹⁷.

Why is public participation important? ¹²

The intention of public participation provisions in the Constitution is clear, to influence government policy outcomes so that they reflect “the will of the people”. Therefore, a vibrant civil society plays an important role in a democracy. It facilitates public engagement with government organs, including legislatures, and ensures that institutions, policies and laws enjoy legitimacy among ordinary people. Legislatures cannot be sustained without an activist people, an activist society. Parliament and legislatures are, in fact, meant to be people orientated –which is why it is called a ‘People’s Parliament’, and Legislature. One of the defining features of parliaments and legislatures is that it should seek to involve all people in issues of governance for better service delivery and development. As a key institution of democracy, it does not only hold the executive (meaning government) accountable, but is itself accountable to us, the people.

Representatives are elected to govern on behalf of the citizens and have to act within their mandates. Checks and balances must be applied to ensure that they are not abusing the powers vested in them by the citizens or failing to exert them while they are in office. The most effective way to do this is through involving the public.

Understanding the powers and mandates of provincial legislatures¹²

The provincial legislature is the legislative branch of government that is found in provinces. All nine provinces of South Africa have legislatures, which differ in size as a result of the population of the province (Simeon & Murray, 2001:70).

Powers and mandate of the Provincial legislature

The powers and mandate of provincial legislatures are very similar to those of the national parliament outlined above. The biggest difference is the fact that their powers are limited to those outlined in the Constitutional Schedules 4 and 5¹⁸. These Schedules outline the powers of all spheres of government: local, provincial and national. Schedule 5 lists the areas over which provinces have exclusive provincial legislative competence and Schedule 4 list the areas where national and provincial spheres share legislative competence. Both Schedules list areas in which cooperation with local sphere of government is mandated.

In other words, the provincial legislatures are given the power, by the Constitution, to pass legislation in various sectors. These sectors include, health, housing, development and town planning, environmental protection and basic education. Even in areas that lie outside

¹⁷ See podcasts series for reflections on how the Regional Liaison Officers in the Northern Cape function to bring parliament to the people here

¹⁸ See Annexure 1



the competencies of the provincial sphere for (e.g. higher education) , the Constitution still provides that they can make recommendations to the national legislature to highlight issues that are specific to provincial contexts or affect their competencies.

The provincial legislature can exercise this power by holding the Premier (as the head of the provincial executive) and provincial executive accountable, and by overseeing the provincial administration (the non-political appointees made by the executive). The executives in provinces are called The Executive Council, which is made up of the Premier and the Members of the Provincial Parliament that he or she elects to serve as Members of Executive Council, or MECs. Members of the Executive Council report and are accountable to the legislature on the performance of their functions. The provincial legislature has the power to remove the Premier through a vote of no confidence. Importantly, the provincial legislature also has the power to bring any person or any member of the executive portfolios before its committees to provide evidence, information or answer to any question that might be of public interests (Chapter 6, RSA Constitution, 1996).

The provincial legislatures also controls the finances and budgeting of the province through appropriation bills also known as spending bills (which simply mean proposed laws that authorise spending of government funds). These bills set money aside for specific spending (RSA Constitution, 1996).

How are members of the Provincial legislatures elected?

Members of Provincial legislatures (MPL's) are elected to the legislature through the political party lists. The political party that gets the most votes in provincial elections receives the greatest proportional representation in the legislature and will enjoy a bigger number of MPL's representing them in the legislature. The legislature then elects its own portfolio committee chairs as well as the leadership of the legislature which is the Speaker and Deputy Speakers (Mattes & Southall, 2004).

Structure of provincial legislature

Understanding the structure of provincial legislature is essential as it enables identifying to whom to direct inquiries and communications.

A provincial legislature must have its first meeting within 14 days after election results have been declared. Each legislature is chaired by the speaker and deputy speaker which are elected by the provincial legislature (RSA Constitution, 1994).

Provincial legislatures have portfolio committees which reflect the various committees of the executive. For example the provincial department of Health in Limpopo has a portfolio committee of Health. These committees are responsible for overseeing the work done by the different departments in the provincial Executive Council. The Limpopo Provincial Legislature therefore also has a Committee of Health. Please see a list of all the Limpopo Provincial Legislature Committees on the PMG website [here](#), where you can also find information about other provincial legislatures. The parliamentary committees also deliberate on bills and amendments proposed by the MECs, scrutinise budget reports and strategy plans from the Executive Council and provincial departments (Obiyo, R., 2013:98).

As public representatives, members of portfolio committees determine whether government departments are delivering on what they have promised and if they are spending government money in a responsible way. From time to time portfolio committee members can also visit communities to hear from the people if governments departments are delivering on the promise of service delivery and to receive mandate on how to shape



policy. The committees might also recommend matters that they feel are of priority to the house, for debating. The executive council of the province which consists of the Premier and MEC's also sit as members of the legislature but do not vote on matters (Obiyo, 2013:102). Understanding the thematic areas and function of the provincial legislature's committees is therefore essential for you to engage your representatives on issues you feel are important and within their mandate.

Office bearers in the provincial legislature

- **The Speaker-** In the provincial legislatures is the person who presides over the proceedings of the House and is responsible for running the legislature subject to the policy laid down by the Joint Rules Committee of Parliament, they also regulate public access.
- **The Deputy Speaker-** The deputy speaker assists the speaker to run the house of Parliament with whatever duties the speaker sees necessary.
- **Leader of the House-** Is appointed by the Premier, the Leader of the House serves as a link between the Executive Council and its Legislature and s/he in consultation with chief whips is responsible for determining the programme of the legislature.
- **The Chairperson and the Deputy Chairperson of Committees-** Is appointed by the Members of a legislature. His/her primary functions are to preside at meetings of the Committee.



Limitations on the power of provincial legislatures

In an August 2011 article first published in <https://constitutionallyspeaking.co.za/why-provinces-have-little-real-power-but-huge-responsibilities/>, Pierre de Vos discusses why provinces have little real power but huge responsibilities. A short extract follows below, with the full article to be found at Annexure 2.

“The exact contours of South Africa’s quasi-federal system of government, in which legislative and executive powers are distributed between different spheres of government in a way that seems to tilt power away from provincial governments towards the national government, has not yet been fully worked out. The Constitutional Court has only been asked to consider this rather complex issue in very few cases, perhaps because provinces – even the Western Cape government currently controlled by the opposition Democratic Alliance – have not pushed the envelope on this issue.

There are reasons for this reluctance on the part of Provinces to challenge the powers of the national legislature and executive. Provincial governments do not have the power to raise much revenue and is also required to co-operate with the national sphere of government. Besides, provincial legislatures do not have any residual powers to pass legislation. In other words, unlike the national Parliament, which enjoys plenary legislative power within the bounds of the Constitution, the legislative authority of provinces is circumscribed by the Constitution.

Schedule 4 of the Constitution lists those functional areas on which both the national Parliament and the provincial legislatures can pass legislation. These include important areas such as housing, health care, education, policing and education. Schedule 5 lists functional areas with regard to which provincial legislatures have exclusive legislative competence, but these exclusive powers relate to subjects of little importance such as beaches and amusement facilities; billboards and the display of advertisements in public places; cemeteries, funeral parlours and crematoria; fencing and fences; local sport facilities; noise pollution; street trading; street lighting; and traffic and parking.

Provinces have no power to legislate on a matter falling outside Schedules 4 and 5 unless it is a matter “that is expressly assigned to the province by national legislation” or is a “matter for which a provision of the Constitution envisages the enactment of provincial legislation”.

This does not mean that provincial governments have no power to affect the lives of ordinary people. A good provincial government can make a huge difference to the delivery of basic services and can also wreck the best-laid plans of a national minister if it does not do its job properly. This is because provincial executives are tasked with implementing not only provincial legislation in the province, but also with implementing all national legislation within the functional areas listed in Schedule 4 or 5 (except where the Constitution or an Act of Parliament provides otherwise)...”



How can civil society strengthen the capacity of South Africa's parliament?

In a Policy Brief, first published on the Democracy Works Foundation [website](#), DWF Chairperson William Gumede discusses how civil society strengthens the capacity of South Africa's parliament. An extract follows below with the full paper to be found at the [website link](#) provided.

There is often a disconnect between government and ordinary people being heard and represented in government structures, processes and decision-making. The role of CSOs is critical in addressing the gap between government and ordinary people to strengthen a democracy that ensures robust, accountable and effective public and government partnerships and representation.

Introduction

CSOs are not only crucial for holding national parliament, provincial legislatures and municipalities to account, they can also strengthen the capacity, efficiency and accessibility of these institutions.

Parliament is the key representative institution in a democracy. Parliament holds governments accountable, ensure that public services are delivered effectively, and that public money is spent wisely. South Africa's legislatures consist of the National Assembly, the National Council of Provinces and the nine provincial legislatures. They are tasked with representing citizens, ensuring that public resources are prudently managed, and that government delivers quality public services.

South Africa's constitution gives a special place for civil society to play an oversight role over democratic institutions, such as Parliament, participate in policy and decision-making and monitor the implementation thereof (RSA 1996). Civil society has a crucial role to play to make legislatures accountable, responsive and act in the public interest (Diamond 1997; Govender 2006).

Civil society also helps citizens especially the poor, vulnerable and excluded, access the tools and resources required to assert their rights and participate in legislative decision and policy-making. South Africa's CSOs have increasingly become the last line of defence fighting on behalf of ordinary citizens to secure their input in parliament policies and decisions and holding elected representatives, the executive and country president accountable.



Civil society provides information about citizens' rights, policies and decisions

Citizens cannot meaningfully participate in the decision, policy and law-making in Parliament unless they have full information (Constitutional Court 2006). Many of South Africa's people are illiterate, live in poverty and do not understand their rights and what they entail. CSOs, therefore, play an important role in providing civic education about the rights of ordinary citizens and communities about the policy debates in Parliament, decisions made and the impact of these on them.

CSOs also play an important role in helping ordinary citizens' access to parliament, understanding their rights and the obligations of their elected representatives. CSOs must lobby parliament on behalf of people and communities they represent. These are often people who are marginalised, illiterate and impoverished, and can be easily hoodwinked by unscrupulous elected representatives.

Unscrupulous politicians in South Africa increasingly pursue populist policies to hide their incompetence, corruption and for self-enrichment. CSOs, through their unique position in society also have the power to identify and expose opportunism, incompetence, corruption and self-enrichment on behalf of elected representatives. Being close to and located within communities also gives CSOs the access to data and information which allows them to propose evidence-based alternative policies.

Civil society hold parliament accountable to the people they represent

CSOs therefore have the power, to hold representatives within the executive accountable for their decisions, policies and for the behaviour of individuals. Civil society can mobilise citizens and communities to take action against undemocratic policies, unresponsive executive and lack of legislative transparency.

The power of South African civil society has been demonstrated throughout South Africa's history. Since the advent of democracy, civil society has been partly responsible forcing out two South African Presidents when they behaved undemocratically. During this period Parliament proved impotent to hold the leaders' executive accountable and civil society stepped in to uphold the countries democratic ambitions.

Consistent civil society mobilisation compelled many ANC MPs in Parliament to again against former ANC and South African president Jacob Zuma for his involvement in alleged corruption and manipulation of democratic institutions, including Parliament. This kick started inquires in what commonly became known as State Capture and saw many key political figures accused of involvement in illegal and criminal practices.

Former ANC and South African president Thabo Mbeki faced long-running civil society opposition to his refusal to make antiretroviral medication, which prevents Mother-to-child transmission of HIV, available at public hospitals. Led by civil society Mbeki was accused of a lack of consultation and marginalisation of critics, including ANC members of parliament.

CSOs – with their ideas, skills and community footprint can provide representative chambers with the capacity to come up with quality policies and decisions (Kaulem 2007; Jones and Tembo 2008). CSOs could themselves write the policies, laws and decisions on behalf of representative chambers – and this way ensure that these are in favour of the poor, vulnerable and the excluded.

Civil society provides input to policies

CSOs can also influence policies and decisions that elected representatives make (Nakedi 2004; Allen, Forrester and Patel 2008). South Africa's elected representatives frequently come up with policies and decisions which do not reflect the interests or needs of the constituencies that voted them in.

CSOs can give input to policies, laws and decisions which their representatives are considering, to ensure that the views, needs and wants of people and communities are taken into account. This input to policies and decisions can ensure they are evidence based, socially just and in the widest public interest.

Very few of the legislature structures have dedicated policy and research offices, or budgets which can provide policy drafting or analysis. If these offices do exist they are often working without adequate budgets and staff. The policy-making capacity of the national parliamentary, provincial legislature and municipal wings of political parties are often also equally under-resourced.

This is another reason why it is crucial that CSOs to get involved policy-making and decision-making processes because they can provide ideas and critique and offer alternatives examples of policies and their implementation. CSOs can also mobilise society-wide experts who are not necessarily known to parliament representatives or the state, to provide expert input in policy and decision-making.

CSOs have kept social justice on the legislative agenda. Examples include calls for a Basic Income Grant (BIG). The BIG campaign called for a universal, across-the-board, income grant without a means test (BIG Coalition 2002) The Basic Income Coalition ranged from the Congress of South African Trade Unions (Cosatu), to the Black Sash and the South African Council of Churches (SACC) and is supported by the official opposition, the Democratic Alliance (DA).

The BIG would benefit the many vulnerable citizens who fall outside of the current social security system. Although government has never implemented the proposal, the campaign played an instrumental role in government expanding social grant recipients.





Civil society ensure budgets are inclusive

CSOs can play a huge role in engaging with the budgets that national parliament, provincial legislatures and municipalities draws up. The public budgeting process is difficult for the public to understand and therefore to engage with. CSOs, therefore, have can play a vital role, to ensure that the needs of vulnerable and marginalised communities are genuinely addressed in budgets. They can play an interlocutory role in helping people and communities to hold elected representatives accountable for their budget decisions.

Civil society can make the budget process accessible to people and communities, by educating them about their rights related to spending priorities; mobilising them to participate in the decision-making processes; and involve the public in monitoring and evaluating the actual spending and distribution of budgets.

An outstanding example of civil society mobilising around budget is the People's Budget Coalition, which includes trade unions, churches, and NGOs, including the South African Coalition of Churches, the Congress of South African Trade Unions and the Treatment Action Campaign (TAC). They campaign for national budgets which are focused on social justice, are pro-poor and were adopted following participatory processes. The Coalition ensured that National Budgets are more widely scrutinised, people can access information how to get involved in monitoring and compelled government to include aspects of pro-poor proposals in the national budget.

The role of budget oversight during and following a time of a global pandemic, where vast amounts of resources have been made available for the emergency response, cannot be overstated. Civil society can ensure greater accountability of the allocation and expenditure of the emergency funds flowing from private, national and international bodies.



Civil society monitors implementation and impact of policies

CSOs are also necessary to monitor and evaluate the implementation of policies and decisions that their elected representative adopt. Even if the policy is evidence based and speaks to the needs of the communities it is aimed at, they can in practice still lack in just and fair implementation.

CSOs can monitor the implementation of policies and decisions adopted by representative chambers, and alert them about implementation bottlenecks, and provide remedies to unlock such obstacles. CSOs can also evaluate the impact of policies and decisions are having on the beneficiaries of their services and provide insight into whether policies and decisions adopted, actually serve their objectives.

Civil society can do this by conducting regular audits of policies, citizen report cards, in which citizens are surveyed on their views on policy impact and implementation, and through involving communities in tracking budget spending. CSOs can then feedback the results of such public audits, tracking and citizen views back to parliament to allow them to adjust the policy or engage with the relevant departments about addressing the issues raised.

Civil society monitors and reports on the behaviour of elected representatives

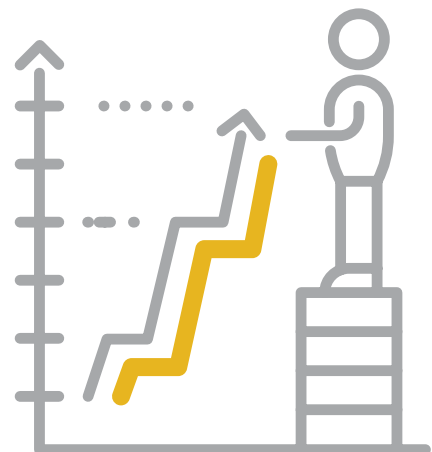
CSOs are also vital to monitor the behaviour of elected representatives such as dishonesty, incompetence and pork-barrelling. Policy and decision-making processes are often captured by corrupt, partisan and factional interests.

CSOs' role is also to inform ordinary citizens about decisions and policies that elected representatives make, and analyse the extent to which such decisions and policies are in the public interest. Civil society can therefore bridge gaps created by high levels of illiteracy and poverty, and the social distance between ordinary citizens and elected representatives. Elected representatives could embellish their delivery record or come up with excuses for non-delivery – and their constituencies would not be any wiser. CSOs and activists are uniquely placed to point out such inconsistencies and place them on the public's agenda. At the same time civil society can also support democratically minded representatives who are trying to do the right thing...

Civil society can foster cross-parliamentary political party alliances

CSOs have in the past helped foster cross-party legislative alliances on policies specifically centred on defending constitutionally enshrined human rights such as gender equality, social justice and substantive, racial equality.

South African civil society have for many years opposed the Traditional Courts Bill which has the potential to directly, negatively impact the rights of more than 14 million rural South Africans. Since the Bill was first introduced in parliament in 2008, CSOs embarked on awareness campaigns on how the proposed bill will affect the basic constitutional rights of especially rural people in South Africa. It also has been continuously and tirelessly using democratic processes to oppose the bill and the processes it proposes...



EXAMPLE OF A SUBMISSION

Public participation in practise

Treatment Action Campaign
Limpopo
3 Khensani Road
GIYANI
0826
03 October 2019

Re: CHALLENGES OF HEALTH CARE SERVICES IN OUR LOCAL CLINICS

We are writing this petition as Treatment Action Campaign affectionately known as "TAC". TAC was founded in 1998 with the prime objective of fighting for Health Rights as enshrined in the Constitution of South Africa, Section 27.

Since its inception, TAC has championed free access to ARVs for people living with HIV. This prompted TAC to extend its mandate and considered to also look at other challenges like shortages of health care staff, shortages of other chronic illness like tuberculosis (TB) etc., and other challenges that are unbearable to the people such as keeping patient long time unattended.

As a result of a three months long investigation conducted at local clinics in the districts of Vhembe and Mopane through conducting site visits at local clinics, we have observed a trend where there are shortages of contraceptive pills for female patients. This trend comes with challenges and negative bearing to the local poor people who are supposed to be beneficiaries of these health care systems. The consequences of this challenge is:

- (1) People have to travel long distance to nearby hospitals, for birth control medicines, which is a burden for most of the poor and unemployed population groups.
- (2) There is a challenge of people who can't afford transport to hospitals and as a result are unable to access birth prevention medication.
- (3) A lack of access to birth control medication results to many unwanted pregnancies which is can place a burden on government.

Another alarming fact is that in 2018 it was reported that 38 young school girls between the ages of 10-19 years were pregnant in the area of Molenzhe. High levels of teenage pregnancy

among school going girls remains a challenge in most areas across Limpopo. This has also been a major concern around the levels of dropping out in schools.

In resolving this challenge, we have gone through various channels attempting to raise this matter through fruitless engagements with district and provincial departments of health. We have thus arrived at the decision to petition the provincial legislature and ask that through the portfolio committee concerned with health matters, they conduct an investigation of their own into the matter, with the end goal of encouraging provincial government to make birth prevention measures available within a reasonable distance from population groups in the districts of Vhembe and Mopane.

We are also available for further deliberation or any possible evidence we can provide to this matter. We look forward for a prompt reaction in this matter, and trust that through the intervention of the legislature we will be able to see results.

Sincerely,

Robert Chauke
Organiser (Treatment Action Campaign)
Limpopo

Name and Surname of the Petitioner(s)/ Association/Organisation
Democracy Exorcs Foundation Limpopo Group

Postal Address
PO BOX 4246, GIYANI, 0826

Residential Address
*STAND NO: 603 NWADZEKU - dzeku village
GIYANI*

Contact Number
083 352 0299 - Boster Chauke

Name of Local Municipality
GREATER GIYANI

Name of the local Traditional Leader/Village/Location/Suburb/Si
GIYANI

Name of your Ward Councillor and Ward Number
CALVIN MAHLANLE WARD 15

Statement of complaint/request/representation or submission (r
supplemented by attaching an Annexure herewith)
Stock out of treatment

What do you want the Legislature to do
Monitor the issue

Where have you taken your complaint/request/submission befo
Department of Health provincial



ANNEXURE 1:

Additional resource documents

Democracy Works Foundation resources drawn from the CSPPL project

Public participation case studies

Democracy Works Foundation has produced case studies that reflect learnings and examples of the CSPPL project. These provide a valuable resource for future such work. They are available [here](#)

CSPPL project newsletters

The CSPPL project has updated stakeholders as to progress and successes in the form of newsletters. Please see these [here](#) and [here](#).

CSPPL project articles

Learnings from a baseline study conducted as part of the project are to be found in the an article titled [Building stronger bridges between provincial legislatures and CSOs – reflections from a baseline study](#) by Nompumelelo Runji.

DWF South Africa programme manager Mira Dutschke wrote about [The power of community-driven oversight to promote social cohesion](#)

CSPPL podcast series

The CSPPL project has produced a series of podcasts on key highlights of the project. These Learnings from a baseline study conducted as part of the project are to be found in the an article titled [Building stronger bridges between provincial legislatures and CSOs – reflections from a baseline study](#) by Nompumelelo Runji.

CSPPL training materials

Introduction to the Parliamentary Monitoring Group¹⁹

[Introduction to the Parliamentary Monitoring Group](#) is the result of a training conducted by Rashaad Alli and Monique Doyle of the Parliamentary Monitoring Group and the Civil Society Participation in Provincial Legislature Project, run by DWF.

¹⁹ With thanks to Rashaad Alli and Monique Doyle of the Parliamentary Monitoring Group

Additional resources

Reference work of enormous value to CSOs has been produced by a range of organisations, and made available free of charge on the internet. We reference the material below in this toolkit due to its value in this area. The works are not by Democracy Works Foundation and authors are acknowledged.

Action 24 initiative

As part of the **Action 24** initiative, a range of partners (including the European Union) produced and made available *Public Participation in the South African Legislature*, a booklet that compiles “basic concepts, information and facts that explain the rationale and features of public participation in the South African legislative sector”. It is available [here](#).

Public Participation Framework

The development of the *Public Participation Framework for the South African Legislative Sector* involved an extensive and intensive process of consultation and writing, and involved input from a wide range of legislative and other bodies. It is available [here](#).

Freedom House/Susan Booyesen publication

Twenty years of South African democracy: Citizen views of human rights, governance and the political system was produced by Susan Booyesen with the support of Freedom House. It is available [here](#).

ANNEXURE 2: Constitutional Schedules 4 and 5 of the Constitution of the Republic of South Africa, 1996



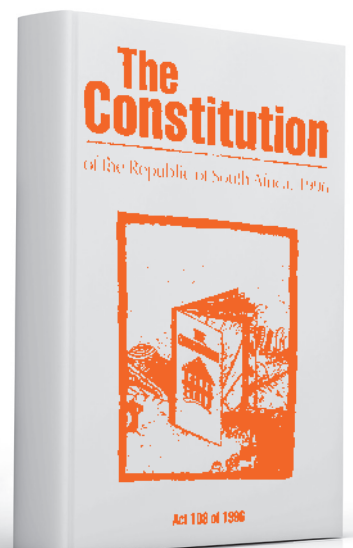
SCHEDULE

4

Functional Areas of Concurrent National and Provincial Legislative Competence

Part A

- Administration of indigenous forests
- Agriculture
- Airports other than international and national airports
- Animal control and diseases
- Casinos, racing, gambling and wagering, excluding lotteries and sports pools
- Consumer protection
- Cultural matters
- Disaster management
- Education at all levels, excluding tertiary education
- Environment
- Health services
- Housing
- Indigenous law and customary law, subject to Chapter 12 of the Constitution
- Industrial promotion
- Language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures legislative competence
- Media services directly controlled or provided by the provincial government, subject to section 192
- Nature conservation, excluding national parks, national botanical gardens and marine resources



- Police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence
- Pollution control
- Population development
- Property transfer fees
- Provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5
- Public transport
- Public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law
- Regional planning and development
- Road traffic regulation
- Soil conservation
- Tourism
- Trade
- Traditional leadership, subject to Chapter 12 of the Constitution
- Urban and rural development
- Vehicle licensing
- Welfare services

Part B

The following local government matters to the extent set out in section 155(6)(a) and (7):

- Air pollution
- Building regulations
- Child care facilities
- Electricity and gas reticulation
- Firefighting services
- Local tourism
- Municipal airports
- Municipal planning
- Municipal health services
- Municipal public transport
- Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law
- Pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto
- Stormwater management systems in built-up areas
- Trading regulations
- Water and sanitation services limited to potable water supply systems and domestic wastewater and sewage disposal systems

Functional Areas of Exclusive Provincial Legislative Competence

SCHEDULE

5

Part A

- Abattoirs
- Ambulance services
- Archives other than national archives
- Libraries other than national libraries
- Liquor licences
- Museums other than national museums
- Provincial planning
- Provincial cultural matters
- Provincial recreation and amenities
- Provincial sport
- Provincial roads and traffic
- Veterinary services, excluding regulation of the profession

Part B

The following local government matters to the extent set out for provinces in section 155(6) (a) and (7):

- Beaches and amusement facilities
- Billboards and the display of advertisements in public places
- Cemeteries, funeral parlours and crematoria
- Cleansing
- Control of public nuisances
- Control of undertakings that sell liquor to the public
- Facilities for the accommodation, care and burial of animals
- Fencing and fences
- Licensing of dogs
- Licensing and control of undertakings that sell food to the public local amenities
- Local sport facilities
- Markets
- Municipal abattoirs
- Municipal parks and recreation
- Municipal roads
- Noise pollution
- Pounds
- Public places
- Refuse removal, refuse dumps and solid waste disposal
- Street trading
- Street lighting
- Traffic and parking

ANNEXURE 3

Why provinces have little real power but huge responsibilities

This article, first published in <https://constitutionallyspeaking.co.za/why-provinces-have-little-real-power-but-huge-responsibilities/>, is by Pierre de Vos, 11 August 2011

The exact contours of South Africa's quasi-federal system of government, in which legislative and executive powers are distributed between different spheres of government in a way that seems to tilt power away from provincial governments towards the national government, has not yet been fully worked out. The Constitutional Court has only been asked to consider this rather complex issue in very few cases, perhaps because provinces — even the Western Cape government currently controlled by the opposition Democratic Alliance — have not pushed the envelope on this issue.

There are reasons for this reluctance on the part of Provinces to challenge the powers of the national legislature and executive. Provincial governments do not have the power to raise much revenue and is also required to co-operate with the national sphere of government. Besides, provincial legislatures do not have any residual powers to pass legislation. In other words, unlike the national Parliament, which enjoys plenary legislative power within the bounds of the Constitution, the legislative authority of provinces is circumscribed by the Constitution.

Schedule 4 of the Constitution lists those functional areas on which both the national Parliament and the provincial legislatures can pass legislation. These include important areas such as housing, health care, education, policing and education. Schedule 5 lists functional areas with regard to which provincial legislatures have exclusive legislative competence, but these exclusive powers relate to subjects of little importance such as beaches and amusement facilities; billboards and the display of advertisements in public places; cemeteries, funeral parlours and crematoria; fencing and fences; local sport facilities; noise pollution; street trading; street lighting; and traffic and parking.

Provinces have no power to legislate on a matter falling outside Schedules 4 and 5 unless it is a matter "that is expressly assigned to the province by national legislation" or is a "matter for which a provision of the Constitution envisages the enactment of provincial legislation".

This does not mean that provincial governments have no power to affect the lives of ordinary people. A good provincial government can make a huge difference to the delivery of basic services and can also wreck the best-laid plans of a national minister if it does not do its job properly. This is because provincial executives are tasked with implementing not only provincial legislation in the province, but also with implementing all national legislation within the functional areas listed in Schedule 4 or 5 (except where the Constitution or an Act of Parliament provides otherwise).

That is why a national minister of housing, health or education has limited powers to ensure that the services provided in a province is of a high standard. Where the MEC for education and her officials in a province fail to ensure that textbooks are delivered on time or that ARV medication is freely available at hospitals and clinics, the national minister can usually do little more than discuss this problem with that MEC during a MINMEC meeting (a meeting of the minister and relevant MEC's).

Our system of co-operative government means that the national government and provincial governments have a duty to co-operate with one another "in mutual trust and good faith", but as anyone knows who has tried to delegate work to an incompetent or lazy person, these requirements work best when the MECs are diligent and their departments are run efficiently. Unless the national

government decides to intervene officially in a province in terms of section 100 of the Constitution (in cases where a province cannot or does not fulfil an executive obligation in terms of legislation or the Constitution), the national minister has limited power to interfere in the day to day running of the affairs of a provincial department.

But despite the fact that these general principles are now quite settled, it is far from clear exactly where the powers of the national Parliament and Executive end and where the powers of provincial Parliaments and Executives begin. We would need more test cases to be brought to the Constitutional Court to clarify the boundaries of the powers that may constitutionally be exercised by provincial Parliaments and provincial Executive Committees.

That is why the Constitutional Court judgment handed down today in the case of *Premier: Limpopo Province v Speaker of the Limpopo Provincial Government and Others* is of some interest — even though the case dealt with a seemingly rather technical question. The question presented in the case was whether the Provincial Legislature of Limpopo had the authority to enact legislation dealing with its own financial management. It arose out of the Financial Management of the Limpopo Provincial Legislature Bill, 2009 (Bill), which was passed by the Provincial Legislature, but which the Premier – very properly, it must be said — declined to assent to and sign. (Maybe the Premier’s legal adviser could be promoted to assist the State Law Adviser with the more complex constitutional questions with which he seems to have such difficulties.)

The Bill mirrored to a large degree national legislation on how to deal openly and transparently with the finances of the Limpopo legislature by creating an oversight committee; setting out the responsibilities of the accounting officer in relation to the money of the provincial legislature; how to deal with the financial misconduct of its own employees and several other related issues.

Schedule 4 or 5 of the Constitution does not allow the provincial legislature to pass laws dealing with its own financial management. The most important legal question was therefore whether the Bill dealt with a matter “that is expressly assigned to the province by national legislation” or a “matter for which a provision of the Constitution envisages the enactment of provincial legislation”. It is the second question that is of particular interest here.

In a minority judgment, Justice Yacoob (in a judgment concurred in by Justice Cameron) argued that the Constitution did “envisage” that a province could pass legislation like the Bill under discussion. Finding that the word “envisages” means something different from “expressly assigned”, Yacoob argued that section 215(1) of the Constitution envisaged that provincial legislatures had the power to pass legislation dealing with its own financial management.

This section requires provincial budgetary processes to promote transparency, accountability and effective financial management of the economy, debt and the public sector. The section then provides that national legislation must prescribe certain pre-requisites that must be complied with by provincial entities and prescribes what budgets in each sphere of government should contain. This, in effect, implied (although the minority is careful not to use this term) that a provincial legislature has the power to determine its own budgetary processes and that it could determine this process by passing legislation regulating that process.

The majority disagreed. In a judgment authored by Chief Justice Ngcobo, a slightly narrower view was taken on the powers conferred on provincial legislatures by the Constitution. It did so by arguing that where the Constitution does not expressly grant legislative powers to the provincial legislature, it does not “envisages” the enactment of provincial legislation. The majority judgment thus confirmed the view that one cannot assume that provincial legislatures have the power to pass legislation merely because they have the power to regulate their own processes and can do so administratively.

Our constitutional scheme does not permit legislative powers of the provincial legislatures to be implied. Were it to be otherwise, the constitutional scheme for the allocation of legislative power

would be undermined. The careful delineation between the legislative competence of Parliament and that of provincial legislatures would be blurred. This may very well result in uncertainty about the limits of the legislative powers of the provinces. In the light of the plenary legislative powers of Parliament, it would result in the provinces having concurrent legislative competence with Parliament in respect of many matters. This is not what the drafters of our Constitution had in mind.

If the legislative powers of the provincial legislatures are to be implied beyond those expressly set out in the Constitution, this would, in my view, diminish, through an expansive reading of the Constitution, the residual legislative powers of Parliament. This would be inconsistent with the scheme of the Constitution, by which the provincial legislatures are given specific powers under the Constitution and Parliament is assigned the rest. In my view, the plenary legislative powers granted to Parliament are not to be diminished by implying legislative powers of provincial legislatures not expressly stated in the Constitution. The assignment of powers to the provinces must be expressed in clear and unequivocal language.

Chief Justice Ngcobo argued that the sections relied upon by Justice Yacoob do not envisage the enactment of provincial legislation but, on the contrary, expressly envisage the enactment of national legislation. The national parliament could therefore pass such legislation for provinces, but provinces could not pass such legislation themselves.

In a formal legal sense, I suspect this reading is the more accurate one. It is also more in line to the spirit of the Constitutional Court's previous forays into this area of the law as it is based on the assumption that provinces only have those powers explicitly provided for by the Constitution and that our Constitution was drafted to secure the upper hand in such matters for the national sphere of government.

On a policy level the (perhaps) slightly more strained interpretation of Justices Yacoob and Cameron is probably preferable to the more logical and coherent interpretation of the majority. If we are going to have a provincial sphere of government that works effectively, a sphere of government where each province established its own character and its government could demonstrate its ability to do better than the national government, our courts should be hesitant to interpret the Constitution too narrowly in a way that favours the powers of the national sphere of government.

At the moment this will make little difference but as the political landscape changes and as more provinces are governed by parties who are not represented in the national government, this could become important. Imagine the SACP or some other party of the left governs three provinces while the ANC retains power at national level. In such a scenario one would probably want the provinces to have the freedom to experiment with different policies that might demonstrate — within the boundaries of what is constitutionally permissible — the benefits of such progressive policies. Whether this will really make any difference — given the fact that budgets are mostly determined at national level — is another question.

However, because the case dealt with a rather technical issue, it does not really help us to understand how the Court will rule in cases where provincial governments push through legislation aimed at further regulating the administration of health, education, policing and housing and where such legislation is in conflict with national legislation on the same topic.

One may argue that it is time for provincial governments to become more adventurous by establishing particular legislative standards and criteria for the delivery of very important services in the fields of education, housing, health and policing as they are co-responsible for these along with the national government. But because provinces have very little independent revenue raising capacity and depend on an allocation from the national budget, this will be rather difficult — especially if a province wished to establish higher standards for the delivery of a particular service and this would have budgetary implications.

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